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HAIL, HAIL, THE GANGS ARE ALL HERE: WHY NEW YORK SHOULD ADOPT A COMPREHENSIVE ANTI-GANG STATUTE

Bart H. Rubin

They stop to ask you for the correct time. When the unwary pedestrian glances at their watch, a knife blade arcs through the air. As the victim collapses in a pool of blood another young man has been initiated into one of the most feared street gangs in the world.¹

INTRODUCTION

While recent reports indicate that crime has declined in New York City² and elsewhere across the country,³ there has been a steady and alarming increase in violent criminal street gang activity.⁴ Over the last decade, California-based gangs have migrated across the United States, infiltrating areas that never before had gang problems.⁵ More-

1. James Langton, *New Yorkers Fear Knife Gang with a Thirst for Blood: Street Thugs with a Sinister Initiation Rite Are Bringing Back Terror to a City Where Crime Had Been Falling*, Daily Telegraph (London), Oct. 12, 1997, at 35, available in 1997 WL 2344940.

2. See David Kocieniewski, *Mayor Gets Credit for Safer City, but Wider Trends Play a Role*, N.Y. Times, Oct. 28, 1997, at B4.

3. See Attorney General Janet Reno, *Fighting Youth Violence: The Future Is Now*, 11 Crim. Just. 30, 30 (Summer 1996); Joy Powell, *FBI Reports Violent Crime Declined in First Half of '97*, Star Trib. (Minneapolis-St. Paul), Nov. 24, 1997, at A1.

4. "The incidence of gang violence has escalated, and the patterns of gang violence have become increasingly lethal . . ." Lewis Yablonsky, *Gangsters: Fifty Years of Madness, Drugs, and Death on the Streets of America* 3 (1997). Yablonsky attributes the escalation of gang violence to several significant factors:

1. *Gun Firepower*. Today's gangs have access to and pack more lethal weapons than at any time in the history of America.

2. *Intraracial Violence*. In the first half of the twentieth century, minority gangs tended to band together and fight gangs from different racial and ethnic backgrounds. Today's gangs, especially black and Chicano gangs, participate in internecine warfare with black on black and Chicano on Chicano violence.

3. *The Use and Commerce of Drugs*. In the past fifty years there has been a marked increase in the involvement of gangsters in the use and dealing of drugs.

4. *The Multipurpose Gang*. In the past gangs tended to have more simple functions for its participants. Youths joined gangs for a sense of belonging and to "protect" their territory. Today's gangs provide more deviant opportunities for their participants—including violent activities, drug use, the commerce of drugs, and the possibility for participating in the illegal activities of organized burglary and robbery.

Id. at 3-4.

5. "The first reported movement of Los Angeles' gang culture to other cities began in the late 1980s, when cities ranging from Portland to Seattle to Las Vegas experienced the emergence of gangs identifying with Crip or Blood sets." *167 Gang Members Arrested in New York Crackdown*, L.A. Times, Aug. 28, 1997, at B10 [hereinafter *167 Gang Members*].

over, these gangs have taken root in American cities that traditionally have experienced gang activity, thus exacerbating the problem.⁶

Recently, in some areas, gangs are displaying a level of violence that gangs earlier this century rarely displayed.⁷ Vicious face and neck slashings, brutal assaults, drive-by shootings, and senseless murders are all part of the gangs' standard procedures⁸ when protecting their turf,⁹ running their drug operations,¹⁰ and initiating new members.¹¹ The violent nature of these practices are horrifying to victims and communities. Gang violence was once isolated amongst gang mem-

The continuing migration of Los Angeles-based gangs across the nation is a matter of growing alarm to law enforcement authorities at all levels [C]riminal groups claiming affiliation with the Bloods or Crips . . . have been reported in 180 communities in 42 states. . . . [I]n recent years other Los Angeles-based gangs . . . 'have expanded their territories beyond their traditional neighborhood turf' to the East Coast and sometimes to the Caribbean.

The nationwide expansion has been in progress since the late 1980s and has continued despite concerted campaigns by law enforcement officers in Southern California and elsewhere to curb gang activity

Robert L. Jackson, *Nationwide Spread of L.A. Gangs is Alarming, FBI Says*, L.A. Times, Apr. 24, 1997, at B3; see Malcolm W. Klein, *The American Street Gang: Its Nature, Prevalence, and Control* 31-33 (1995). Klein states:

Migration sources are widespread [T]he Los Angeles area, with 27 percent, and the Chicago area, with 18 percent, together account for almost half the . . . migration sources. Much of the gang member migration from each of these places is to other cities in the same areas, whereas much of the remainder is also local or regional.

Id. at 33; see also *Gang Expansion Is Rampant, a Senate Committee is Told*, Boston Globe, Apr. 24, 1997, at A14, available in 1997 WL 6250763 ("Violent gangs are spreading to formerly peaceful corners of America not primarily through planned expansion but because of families' routine moves and their searches for safe places to raise children 'Gangs have expanded from state to state and have national, and perhaps even international, networks of illegal activity'" (quoting Sen. Orrin Hatch, Chairman, Senate Judiciary Committee)).

Congress has also recognized the gang migration problem:

Gang violence . . . is now common even in places where it would have been unthinkable several years ago. Nationwide, 95 percent of major cities and 88 percent of smaller cities report problems with gang violence. Gangs like the "Bloods" and the "Crips," that originated in Los Angeles have made their way into smaller cities; in fact, the "Bloods" and "Crips" have expanded to at least 118 cities. The "Gangsta Disciples" have expanded throughout the Midwest and south, and Asian Gangs have emerged in 16 cities throughout the country.

S. Rep. No. 105-108, at 81 (1997).

6. See Klein, *supra* note 5, at 33 ("Most gang problems . . . are locally derived, although in a number of cases, they are exacerbated by traveling gang members from outside.").

7. Gang violence in the first half of the twentieth century included fistfights, stabings, territorial disputes, and the occasional murder using a gun. See Yablonsky, *supra* note 4, at 28.

8. "[The] earlier justifications for violence clearly remain in place for gangs in the 1990s, however, the combination of gangbanging, drive-bys, the drug business, and more lethal guns account for the escalation of murderous violence by contemporary gangs." *Id.* at 57.

9. See *id.* at 18-19 (arguing that territorial gangs virtually have to be violent to obtain more turf).

bers, rarely affecting innocent, unsuspecting people,¹² but this pattern has changed.¹³ In fact, almost 50 percent of victims of gang murders are innocent bystanders.¹⁴

New York is becoming a breeding ground for these violent criminal street gangs.¹⁵ The Mafia was the "gang" of New York City for decades.¹⁶ It may even be argued that the Mafia kept the activities of the smaller criminal street gangs in check.¹⁷ It is no coincidence therefore, that as the Mafia's presence has been significantly reduced in New York over the last ten years, there has been a concomitant increase in violent gang activity.¹⁸

While Congress and state legislatures in California, Alaska, and Florida have adopted comprehensive statutes to penalize criminal street gangs specifically,¹⁹ the New York legislature has done little to address its growing gang problem.²⁰ Part I of this Note briefly outlines New York State's growing gang problem—a predicament other urban areas share. Part II describes both the current New York penal laws specifically aimed at combating gang violence, and traditional penal laws used to prosecute gang activity. This part also explores the inadequacy of existing laws in combating gang violence. Part III analyzes criminal and civil legislation enacted at both the federal and state levels specifically targeting gang activities. Part IV counsels New

10. See William B. Sanders, *Gangbangers and Drive-Bys: Grounded Culture and Juvenile Gang Violence* 83 (1994) (describing the connection of drive-by shootings to the sale and distribution of crack cocaine).

11. See Scott H. Decker & Barrick Van Winkle, *Life in the Gang: Family, Friends, and Violence* 174-75 (1996) (discussing various violent initiation practices).

12. See Klein, *supra* note 5, at 72-74. In earlier decades, "[b]lack gangs generally attacked black gangs, Hispanic attacked Hispanic gangs, [and] white gangs attacked white gangs . . ." *Id.* at 72.

13. Yablonsky, *supra* note 4, at 5 ("In the maniacal foray into 'enemy territory' of a drive-by, gangbangers inaccurately spray and kill as many innocent people as the enemy gangsters they are attempting to kill.").

14. See *id.* ("Various research, including police reports, reveals that only about 50 percent of gang-related murders hit the target of enemy gangsters. The other 50 percent of victims of gangster drive-bys and street violence are innocent children and adults who happen to be in the wrong place at the wrong time.").

15. See *Gangs from California Take Root in New York*, *Patriot Ledger* (Quincy, Mass.), Aug. 30, 1997, at 7, available in 1997 WL 8190595; see also Kit R. Roane, *New York Gangs Mimic California Original*, *N.Y. Times*, Sept. 14, 1997, at 37 (describing how young New Yorkers are copying behavior associated with the Bloods and forming their own subsets of the gang).

16. See generally Howard Blum, *Gangland: How the FBI Broke the Mob* (1993) (documenting the activities of New York's Gambino Crime Family and the demise of its boss John Gotti).

17. See Martín Sánchez Jankowski, *Islands in the Street: Gangs and American Urban Society* 69-70 (1991) ("[T]he Mafia provided a service to the communities in which it was based in that it saw to it that crime did not take place there—in other words, it created crime-free zones in its neighborhoods.").

18. See *id.* at 316-17.

19. See *infra* Part III.

20. See *infra* Part II.

York, as well as other states, to enact a comprehensive gang activity statute, and offers a model statute for those states to adopt. This model statute incorporates the most important components of current federal and state gang laws. This Note concludes that New York has waited too long to address its gang problem and that its legislature has not done enough to find an effective solution. Adopting statutes specifically targeting a broad category of gang activities, like the one suggested by this Note, would be an important start to deal with the nation's growing gang crisis.

I. NEW YORK'S CURRENT GANG PROBLEM

Over the past year, New York City has been victimized by an outbreak of violent street gang activity.²¹ This recent spate of crime has underscored fears that the California gang, the Bloods, has expanded into New York.²² The following sections provide a brief history of New York City's gang culture and discuss the recent outbreak of gang violence in the City.

A. *Gangs in New York*

There is nothing new about gangs occupying New York City.²³ New York's biggest "gang," the Mafia, reigned supreme over New York City for more than half a century,²⁴ with figures like "Teflon Don" John Gotti as its kingpin.²⁵ In addition to the mob, smaller ethnic gangs established themselves on the fringes of the Mafia's domain. The Netas,²⁶ the Westies,²⁷ and the notorious Almighty Latin Kings,²⁸

21. Tom Hays, *New York Fears the Rise of the Bloods*, Associated Press, Nov. 3, 1997, available in 1997 WL 4890895.

22. Roane, *supra* note 15, at 37; see also John Marzulli, *Cops Gang Up on Bloods in Sweep Nabbing 167*, Daily News (New York), Aug. 28, 1997, at 5 ("Queens [County] District Attorney Richard Brown said Bloods have migrated east in the past few years and have outposts in 33 states and 123 cities.").

23. Hays, *supra* note 21 (quoting Jeffrey Fagan of Columbia University's Center for Violence Research and Prevention).

24. Although the Mafia is more commonly viewed as an organized crime entity, numerous mob organizations began as bootleg gangs during the Prohibition era of the 1920s. See Yablonsky, *supra* note 4, at 31-32.

25. See generally Blum, *supra* note 16, at 7-9 (detailing John Gotti's history in the Gambino Crime Family and his subsequent conviction); Jerry Capecci & Gene Mustain, *Gotti: Rise and Fall* (1996) (same).

26. "Netas was initially established for the improvement of inmates' rights in Puerto Rico in the 1970s but has evolved into a street gang, with several chapters in New York State." Blanca Mónica Quintanilla, *15 Drug Arrests: Cops: Gang Members Were Operating a Narcotics Network*, Newsday (Nassau & Suffolk), Dec. 5, 1997, at A37.

27. The Westies, an Irish gang, were formed in the mid-1960s in an attempt to obtain control of the criminal activity in the Hell's Kitchen area of Manhattan's West Side. See *United States v. Coonan*, 938 F.2d 1553, 1556 (2d Cir. 1991). "Throughout the 1970s and early 1980s, the Westies . . . maintained and expanded their position as the preeminent organized crime group in Hell's Kitchen. . . . The Westies' money-making activities centered around loansharking, narcotics dealing, extorting local la-

are examples of gangs that have called New York home. More recently, Chinese,²⁹ Vietnamese,³⁰ and Russian³¹ gangs have established a foothold in New York City. All told, New York was considered the gang capital of the world until a few years ago, when Los Angeles eclipsed it.³²

B. Recent Incidents of Gang Activity and Violence

Until recently, the Bloods and Crips of California³³ had traditionally kept their distance from New York.³⁴ An increasing number of young New Yorkers, however, are taking on the symbols, colors, and

bor unions and controlling New York's West Side piers." *Id.* The Westies' operations ceased in the late 1980s. *See id.* at 1558.

28. "The Latin Kings have been able to attract thousands of young Puerto Ricans to their ranks by appealing to their ethnic pride Claiming to represent the aspirations of the Puerto Rican people, the gang holds huge outdoor meetings at parks in the Bronx, Queens, [and] Brooklyn" William Kleinknecht, *The New Ethnic Mobs: The Changing Face of Organized Crime in America* 238-39 (1996). The Latin Kings are "a Latino gang [that was] formed in jail nearly 50 years ago that still is the largest, most organized street gang in New York." Greg B. Smith, *Dis Drive: Gangs Use Web*, Daily News (New York), Nov. 23, 1997, at 44.

29. For instance, the Fukienese Flying Dragons gang, "a large and violent spinoff from the traditional Flying Dragons [gang], has been 'the dominant force in Chinatown since 1990'" and has perpetrated hundreds of kidnappings, robberies, acts of extortion, and the smuggling of hundreds of illegal aliens into the United States. William Branigin, *Arrests Break Up Chinese Gang That Preyed on Illegal Aliens*, Wash. Post, Feb. 24, 1996, at A3 (quoting Mary Jo White, U.S. Attorney for the Southern District of New York). "New York City police report that 80 percent of Chinatown merchants pay monthly fees to street gangs." Rick Landre et al., *Gangs: A Handbook for Community Awareness* 83 (1997).

30. *See generally* T.J. English, *Born to Kill: America's Most Notorious Vietnamese Gang, and the Changing Face of Organized Crime* (1995) (describing the activities of the notorious Vietnamese gang "Born to Kill" that held control over New York City's Chinatown during the late 1980s and early 1990s).

31. "Russian gangsters are fanning out across the United States. The headquarters of the Russian Mafia is southern Brooklyn Brighton Beach and nearby neighborhoods have been the scene of nearly two dozen gangland slayings involving Russians since 1982." Kleinknecht, *supra* note 28, at 274-75.

32. *See* Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-Gang Legislation*, 21 J. Contemp. L. 259, 276 (1995). "[A]s of 1992, Los Angeles surpassed New York City as the nation's gang capital with an estimated 100,000 members of the Crips and Bloods in the greater Los Angeles area." *Id.* (citing C. Ronald Huff, *Gangs in the United States*, in *The Gang Intervention Handbook* 7 (Arnold P. Goldstein & C. Ronald Huff eds., 1993)).

33. For a general discussion of the history and profiles of the Bloods and Crips gangs, see Landre et al., *supra* note 29, at 70-75. "Both the Crips and Bloods began as primarily African American and Hispanic [South Central Los Angeles] street gangs around 1969. The Crips were first; then the Bloods developed to provide protection against the Crips." Huff, *supra* note 32, at 12.

34. The Bloods were "[a]bsent on New York police blotters just a year ago." Hays, *supra* note 21; *see also* Julia Campbell, *Police Say Los Angeles Gang Is Taking Hold in New York*, N.Y. Times, Mar. 28, 1997, at B3 ("While the two gangs . . . were able to establish footholds in cities throughout the nation over the last decade, until now they have not been a notable presence in New York City.").

initiation rites of these notorious Los Angeles street gangs.³⁵ New York authorities have identified more than 1000 Bloods in the City, including 500 within the jail system, and they fear that these Bloods have replaced the Latin Kings as New York's most pervasive and violent street gang.³⁶ In August, 1997, in "Operation Red Bandana," New York City police arrested 167 members and associates of the Bloods and Crips gangs in an effort to stop the expansion of these gangs.³⁷

Authorities agree, however, that the New York Bloods bear little resemblance to their Los Angeles counterparts or other New York gangs.³⁸ Police believe that New York's Bloods have no official affiliation with the Los Angeles Bloods, and that they are much less organized and fraternal than established New York City gangs like the Latin Kings and the Netas.³⁹ "Some authorities speculate that the Bloods on the street 'graduated' from the city jail system, where black inmates began banding together and using the name to protect themselves from Hispanic gangs."⁴⁰ Others believe that the Bloods' emergence resulted from random moves by gang members whose families migrated to New York, and from imitation by those who created their own gangs and simply gave them Los Angeles names.⁴¹ Regardless of how these gangs originated, however, they are steadily

35. See Roane, *supra* note 15, at 37. "The most common symbolic representations of gang membership include[] wearing specific colors . . . , giving hand signs . . . , painting graffiti . . . , or being tattooed . . ." Decker & Van Winkle, *supra* note 11, at 76. Decker and Van Winkle also state that

[s]ymbolic representations of gang membership fulfill a variety of functions for gang members. First, the symbols . . . help to identify both rivals and allies, providing a "perceptual shorthand" by which the threat represented by an individual can be gauged. . . . A second function of gang symbols is to announce the presence of a gang or gang member in a neighborhood. . . . A third function of symbols is to communicate threats to others.

Id. at 75-76.

36. See David Kocieniewski, *Youth Gangs From West Coast Become Entrenched In New York*, N.Y. Times, Aug. 28, 1997, at B1 (describing how the Bloods have used the New York City jails as a "beachhead" to embed themselves in New York's gang culture); see also Campbell, *supra* note 34 ("Gang activity in New York City jails, particularly by the Bloods, has increased over the last three years . . ."). While the Latin Kings have tended to move away from violent activities, the Bloods have started to dominate. Dan Morrison, "Bloods" *New Street Kings*, Newsday (Queens), Oct. 5, 1997, at A26, available in 1997 WL 2711942.

37. *167 Gang Members*, *supra* note 5; see also Marzulli, *supra* note 22 ("Federal agents and NYPD narcotics cops dismantled seven groups of Bloods—known as sets—during the two-day sweep in central and East Harlem; Bedford-Stuyvesant and Crown Heights in Brooklyn and Far Rockaway in Queens. . . . [A]lso charged . . . were five members of the rival Crips gang.").

38. See Hays, *supra* note 21.

39. See *id.* "Experts say the Bloods in New York are not connected to their West Coast counterparts They are disorganized and there are few identifiable leaders." Morrison, *supra* note 36.

40. Hays, *supra* note 21.

41. See *167 Gang Members*, *supra* note 5.

establishing their territories in New York and their brands of terrorism are frightening New Yorkers.

In fact, the New York Police Department estimates that there have been approximately 135 vicious face and neck slashings of unsuspecting victims since March, 1997.⁴² Authorities have linked these slashings to gang initiation rites, especially those of the Bloods.⁴³ The attacks are usually committed by teenagers armed with razor blades or box cutters who seek to become gang members by drawing the blood of innocent people.⁴⁴ During September and October of 1997, the City endured a disproportionate number of these brutal attacks.⁴⁵ In addition to these bloody initiation-rite-slashings, gang members

42. *Id.*

43. *Id.*

44. The Bloods' credo is "Blood in, Blood out." Morrison, *supra* note 36. "Blood in" refers to the drawing of someone's blood, an innocent person's or their own, in order to be admitted into the gang. See Helen Kennedy, *They Earn Their Name—Bloods*, Daily News (New York), Aug. 28, 1997, at 5. "Blood out" means the only way of getting out of the gang is by enduring a beating, or in some cases death. See Landre et al., *supra* note 29, at 136-37; Tom Raftery & John Marzulli, *Bloods Eyed in Subway Slashing*, Daily News (New York), Sept. 4, 1997, at 27 (reporting that a reputed Bloods member was slashed in the face and shoulder because he was trying to leave the gang).

45. On September 9, 1997, a 10-year-old boy was slashed in the face in his Brooklyn elementary school by an 11-year-old classmate who claimed to be a member of the Bloods. Carolina Gonzales & John Marzulli, *Eye Gang Tie in Boy Slash*, Daily News (New York), Sept. 10, 1997, at 22. When the victim refused the attacker's offer to join his gang, the attacker sliced him across his cheek with the blade from a pencil sharpener. *Id.*

On September 27, "a 21-year-old Brooklyn woman was brutally beaten and repeatedly slashed by thugs believed to be members of the notorious Bloods gang." Chrisena Coleman, *Slashers Gash Third Victim in Six Days*, Daily News (New York), Oct. 3, 1997, at 7. While some of the suspects punched, kicked, and held down the woman's friend, "[t]hey slashed her in the buttocks, back and the back of her neck as she tried to get away." *Id.* (quoting Jermaine Gatson, victim's friend). The attackers knocked her to the ground, and then kicked, punched, and slashed her face, arms, and hands. *Id.*

On September 28, a gang of thugs donning red bandanas and claiming to be members of the Bloods slashed a 14-year-old Brooklyn boy. Chrisena Coleman, *Bloods Eyed in Slashing: Brooklyn Teen Left with 400 Stitches*, Daily News (New York), Sept. 30, 1997, at 7 [hereinafter *Bloods Eyed*]. The victim attempted to flee, but was caught and subsequently stabbed repeatedly with a box cutter. *Id.* "[T]he teen's tongue was sliced and he was stabbed across the face, chest, head, neck and arms[;]" the injuries required about 400 stitches. *Id.*

On October 1, three girls, aged thirteen, fourteen, and fifteen, slashed a 20-year-old Manhattan woman's neck with a box cutter on Park Avenue as part of a Bloods initiation rite. Tom Raftery & Miguel Garcilazo, *Three Girls Cut Woman in Bloods Rite*, *Cops Say*, Daily News (New York), Oct. 2, 1997, at 7.

On October 3, two teenagers were stabbed on a Brooklyn subway train by a member of the Latin Kings after replying "no" to the attacker's question of whether they were members of the Bloods gang. John Marzulli, *Gang Tie in Subway Stabs*, Daily News (New York), Oct. 4, 1997, at 8.

On October 6, a man and a woman in their late teens slashed a 14-year-old girl's face near New York City's Museum of Natural History. Miguel Garcilazo & Helen Kennedy, *2 Slash Teen Girl in Face at Museum Subway Stop*, Daily News (New York),

and “wanna-bes”⁴⁶ have murdered⁴⁷ and sexually assaulted innocent victims.⁴⁸

II. NEW YORK’S CURRENT ANTI-GANG STATUTES

Despite New York’s historical and current gang situation, its legislature has done little to effectively address the problem. Prior to 1996, New York’s penal code contained no provisions that directly con-

Oct. 7, 1997, at 45 (“They asked for the time. When the girl looked at her watch, one of the strangers slashed her face.”).

On October 7, two teenage girls slashed a 15-year-old girl in the neck and face after asking their victim for the time and whether she was a member of the Bloods gang. David Rohde, *Another Girl, 15, Is a Slashing Victim; Gang Link Is Sought*, N.Y. Times, Oct. 8, 1997, at B3.

On October 8, a 16-year-old Harlem youth was slashed on the hand with a box cutter—an attack linked to the Bloods gang. John Marzulli, *Boy, 16, Slashed*, Daily News (New York), Oct. 9, 1997, at 20.

The fear resulting from these attacks reached a high point on Halloween Day, “when hundreds of thousands of New York City students stayed away from public schools because they, or their parents, feared a rash of gang-related attacks.” Jacques Steinberg, *Fed by Rumors, Fears of Gangs Keep Pupils Home on Halloween*, N.Y. Times, Nov. 1, 1997, at A1. High-ranking police officials rumored that Halloween was to be an initiation day for the Bloods. *Id.* “Even the Latin Kings . . . bought into the hype; . . . they were ordering their school-age members to skip school on Halloween.” John Marzulli with Patrice O’Shaughnessy, *Halloween Gang Vigil for NYPD*, Daily News (New York), Oct. 26, 1997, at 4.

46. “Often referred to as the ‘gonna-bes,’ these individuals dress and mimic the gang in their neighborhood. Such activity has been documented among individuals as early as preschool. Wanna-bes find gangs intriguing and view hard core [gang members] as role models.” Landre et al., *supra* note 29, at 16.

47. On November 14, 1997, for example, during a failed robbery attempt, two female Bloods members shot and killed a Senegalese livery cab driver. See Robert D. McFadden, *Suspect in Cabby Killing Glimpsed Hope, but Life Fell Apart*, N.Y. Times, Nov. 17, 1997, at B1. New York City’s first murder victim of 1998 was shot four times in the chest and once in the stomach by a self-proclaimed Bloods gang member. Douglas Montero & Rocco Parascandola, *Out-of-Towner Is City’s First Slay Victim*, N.Y. Post, Jan. 2, 1998, at 11. In January, 1997, four Netas gang members were indicted for murdering a Bronx police captain in retaliation for the acquittal of a police officer charged with killing a young Latino while on duty. Jorge Fitz-Gibbon & Bob Kappstatter, *DA: Cop Shooting Was Revenge*, Daily News (New York), Jan. 8, 1997, Metro Section, at 1. According to police, the triggerman “was given the task of shooting ‘a cop, any cop’ as an initiation rite into the group . . .” *Id.* In addition, in October, 1997, a pair of accused rapists, allegedly affiliated with the Bloods, arranged to pay another Bloods gang member \$5000 to kill their victim before she could testify against them. Lawrence Goodman, *2 Bloods Charged in Kill-For-Hire Plot*, Daily News (New York), Oct. 31, 1997, at 74.

48. In October, 1997, six Manhattan teens were charged with forcing a 13-year-old schoolmate to perform oral sex in a high school bathroom. See Kit R. Roane, *Sex Attack at School Is Tied to Gang Threat*, N.Y. Times, Oct. 8, 1997, at B3. The 15-year-old girl who orchestrated the crime “identified herself as a gang member and warned the victim that she would ‘be in trouble’ if she refused to perform sex acts” on the boys charged. *Id.* In December, 1997, police arrested eight Bloods members for holding a teenage recruit captive in a closet when she tried to back out of joining. Henri E. Cauvin, *8 Arrested in Bloods Sex Assault*, Daily News (New York), Dec. 15, 1997, at 32. They did not let her out until she performed oral sex with a male gang member. *Id.*

fronted gang activity. Instead, prosecutors and police relied on the existing general criminal statutes to combat gangs.

Inevitably, the increase in violent gang attacks became too much for New York's legislature to ignore. Thus, in September, 1996, in an effort to protect New Yorkers from crime and violence,⁴⁹ New York lawmakers passed a bill that created two new felony assault crimes: Gang assault in the first degree⁵⁰ and gang assault in the second degree.⁵¹ Recognizing the severity of assaults committed by gangs, which "[f]or the victims . . . are particularly harrowing crimes,"⁵² the legislature filled a gap in the old assault statute.⁵³ Part II.A critiques New York's gang assault statutes. Part II.B then outlines legislation New York lawmakers have proposed to deal with the gang assault statutes' weaknesses.

A. *New York's Present Gang Assault Statutes*

A person commits gang assault in the first degree when "with intent to cause serious physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person."⁵⁴ Under this new statute, such an assault constitutes a class B violent felony offense.⁵⁵ Gang assault in the second degree, a class C violent felony,⁵⁶ is committed when "with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person."⁵⁷ The respective B and C felony penalties are more severe than the penalties available under the regular assault laws.⁵⁸

49. Legis. Mem., ch. 647, 1996 N.Y. Laws 2581-82 [hereinafter Legislative Memorandum].

50. N.Y. Penal Law § 120.07 (McKinney 1998).

51. *Id.* § 120.06.

52. Legislative Memorandum, *supra* note 49.

53. In approving the bill, Governor George E. Pataki criticized the old system:

Current law fails to appreciate that gang assaults pose a greater threat to public safety than assaults committed by individual actors; thus, under present law, a person who assaults another and causes serious physical injury while acting with a gang does not commit a more serious crime than the person who commits such an assault while acting alone.

Exec. Mem., ch. 647, 1996 N.Y. Laws 1919.

54. N.Y. Penal Law § 120.07.

55. *Id.* Committing a class B felony subjects the offender to a sentence that must be at least six years and must not exceed twenty-five years. *Id.* § 70.02(3)(a).

56. For a class C felony, the sentence must be at least four and one-half years and must not exceed fifteen years. *Id.* § 70.02(3)(b).

57. *Id.* § 120.06.

58. First, second, and third degree assaults, respectively, constitute B and D felonies, and an A misdemeanor. See *id.* §§ 120.10, 120.05, 120.00. A class B felony carries a maximum penalty of twenty-five years, *id.* § 70.02(3)(a); the maximum sentence for a class D felony is seven years, *id.* § 70.00(2)(d); and an A misdemeanor is punishable by up to one year in prison, *id.* § 70.15(1).

The New York legislature proffered two rationales for creating these new statutes.⁵⁹ First, the legislature noted that “our existing assault laws recognize that assaults committed by means of deadly weapons or dangerous instruments should be punished more severely than otherwise identical assaults committed without such weapons or instruments.”⁶⁰ Accordingly, these new statutes recognize that “[to] commit an assault with the aid of others is tantamount to committing an assault by means of a deadly weapon or dangerous instrument.”⁶¹ Second, it appears that the legislature wanted to reconcile gang assaults with other sections of the New York penal law that provide enhanced penalties for crimes involving more than one perpetrator.⁶² For instance, New York’s robbery statutes⁶³ provide that a forcible taking of property constitutes robbery in the third degree for the lone actor,⁶⁴ whereas the same robbery committed by a person aided by another who is actually present raises the charge to second-degree robbery.⁶⁵ Both rationales properly address the fact that “joint action of numerous assailants . . . tends to increase the likelihood that severe or lethal injuries will be inflicted” in gang assaults.⁶⁶

Despite the legislature’s good intentions in creating the gang assault statutes, the new laws have been disappointingly unsuccessful in combating most street gang violence. Since their enactment, there has not been one successful prosecution under the statutes.⁶⁷ This disturbing failure has occurred during a period when brutal gang-related initiation rites have plagued New York City.⁶⁸ Even though street attacks have been the most common form of street gang violence, these attacks are not always covered by the current gang assault statutes. First, the statutes require that the gang assault cause *serious physical injury* to the victim.⁶⁹ New York Penal Law defines serious physical injury as one “which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”⁷⁰ Although some gang-related attacks are brutal

59. See Legislative Memorandum, *supra* note 49.

60. *Id.* For instance, assault in the third degree is committed when a person intends to cause physical injury to another person, and causes such injury to such person or to a third person. N.Y. Penal Law § 120.00. Committing the same crime “by means of a deadly weapon or a dangerous instrument” is second degree assault. *Id.* § 120.05.

61. Legislative Memorandum, *supra* note 49.

62. The legislature stated that “participation in a crime of more than one assailant calls for enhanced punishment.” *Id.*

63. N.Y. Penal Law §§ 160.00-160.15 (McKinney 1988 & Supp. 1997).

64. *Id.* § 160.05. Robbery in the third degree is a class D felony. *Id.*

65. *Id.* § 160.10(1). Robbery in the second degree is a class C felony. *Id.*

66. Legislative Memorandum, *supra* note 49.

67. In fact, as of February, 1998, there were no published cases on record that used the statutes as the basis for prosecution.

68. See *supra* Part I.B.

69. N.Y. Penal Law § 120.07 (McKinney 1998).

70. *Id.* § 10.00(10) (McKinney 1997).

and cause serious physical injury or death,⁷¹ New York's definition of serious physical injury prevents common acts of gang violence from falling within the statute's scope.⁷² Unless a face-slashing initiation rite causes permanent scarring or severe and prolonged disfigurement, it will not rise to the level of serious physical injury.⁷³ Thus slashings that do not result in permanent harm are not subject to the gang assault statutes, and instead must be prosecuted as either class A misdemeanors⁷⁴ or class D felony assaults.⁷⁵ Consequently, perpetrators of gang violence could be subject to, at most, a prison sentence of one⁷⁶ or seven years,⁷⁷ respectively. Furthermore, to charge gang assault in the first degree, there must be a subjective finding that the assailants actually intended to cause serious physical injury.⁷⁸ Thus, if they only intended to cause physical injury—their obvious defense—they cannot be prosecuted for first-degree gang assault.

In addition, the requirement that at least three persons participate in the assault⁷⁹ is a hindrance to prosecutions under the statute. Indeed, gang members may be deliberately circumventing the statute. If attacks by three gang members result in a stiffer sentence, why not just attack in groups of two? This obvious gap in the statutes appears inconsistent with the legislature's goals in enacting the new statutes.⁸⁰ "The joint action of two assailants, just as with three or more, increases the terror to the victim and raises the likelihood that serious or lethal injuries will result."⁸¹ If it is true that the legislature modeled the gang assault statutes against second-degree robbery, the three person requirement cannot be reconciled with that robbery statute. Only one other person need be present to trigger the second-degree robbery charge, not "two or more" others as the gang assault statute requires.⁸² Accordingly, a gang-related assault that results in serious

71. See, e.g., *Bloods Eyed*, *supra* note 45 (describing how a 14-year-old boy needed 400 stitches after being attacked by a gang claiming to be Bloods).

72. Abraham Abramovsky, *The Gang-Assault Statute in New York*, N.Y. L.J., Dec. 12, 1997, at 3 [hereinafter *Gang-Assault Statute*].

73. See *id.*

74. N.Y. Penal Law § 120.00 (McKinney 1998). Assault in the third degree occurs when "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person." *Id.*

75. *Id.* § 120.05. "A person is guilty of assault in the second degree when . . . [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . ." *Id.*

76. N.Y. Penal Law § 70.15(1).

77. *Id.* § 70.00(2)(d).

78. See N.Y. Penal Law § 120.07.

79. See *id.* §§ 120.06-.07. The New York legislature did not provide any rationale as to why it made the three-person requirement. See Legislative Memorandum, *supra* note 49.

80. See *Gang-Assault Statute*, *supra* note 69.

81. *Id.*

82. N.Y. Penal Law § 160.10 (McKinney 1988).

physical injury, but is only committed by two assailants, cannot be prosecuted as "gang assault" under the current law.⁸³

The third weakness of the statute is that currently, under New York's Criminal Procedure Law, gang assault is not a crime for which persons under sixteen may be tried as adults.⁸⁴ Much of today's gang violence comes at the hands of juveniles in their quest to become gang members,⁸⁵ to prove themselves to older gang members,⁸⁶ or to carry out the gang's normal operations.⁸⁷ Despite noting this fact when adopting the statute,⁸⁸ the legislature surprisingly failed to add gang assault to the list of crimes for which youthful offenders may be tried as adults.

In sum, if only two actors commit gang assault, if only physical injury is caused, or if only youthful offenders are involved in the attack, the gang assault statute loses its bite. Amazingly, though, all three factors are usually present in the typical gang initiation slashing.⁸⁹

83. *Gang-Assault Statute*, *supra* note 72.

84. *Id.* New York's Criminal Procedure Law provides that a minors may be tried as adults when they satisfy the definition of a "juvenile offender":

"Juvenile offender" means (1) a person, thirteen years old who is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 of the penal law and (2) a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes defined in subdivisions one and two of section 125.25 (murder in the second degree) and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree) or subdivision two of section 160.10 (robbery in the second degree) of the penal law; or defined in the penal law as an attempt to commit murder in the second degree or kidnapping in the first degree.

N.Y. Crim. Proc. Law § 1.20(42) (McKinney 1992).

85. *See, e.g.,* Raftery & Garcilazo, *supra* note 45 (describing how three teenaged girls slashed a woman with a box cutter as part of a Bloods initiation rite).

86. *See* Jankowski, *supra* note 17, at 143-44 (discussing the desire gang members have to establish a reputation for themselves within the gang, and how acts of violence are "undertaken because the attacker believes it will help him move up in the organization").

87. *See* Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, Kan. J.L. & Pub. Pol'y, Fall 1995, at 135, 136 ("Many gang members simply recruit younger members to transport guns and drugs, and to commit drive-by shootings because of the almost absolute certainty that the younger child will not be seriously prosecuted.").

88. *See* Legislative Memorandum, *supra* note 49 ("[T]he incidence of gang assaults—particularly gang assaults committed by youths—has been increasing in recent years.").

89. *See* Raftery & Garcilazo, *supra* note 45 (describing the knifing of a woman on Park Avenue in Manhattan by three young girls).

The legislature can easily cure the statute's shortcomings, however. For example, Brooklyn District Attorney Charles J. Hynes has proposed an amendment to gang assault in the second degree that would include attacks that result in any physical injury.⁹⁰

B. Proposed Legislation in New York

Lawmakers have already introduced legislation to strengthen the gang assault statute.⁹¹ The first bill would permit fourteen- and fifteen-year-old attackers to be tried as adults when they commit first-degree gang assault.⁹² The second bill proposes to close the gap between the gang assault statute and the regular assault laws⁹³ by amending both. Introduced in February, 1997, the bill would amend

90. See Matthew Sweeney, *Smokin' Joe Asks: "Where the Hell is the After-School Money,"* Brooklyn Papers, Oct. 10-16, 1997, at 2; see also *Gang-Assault Statute, supra* note 69 ("As 'physical injury' under the Penal Law requires only 'impairment of a physical condition or substantial pain,' this change would allow the great majority of face slashings and other similar gang attacks to be punished as gang assault in the second degree rather than as misdemeanor assault." (quoting N.Y. Penal Law § 10.00(9) (McKinney 1998))).

91. See A.B. 8179, 220th Sess. (N.Y. 1997); S.B. 2503, 220th Sess. (N.Y. 1997).

92. A.B. 8179, 220th Sess. (N.Y. 1997).

93. S.B. 2503, 220th Sess. (N.Y. 1997). The bill provides in pertinent part:

Gang Assault in the Third Degree. A person is guilty of gang assault in the third degree, when while aided by one or more other persons, he commits assault in the third degree. Gang assault in the third degree is a class D felony.

Gang Assault in the Second Degree. A person is guilty of gang assault in the second degree, when while aided by one or more other persons, he commits assault in the second degree. Gang assault in the second degree is a class C felony.

Gang Assault in the First Degree. A person is guilty of gang assault in the first degree, when while aided by one or more persons, he commits assault in the first degree. Gang assault in the first degree is a class B felony.

Id. The New York assault statutes read as follows:

Assault in the third degree. A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

N.Y. Penal Law § 120.00 (McKinney 1998).

Assault in the second degree. A person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
3. With intent to prevent a peace officer, police officer, a fireman, including a fireman acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such fireman, or an emergency medical service paramedic or emergency medical service tech-

the gang assault statutes by reducing the requisite participation of others to "one or more persons" and enhances the penalty of the regular assault statute.⁹⁴ Thus, if a person commits assault in the third degree—usually a class A misdemeanor offense—while aided by another person, the crime could constitute gang assault in the third degree, a class D felony.⁹⁵ This bill has several advantages. First, gang attacks committed by two persons could be prosecuted as gang as-

nician, from performing a lawful duty, he causes physical injury to such peace officer, police officer, fireman, paramedic or technician; or

4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or

6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or

7. Having been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

8. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly causes serious physical injury to such person; or

9. Being eighteen years old or more and with intent to cause physical injury to a person less than seven years old, the defendant causes such injury to such person.

Assault in the second degree is a class D felony.

Id. § 120.05.

Assault in the first degree. A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class B felony.

Id. § 120.10.

94. S.B. 2503, 220th Sess. (N.Y. 1997).

95. Accordingly, the penalty would increase from one year in prison to the possibility of seven years. *See supra* note 58.

sault.⁹⁶ Second, the proposed law would eliminate both the serious physical injury and the intent elements from the gang assault statute.⁹⁷

Although these proposals would significantly fortify and broaden the scope of the gang assault statute, the law barely scratches the surface of the growing threat of street gang-related activities. The main problem with the current New York gang statute and the above proposals is that they only penalize gang-related assaults. To better address its criminal street gang problem, New York State needs legislation that criminalizes a broader range of gang activities, including drug dealing, weapons violations, drive-by shootings, recruitment efforts, and violent felony offenses that promote gang existence and proliferation.⁹⁸ Gang recruitment, particularly the recruitment of minors, is perhaps the most important activity that needs to be confronted.⁹⁹ Moreover, the New York statute lacks an asset forfeiture provision¹⁰⁰ that could be used to seize gang property and income,¹⁰¹ and could help cut off the capital sources necessary to sustain gang activities.

As such, the lack of a broad anti-gang statute may be contributing to violent street gang migration to New York State. Thus, for New York to adequately protect its citizens from these threats, "a more comprehensive statute is necessary to combat the full range of criminal activities committed by street gangs."¹⁰² The next part of this Note will describe and analyze anti-gang laws that have been enacted across the country.

III. CURRENT STATUTORY SCHEMES THAT SPECIFICALLY TARGET GANG VIOLENCE AND ACTIVITIES

Over the past ten years, Congress and some state legislatures have enacted statutory schemes in an effort to better confront gang problems. Part III.A discusses federal laws applicable to gangs, and Part III.B reviews anti-gang statutes at the state level.

96. *Gang-Assault Statute*, *supra* note 69.

97. *Id.* ("Instead a prosecutor would be able to obtain a gang assault conviction by establishing any of the alternative elements of assault, including reckless infliction of injury or injury caused by depraved indifference to human life.").

98. For a comprehensive list of gang-related offenses that such a law would penalize, see *infra* notes 115 and 213, and part IV.

99. See *infra* notes 181-83 and accompanying text.

100. The Federal Government, California, and Alaska have adopted asset forfeiture provisions to disable gangs and criminal organizations. See *infra* notes 117, 180, 219, 239, 240, and accompanying text.

101. Gang property and income includes weapons, motor vehicles, electronic communication devices, money, and other valuables used by criminal street gangs. See, e.g., Alaska Stat. § 12.55.015(a)(11) (Michie 1996).

102. *Gang-Assault Statute*, *supra* note 69.

A. *Federal Statutes Applicable to Gang-Related Activities*

1. The Racketeering Influenced and Corrupt Organizations Act
("RICO")¹⁰³

When RICO was enacted in 1970, Congress intended that the statute aid in eradicating organized crime,¹⁰⁴ specifically, but not limited to, the Mafia.¹⁰⁵ RICO's drafters hoped to dismantle the Mafia and other criminal organizations by disabling their enormous financial bases, thus diluting their power.¹⁰⁶ Since its passage, federal prosecutors have had great success convicting the major "bosses" of this nation's notorious crime families, and in significantly reducing their criminal influence.¹⁰⁷ Unfortunately, this success against the Mafia has arguably contributed to the increase in street gang activities.¹⁰⁸

Although street gangs have been present throughout this country's history, their propensity to engage in sophisticated and violent criminal conduct has increased dramatically in recent history.¹⁰⁹ Recognizing this fact, along with the "striking similarities between sophisticated urban street gangs and Mafia organizations," federal prosecutors have

103. 18 U.S.C. §§ 1961-1968 (1994).

104. Congress stated:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922) 1073. Congress intended for RICO "to broaden the scope of organized crime prosecutions by allowing the prosecution of the entire history of a criminal organization's illegal acts, including multiple acts committed by a wide range of persons, rather than perpetuating the practice of separately prosecuting individual crimes within a pattern of activity." Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 Cath. U. L. Rev. 579, 594 (1993).

105. See S. Rep. No. 91-617, at 36-43 (1969). In enacting RICO, "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

106. See Bonney, *supra* note 104, at 583.

107. See, e.g., *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (affirming the RICO convictions of Gambino Crime Family boss John Gotti, underboss Frank Locascio, and "consigliere" Sammy "The Bull" Gravano); *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989) (affirming the RICO convictions of several bosses and underbosses of New York City's Genovese, Lucchese, Colombo, and Bonanno Crime Families); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988) (affirming the RICO conviction of Nicodemo Scarfo, boss of the Philadelphia La Cosa Nostra); *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986) (upholding the RICO convictions of members of the Colombo Crime Family); *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997) (finding the leader of New York City's Genovese Crime Family guilty of RICO violations).

108. Bonney, *supra* note 104, at 581 ("[A] new breed of criminal organization is moving swiftly to fill the void left in the illegal marketplace—the sophisticated urban street gang." (citation omitted)).

109. See Yablonsky, *supra* note 4, at 3-4.

turned to RICO to prosecute highly sophisticated urban street gangs.¹¹⁰

The basic RICO provision makes it unlawful for a person associated with any enterprise to participate in the conduct of the enterprise's affairs through an ongoing pattern of racketeering activity.¹¹¹ The statute broadly defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."¹¹² Numerous courts have interpreted this definition broadly, thus allowing a criminal street gang to satisfy this enterprise requirement.¹¹³ The second major element of RICO—the "pattern of racketeering activity"—is defined as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."¹¹⁴ When enacting RICO, Congress attempted to define the term "racketeering

110. Bonney, *supra* note 104, at 599 (describing how the recent evolution of gangs into "ruthless and sophisticated criminal organizations" prompted the United States government to combat this trend through the use of RICO); *see infra* note 113.

111. 18 U.S.C. § 1962(c) (1994). RICO prohibits the following activities:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Id. § 1962(a)-(d).

112. *Id.* § 1961(4).

113. *See, e.g.,* United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir.) (holding that "enterprise" under RICO "includes informal organizations such as criminal gangs"), *cert. denied*, 117 S. Ct. 495 (1996); United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994) (affirming RICO conviction of gang member for activities designed to earn money for or increase prestige of his gang); United States v. Thai, 29 F.3d 785 (2d Cir. 1994) (convicting a New York Vietnamese street gang under RICO for a Tennessee robbery); United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) (upholding RICO convictions of members of the Westies gang); United States v. Louie, 625 F. Supp. 1327 (S.D.N.Y. 1985) (convicting members of the "Ghost Shadows," a Chinese gang from New York City's Chinatown, of RICO violations).

114. 18 U.S.C. § 1961(5) (1994).

activity" as broadly as possible by including a wide range of offenses within its scope.¹¹⁵

Congress intended that RICO be used to prosecute sophisticated criminal organizations that profit from illegal activities and later use such revenues to infiltrate legitimate businesses.¹¹⁶ Accordingly, the legislature included a forfeiture provision¹¹⁷ in an attempt to prevent these practices. The theory behind the provision is that money provides power to criminal organizations.¹¹⁸ Thus, by seizing their assets and capital bases,¹¹⁹ the government will leave criminal organizations powerless and ultimately cause their collapse.

In 1986, a Presidential Commission issued a report that described a framework for defining organized criminal groups based on their

115. *Id.* § 1961(1). Enumerated offenses include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, . . . dealing in a controlled substance," embezzlement, fraud, obstruction of justice, tampering with or retaliating against a witness, money laundering, interstate transportation of stolen property, *inter alia*. *Id.*

116. See Bonney, *supra* note 104, at 591.

117. 18 U.S.C. § 1963(a) (1994). The forfeiture provision states:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Id.

118. "[O]rganized crime derives a major portion of its power through money obtained from . . . illegal endeavors . . ." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922) 1073, at sec. 2.

119. Property that is subject to criminal forfeiture under RICO includes: "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b) (1994).

structural and behavioral characteristics.¹²⁰ This framework has helped to define organizations that fall within RICO's scope, thus making such groups targets for RICO prosecutions.¹²¹ According to the report, a criminal organization fits within the framework when it displays the following characteristics: continuity of operations over a long period of time; a hierarchical management structure; restricted membership based upon a common trait among the individuals in the group; reliance on continuing criminal activity as a source of income; systematic violence used as a means of control and protection; and a motivation to enhance its power in the community and its level of profits.¹²² Analyzing today's criminal street gangs under this framework shows how they may be prosecuted under RICO.

An objective analysis of these gangs indicates that they are just modern versions of the Mafia, in that gangs possess the same characteristics that are necessary to satisfy the organized crime framework outlined above: continuity, structure, membership, criminality, violence, and power/profit motive.¹²³ An organization satisfies the continuity requirement when it operates with a criminal purpose over time.¹²⁴ Like the Mafia, the 1990s street gang engages "in criminal activity that becomes the livelihood of the organization throughout its duration."¹²⁵ Activities such as drug dealing, drive-by shootings, and violent attacks perpetrated during the lifetime of gangs easily satisfy this continuity element.

Furthermore, street gangs fulfill the framework's structure requirement. This element requires that the organization contain an established managerial structure.¹²⁶ Similar to the Mafia, most street gangs today have some form of hierarchical structure.¹²⁷ While small, local gangs usually have informal structures, the large and sophisticated national gangs are formal, multi-tiered, and complex entities.¹²⁸

The common criminal street gang will usually satisfy the membership element of the criminal organization framework. Most criminal street gangs, if not all, have some level of selectivity when admitting

120. President's Commission on Organized Crime, Report to the President and the Attorney General, *The Impact: Organized Crime Today* 34 (1986) [hereinafter *President's Report*].

121. See Bonney, *supra* note 104, at 592.

122. *President's Report*, *supra* note 120, at 26-29.

123. See Bonney, *supra* note 104, at 606. "Because of their structural, organizational, and functional similarities to the Mafia, urban street gangs fit within the narrow group of entities that RICO is designed to prosecute." *Id.*

124. See *President's Report*, *supra* note 120, at 26.

125. See Bonney, *supra* note 104, at 607.

126. See *President's Report*, *supra* note 120, at 26-27.

127. See Jankowski, *supra* note 17, at 63-78 (discussing the various organizational structures utilized by contemporary gangs).

128. "Sophisticated urban street gangs involved in the drug trade fit this profile because they have a management hierarchy that mimics the structure of a complex marketing and sales organization." Bonney, *supra* note 104, at 608.

new members.¹²⁹ To ascertain a prospective member's worthiness, gang leaders often require the person to pass a test or initiation rite.¹³⁰ Such rituals may include slashing innocent people, fighting current gang members, having sex with specified members of the opposite sex, or performing criminal acts.¹³¹ Performance during these initiations not only determines if membership will be granted, but it also assesses the recruit's capabilities.¹³² In addition, being of a certain race or ethnicity is often a prerequisite for membership.¹³³

The next prong of the organized crime profile requires that the group to rely on criminal activities for financing. Under the RICO statute, it appears that any illicit activity generating income for the gang will serve to satisfy this element.¹³⁴ This element does not pose a problem to prosecutors because most criminal street gangs rely on dealing narcotics to support their organization.¹³⁵

Prosecutors must also demonstrate the gang's systematic use of violence. Like the criminal financing prong, this requirement is easily met because such violence is commonplace, if not required, in gang culture.¹³⁶ Gangs generally use violence to protect their turf,¹³⁷ to maintain their status in the communities,¹³⁸ and to initiate new members.¹³⁹ The level of violence ranges from minor assault to brutal murder.

The final necessary element in the organized crime framework is to establish the group's motive for power or profit. For gangs, power and profit are synonymous. The more money a gang has, the more

129. See Holland, *supra* note 32, at 276 ("Gangs often are very selective in determining who joins, and they are often looking for members they believe will best help the gang achieve its goals."); see also Landre et al., *supra* note 29, at 131 ("All organizations have established some type of ritual by which hopeful members must prove themselves worthy of acceptance.").

130. See Landre et al., *supra* note 29, at 131.

131. *Id.* at 133-36.

132. See Jankowski, *supra* note 8, at 48-49 (discussing the importance of the prospective member's will and ability to fight).

133. Bonney, *supra* note 104, at 608.

134. See 18 U.S.C. § 1962(a) (1994).

135. "Proving a pattern of racketeering activity should not be a significant hurdle considering that the primary business for many street gangs is drug dealing." Gail A. Feichtinger, *RICO's Enterprise Element: Redefining or Paraphrasing to Death?*, 22 Wm. Mitchell L. Rev. 1027, 1057 (1996); see also *United States v. Darden*, 70 F.3d 1507, 1525 (8th Cir. 1995) (finding that defendant's acts of participating in a narcotics conspiracy and his possession of narcotics with intent to distribute within a long-term drug-trafficking enterprise was enough to satisfy the pattern of racketeering activity element).

136. See Yablonsky, *supra* note 4, at 200 ("Illegal violence is a basic characteristic of the violent gang").

137. See Arnold P. Goldstein & Barry Glick, *The Prosocial Gang: Integrating Aggression Replacement Training 17* (1994) ("The traditional major source of gang violence [is] territoriality . . .").

138. See Jankowski, *supra* note 17, at 163 (observing that fears that their organizations are in decline sometimes induces gang leaders to order attacks on other gangs).

139. See Landre et al., *supra* note 29 and text accompanying note 131.

power it can wield.¹⁴⁰ The more power a gang has, the more revenue it can generate.¹⁴¹ Accordingly, gangs will invariably attempt to obtain as much power as possible.¹⁴² Such power and money may bring them "respect" in their communities,¹⁴³ make them more attractive to members of the opposite sex,¹⁴⁴ cause rival gangs to fear them, and help capture more territory for them to control. The drug trade has historically proven to be the lucrative activity of choice for many criminal organizations.¹⁴⁵ Thus, gangs involved in drug trafficking fulfill this last element.

The analysis of the organized crime framework factors demonstrates that criminal street gangs are appropriate targets for RICO prosecutions.¹⁴⁶ Having established this, it is necessary to determine whether these gangs satisfy the elements required to obtain a conviction under RICO.¹⁴⁷ The first essential element of a RICO claim is the existence of an "enterprise" engaged in illegal activity.¹⁴⁸ An enterprise has been characterized as an "ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making."¹⁴⁹ Today's criminal street gangs fall within the scope of this definition.

The second essential element of a RICO claim is the participation of the enterprise in a "pattern of racketeering activity."¹⁵⁰ The Supreme Court has stated that a plaintiff alleging a pattern of racketeering activity must demonstrate: (1) that there is a relationship between the predicate acts, and (2) that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity.¹⁵¹ The factor of "continuity plus relationship" produces such a pattern.¹⁵²

140. See Holland, *supra* note 32, at 286 ("As organizations obtain wealth, they obtain power."); Jankowski, *supra* note 17, at 103-04 ("There is a profit-motive element to the entrepreneurial values of gang members.").

141. See Landre et al., *supra* note 29, at 18 ("The corporate gang's intention is to make money, and the gang will commit itself and its members to whatever is necessary to achieve this goal.").

142. "Gangs feed on power, and one could say that gangs live by the old axiom 'might makes right.'" *Gangs: A National Crisis: Hearings on S. 54 Before the Senate Comm. on the Judiciary*, 105th Cong. 52 (1997) [hereinafter *Hearings*] (statement of James Mulvihill, Captain, L.A. County Sheriff's Department).

143. See Jankowski, *supra* note 17, at 104 ("Mirroring the dominant values of the larger society, most gang members attempt to achieve some form of status with the acquisition of possessions.").

144. See Landre et al., *supra* note 29, at 21.

145. See *id.* at 126 (discussing the large profits earned by gangs through crack cocaine distribution).

146. Bonney, *supra* note 104, at 609.

147. *Id.*

148. 18 U.S.C. § 1962 (1994).

149. *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990).

150. 18 U.S.C. § 1961(5) (1994).

151. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

152. *Id.* (quoting 116 Cong. Rec. 18940 (1970)).

"In the context of gang-related RICO prosecutions, once the 'enterprise' has been established, the 'pattern' element is usually not difficult to prove."¹⁵³ Most prosecutors should have no problem tying drug charges to violent crimes to demonstrate a pattern because criminal street gangs often commit a significant number of crimes in the course of conducting their illegal activities.¹⁵⁴

This analysis of the pertinent RICO provisions and the organized crime framework demonstrates that today's violent criminal street gangs can successfully be prosecuted under the RICO statute. Congress intended for RICO to aid in eradicating organized crime. With the Mafia seriously weakened, gangs are now in the forefront of organizations threatening the safety and welfare of this country. Until recently, RICO was arguably the only federal law that could feasibly be extended to tackle the gang problem. The next section analyzes the recent federal legislation aimed at criminal gang activities.

2. The Federal Gang Violence Act¹⁵⁵

In October, 1997, the Senate Judiciary Committee ("the Committee") approved the Violent and Repeat Juvenile Offender Act of 1997 ("VRJO").¹⁵⁶ Introduced by Senator Orrin Hatch of Utah,¹⁵⁷ the Bill's purpose is to reduce juvenile crime and to promote accountability of juvenile criminals.¹⁵⁸ Most importantly, Title II of the VRJO, the Federal Gang Violence Act ("the Act"), would specifically address the problem of violent criminal offenses committed by gangs.¹⁵⁹ The Committee believed that the current federal gang law¹⁶⁰ and RICO

153. Bonney, *supra* note 104, at 611.

154. *See id.* ("Because of the significant number of offenses that are committed on a daily basis through the operation of a drug enterprise, the prosecution can tie drug charges to other charges, such as violent crimes, in order to establish the 'pattern.'").

155. S. Rep. No. 105-108, §§ 202-13 (1997).

156. S. Rep. No. 105-108 (1997). The Violent and Repeat Juvenile Offender Act is a proposed law and has not yet been passed by Congress.

157. *Id.*

158. *Id.* § 2(b).

159. *Id.* §§ 201-13. The Judiciary Committee was extremely concerned with the alarming increase in criminal gang activity and recommended this title to address "that growing national menace." *Id.* at 80. The Committee considered the following statistics:

The greater Los Angeles area suffers under the weight of 1,200 gangs and the membership as of last count is in excess of 150,000. The gangs have been responsible for nearly 7,000 homicides in the last 10 years, the peak year being 1995, when 807 gang murders occurred. Many of these victims were innocent citizens who were just in the wrong place at the wrong time. Over 90 percent of these victims were shot to death.

Hearings, supra note 140, at 51 (statement of James Mulvihill, Captain, L.A. County Sheriff's Department).

160. 18 U.S.C. § 521 (1994). The following is the current law in its entirety:

521. Criminal street gangs

(a) Definitions.—

contain gaps that "leave unpunished significant criminal activity."¹⁶¹

"conviction" includes a finding, under State or Federal law, that a person has committed an act of juvenile delinquency involving a violent or controlled substances felony.

"criminal street gang" means an ongoing group, club, organization, or association of 5 or more persons—

- (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);
 - (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and
 - (C) the activities of which affect interstate or foreign commerce.
- (b) Penalty.—The sentence of a person convicted of an offense described in subsection (c) shall be increased by up to 10 years if the offense is committed under the circumstances described in subsection (d).
- (c) Offenses.—The offenses described in this section are—
- (1) a Federal felony involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years;
 - (2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another; and
 - (3) a conspiracy to commit an offense described in paragraph (1) or (2).
- (d) Circumstances.—The circumstances described in this section are that the offense described in subsection (c) was committed by a person who—
- (1) participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses described in subsection (c);
 - (2) intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang; and
 - (3) has been convicted within the past 5 years for—
 - (A) an offense described in subsection (c);
 - (B) a State offense—
 - (i) involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years' imprisonment; or
 - (ii) that is a felony crime of violence that has as an element the use or attempted use of physical force against the person of another;
 - (C) any Federal or State felony offense that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense; or
 - (D) a conspiracy to commit an offense described in subparagraph (A), (B), or (C).

Id.

161. See S. Rep. No. 105-108, at 82 (1997). For instance, the RICO statute prohibits investment, ownership, or operation of a business with proceeds from a pattern of racketeering activity. *Id.* In contrast, the Federal Gang Violence Act makes a separate crime of the serial commission of various predicate gang crimes. See *id.* § 203. Similarly, the *Federal Continuing Criminal Enterprise Act*, 21 U.S.C. § 848 (1994), prohibits leading a drug gang and requires that "substantial income" be obtained from offenses. S. Rep. No. 105-108, at 82 (1997). The Federal Gang Violence Act, on the other hand, covers a wider range of offenses commonly committed by gang members.

As such, the Act would amend the current law to address what the Committee believed was the "evolving, broader nature of gang crime."¹⁶²

Noting that interstate and international criminal gang activity is becoming a "national crisis,"¹⁶³ the Committee believed it was time for the federal government to "take a greater role in assisting State and local law enforcement efforts in addressing these criminal enterprises."¹⁶⁴ Moreover, the Committee viewed the Act as necessary to "add teeth" to the current federal law dealing with criminal street gangs,¹⁶⁵ which is "too narrowly focused on drug offenses and provides inadequate penalties to be an effective tool for Federal prosecutors."¹⁶⁶

Echoing the New York legislature's reasoning for enacting its gang assault statute,¹⁶⁷ the Committee stated that crimes committed in connection with gangs pose a greater threat to community safety than those same crimes committed by lone perpetrators.¹⁶⁸ Accordingly, the first section of the Act would increase the offense level for participation in crime as a gang member.¹⁶⁹ This section would also amend the Federal Sentencing Guidelines to

provide an appropriate enhancement for any Federal offense that is a predicate gang crime . . . if the offense was both committed in connection with, or in furtherance of, the activities of a criminal gang and the defendant was a member of the criminal gang at the time of the offense.¹⁷⁰

The factors that would be considered in determining the appropriate enhancement include the seriousness of the offense, the offender's relative position in the criminal gang, and the risk of death or serious bodily injury to victims.¹⁷¹

The next section of the Act¹⁷² would significantly amend the current federal gang law codified in 18 U.S.C. § 521. Section 203 of the Act defines a "criminal gang" as "an ongoing group, club, organization, or association of 5 or more persons, whether formal or informal—(A) that has as 1 of its primary activities or purposes of the commission of

See id. § 203. It is not limited only to leaders or organizers and does not require a showing that income has been derived from those offenses. *Id.* at 82.

162. *Id.*

163. *Id.* at 80.

164. *Id.* The Committee believed that because criminal gangs are now moving interstate and internationally to commit crimes, now is a proper time for the Federal Government to take action. *See id.* at 81.

165. *See supra* note 160.

166. S. Rep. No. 105-108, at 81 (1997).

167. *See supra* notes 59-66 and accompanying text.

168. *See* S. Rep. No. 105-108, at 82 (1997).

169. *Id.* § 202.

170. *Id.* § 202(b)(1).

171. *Id.* § 202(b)(2).

172. *Id.* § 203.

1 or more predicate gang crimes; and (B) the activities of which affect interstate or foreign commerce.”¹⁷³ The term “pattern of criminal gang activity” is defined in section 203 as “the commission of 2 or more predicate gang crimes committed in connection with, or in furtherance of, the activities of a criminal gang”¹⁷⁴ Section 203 then defines a “predicate gang crime” as an offense, including an act of juvenile delinquency that, that if committed by an adult, would be one of a number of enumerated Federal and State offenses,¹⁷⁵ or a “conspiracy, attempt or solicitation to commit [such] offense[s]”¹⁷⁶

The current gang law increases the sentence of anyone convicted under the statute by up to ten years.¹⁷⁷ Section 203 of the Act would amend this penalty by providing that those engaging in a pattern of criminal activity would be sentenced to between five and twenty-five years of imprisonment, be fined, or both.¹⁷⁸ Moreover, offenders with one or more prior convictions under this section would be sentenced to prison for a twenty-year-to-life term.¹⁷⁹ The new section would also provide for the criminal forfeiture of gang-related assets and profits.¹⁸⁰

Section 205 is perhaps the most important part of the Act, in that it addresses the solicitation or recruitment of persons into criminal gang activity.¹⁸¹ The impetus behind this section was the hypothesis that “[w]ithout the recruitment of new members, and the pressure of threats or intimidation that frequently keeps members from leaving

173. *Id.* § 203(a)(1)(B)(1).

174. *Id.* § 203(a)(1)(B)(2). At least one predicate gang crime must be committed after the date of enactment of the Act, and the first crime must have occurred not more than five years before the commission of another predicate gang crime. *Id.* § 203(a)(1)(B)(2)(B).

175. *Id.* § 203(a)(3)(A). Federal offenses listed include crimes: (1) of violence for which the maximum penalty is at least 10 years; (2) that involve a controlled substance for which the maximum penalty is at least 10 years; (3) relating to gang recruitment; (4) relating to extortion, threats, gambling, or obstruction of justice; (5) relating to money smuggling; and (6) relating to alien smuggling. *Id.* § 203(a)(1)(C)(3)(A)(i)-(vii).

176. *Id.* § 203(a)(1)(B)(3)(C). Conspiracy is defined as:

A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.

Black's Law Dictionary 309 (6th ed. 1990). Solicitation is defined as “[t]he inchoate offense of requesting or encouraging someone to engage in illegal conduct.” *Id.* at 1392.

177. 18 U.S.C. § 521(b) (1994).

178. S. Rep. No. 105-108 § 203(a)(2)(b)(1)(A).

179. *Id.* § 203(a)(2)(b)(2)(A).

180. *Id.* § 203(a)(2)(b)(2)(B).

181. *Id.* § 205. Again, the Committee believed that current law was not adequate in this regard because it did little to discourage or penalize gang recruitment. *See* S. Rep. No. 105-108, at 83 (1997).

the gang, many gangs might disappear over time."¹⁸² Furthermore, the Committee believed the recruitment of minors into gangs was "[p]articularly pernicious."¹⁸³

Accordingly, section 205 of the Act would create a new section of the United States Code, 18 U.S.C. § 522, to address this problem. Section 522 would provide stiff federal criminal penalties for the recruitment of persons into criminal gang activity.¹⁸⁴ The new law would state:

It shall be unlawful for any person to use any facility in, or travel in, interstate or foreign commerce, or cause another to do so, to recruit, solicit, induce, command, or cause another person to be or to remain as a member of a criminal gang, or conspire to do so.¹⁸⁵

Recognizing the implications of the recruitment of minors into gangs,¹⁸⁶ the Committee recommends the enhanced penalty created by the Act for such recruitment.¹⁸⁷ While the penalty for recruiting an adult into a gang would be imprisonment "for a term of not less than 1 year and not more than 10 years,"¹⁸⁸ the incarceration period for recruiting a minor¹⁸⁹ would jump to a minimum of four years with a maximum of ten years.¹⁹⁰ Furthermore, a person convicted of this crime would have to pay the costs of housing, maintaining, and treating the minor until the minor reached the age of majority.¹⁹¹

Finally, the Act would also amend the federal RICO statute¹⁹² to include crimes involving criminal street gang recruitment as predicate RICO crimes,¹⁹³ and would ensure that the penalties for violations of federal racketeering laws are as severe as the penalties for the underlying crimes that serve as racketeering predicates.¹⁹⁴

182. *Id.*

183. *Id.* "Gang leaders prey on the most vulnerable juveniles—those without solid family structures, and in need of guidance and acceptance." *Id.* "The price to the juvenile . . . is participation in a culture of drugs, intimidation, and criminal activity from which the juvenile may find it difficult to extricate him or herself." *Id.*

184. *Id.*; see *infra* notes 188-90 and accompanying text.

185. S. Rep. No. 105-108 § 205(a) (1997).

186. See *id.*; *supra* note 183.

187. S. Rep. No. 105-108, at 84 (1997).

188. *Id.* § 205(b)(1)(B).

189. "The term 'minor' means a person who is younger than 18 years of age." *Id.* § 205(c)(2).

190. *Id.* § 205(b)(1)(A).

191. *Id.* § 205(b)(2).

192. See 18 U.S.C. §§ 1961-1968 (1994).

193. S. Rep. No. 105-108 § 206 (1997). For a list of predicate RICO crimes, see *supra* note 115 and accompanying text.

194. The Act provides:

Section 1963(a) of title 18, United States Code, is amended by striking "imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both," and inserting "imprisoned not more than the greater of 20 years or the statutory maximum term of imprisonment (including life impris-

In addition to providing statutory amendments, the Act would also authorize funding to advance cooperation between federal, state, and local law enforcement in investigating, disrupting, and prosecuting gangs.¹⁹⁵ Section 210 of the Act would authorize the U.S. Attorney General to establish joint agency task forces to address gang crime in "High Intensity Interstate Gang Activity Areas."¹⁹⁶ This provision would also authorize \$100 million per year for this initiative; 60 percent of which would be for the establishment and operation of High Intensity Interstate Gang Activity Areas, and 40 percent would be allocated for community-based gang prevention and intervention for gang members and at-risk youth in gang areas.¹⁹⁷

B. State Anti-Gang Statutes

Several states have taken a proactive approach to fight the increase in gang-related activities and violence within their borders by enacting comprehensive criminal statutes specifically aimed at criminal street gangs.¹⁹⁸ This section will discuss and analyze the gang laws of California, Alaska, Arkansas, Florida, South Dakota, Iowa, and Arizona.

1. California's Street Terrorism Enforcement and Prevention Act¹⁹⁹

California, home of the "street gang capital of the United States,"²⁰⁰ took the lead in the statutory fight against criminal gangs in 1988 by enacting the Street Terrorism Enforcement and Prevention Act ("STEP").²⁰¹ The California Legislature's primary objective in passing STEP was the "eradication" of criminal street gang violence.²⁰² Before STEP's enactment, the legislature stated that "the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."²⁰³ The legislature claimed that its goal could be attained by targeting both the patterns of criminal gang activity, as well as the organized nature of

onment) applicable to a racketeering activity on which the violation is based, or both."

Id. § 211.

195. *Id.* § 210.

196. *Id.*

197. *Id.* § 210(c)(1)-(2).

198. *See infra* note 225.

199. Cal. Penal Code §§ 186.20-28 (West Supp. 1998).

200. David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 Wash. U. L.Q. 683, 686 (1995) (quoting Michael D. Harris, *Prosecutors Seek to Make Street Gangs Illegal*, UPI, June 8, 1987, available in Lexis, Nexis library, UPI File, at *2).

201. *See* Cal. Penal Code §§ 186.20-28 (West Supp. 1998).

202. *Id.* § 186.21.

203. *Id.* "These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected." *Id.*

street gangs, because these two factors help create street gang terror.²⁰⁴

Structurally similar to the federal RICO statute,²⁰⁵ STEP was the first statute to criminalize participation in criminal street gang activity.²⁰⁶ STEP also provides for enhanced sentences for gang-related felonies,²⁰⁷ allows buildings used by criminal street gangs to be declared nuisances,²⁰⁸ and provides for weapons forfeiture.²⁰⁹ The primary section of STEP provides that

[a]ny person who actively participates²¹⁰ in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.²¹¹

Enforcing the statute requires satisfying two key terms: "criminal street gang" and "pattern of criminal gang activity." The statute defines a "criminal street gang" as

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary

204. *Id.*

205. While RICO defines an "enterprise" and criminalizes a "pattern of racketeering activity," see 18 U.S.C. § 1961(4)-(5) (1994), STEP defines a "criminal street gang" and penalizes a "pattern of criminal gang activity," see *infra* notes 212-14 and accompanying text.

206. See Truman, *supra* note 200, at 686.

207. See Cal. Penal Code § 186.22(b) (West Supp. 1998).

208. See *id.* § 186.22a(a); see also Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 Harv. C.R.-C.L. L. Rev. 477, 478 (1994) (discussing the use of nuisance abatement injunctions as a law enforcement weapon against unlawful street gang activity); Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 Nw. U. L. Rev. 212 (1994) (addressing the constitutional questions surrounding anti-gang injunctions).

209. See Cal. Penal Code § 186.22a(e) (West Supp. 1998).

210. "It is not even necessary to be a member of a criminal street gang to 'actively participate.'" Abraham Abramovsky, *An Anti-Gang Statute for New York?*, N.Y. L.J., Dec. 30, 1997, at 3 [hereinafter *Anti-Gang Statute*] (citing *In re Lincoln J.*, 223 Cal. App. 3d 322 (Ct. App. 1990)). One California appellate court stated:

To be convicted [of being an active participant in a street gang], a defendant must have a relationship with a criminal street gang that is more than nominal, passive, inactive or purely technical, and the defendant must devote all or a substantial part of his or her time and efforts to the criminal street gang.

People v. Green, 227 Cal. App. 3d 692, 694 (Ct. App. 1991).

211. Cal. Penal Code § 186.22(a) (West Supp. 1998); see *People v. Marroquin*, 65 Cal. Rptr. 2d 62, 68 (Ct. App. 1997) (holding that a conviction for participation in criminal street gang requires a finding of current active participation in criminal street gang: "This requirement establishes a distinction between current active participation and active participation at some earlier time."). But see *In re Ramon T.*, 57 Cal. App. 4th 201, 207 (Ct. App. 1997) ("We decline to read a requirement into subdivision (b) of section 186.22 that violation of that act requires either 'active' or 'current, active' participation in a gang.").

activities the commission of one or more of the criminal acts enumerated in [subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.²¹²

The second key phrase, a "pattern of criminal gang activity" involves the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [23 enumerated] offenses,²¹³ provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.²¹⁴

212. Cal. Penal Code § 186.22(f) (West Supp. 1998); *In re Nathaniel C.*, 228 Cal. App. 3d 990, 1001 (Ct. App. 1991) (ruling that the element of "criminal street gang" was met by testimony of witnesses identifying at least three participants in a particular incident as street gang members, testimony that there was a membership roll written on a wall, and that members, friends, and supporters of the group were capable of concerted action); see *Green*, 227 Cal. App. 3d at 704 (finding the term "criminal street gang," as used in section 186.22, to be sufficiently defined and did not render section unconstitutionally vague under due process clause).

213. The twenty-three listed offenses are:

- (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury,
- (2) Robbery
- (3) Unlawful homicide or manslaughter
- (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances
- (5) Shooting at an inhabited dwelling or occupied motor vehicle
- (6) Discharging or permitting the discharge of a firearm from a motor vehicle
- (7) Arson
- (8) The intimidation of witnesses and victims
- (9) Grand theft . . . when the value of the money, labor, or real or personal property taken exceeds ten thousand dollars (\$10,000).
- (10) Grand theft of any vehicle, trailer, or vessel
- (11) Burglary
- (12) Rape
- (13) Looting
- (14) Moneylaundering
- (15) Kidnapping
- (16) Mayhem
- (17) Aggravated mayhem
- (18) Torture
- (19) Felony extortion
- (20) Felony vandalism
- (21) Carjacking
- (22) The sale, delivery, or transfer of a firearm
- (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person

Cal. Penal Code § 186.22(e) (West Supp. 1998).

214. *Id.*; see *In re Elodio O.*, 56 Cal. App. 4th 1175, 1180 (Ct. App. 1997) (holding that the requirement that there be a pattern of criminal gang activity was satisfied when a group of youths, including defendant, committed both robbery and assault

Accordingly, a conviction under STEP requires proof of five primary elements: 1) the existence of a "criminal street gang;" 2) the defendant's membership in the gang; 3) the defendant's knowledge that the gang members are engaging in a pattern of gang activity; 4) that the defendant willfully promoted, furthered, or assisted in any of the gang's felonious criminal conduct; and 5) the existence a pattern of criminal gang activity.²¹⁵

The California statute also provides for enhanced sentences for those who commit certain gang-related offenses. For instance, any defendant "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang" to promote any criminal conduct by gang members, will be punished by an additional prison term of one to three years to be served consecutive with the punishment received for the underlying felony.²¹⁶ If the defendant commits the underlying felony within 1000 feet of school grounds during school hours, the prison term increases an additional two to four years.²¹⁷ Furthermore, if the underlying felony is punishable by life imprisonment, the defendant must serve a minimum of fifteen years before being eligible for parole.²¹⁸

STEP also contains nuisance and weapon forfeiture provisions.²¹⁹ STEP provides that "[e]very building or place" used by criminal street gang members for the purpose of committing predicate STEP crimes or other criminal acts "is a nuisance which shall be enjoined, abated, and prevented."²²⁰ Moreover, weapons owned or possessed by criminal street gang members for the purpose of committing STEP predicate crimes, burglary, or rape may be seized by police and destroyed if declared a nuisance.²²¹

Finally, a 1993 amendment to the California statute provided penalties for the recruitment of minors into criminal street gangs. "Any adult who utilizes physical violence to coerce, induce, or solicit another person who is under 18 years of age to actively participate in any criminal street gang . . . shall be punished" for a prison term of one to

with a deadly weapon in connection with an attack upon a juvenile bicyclist as he went through a park).

215. Truman, *supra* note 200, at 709.

216. Cal. Penal Code § 186.22(b)(1) (West Supp. 1998).

217. *Id.* § 186.22(b)(2).

218. *Id.* § 186.22(b)(4).

219. *See id.* § 186.22a. The California Legislature found that "an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs." *Id.* § 186.21; *cf.* *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1119, *cert. denied*, 117 S. Ct. 2513 (1997) (finding that STEP is not the exclusive means of enjoining criminal street gangs and abating gang behavior as public nuisances, and does not preempt use of general public nuisance statutes).

220. Cal. Penal Code § 186.22a(a) (West Supp. 1998).

221. *Id.* § 186.22a(e)(1)-(2).

three years.²²² The same activity constitutes a misdemeanor when committed by a minor who is 16 years or older.²²³ Additionally, any adult who "threatens" to use physical violence against a minor on two or more occasions within a thirty-day period with the intent to coerce, induce, or solicit him to actively participate in a street gang will also be punished by one to three years in prison.²²⁴

Since STEP's enactment in 1988, sixteen states have adopted some form of the California statute to address the criminal street gang activities in their jurisdictions.²²⁵ While states like Georgia, Louisiana, and Missouri have enacted gang laws that are essentially identical to the California STEP Act,²²⁶ some states have supplemented their existing statutes to deal with gang problems.²²⁷ Other states have taken even more radical approaches than those of California by drafting their own anti-gang statutes that surpass STEP's scope.²²⁸ The following sections analyze the more aggressive of these laws.

2. Alaska's Anti-Gang Statutes

Alaska's anti-gang recruiting statute goes considerably beyond that of its California counterpart.²²⁹ In Alaska, recruiting a gang member in the first degree requires use of force, or the threat of force, to induce a person to participate in a gang or to commit a crime on behalf

222. *Id.* § 186.26(a).

223. *Id.* § 186.26(c).

224. *Id.* § 186.26(b).

225. These states include Alaska, Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nevada, Oklahoma, Rhode Island, and South Dakota. See Alaska Stat. §§ 11.61.160, 11.61.165, 12.55.015(a)(11), 12.55.137(a)-(b) (Michie 1996); Ariz. Rev. Stat. Ann. § 13-2308 (West Supp. 1997); Ark. Code Ann. § 5-74-104 (Michie 1997); Fla. Stat. Ann. §§ 874.01-.09 (West Supp. 1998); Ga. Code Ann. §§ 16-15-1 to -7 (1996); 730 Ill. Comp. Stat. Ann. 5/5-5-3(c)(2)(J) (West 1997); Ind. Code Ann. §§ 35-45-9-1 to -4 (Michie 1994 & Supp. 1997); Iowa Code Ann. § 723A.2-A.3 (West 1993 & Supp. 1997); La. Rev. Stat. Ann. §§ 15:1401-1405 (West 1992 & Supp. 1998); Minn. Stat. Ann. § 609.229 (West Supp. 1998); Mo. Ann. Stat. §§ 578.421-.430 (West 1995); Nev. Rev. Stat. Ann. § 193.168 (Michie 1997); Okla. Stat. Ann. tit. 21, § 856(D)-(F) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 to -15 (Michie Supp. 1997).

226. See, e.g., Ga. Code Ann. §§ 16-15-1 to -7 (1996) (tracking STEP's language); La. Rev. Stat. Ann. §§ 15:1401-1405 (West 1992 & Supp. 1998) (same); Mo. Ann. Stat. §§ 578.421-.430 (West 1995) (same).

227. See, e.g., Nev. Rev. Stat. § 193.168 (Michie 1997) (enhancing criminal penalties for felonies committed to promote criminal gang activities); N.Y. Penal Law §§ 120.06-.07 (McKinney 1997) (adding two new statutory crimes: gang assault in the first and second degrees); Okla. Stat. Ann. tit. 21, § 856(D)-(F) (West Supp. 1998) (creating a new statutory crime regarding gang recruitment).

228. See Alaska Stat. §§ 11.61.160, 11.61.165, 12.55.015(a)(11), 12.55.137(a)-(b) (Michie 1996); Ariz. Rev. Stat. Ann. § 13-2308 (West Supp. 1997); Ark. Code Ann. § 5-74-104 (Michie 1997); Fla. Stat. Ann. §§ 874.01-.09 (West Supp. 1997); Iowa Code Ann. § 723A.2 (West 1993); S.D. Codified Laws §§ 22-10-14 to -15 (Michie Supp. 1997).

229. See *Anti-Gang Statute*, *supra* note 210.

of a gang.²³⁰ Unlike the California statute,²³¹ the Alaska law does not limit the crime to the recruitment of a minor.²³² Thus, a person who uses force or the threat of force to recruit an adult into a criminal street gang may be prosecuted.²³³ Furthermore, the second degree offense of gang recruitment punishes a person 18 years of age or older who merely "encourages" or attempts to recruit a minor into a criminal street gang.²³⁴ Unlike the first degree offense,²³⁵ and unlike California's gang recruitment provisions,²³⁶ the use or threat of force is not a required element of this second degree offense.²³⁷ Finally, force used or threatened against one's property in an effort to recruit gang members is also punishable under the Alaska statute.²³⁸

Furthermore, Alaska law provides for more expansive forfeiture of gang assets than does STEP. While California only forfeits gang members' firearms,²³⁹ Alaska extends forfeiture to motor vehicles, electronic communication devices, money, and other valuables used or garnered by criminal street gangs.²⁴⁰ Moreover, Alaska law enhances punishment, by one level, for misdemeanor offenses committed for the "benefit of, at the direction of, or in association with" a criminal street gang.²⁴¹ Notably, this law does not require that the misdemeanor be committed by a gang member.²⁴² Finally, unlike California, Alaska provides a valuable prosecutorial tool by allowing for the admissibility of expert testimony relating to criminal street gang activity.²⁴³

230. Alaska Stat. § 11.61.160(a) (Michie 1997). No reported cases exist in which Alaskan prosecutors utilized the statute to prosecute gang members.

231. See Cal. Penal Code § 186.26(a)-(c) (West Supp. 1998).

232. See Alaska Stat. § 11.61.160(a) (Michie 1996).

233. See *id.*

234. Alaska Stat. § 11.61.165(a) (Michie 1996).

235. See *supra* note 230.

236. See Cal. Penal Code § 186.26(a)-(c) (West Supp. 1998).

237. See Alaska Stat. § 11.61.165(a) (Michie 1996).

238. *Id.* § 11.61.160(a).

239. Cal. Penal Code § 186.22a(e)(1)-(2) (West Supp. 1998).

240. Alaska Stat. § 12.55.015(a)(11) (Michie 1996).

241. *Id.* § 12.55.137(a)-(b). STEP does not contain a provision regarding misdemeanor offenses.

242. See *Anti-Gang Statute, supra* note 210.

243. Compare Cal. Penal Code §§ 186.20-28 (West Supp. 1998), with Alaska Stat. § 12.45.037(a) (Michie 1996). The Alaska law provides:

[E]xpert testimony is admissible to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case,

(1) common characteristics of persons who are members of the criminal street gang or criminal street gangs;

(2) rivalries between specific criminal street gangs;

(3) common practices and operations of the criminal street gang or criminal street gangs and the members of those gangs;

(4) social customs and behavior of members of the criminal street gang or the criminal street gangs;

(5) terminology used by members of the criminal street gang or the criminal street gangs;

3. Arkansas Anti-Gang Laws

In 1987, the Arkansas General Assembly passed the Arkansas Criminal Gang, Organization, or Enterprise Act²⁴⁴ ("Arkansas Act") in its effort to reduce crime perpetrated by criminal gangs.²⁴⁵ The legislature modeled the Arkansas Act after the Federal Continuing Criminal Enterprise Act²⁴⁶ to provide police, prosecutors, and courts with guidance and ample case law.²⁴⁷ The goals behind enactment of the Arkansas Act include: penalizing conduct of continuing criminal gangs, organizations, or enterprises;²⁴⁸ reducing the distribution of controlled substances;²⁴⁹ preventing the use of another person's property to avoid detection and identification in the commission of gang-related crimes;²⁵⁰ preventing drive-by shootings;²⁵¹ preventing the simultaneous possession of drugs and firearms;²⁵² and preventing vio-

(6) codes of conduct of the particular criminal street gang or criminal street gangs; and

(7) the types of crimes that are likely to be committed by the particular criminal street gang.

Alaska Stat. § 12.45.037 (Michie 1996). Nevada law contains a similar expert testimony provision. *See* Nev. Rev. Stat. Ann. § 193.168(5) (Michie 1997).

244. Ark. Code Ann. §§ 5-74-101 to -109 (Michie 1997).

245. *Id.* § 5-74-102(b). "'Criminal gang, organization, or enterprise' is defined as any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses which are undertaken in concert with each other." *Id.* § 5-74-202(a).

246. 21 U.S.C. § 848 (1994). Under the federal statute, a person engages in a continuing criminal enterprise if:

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

Id. § 848(c).

247. Ark. Code Ann. § 5-74-102(e) (Michie 1997).

248. *Id.* § 5-74-102(b).

249. *Id.*

250. *Id.* "A person commits the offense of unauthorized use of another person's property to facilitate a crime when he knowingly uses the property of another person to facilitate in any way the violation of a predicate criminal offense without the owner's knowledge." *Id.* § 5-74-105(a)(1).

251. *Id.* § 5-74-102(c). "A person commits unlawful discharge of a firearm from a vehicle in the first degree if he knowingly discharges a firearm from a vehicle and thereby causes death or serious physical injury to another person." *Id.* § 5-74-107(a)(1). "A person commits unlawful discharge of a firearm from a vehicle in the second degree if he recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure." *Id.* § 5-74-107(b)(1).

252. *Id.* § 5-74-106; *see* Manning v. State, 956 S.W.2d 184, 187 (Ark. 1997) (affirming conviction of defendant for simultaneous possession of drugs and a firearm where he had "a loaded handgun, wrapped in a ski mask, near an abundant supply of illegal drugs, all within his easy reach").

lent criminal group activity in general.²⁵³ In addition, the Arkansas Act provides for enhanced penalties for gang-related crimes up to two felony classifications higher than the penalty assessed for the underlying predicate offense committed.²⁵⁴

In 1994, the Arkansas legislature determined that the growth in criminal gangs in Arkansas was due largely to the flow of minors into such gangs. The legislature noted that "street gangs have become rampant in our communities and that such gangs recruit minors to engage in criminal activity."²⁵⁵ The legislature called an "extraordinary session," and declared a state of emergency in Arkansas which enabled it to create the substantive crime of soliciting a minor to join a street gang.²⁵⁶

4. Florida and South Dakota Anti-Gang Laws

The anti-gang statutes of Florida and South Dakota are substantially similar to each other, but they differ significantly from the California STEP Act.²⁵⁷ The most pronounced difference contained in the

253. Ark. Code Ann. § 5-74-102(b)-(c) (Michie 1997). "Any person who violates any provision of Arkansas law which is a crime of violence while acting in concert with two (2) or more other persons shall be subject to enhanced penalties." *Id.* § 5-74-108(a); *see also* B.J. v. State, 937 S.W.2d 675, 677 (Ark. 1997) ("[E]ngaging in violent criminal activity, as enumerated in Ark. Code Ann. § 5-74-108, would not be a Class D felony in itself, but rather would raise a third-degree battery Class A misdemeanor to a Class D felony."). "'Crime of violence' means any violation of Arkansas law where a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person or persons, specifically including rape . . ." Ark. Code Ann. § 5-74-202(c) (Michie 1997).

254. For first and second degree offenses of "engaging in a continuing criminal gang, organization, or enterprise," *see* Ark. Code Ann. § 5-74-104. "A person who engages in a continuing criminal gang, organization, or enterprise in the first degree is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate offense" committed. *Id.* § 5-74-104(a)(2). "A person who engages in a continuing criminal gang, organization, or enterprise in the second degree is guilty of a felony one (1) classification higher than the classification of the highest underlying offense" committed. *Id.* § 5-74-104(b)(2).

255. Ark. Code Ann. §§ 5-74-201 to 203, Effective Dates (Michie 1997).

256. *See id.* ("[A]n emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety . . ."). The Arkansas anti-solicitation statute states that:

(a) Every person who by intimidation or duress causes, aids, abets, encourages, solicits, or recruits a minor to become or to remain a member of any group which he knows to be a criminal gang, organization, or enterprise . . . is guilty of a Class C felony.

(b) Every person who is found guilty of, or who pleads guilty or *nolo contendere* [sic] to, a second or subsequent violation of this section is guilty of a Class B felony.

Ark. Code Ann. § 5-74-203 (Michie 1997).

257. *Compare* Fla. Stat. Ann. §§ 874.01-.09 (West Supp. 1998), and S.D. Codified Laws §§ 22-10-14 to -15 (Michie Supp. 1997), with Cal. Penal Code §§ 186.20-.28 (West Supp. 1998).

Florida Criminal Street Gang Prevention Act of 1996²⁵⁸ ("Florida Act") is its detailed definition of "criminal street gang member," which provides specific criteria for making such a determination.²⁵⁹ South Dakota, not generally considered a "hotbed of urban violence,"²⁶⁰ has enacted a similar law, with similar criteria.²⁶¹

The Florida law defines a gang "associate" as someone who meets any single criterion listed or admits to criminal street gang association.²⁶² Florida and South Dakota then provide for a one-level enhanced penalty for any crime committed by a street gang member²⁶³ and, unlike California, Florida does not require the crime to be committed for the benefit or furtherance of the gang.²⁶⁴ Also unlike the

258. Fla. Stat. Ann. §§ 874.01 (West Supp. 1998). Originally, the law was named the Street Terrorism Enforcement and Prevention Act of 1990. *Id.* § 874.01 (West 1994). Notably, the Florida gang statutes have only been used once. *See S.P. v. State*, 664 So. 2d 1064, 1065-66 (Fla. Dist. Ct. App. 1995) (holding that a juvenile was not subject to enhanced penalties as a gang member because he committed acts prior to the amendment to gang statute that included acts committed by juveniles which would be felonies or violent misdemeanors if committed by adults).

259. *See* Fla. Stat. Ann. § 874.03(2) (West Supp. 1998). Florida deems defendants as gang "members" when they meet two or more of the enumerated criteria:

- (a) Admits to criminal street gang membership.
- (b) Is identified as a criminal street gang member by a parent or guardian.
- (c) Is identified as a criminal street gang member by a documented reliable informant.
- (d) Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
- (e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
- (f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
- (g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
- (h) Has been stopped in the company of known criminal street gang members four or more times.

Id.

260. *See* Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 Wake Forest L. Rev. 943, 977 (1993).

261. *See* S.D. Codified Laws §§ 22-10-14 to -15 (Michie Supp. 1997). "Thus, in either [Florida or South Dakota], prosecutors can turn a misdemeanor into a felony by alleging and proving that photographs identify the individual as a gang member and that the individual was 'stopped in the company of known gang members four or more times.'" Mayer, *supra* note 260, at 977 (citations omitted). Similar to Alaska, South Dakota has no reported cases in which prosecutors used the statute.

262. Fla. Stat. Ann. § 874.03(4)(a) (West Supp. 1998). Persons are designated "criminal street gang associates" for purposes of law enforcement identification and tracking. *Id.*

263. *Id.* § 874.04; S.D. Codified Laws § 22-10-15 (Michie Supp. 1997).

264. *Anti-Gang Statute*, *supra* note 210. *Compare* Fla. Stat. Ann. § 874.03(3) (West 1997) (providing no requirement that the criminal acts benefit the gang), *with* Cal. Penal Code §186.22(a) (West Supp. 1998) (requiring that the criminal conduct "promote[], further[], or assist[]" the gang).

California statute, but similar to the Alaska law, Florida's gang recruitment statute penalizes the solicitation of new gang members even if physical coercion or force is not used.²⁶⁵ Finally, the Florida Act allows those harmed by criminal gang activity to bring civil causes of action against gang members,²⁶⁶ and also provides a broader forfeiture provision than California's Act.²⁶⁷

5. Iowa's Anti-Gang Law

The Iowa anti-gang statute is also somewhat broader in scope than the California Act. In Iowa, a street gang member is subject to prosecution for "criminal gang participation" when he "willfully aids and abets any criminal act" committed for the benefit of a criminal gang.²⁶⁸ Moreover, because the statute does not specify whether the criminal act need be a felony, aiding or abetting a misdemeanor presumably satisfies this section.²⁶⁹ In addition, unlike California law,²⁷⁰ Iowa law adds conspiracy to its definition of "pattern of criminal gang

265. Compare Fla. Stat. Ann. § 874.05(1) (West Supp. 1998), and Alaska Stat. § 11.61.165(a) (Michie 1996), with Cal. Penal Code § 186.26(a) (West Supp. 1998). "A person who intentionally causes, encourages, solicits, or recruits another person to join a criminal street gang that requires as a condition of membership or continued membership the commission of any crime commits a felony of the third degree" Fla. Stat. Ann. § 874.05(1) (West Supp. 1998).

266. See *id.* § 874.06.

267. Compare *id.* § 874.08, with Cal. Penal Code § 186.22a(e) (West Supp. 1998). Florida's forfeiture law states:

All profits, proceeds, and instrumentalities of criminal street gang activity and all property used or intended or attempted to be used to facilitate the criminal activity of any criminal street gang or of any criminal street gang member; and all profits, proceeds, and instrumentalities of criminal street gang recruitment and all property used or intended or attempted to be used to facilitate criminal street gang recruitment are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act, § 932.704.

Fla. Stat. Ann. § 874.08 (West Supp. 1998). For California's forfeiture provision, see *supra* note 239 and accompanying text.

268. Iowa Code Ann. § 723A.2 (West 1993); see also *In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994) (holding that definition of "criminal act" in criminal gang participation statute requires only that evidence establish that crime took place, not that perpetrator be convicted of or arrested for a crime); *State v. Lewis*, 514 N.W.2d 63, 67-68 (Iowa 1994) (finding that evidence that several members of defendant's street gang had been arrested for possession of a controlled substance with intent to deliver and had been involved in a fight with members of rival gang was sufficient to show "pattern of criminal gang activity" within meaning of criminal gang participation statute); *State v. Hayes*, 532 N.W.2d 472, 475-76 (Iowa Ct. App. 1995) (affirming finding that defendant was a member of criminal street gang; finding was supported by letter which bore some gang symbols, three tattoos on defendant's body, photographs depicting mannerisms and gestures that reflected gang activity, and prior admission by defendant to police officer that he was a gang member).

269. See Iowa Code Ann. § 723A.2 (West 1993).

270. See Cal. Penal Code § 186.22(e) (West Supp. 1998).

activity,²⁷¹ and also punishes mere conspiracy to recruit a minor into a criminal street gang.²⁷²

6. Arizona's Anti-Gang Laws

Arizona took a broader approach than most other states in dealing with gangs and other criminal groups. First, Arizona law makes it unlawful to lead, participate in, or assist a "criminal syndicate."²⁷³ Criminal syndicate is defined as "any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct which violates any one or more provisions of any felony statute of this state."²⁷⁴ Arizona provides a definition of a criminal street gang similar to that of other states but, amazingly, only requires that the gang be comprised of one individual who is a "gang member."²⁷⁵ STEP, in contrast, specifically requires that a gang consist of at least

271. See Iowa Code Ann. § 723A.1(3) (West 1993) ("'Pattern of criminal gang activity' means the commission, attempt to commit, *conspiring to commit*, or solicitation of two or more criminal acts, provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang." (emphasis added)).

272. See *id.* § 723A.3(2) (West Supp. 1997) ("A person who conspires to solicit, recruit, entice, or intimidate a minor to join a criminal street gang commits a class 'D' felony.").

273. See Ariz. Rev. Stat. Ann. § 13-2308 (West 1997). A person participates in a criminal syndicate by:

1. Intentionally organizing, managing, directing, supervising or financing a criminal syndicate with the intent to promote or further the criminal objectives of the syndicate; or
2. Knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of a criminal syndicate; or
3. Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate; or
4. Intentionally promoting or furthering the criminal objectives of a criminal syndicate by inducing or committing any act or omission by a public servant in violation of his official duty; or
5. Hiring, engaging or using a minor for any conduct preparatory to or in completion of any offense in this section.

Id. § 13-2308(A).

274. *Id.* § 13-2301(C)(2); see *State v. McCoy*, 928 P.2d 647 (Ariz. Ct. App. 1996). The *McCoy* court found that defendant's conviction for participating in a criminal street gang was supported by evidence that the gang committed at least three felony offenses involving physical injury or threat thereof, one of which was committed in defendant's presence. *McCoy*, 928 P.2d at 650. Moreover, the court found that the gang committed aggravated assaults on an ongoing basis as part of their ritual for initiating new members and ousting disloyal members. *Id.* Furthermore, the defendant advised members on how to best organize gang members and also counseled members to continue initiation practices and to increase graffiti activities. *Id.* Finally, the defendant had prior affiliation and experience in another gang. *Id.*

275. Ariz. Rev. Stat. Ann. § 13-105(7) (West 1997) ("'Criminal street gang' means an ongoing formal or informal association of persons whose members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and who has *at least one individual who is a criminal street gang member.*" (emphasis added)).

three or more members.²⁷⁶ Thus, as Arizona does not set forth such a minimum, it is feasible that a person who deems himself a "criminal gang member"²⁷⁷ could actually constitute his own one-man criminal street gang.²⁷⁸

The Arizona statute provides for one-level sentence enhancements for those convicted of gang-related activities.²⁷⁹ Assisting a criminal syndicate under Arizona law consists of a class 4 felony.²⁸⁰ "A person commits assisting a criminal syndicate by committing any felony offense, whether completed or preparatory, with the intent to promote or further the criminal objectives of a criminal syndicate."²⁸¹ When that syndicate is a criminal street gang, however, the punishment for such assistance results in a class 3 felony.²⁸² Additionally, the punishment for "participating" in a criminal syndicate that is a criminal street gang with the intent to promote, further, or assist its criminal conduct is a class 2 felony.²⁸³ Finally, "[h]iring, engaging or using a minor"²⁸⁴ in connection with gang activities also constitutes a class 2 felony, and the defendant is not eligible for parole.²⁸⁵

IV. A NEW YORK STATE COMPREHENSIVE ANTI-GANG STATUTE

Numerous law enforcement professionals, including Brooklyn District Attorney Charles J. Hynes, have advocated for the adoption of comprehensive anti-gang legislation in New York.²⁸⁶ Because statutes like STEP and RICO have proven effective in combating the escalating criminal street gang crisis,²⁸⁷ such a statute would likely benefit

276. See *supra* note 212 and accompanying text.

277. The Arizona statute defines "criminal street gang member" as: an individual to whom two of the following seven criteria that indicate criminal street gang membership apply:

- (a) Self-proclamation.
- (b) Witness testimony or official statement.
- (c) Written or electronic correspondence.
- (d) Paraphernalia or photographs.
- (e) Tattoos.
- (f) Clothing or colors.
- (g) Any other indicia of street gang membership.

Ariz. Rev. Stat. Ann. § 13-105(8) (West 1997).

278. See *id.* § 13-2308.

279. See *id.* § 13-2308(F).

280. See *id.* In Arizona, a class 4 felony is punishable by up to two and one-half years in prison. *Id.* § 13-701(C)(3).

281. See *id.* § 13-2308(C).

282. See *id.* § 13-2308(F). A class 3 felony is punishable by a sentence up to three and one-half years. *Id.* § 13-701(C)(2).

283. See *id.* § 13-2308(G). A class 2 felony is punishable up to five years imprisonment. *Id.* § 13-701(C)(1).

284. *Id.* § 13-2308(A)(5).

285. See *id.* § 13-2308(E).

286. See Patricia Hurtado, *Hynes Will Convene Grand Jury on Gangs*, *Newsday* (Queens), Oct. 8, 1997, at A7.

287. Truman, *supra* note 200, at 728.

New York.²⁸⁸ Rather than merely punishing gang-related assaults, a comprehensive anti-gang law would enable prosecution of a wider range of criminal gang conduct.²⁸⁹ Such a statute could also provide law enforcement, citizens, and communities with additional remedies to proceed against such gangs. Part IV.A provides a proposal for the type of statute that New York, and other states lacking adequate gang statutes, should adopt to effectively control violent criminal street gang conduct. Its provisions are drawn and inspired by current state and federal gang statutes. Part IV.B offers analyses and rationales for this model gang law.

A. *The Gang and Violent Enterprise Legislation Act of 1998*
("GAVEL")²⁹⁰

§ 490.00. LEGISLATIVE FINDINGS.

(1) The Legislature finds and declares that it is the right of every person regardless of race, color, creed, religion, national origin, sex, age, or disability to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The Legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for redress of perceived grievances, and to participate in the electoral process.

(2) The Legislature, however, further finds that New York is in a state of crisis that has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(3) The Legislature finds that there are criminal street gangs operating in New York and that the number of gang-related violent crimes is increasing. It is the intent of the Legislature in enacting this chapter to seek the eradication of gang activity by focusing upon patterns of criminal street gang activity, and more importantly, upon patterns of violent criminal street gang activity, which is the chief source of terror created by street gangs.

(4) The Legislature also finds the recruitment of minors into the violent world of criminal street gangs to be a particularly reprehensible offense, especially when committed by use of physical violence. As such, this Act sets forth four degrees of gang recruitment offenses,

288. *Anti-Gang Statute*, *supra* note 210.

289. *See id.*

290. This act could be added to New York's Penal Law as Article 490.

modeled after this State's criminal solicitation statutes, to penalize this pernicious conduct and to curtail the expansion of criminal street gang membership.

(5) The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the weapons, profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs. Moreover, declaring buildings in which gangs conduct their operations public or private nuisances can also be used to enjoin and disrupt criminal street gang activities.

§ 490.10. DEFINITIONS.

The following definitions are applicable to this article:

1. "Violent enterprise" is defined as any group of two or more persons engaging, on a continuing basis, in conduct that violates any one or more provisions of any violent felony statute of this state.

2. "Criminal street gang" is defined as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision 3, or subdivision 4, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal street gang activity or violent criminal street gang activity.

3. "Pattern of criminal street gang activity" is defined as:

(a) the commission of, attempted commission of, solicitation of, conspiracy to commit, or conviction of two or more of the following offenses:

(1) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance;

(2) The intimidation of witnesses;

(3) Grand theft when the value of the money, labor, or real or personal property taken exceeds ten thousand dollars (\$10,000);

(4) Grand theft of any vehicle, trailer, or vessel;

(5) Money laundering;

(6) Extortion;

(7) Felony criminal mischief;

(8) The sale, delivery, or transfer of a firearm;

(9) Prostitution;

(10) Attempt of any of the above offenses;

(b) provided that at least two offenses are committed within a period of three years, and one of which is committed after the enactment of this statute.

4. "Pattern of violent criminal gang activity" is defined as:

(a) the commission of, attempted commission of, solicitation of, conspiracy to commit, or conviction of one or more of the following offenses and another violent felony offense:

(1) Assault with a deadly weapon or by means of force likely to produce physical injury or serious physical injury;

(2) Robbery;

(3) Murder or manslaughter;

(4) Shooting at an inhabited dwelling or occupied motor vehicle;

(5) Shooting a firearm from a motor vehicle;

(6) Arson;

(7) Rape or sexual assault;

(8) Kidnapping;

(9) Carjacking;

(10) Possession of a pistol, revolver, or other firearm capable of being concealed upon a person;

(11) Attempt of any of the above offenses;

(b) provided that at least two offenses are committed within a period of five years, and one of which is committed after the enactment of this statute.

§ 490.20. PARTICIPATION IN A VIOLENT ENTERPRISE.

A person is guilty of participating in a violent enterprise when he engages in criminal activity at the direction of, or for the benefit of two or more of the members of a group that does not meet the criteria of a "criminal street gang" as set forth in § 490.10.

Participation in a violent enterprise is punishable by the enhancement of the offense level of the underlying crime by one degree.

§ 490.25. PARTICIPATION IN A CRIMINAL STREET GANG IN THE SECOND DEGREE.

A person is guilty of participation in a criminal street gang in the second degree when, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity as set forth in § 490.10(3), he willfully promotes, furthers, or assists in any felonious criminal conduct, enumerated in § 490.10(3)(a), that benefits such gang.

Participation in a criminal street gang in the second degree is punishable by a sentence of one to five years in addition to and consecutive with the penalty for the underlying crime.

§ 490.26. PARTICIPATION IN A CRIMINAL STREET GANG IN THE FIRST DEGREE.

A person is guilty of participation in a criminal street gang in the first degree when, with knowledge that its members engage in or have engaged in a pattern of violent criminal gang activity as set forth in § 490.10(4), he willfully promotes, furthers, or assists in any felonious criminal conduct, enumerated in § 490.10(4)(a), that benefits such gang.

Participation in a criminal street gang in the first degree is punishable by a sentence of five to twenty-five years in addition to and consecutive with the penalty for the underlying crime.

§ 490.30. GANG RECRUITMENT IN THE FOURTH DEGREE.

A person is guilty of gang recruitment in the fourth degree when he being under eighteen years of age recruits, solicits, induces, coerces or commands another person who is under eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the fourth degree is an A misdemeanor.

§ 490.31. GANG RECRUITMENT IN THE THIRD DEGREE.

A person is guilty of gang recruitment in the third degree when he:

1. being under eighteen years of age utilizes physical violence to coerce, recruit, solicit, or induce another person who is under eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so; or

2. being over the age of eighteen years of age recruits, solicits, induces, coerces or commands another person who is over eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the third degree is an E felony.

§ 490.32. GANG RECRUITMENT IN THE SECOND DEGREE.

A person is guilty of gang recruitment in the second degree when he being over eighteen years of age utilizes physical violence to coerce, recruit, solicit, or induce another person who is over eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the second degree is a D felony.

§ 490.33. GANG RECRUITMENT IN THE FIRST DEGREE.

A person is guilty of gang recruitment in the first degree when he being over eighteen years of age utilizes physical violence to coerce, recruit, solicit, or induce another person who is under sixteen years of

age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the first degree is a C felony.

§ 490.34. GANG RECRUITMENT; SUBSEQUENT VIOLATIONS.

(1) A person being over the age of eighteen who is found guilty of, or who pleads guilty to a second or subsequent violation of this article is guilty of a B felony.

(2) A person being under the age of eighteen who is found guilty of, or who pleads guilty to a second or subsequent violation of this article is guilty of a felony that is one level higher than the degree of the prior offense.

§ 490.35. GANG RECRUITMENT ON SCHOOL GROUNDS.

A person who is found guilty of recruiting a minor within 1000 feet of school grounds during normal school hours will be subject to a sentence enhancement of one level.

§ 490.40. CRIMINAL STREET GANGS; FORFEITURE.

1. In imposing sentence on a defendant convicted of an offense encompassed by this article, the court may order the forfeiture to the state of a motor vehicle; weapon; electronic communication device; money or other valuables; real property; or intangible personal property, including rights, privileges, interests, claims, and securities, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang in violation of this article.

2. In those cases where a law enforcement agency believes that the return of the firearm, ammunition, or deadly weapon confiscated pursuant to this section, is or will be used in criminal street gang activity or that the return of the item would be likely to result in endangering the safety of others, the law enforcement agency shall initiate a petition in the supreme court to determine if the item confiscated should be returned or declared a nuisance.

3. If the items are declared to be a nuisance, the law enforcement agency shall dispose of or destroy the items pursuant to § 400.05 of the Penal Law.

§ 490.45. BUILDINGS OR PLACES USED BY CRIMINAL STREET GANGS; NUISANCE.

Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in this article, or any offense involving dangerous or deadly weapons, burglary, or rape, and every building or place wherein or upon which that criminal

conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

§ 490.50. CRIMINAL STREET GANGS; EXPERT TESTIMONY.

In a criminal prosecution under this article, expert testimony is admissible to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case,

- (1) common characteristics of persons who are members of the criminal street gang or criminal street gangs;
- (2) rivalries between specific criminal street gangs;
- (3) common practices and operations of the criminal street gang or criminal street gangs and the members of those gangs;
- (4) social customs and behavior of members of the criminal street gang or the criminal street gangs;
- (5) terminology used by members of the criminal street gang or the criminal street gangs;
- (6) codes of conduct of the particular criminal street gang or criminal street gangs; and
- (7) the types of crimes that are likely to be committed by the particular criminal street gang.

B. *Analysis of GAVEL*

§ 490.00. LEGISLATIVE FINDINGS.

(1) The Legislature finds and declares that it is the right of every person regardless of race, color, creed, religion, national origin, sex, age, or disability to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The Legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(2) The Legislature, however, further finds that New York is in a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(3) The Legislature finds that there are criminal street gangs operating in New York and that the number of gang related violent crimes is increasing. It is the intent of the Legislature in enacting

this chapter to seek the eradication of gang activity by focusing upon patterns of criminal street gang activity, and more importantly, upon patterns of violent criminal street gang activity, which is the chief source of terror created by street gangs.

(4) The Legislature also finds the recruitment of minors into the violent world of criminal street gangs to be a particularly reprehensible offense, especially when committed by use of physical violence. As such, this Act sets forth four degrees of gang recruitment offenses, modeled after this State's criminal solicitation statutes, to penalize this pernicious conduct and to hopefully curtail the expansion of criminal street gang membership.

(5) The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the weapons, profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs. Moreover, declaring buildings in which gangs conduct their operations public or private nuisances is also a measure that can be used to enjoin and disrupt criminal street gang activities.

While GAVEL shares many of the legislative findings found in other state gang statutes,²⁹¹ it also enumerates additional rationales for its creation. First, unlike other state legislative findings, section 490.00(3) elucidates GAVEL's focus of eradicating patterns of *violent* criminal street gang activity. Second, section 490.00(4) distinguishes GAVEL from other legislative findings by acknowledging that gang recruitment must be eliminated. Finally, section 490.00(5) states that declaring gang-related buildings nuisances is complementary to the gang forfeiture provisions.

§ 490.10. DEFINITIONS.

The following definitions are applicable to this article:

1. "Violent enterprise" is defined as any group of two or more persons engaging, on a continuing basis, in conduct that violates any one or more provisions of any violent felony²⁹² statute of this state.
2. "Criminal street gang" is defined as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision 3, or subdivision 4, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal street gang activity or violent criminal street gang activity.
3. "Pattern of criminal street gang activity" is defined as:

291. See, e.g., Cal. Penal Code § 186.21 (West Supp. 1998); Fla. Stat. Ann. § 874.02 (West 1998); Ga. Code Ann. § 16-15-2 (Michie 1996).

292. For a comprehensive list of crimes that constitute violent felony offenses and their respective penalties, see N.Y. Penal Law § 70.02 (McKinney 1998).

(a) the commission of, attempted commission of, solicitation of, conspiracy to commit, or conviction of two or more of the following offenses:

- (1) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance;
- (2) The intimidation of witnesses;
- (3) Grand theft when the value of the money, labor, or real or personal property taken exceeds ten thousand dollars –\$10,000);
- (4) Grand theft of any vehicle, trailer, or vessel;
- (5) Money laundering;
- (6) Extortion;
- (7) Felony criminal mischief;
- (8) The sale, delivery, or transfer of a firearm;
- (9) Prostitution;
- (10) Attempt of any of the above offenses;

(b) provided that at least two offenses are committed within a period of three years, and one of which is committed after the enactment of this statute.

4. "Pattern of violent criminal gang activity" is defined as:

(a) the commission of, attempted commission of, solicitation of, conspiracy to commit, or conviction of one or more of the following offenses and another violent felony offense:

- (1) Assault with a deadly weapon or by means of force likely to produce physical injury or serious physical injury;
- (2) Robbery;
- (3) Murder or manslaughter;
- (4) Shooting at an inhabited dwelling or occupied motor vehicle;
- (5) Shooting a firearm from a motor vehicle;²⁹³
- (6) Arson;
- (7) Rape or sexual assault;
- (8) Kidnapping;
- (9) Carjacking;
- (10) Possession of a pistol, revolver, or other firearm capable of being concealed upon a person;
- (11) Attempt of any of the above offenses;

(b) provided that at least two offenses are committed within a period of five years, and one of which is committed after the enactment of this statute.

GAVEL's definition of "violent enterprise" was adopted from the Arizona gang statute's definition of "criminal syndicate."²⁹⁴ Because many gang-related assaults and violent crimes are often perpetrated by two individuals,²⁹⁵ GAVEL's two-person requirement allows for the enhancement of penalties for crimes that would fall through the

293. This crime is more commonly referred to as a "drive-by shooting." See Sanders, *supra* note 10, at 65.

294. See Ariz. Rev. Stat. Ann. § 13-2301(C)(2) (West Supp. 1997).

295. See *supra* notes 45, 79-83 and accompanying text.

legislative cracks in STEP,²⁹⁶ and the Federal Gang Violence Act²⁹⁷ which both require more participants. The GAVEL provision provides a safety net for violent crimes in furtherance of entities that do not satisfy the criminal street gang definition. GAVEL also recognizes that crimes committed by more than one person are potentially more dangerous for their victims, and therefore warrant enhanced penalties.²⁹⁸

GAVEL's definition of "criminal street gang" mirrors STEP's²⁹⁹ by requiring three or more persons to commit the requisite acts, and thus departs from the Federal Gang Violence Act³⁰⁰ that requires five or more persons to commit the requisite acts. GAVEL differs from STEP by differentiating between patterns of criminal street gang activity and patterns of violent criminal street gang activity.³⁰¹ This distinction allows GAVEL to target violent gang-related felonies, and to create harsher penalties for their commission. STEP does not make this distinction.³⁰²

Section (a) of GAVEL's definition of "pattern of criminal street gang activity" is modeled after Iowa's gang statute.³⁰³ Because this provision includes "conspiracy to commit" the predicate crimes, it encompasses a substantially broader amount of gang activity than does the Federal Gang Violence Act or STEP that do not penalize conspiracy.³⁰⁴

The enumerated offenses listed in section 3(a)(1)-(10) also distinguish GAVEL from STEP.³⁰⁵ In its definition of "pattern of criminal gang activity," STEP lists a total of twenty-three predicate gang offenses, and does not distinguish between violent and nonviolent crimes.³⁰⁶ In light of Congress' and numerous states' legislative findings that *violent* gang activity is plaguing their constituents,³⁰⁷ it is a

296. See Cal. Penal Code § 186.22(f) (West Supp. 1998) (detailing STEP's three-person requirement).

297. See S. Rep. No. 105-108, § 203(a)(1)(B)(1) (detailing the Federal Gang Violence Act's five-person requirement).

298. See *supra* notes 53, 61-66 and accompanying text.

299. See Cal. Penal Code § 186.22(f) (West Supp. 1998); *supra* note 212 and accompanying text.

300. See S. Rep. No. 105-108, § 203(a)(1)(B)(1); *supra* note 173 and accompanying text.

301. See *infra* § 490.25-.26.

302. See Cal. Penal Code § 186.22(e) (West Supp. 1998).

303. See Iowa Code Ann. § 723A.1(3) (West Supp. 1997); *supra* note 271 and accompanying text.

304. See S. Rep. No. 105-108; Cal. Penal Code § 186.22(e); see also *supra* notes 174, 213 and accompanying text.

305. See Cal. Penal Code § 186.22(e); see also *supra* note 213 and accompanying text.

306. See Cal. Penal Code § 186.22(e), see also *supra* note 213 and accompanying text.

307. See, e.g., S. Rep. No. 105-108 § 2(a); Cal. Penal Code § 186.21 (West Supp. 1998); Ark. Code Ann. § 5-74-102(a) (Michie 1997); *supra* notes 159, 202 and accompanying text.

better approach to separate violent and nonviolent gang activities and provide different punishments for each. If violent crimes are punished more severely, it is possible that their commission will decrease.³⁰⁸ Accordingly, this section of GAVEL lists only nonviolent offenses that, if committed by gang members, would receive lighter sentences than prescribed for violent felony offenders.

Section (b) of the definition of “pattern of criminal street gang activity” differs from STEP in that it punishes conspiracy to commit the predicate offenses listed, yet is similar to STEP in that it provides for a three-year window to commit the second crime necessary to establish a “pattern.”³⁰⁹ The Federal Gang Violence Act, in contrast, provides for a five-year window.³¹⁰ Utilizing the three-year window to establish the “pattern” would be more appropriate and less draconian here because the crimes enumerated in this section are “nonviolent.” “Violent” crimes, on the other hand, pose a greater threat to society, and therefore warrant a longer time period in which such crimes could be deemed part of a “pattern.” In other words, a potentially larger number of violent crimes would qualify for consideration as a “pattern” than would the number of nonviolent crimes.

The addition of the definition of “pattern of violent criminal street gang activity” in section 490.10(4) differentiates GAVEL from all other existing gang statutes in that it makes “violent” gang activity a separate and more serious crime than nonviolent gang activity. Because violent crime is the focal point of legislative concern, adding this pattern of violent criminal gang activity to gang statutes may provide prosecutors with a more effective tool to aid them in allaying such concern.³¹¹

Section 490.10(4)(a) of GAVEL differs from section (3)(a) in that it requires the commission of only one of the violent offenses enumerated in section (4)(a)(1)-(10), and that offense may be coupled with any other violent felony offense committed by the individual to establish a pattern of violent criminal street gang activity. Because the eradication of all violent crime is the rationale for this provision, the commission of two violent felonies satisfies the provision, provided that at least one crime is gang-related. Included in the list of predicate

308. “Expected punishment is a function of the risk of being caught and convicted multiplied by the median time served. Therefore, everything being equal, increasing the length of sentence increases expected punishment, and hence a criminal is more likely to be deterred when the sentence is longer.” James Wootton, *Truth In Sentencing—Why States Should Make Violent Criminals Do Their Time*, 20 U. Dayton L. Rev. 779, 789 (1995); see also Elsea, *supra* note 87, at 139 (“Studies on the effectiveness of deterrence indicate that, generally, crime rates go down as the certainty and severity of punishment rise.”).

309. See Cal. Penal Code § 186.22(e) (West Supp. 1998).

310. See S. Rep. No. 105-108, § 203(a)(1)(B)(2)(B).

311. If granted this legislative device, prosecutors could specifically target violent gang-related crime and punish perpetrators with longer sentences. See *infra* § 490.26.

crimes are the typical nefarious offenses committed by gangs and their members.

Because violent criminal activity is more destructive and life-threatening than nonviolent crime, using a five-year period, rather than a three-year window, will enable prosecutors to count more violent crimes toward establishing patterns of violent criminal gang activity. Consequently, enhanced sentences could be imposed for the commission of such crimes.³¹² RICO, in contrast, provides that two offenses be committed within a period of ten years.³¹³ One can infer that this period is too long to logically create a "pattern" in the gang context because no state legislature has incorporated such a long period into a gang statute.

§ 490.20. Participation in a violent enterprise.

A person is guilty of participating in a violent enterprise when he engages in criminal activity at the direction of, or for the benefit of, two or more of the members of a group *that does not meet the criteria of a "criminal street gang" as set forth in § 490.10.* (emphasis added)

Participation in a violent enterprise is punishable by the enhancement of the offense level of the underlying crime by one degree.

The purpose of this provision is to afford the opportunity to prosecute violent acts perpetrated for the benefit of a group that does not meet the definition of a criminal street gang. This provision could be used to prosecute wanna-be gangsters³¹⁴ who engage in criminal conduct, but are not yet members of an established gang. By prosecuting individuals who participate in violent enterprises, states may prevent such enterprises from becoming full-blown criminal street gangs.³¹⁵

The one-level enhancement of punishment for participating in a violent enterprise is modeled after the Arkansas gang statute.³¹⁶ As this offense does not involve participation in gang activity, this one-level increase would be more appropriate than utilizing the RICO,³¹⁷ Federal Gang Violence Act,³¹⁸ or STEP³¹⁹ approaches of adding an extra duration of punishment in addition to the sentence imposed for the underlying crime. Because sentence enhancements under those approaches involve additional punishments ranging anywhere from one

312. *See id.*

313. *See* 18 U.S.C. § 1961(5) (1994).

314. *See supra* note 46.

315. While GAVEL requires that at least two persons participate in a violent enterprise, Arizona's gang statute is more aggressive in its attempt to curtail the formation of gangs because it does not set forth any minimum participant requirement. *See* Ariz. Rev. Stat. Ann. §§ 13-105(7), 13-2308 (West 1997).

316. *See* Ark. Code Ann. § 5-74-108 (Michie 1997); *see also supra* note 253.

317. *See* 18 U.S.C. § 1963(a) (1994); *see also supra* note 117.

318. *See* S. Rep. No. 105-108 1997; *see also supra* note 169 and accompanying text.

319. *See* Cal. Penal Code § 186.22(b) (West Supp. 1998); *see also supra* notes 216-18 and accompanying text.

year³²⁰ to life imprisonment,³²¹ the subjectivity inherent in imposing such enhancements should be reserved for only for those convicted for gang participation.

§ 490.25. Participation in a criminal street gang in the second degree.

A person is guilty of participation in a criminal street gang in the second degree when, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity as set forth in § 490.10(3), he willfully promotes, furthers, or assists in any felonious criminal conduct, enumerated in § 490.10(3)(a), that benefits such gang.

Participation in a criminal street gang in the second degree is punishable by a sentence of one to five years in addition to and consecutive with the penalty for the underlying crime.

The language of this provision mirrors that contained in the STEP Act.³²² Because this offense involves only "nonviolent" gang activity it constitutes only a second-degree offense. GAVEL, here, utilizes the STEP³²³ and Federal Gang Violence Acts³²⁴ approaches of adding a range of years onto the punishment for the underlying offense. As this is only a second degree-offense, the one-to-five-year increase is appropriate. In contrast, STEP provides for an enhancement of one to three years.³²⁵

§ 490.26. Participation in a criminal street gang in the first degree.

A person is guilty of participation in a criminal street gang in the first degree when, with knowledge that its members engage in or have engaged in a pattern of violent criminal gang activity as set forth in § 490.10(4), he willfully promotes, furthers, or assists in any felonious criminal conduct, enumerated in § 490.10(4)(a), that benefits such gang.

Participation in a criminal street gang in the first degree is punishable by a sentence of five to twenty-five years in addition to and consecutive with the penalty for the underlying crime.

Because this offense involves "violent" gang activity it warrants a first-degree designation, and a more severe punishment than second-degree gang participation. The five-to-twenty-five-year penalty is the

320. See Cal. Penal Code § 186.22(b)(1) (West Supp. 1998); see also *supra* note 216 and accompanying text.

321. See S. Rep. No. 105-108 (a)(2)(B)(2)(A); see also *supra* note 179 and accompanying text.

322. See Cal. Penal Code § 186.22(a) (West Supp. 1998); see also *supra* note 211 and accompanying text.

323. See Cal. Penal Code § 186.22(b)(1) (West Supp. 1998).

324. See S. Rep. No. 105-108, § 203(a)(2)(b)(1)(A).

325. See Cal. Penal Code § 186.22(b)(1) (West Supp. 1998); see also *supra* note 216 and accompanying text.

same as that provided in the Federal Gang Violence Act³²⁶ and similar to the "not more than 20 years" penalty contained in RICO.³²⁷ Of course, the additional penalty would depend upon the underlying crime committed. For instance, while a person convicted of assault or possession of a weapon may receive an additional sentence on the lower end of the range, murder, manslaughter, and rape could warrant the twenty-five year maximum enhancement.

§ 490.30. Gang recruitment in the fourth degree.

A person is guilty of gang recruitment in the fourth degree when he, being under eighteen years of age, recruits, solicits, induces, coerces, or commands another person who is under eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the fourth degree is an A misdemeanor.

GAVEL differs from the other federal and state gang statutes regarding the offenses of gang recruitment. GAVEL separates gang recruitment into four degrees and mirrors the logic of the New York criminal solicitation statutes.³²⁸ In New York, the degree and punishment for solicitation increases with the level of the offense solicited

326. See S. Rep. No. 105-108 (a)(2)(B)(1)(A); see also *supra* note 178 and accompanying text.

327. 18 U.S.C. § 1963(a) (1994); see also *supra* note 117.

328. The New York criminal solicitation statutes are as follows:

Criminal solicitation in the fifth degree. A person is guilty of criminal solicitation in the fifth degree when, with intent that another person engage in conduct constituting a *crime*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct. Criminal solicitation in the fifth degree is a violation.

N.Y. Penal Law § 100.00 (McKinney 1998) (emphasis added).

Criminal solicitation in the fourth degree. A person is guilty of criminal solicitation in the fourth degree when:

1. with intent that another person engage in conduct constituting a *felony*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct; or

2. being over eighteen years of age, *with intent that another person under sixteen years of age* engage in conduct that would constitute a *crime*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct. Criminal solicitation in the fourth degree is a class A misdemeanor.

Id. § 100.05 (emphasis added).

Criminal solicitation in the third degree. A person is guilty of criminal solicitation in the third degree when, being over eighteen years of age, *with intent that another person under sixteen years of age* engage in conduct that would constitute a *felony*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct. Criminal solicitation in the third degree is a class E felony.

Id. § 100.08 (emphasis added).

Criminal solicitation in the second degree. A person is guilty of criminal solicitation in the second degree when, with intent that another person engage in conduct constituting a *class A felony*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to

and/or for the solicitation of a minor.³²⁹ GAVEL's gang recruitment provisions are drafted in similar fashion in that the penalties increase when physical force is used and/or when a minor is recruited.

GAVEL classifies gang recruitment in the fourth degree as an A misdemeanor which, in New York, is punishable by a prison term up to one year.³³⁰ A felony is too harsh a penalty for minors who commit this offense,³³¹ while many juvenile gang members engage in violent felonious activity, and should be punished accordingly, a minor's mere act of asking someone to join a gang does not rise to felonious conduct.³³²

engage in such conduct. Criminal solicitation in the second degree is a class D felony.

Id. § 100.10 (emphasis added).

Criminal solicitation in the first degree. A person is guilty of criminal solicitation in the first degree when, being over eighteen years of age, *with intent that another person under sixteen years of age* engage in conduct that would constitute a *class A felony*, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct. Criminal solicitation in the first degree is a class C felony.

Id. § 100.13 (emphasis added).

329. See N.Y. Penal Law §§ 100.05-13 (McKinney 1998).

330. N.Y. Penal Law § 70.15 (McKinney 1998).

331. "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long range terms than adults." Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 525 (1987) (citation omitted). Adults, however, know about the dangerous and violent gang lifestyle, and should receive harsher penalties for recruiting juveniles. See *infra* GAVEL § 490.31(2). Analogously, in New York, the offense of "endangering the welfare of a child" carries an A misdemeanor penalty. N.Y. Penal Law § 260.10 (McKinney 1989).

332. "[T]he crimes of juveniles are seldom their fault alone . . . [they] are more susceptible to peer group influences and group process dynamics than are their older counterparts." Feld, *supra* note 331, at 526. Additionally, a felony conviction for mere solicitation to join a gang would warrant sentencing a minor to a multiple-year prison term. See N.Y. Penal Law § 70.00 (McKinney 1998). Such incarceration may result in irreversible consequences for this nonviolent offender:

Let's face it—for many young kids who have been convicted of a first-time, nonviolent offense, our traditional prisons do not work. Our prisons are violent, overcrowded, and hardly conducive to rehabilitation.

The only role models for young offenders are those who are serving lengthy sentences for violent and brutal crimes. . . . With such an environment, is it any wonder that so many youths released from prisons will return within a few years after committing a more serious, and often violent crime?

We are not rehabilitating youths in our prisons, we are allowing them to become career criminals.

139 Cong. Rec. H10191, at H10206 (1993); see also Shari Del Carlo, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 Or. L. Rev. 1223, 1245 (1996) ("When these juveniles are released, they are going to have 'institutionalized' personalities. The social skills that they learn during their adult forming years will be based on the social cues they received in their institutional world. These cues will be victimization and retaliation rather than rehabilitation and education." (citations omitted)).

§ 490.31. Gang recruitment in the third degree.

A person is guilty of gang recruitment in the third degree when he:

1. being under eighteen years of age, utilizes physical violence³³³ to coerce, recruit, solicit, or induce another person who is under eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so; or

2. being over the age of eighteen years of age, recruits, solicits, induces, coerces, or commands another person to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the third degree is an E felony.³³⁴

Section 490.31(1) represents the next logical progression in GAVEL's gang recruitment statutes. It penalizes a minor who uses physical force to recruit another minor into a criminal street gang. This use of force eviscerates any benefit of the doubt minors receive under section 490.30,³³⁵ and thus, GAVEL mandates an E felony punishment.

GAVEL penalizes adults who recruit for gangs pursuant to section 490.31(2). Under this provision, adults receive an E felony regardless of whether they solicit a minor or another adult to join a gang. The logic underlying section 490.31 is that an adult who recruits without force is analogous to a minor who recruits by utilizing physical force. For instance, where a twelve year-old boy may need to use force to coerce another boy to join a gang, a six-and-one-half-foot tall, 250 pound man may be intimidating enough that use of force is unnecessary to coerce membership.

§ 490.32. Gang recruitment in the second degree.

A person is guilty of gang recruitment in the second degree when he, being over eighteen years of age, utilizes physical violence to coerce, recruit, solicit, or induce another person who is over eighteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the second degree is a D felony.³³⁶

Section 490.32 constitutes a more serious offense than the previous gang recruitment provisions because it proscribes adults from utilizing physical violence to recruit other adults. Physical violence in this context is tantamount to third degree assault under the New York Penal Law.³³⁷

333. Physical violence in this context is tantamount to second degree assault under the New York Penal Law. See N.Y. Penal Law § 120.05 (McKinney 1998).

334. An E felony is punishable by a sentence of up to four years. N.Y. Penal Law § 70.00(2)(e) (McKinney 1998).

335. See *supra* note 332.

336. A D felony is punishable by a sentence of up to seven years. N.Y. Penal Law § 70.00(2)(d) (McKinney 1998).

337. See N.Y. Penal Law § 120.00 (McKinney 1998).

§ 490.33. Gang recruitment in the first degree.

A person is guilty of gang recruitment in the first degree when he, being over eighteen years of age, utilizes physical violence to coerce, recruit, solicit, or induce another person who is under sixteen years of age to be or remain a member of a criminal street gang, or conspires to do so.

Gang recruitment in the first degree is a C felony.³³⁸

Section 490.33 represents the most serious gang recruitment offense because it penalizes an adult who uses physical violence to recruit a juvenile into a criminal street gang. When adults use physical force to coerce minors to join gangs, it is clearly the most reprehensible recruiting offense they can commit.³³⁹ Thus, the first-degree designation and severe punishment are warranted.

§ 490.34. Gang recruitment; subsequent violations.

(1) A person being over the age of eighteen who is found guilty of, or who pleads guilty to a second or subsequent violation of this article is guilty of a B felony.³⁴⁰

(2) A person being under the age of eighteen who is found guilty of, or who pleads guilty to a second or subsequent violation of this article is guilty of a felony that is one level higher than the degree of the prior offense.

This provision may cause a gang member with a previous gang recruitment conviction to think twice about attempting to recruit for the gang a second time. It is anticipated that as the number of recruiters decrease, so will the concomitant number of those recruited into gangs. The rationale of this provision follows that of New York's second felony offender statute.³⁴¹ Through section 490.34(2), GAVEL recognizes that it would be unconscionable to sentence a minor to a B felony for subsequent recruiting violations.³⁴²

§ 490.35. Gang recruitment on school grounds.

A person who is found guilty of recruiting a minor within 1000 feet of school grounds during normal school hours will be subject to a sentence enhancement of one level.

This provision is taken from the California STEP Act.³⁴³ Similar to the California legislature's rationale,³⁴⁴ GAVEL recognizes the impor-

338. A C felony is punishable by a sentence of up to fifteen years. N.Y. Penal Law § 70.00(2)(c) (McKinney 1998).

339. See Holland, *supra* note 32, at 302 ("The use of threats or intimidation to induce another into joining a known criminal organization is an opprobrious activity by the standards of most, if not all, societies.")

340. A B felony is punishable by a sentence of up to twenty-five years. N.Y. Penal Law § 70.00(2)(b) (McKinney 1998).

341. N.Y. Penal Law § 70.06 (McKinney 1998).

342. See *supra* notes 331-32.

343. Cal. Penal Code § 186.22(b)(2) (West Supp. 1998).

344. In 1991, the California legislature enacted a bill that provided for an additional sentence for a gang-related felony "committed on the grounds of, or within 1,000 feet

tance of preventing criminal elements from invading our children's schools. This provision mirrors a similar one contained in the federal drug laws.³⁴⁵

§ 490.40. Criminal street gangs; forfeiture.

1. In imposing sentence on a defendant convicted of an offense encompassed by this article, the court may order the forfeiture to the state of a motor vehicle; weapon; electronic communication device; money or other valuables; real property; or intangible personal property, including rights, privileges, interests, claims, and securities, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang in violation of this article.

2. In those cases where a law enforcement agency believes that the return of the firearm, ammunition, or deadly weapon confiscated pursuant to this section, is or will be used in criminal street gang activity or that the return of the item would be likely to result in endangering the safety of others, the law enforcement agency shall initiate a petition in the supreme court to determine if the item confiscated should be returned or declared a nuisance.

3. If the items are declared to be a nuisance, the law enforcement agency shall dispose of or destroy the items pursuant to § 400.05 of the Penal Law.³⁴⁶

of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school related programs, or when minors are using the facility . . .” 1991 Cal. Legis. Serv. Ch. 661 (A.B. 1866) (West).

345. 21 U.S.C. § 860(a) (1994). The statute provides:

Any person who . . . distribut[es], possess[es] with intent to distribute, or manufactur[es] a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is . . . subject to (1) twice the maximum punishment authorized by section 841(b) of this title”

Id.; see also 143 Cong. Rec. E2111, E2112 (1997) (recording speech by Rudolph W. Giuliani, Mayor, New York City: “Critical to our anti-drug efforts is the need to focus on our schools to ensure that our children are educated in a drug-free environment so that they can learn, develop and participate in all that New York City has to offer.”).

346. Section 400.05 states in pertinent part:

(1) Any weapon, instrument, appliance or substance specified in article two hundred sixty-five, when unlawfully possessed, manufactured, transported or disposed of, or when utilized in the commission of an offense, is hereby declared a nuisance. . . .

(2) The official to whom the weapon, instrument, appliance or substance which has subsequently been declared a nuisance pursuant to subdivision one of this section is so surrendered shall, at any time but at least once each year, destroy the same or cause it to be destroyed, or render the same or cause it to be rendered ineffective and useless for its intended purpose and harmless to human life.

N.Y. Penal Law § 400.05(1)-(2) (McKinney Supp. 1997-1998).

Section 490.35(1) of this asset forfeiture statute is modeled after RICO's forfeiture law³⁴⁷ and Alaska's gang forfeiture provision³⁴⁸ because they include more gang-related assets than does California's forfeiture law.³⁴⁹ Sections 490.35(2)-(3) mirror similar provisions contained in California's gang-weapon forfeiture statute.³⁵⁰ As previously discussed, gangs and other criminal organizations become more powerful as their revenues increase.³⁵¹ Accordingly, enforcing GAVEL's forfeiture provisions could reduce the economic incentive to join gangs,³⁵² and could also debilitate entire gangs by seizing their capital bases.³⁵³

§ 490.45. Buildings or places used by criminal street gangs; nuisance.

Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in this article, or any offense involving dangerous or deadly weapons, burglary, or rape, and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.³⁵⁴

Section 490.40 could help to disrupt gang activities if gang headquarters or safe-houses are declared nuisances and subsequently enjoined. "[T]he application of such laws not only to the gang members but also to the property owners, if followed by selective enforcement, could effectively suppress gang activity on the site, at least temporarily, and keep it 'on the move' in a less organized fashion."³⁵⁵

§ 490.50. Criminal street gangs; expert testimony.

In a criminal prosecution under this article, expert testimony is admissible to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case,

- (1) common characteristics of persons who are members of the criminal street gang or criminal street gangs;
- (2) rivalries between specific criminal street gangs;
- (3) common practices and operations of the criminal street gang or criminal street gangs and the members of those gangs;
- (4) social customs and behavior of members of the criminal street gang or the criminal street gangs;

347. 18 U.S.C. § 1963(b) (1994).

348. Alaska Stat. § 12.55.015(a)(11) (Michie 1996).

349. Cal. Penal Code § 186.22a(e)(2) (West Supp. 1998).

350. *Id.*

351. *See supra* notes 118, 140-42 and accompanying text.

352. *See Truman, supra* note 200, at 732-33.

353. *See supra* note 119 and accompanying text.

354. This provision is taken directly from STEP. Cal. Penal Code § 186.22a(a) (West Supp. 1998).

355. Klein, *supra* note 5, at 182 (discussing property abatement laws as applied to gangs).

(5) terminology used by members of the criminal street gang or the criminal street gangs;

(6) codes of conduct of the particular criminal street gang or criminal street gangs; and

(7) the types of crimes that are likely to be committed by the particular criminal street gang.

Section 490.45 is modeled directly after Alaska's and Nevada's expert testimony provisions.³⁵⁶ Gangs can be extremely dynamic and their evolutions on-going. This provision would allow prosecutors and defense attorneys to call gang experts to testify about gang activities and customs as they develop.³⁵⁷ The prosecution may use expert testimony to discuss the relevance of a gang's characteristics and habits to the case, as well as to establish whether criminal conduct is part of a gang's primary activities.³⁵⁸ In rebutting the prosecution's testimony, defense counsel could call its own expert to testify that a gang's principal functions are social and not criminal.³⁵⁹

V. CONCLUSION

New York, and other states lacking a comprehensive anti-gang statute, could certainly benefit from the enactment of the example above. Adoption of GAVEL would afford prosecutors and law enforcement officials with a more powerful tool that specifically targets criminal street gangs and would help to effectively combat and eradicate their violent criminal conduct. Unfortunately, passage of anti-gang legislation like GAVEL is just one important factor in the war to end gang participation. District Attorneys must also be willing to utilize such statutes to prosecute gang-related activities. Moreover, states must implement realistic social and youth intervention programs in efforts to divert its children and young adults from entering into the perilous

356. See *supra* note 243.

357. One should not infer that this testimony would otherwise be inadmissible without this provision. In the federal system, Federal Rule of Evidence 702 governs the use of expert testimony. Fed. R. Evid. 702. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* The Federal Rules of Evidence also provide that the admissibility evidence shall be determined at the trial court's discretion. Fed. R. Evid. 104(a). Accordingly, section 490.45 would reduce the judge's discretion in determining what constitutes gang-related expert testimony, thus allowing for more liberal use of such experts to help the jury better understand gang activities. See *United States v. Johnson*, 28 F.3d 1487, 1496-97 (8th Cir. 1994) (holding that a gang member, an unindicted co-conspirator with extensive experience in drug distribution, qualified as an expert, and ruled that his testimony was admissible because it helped the jury understand the drug trafficking business); *People v. Siu Wah Tse*, 458 N.Y.S.2d 589, 592 (App. Div. 1st Dept. 1983) (finding that information regarding Chinatown gangs was not common knowledge, and that detective's testimony would be helpful to the jury).

358. See Truman, *supra* note 200, at 729-30.

359. See *id.* at 730.

gang lifestyle. Because street gangs have existed for decades, however, their total elimination seems unlikely. Accordingly, a comprehensive anti-gang statute is essential to properly prosecute those who choose to break the law by participating in violent gangs.