

# Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls

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*A number of state legislatures have developed new strategies for addressing the problems of gang-related criminal behavior. Legislatures have both enhanced traditional criminal laws and drafted new legislation aimed specifically at alleviating the gang problem. One of the most comprehensive approaches originated in California where the first statute aimed exclusively at prohibiting the activities of criminal street gangs was enacted. The California Street Terrorism and Enforcement Prevention Act's primary focus was to make it a criminal offense to engage in criminal gang activity. A multitude of other states quickly followed suit and passed similar legislation. The purpose of the article is to examine the approach taken by state legislatures to make participating in gang activities a substantive crime. This approach will be analyzed in terms of its potential effectiveness as well as its potential for abuse and discriminatory application. Last, suggestions for improving existing statutes will be offered.*

**Keywords:** *antigang legislation; street gang legislation; California Street Terrorism and Enforcement Prevention Act (STEP)*

There is a growing perception that street gangs are becoming more powerful and aggressive and are infiltrating areas of the United States previously thought to be immune to the threat of gang activity. There is evidence that both the nature of gangs and their criminal activities have changed significantly in recent years (Quinn & Downes, 1993). Several theses have been advanced to explain these changes, such as the gangs' increased involvement in the drug trade, increased access to firearms, and increased sophistication. In conjunction, media coverage of gangs began to intensify during the 1980s (McCorkle & Miethe, 2002, p. 4). There is little doubt that these changes have resulted in an increased awareness of the problems associated

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AUTHOR'S NOTE: The author would like to thank M. Dwayne Smith for his helpful review of earlier drafts.

*Criminal Justice Policy Review*, Volume 14, Number 2, June 2003 171-192

DOI: 10.1177/0887403403252319

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with gangs. As a result, law enforcement personnel and policy makers began to focus on strategies to solve the emerging gang problem. Communities, whose social lives have been negatively affected by gangs and their criminal activities, also began to search out ways to effectively deal with gang-related activities

### REVIEW OF LEGISLATIVE APPROACHES

There are essentially three primary strategies that have been developed to deal with gangs: prevention, intervention, and suppression. Prevention programs have been designed to identify and amend the factors associated with gang membership. Intervention programs are designed to direct youth out of the gangs. Suppression strategies, on the other hand, emphasize the supervision, arrest, prosecution, and incarceration of known gang members. In recent years, the growing conservatism that has emerged in the United States, coupled with the perceived failure of rehabilitation as an effective approach to crime control, has resulted in an increased emphasis on suppression techniques (Klein, 1995). This approach has been best developed in areas with established gang problems and has resulted in a variety of inventive policies. Police departments, in mainly large urban areas, have created specialized gang units designed to conduct surveillance and gather information about both gangs and gang members operating in their jurisdictions. Other strategies have included such things as conducting police sweeps, establishing special gang prosecution units, and incarcerating serious known gang members (for a summary of these approaches, see Spergel, 1995). However, research has suggested that these approaches have not been particularly successful (Klein, 1995; Oehme, 1997).

In conjunction with these approaches, a number of innovative approaches have emerged in recent years including the creation of new legislation aimed specifically at prosecuting gang members. Some jurisdictions have relied on traditional tactics utilizing antiloitering, public nuisance, curfew, and parental responsibility statutes to prosecute gang members. Additionally, legislatures have criminalized a variety of gang activities such as gang solicitation and recruitment, witness intimidation, and drive-by shootings. One of the most comprehensive approaches was initiated in the state of California. In 1988, the state enacted the California Street Terrorism Enforcement and Prevention Act (STEP) (1997). The STEP Act makes it a substantive crime to participate in criminal gang activity. The act states that any person who

actively participates 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 any felonious criminal conduct by members of that gang

is guilty of a criminal offense. Over the next several years, numerous states followed California's lead and enacted similar statutes (for a review of statutes, see Bjerregaard, 1999).

Most of these statutes are patterned after the California STEP Act and share several common features. To convict someone under these statutes, the state must prove a number of elements. First, they must demonstrate the existence of a criminal street gang. Although a variety of definitions are utilized by different states, the majority of states clarify that a gang should consist of at least three individuals, can have either a formal or informal organizational structure, and include members who have engaged in a pattern of criminal activity (e.g., STEP Act, 1997). Once the state has proven the existence of a criminal street gang, they must demonstrate that the defendant had "knowledge that [the gang] members engage in or have engaged in a pattern of criminal activity" and that he or she had the specific intent to "promote, further, or assist the criminal conduct of the gang" (e.g., STEP Act, 1997). Last, the state must demonstrate that the defendant is a member of that gang. There are a variety of definitions utilized by states to identify an individual as a gang member.

The purpose of this article is to examine these legislative responses by analyzing them in terms of their potential benefits and abuses. Particular emphasis will be placed on the potential discriminatory application of these legislative responses. Last, suggestions for improving such legislation will be offered.

### POTENTIAL BENEFITS OF THE LEGISLATION

Despite their rapid enactment, there were some legitimate rationales offered for the necessity of such laws. Both law enforcement agencies and the courts have expressed frustration at their attempts to address the gang problem by enforcing traditional criminal laws. Such officials recognize that dealing with gang-related criminal activity often presents unique challenges. Law enforcement officials were often confronted with situations where they were unable to act. The L.A. City Attorney Gang Prosecution Section (2001, p. 325) points out that gang activities frequently observed by uniformed police officers were oftentimes lawful behaviors (e.g., flashing

handsigns, hanging around particular territories) and that officers were unable to prohibit such behaviors without directly observing criminal activity such as drug selling. Challenges also exist in terms of prosecuting gang members. First, traditional criminal laws do not effectively deal with situations in which multiple offenders are prosecuted for the same incident (Dahmann, 1995, p. 301). Additionally, Dahmann (1995, p. 301) points out that oftentimes such prosecutions involve both adult and juvenile offenders traditionally necessitating that they be dealt with in different judicial systems. Furthermore, gang prosecutions often engender additional issues such as witness problems (e.g., reluctance to get involved, witness intimidation, etc.).

Legislation, such as the California's STEP statute is seen as a way to address many of these problems. Such legislation provides both law enforcement personnel and prosecutors with additional tools for addressing gang-related activities. Additionally, such legislation helps to serve as a deterrent by announcing to gang members that engaging in criminal activities will not be tolerated and that if one participates in these behaviors as a gang member, this will enhance the punishment received for the substantive criminal act. Perhaps most important, such legislation provides the community with a sense that something is being done to tackle the problem.

### INITIATION OF STEP LEGISLATION

It is important to address the overall framework in which these antigang initiatives have been passed. The passage of the STEP Act in California coincided with a variety of more punitive measures delineated on the crime control agenda. Scholars such as Jackson and Rudman (1993), McCorkle and Miethe (2002), and Zatz (1987) have all addressed the recent responses to the "gang problem" as responses derived from a "moral panic." Moral panics are described as having three distinct characteristics. First, there is a focus on the behavior of threatening populations (Jackson, 1997, p. 147; McCorkle & Miethe, 2002, p. 15). These populations are then demonized and are referred to in exclusively negative terms. Last, McCorkle and Miethe (2002) state that a moral panic should fluctuate over time with the majority of the activity and concern occurring around the time of the discovery of the problem or condition.

Applying these criteria to the gang situation, McCorkle and Miethe (2002) delineate the growth of the gang problem throughout the 1980s and 1990s. They emphasize the role of both the media and law enforcement agencies in helping to create panic in the public regarding the potential

threat generated by gangs. As a result of a perceived threat, which was not objectively confirmed, policy makers found themselves forced to respond to the demands of multiple constituencies.

McCorkle and Miethe (2002) also discuss the role of claims makers in helping to generate this type of panic in the public. These individuals and organizations help to increase public awareness of the negative conditions and situations they believe provide cause for alarm.<sup>1</sup> To make their case, claims makers rely on a variety of techniques including the use of narrative stories, the manipulation of numbers, and metaphors. The use of all three of these methods is evident in the history of antigang legislation in the past two decades.

First, media coverage of gangs exploded simultaneously with a rise in awareness of gang-related problems in police departments across the country (McCorkle & Miethe, 2002). The media engaged in the use of narratives to help convey the danger associated with gang activities frequently relying on stories of drive-by shootings that killed innocent victims. Additionally, media portrayals of these offenses also helped to reinforce the notion of the predatory criminal—an “other” who presents the most danger. McCorkle and Miethe (1998, p. 61) believe that a necessary condition for a moral panic is that the public have some level of fear toward certain minority groups. This is particularly relevant to the gang problem because street gangs are predominantly lower class males who are either African American or Hispanic (Howell, 1994; Joseph, 1997; Oehme, 1997; Spergel, 1990). This is particularly disturbing as both the public and ultimately state legislatures were forced to rely on media accounts for the vast majority of their knowledge concerning gangs (Jackson & Rudman, 1993; McCorkle & Miethe, 2002).

The use of metaphors has also been prevalent in helping to define the social problems presented by street gangs. In large part, the “war” against gangs is a part of the larger “war on crime” in which the United States is engaged. Police in Los Angeles “have been utilizing military weapons and tactics, including helicopters, mass detentions and Checkpoint Charlies” (McKenzie, 1996, pp. 53-54). Focusing on suppression techniques and couching such approaches in terms of a military engagement has a number of adverse implications.

First, there is a heavy reliance on the criminal justice system and law enforcement in particular to solve these problems. There is ample evidence to suggest that the growth of gangs in urban communities coincides with the growth of the underclass in these same areas (Hagedorn, 1988; Huff, 1989; Jackson & Rudman, 1993). William J. Wilson (1987) defines the underclass

as those who are effectively excluded from participation in the mainstream economy. For some youth, the gang represents a survival strategy. If this is the case, then this is a problem that cannot be adequately addressed solely by the criminal justice system. At best, the law enforcement agents are able to focus on the outward manifestations of the gang problem. They do not have the adequate tools or the ability to attack the root causes of the problem. Even more disturbing, this approach casts the criminal justice system into an us versus them mentality, where the need to identify the enemy is of the utmost importance. This in turn increases the risk that profiling may occur.

Because the majority of these enforcement efforts have taken place in minority communities, we are taking a very real risk that such approaches may backfire and actually exacerbate the problem rather than eradicate it. First, suppression techniques targeted at specific communities can lead to a highly adversarial climate in which communities and police view each other suspiciously. The danger is that police officers will rely on “ambiguous cues and stereotyping in trying to identify the enemies” (Skolnick & Fyfe, 1993, p. 114). When this occurs, the danger is that youth who have committed no crimes but were in the “wrong place at the wrong time” will be subject to these tactics (Burrell, 1990, p. 742). Regina Austin (1992) notes that greater surveillance of minority communities leads to “harassment of those black citizens who are most vulnerable to unjustified interference because they resemble the lawbreakers in age, gender, and class” (pp. 1773-1774). It was noted in *Chicago v. Morales* (1997) that opposition to the ordinance was especially intense in the African American community, as they feared that under the ordinance you were “guilty until proven innocent” (Austin, 1992, pp. 4-5). This perspective is not without justification. Researchers have found that police officers, when asked to indicate the locations they most expect to encounter hostile responses, put minority areas at the top of the list (Bayley & Mendelsohn, 1969). There is much evidence that minorities have historically been subjected to disproportionate harassment and excessive use of force by the police (Taylor-Greene, 1994). More recently, there have been complaints of continued harassment and inequitable applications of the criminal laws. Studies in both Maryland and Ohio have demonstrated that the police have utilized traffic codes in discriminatory manners by overwhelmingly targeting Black motorists (Harris, 1997). Ultimately, this can lead to hostilities among the very groups these laws were designed to protect. In minority communities, this can serve to further alienate residents from the police, which may result in inhibited cooperation and negative attitudes toward police.

Further exasperating this problem is the fact that research has also identified both the seriousness of the offense and the demeanor of the offender as the most important factors influencing police responses to juveniles (Quinn & Downs, 1993). Therefore, this may generate more severe police encounters, which simply serve to perpetuate the cycle. Also, as the frequency of contacts with the police increases, many youth will lose their fear of authority. Fear of the police may be replaced with an animosity, which serves to further intensify the problem. This can eradicate respect for the law and eventually confidence in our justice system. Eventually, this becomes a self-fulfilling prophecy. Greater surveillance will lead to more arrests, which in turn will justify the initial surveillance.

There is some evidence that this is a potential problem with gang-related legislation. McCorkle and Miethe (1998, p. 59) relay the comments of a gang unit officer who stated that "it is safe to assume that when you run across a young black drug dealer, he's probably a gang member." Likewise, Freed (1995, p. 290) states that officers of the Community Resources Against Hoodlums (CRASH), a unit operating in Los Angeles, focusing on gang suppression activities, often prejudice all gang members. Additionally, the unit itself has been described as "hostile and adversarial" (Covey, Menard & Franzese, 1997, p. 265). This, coupled with the lack of clear definitional guidance in terms of what constitutes a gang member, has led to a situation in which officers argue that "they know a gang and a gang member when they see one . . . [which] generally means young minority males in lower or working class neighborhoods who act, talk, and wear clothing associated with stereotypical gang images" (McCorkle & Miethe, 2002, p. 64). Again, because gang members are largely minority, the reality of the situation is that the fight against street gangs is a fight that is played out predominantly in inner-city, minority communities.

An additional problem with suppression techniques is that official intervention leads to the official labeling of the youth. McCorkle and Miethe (1998) quote a federal public defender in Las Vegas as stating that

minorities are often identified and entered into the record as gang members or associates, without being informed, simply because they happen to be in the company of a known gang member, and that member probably got labeled in a similar fashion. (p. 59)

There is ample evidence that minorities comprise the vast majority of all gang databases. In fact, in Orange County, California, 92% of those listed were youth of color; similarly, in Cook County, Illinois, the database was

found to be two-thirds Black (Pintado-Vertner & Change, 2000, p. 5). These databases identify youth as “suspects” before any crime has been committed (Pintado-Vertner & Change, 2000, p. 4).

Leading gang experts caution that such labeling may serve to increase group cohesion by drawing attention to the gang and increasing the alienation that exists between the gang and the community (Conly, Kelly, Mahanna, & Warner, 1993; Klein & Maxson, 1989). Malcolm Klein (1995) points out that focusing on gangs and gang members also gives status and identity to the gang.

### PRACTICAL DIFFICULTIES WITH THE STATUTORY CONSTRUCTION OF THE LEGISLATION

Although antigang legislation was enacted with ambitious objectives, it is unclear that such legislation has been or will be an effective tool to address gang-related problems. Existing statutes present a variety of issues, which need to be addressed to enhance their effectiveness and to reduce the chance that such legislation will be utilized inappropriately.

#### **Constitutionality of Statutes**

All of these statutes were designed to provide states with a tool to attack gangs and gang members directly instead of simply addressing the resultant criminal activities. Since their enactment, several of these statutes have faced constitutional challenges. The most common method of attacking this legislation has been to challenge it as unconstitutionally vague. Cases have questioned specific terminology contained within the statutes such as “actively participates,” “criminal street gang,” and “gang membership” (Bjerregaard, 1998). These statutes have also been attacked for being overbroad and infringing on constitutionally protected activities such as freedom of association. Thus far, state antigang legislation modeled after the California STEP Act has withstood these challenges and been upheld at the state appellate level. In upholding these statutes, the courts have recognized the importance of employing limiting elements. Specifically, the courts have emphasized the importance of requiring specific intent and knowledgeable active participation in the construction of these statutes. Similarly, they have applauded states for clearly defining key terminology within the statutes. All of these components operate to reduce discretion and act to ensure the fair and equitable application of the law.

In 1998, for the first time, the U.S. Supreme Court, in *City of Chicago v. Morales et al.* (1999), considered the constitutionality of a city ordinance prohibiting gang loitering. In response to citizen complaints, the city of Chicago enacted an ordinance, which stated that

whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section. (Chicago Municipal Code §8-4-015)

The key problem cited by the Supreme Court was the vagueness of the key terminology in the ordinance, which essentially gave the police officers the “absolute discretion to determine what activities constitute loitering” (*City of Chicago v. Morales et al.*, 1999, pp. 32-33) and therefore potentially enforce the law in an arbitrary and/or discriminatory fashion.

Thus far, almost all of these statutes have withstood constitutional challenges at the state appellate level. Having been held facially valid, we need to turn toward the application of such laws.

### **Definitional Issues**

Social scientists have been grappling with definitional issues since they first started studying gangs (see Ball & Curry, 1995). Although a consensus seems to exist among the STEP legislation, not all antigang statutes employ similar definitions. Most states’ statutes are patterned after California’s STEP Act (1997) and define a gang 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, 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. (STEP Act, 1997)

Perhaps most troubling, in terms of providing guidance for enforcement of these statutes, are the definitions of gang membership. Under existing legislation, law enforcement officers must have probable cause to believe that the alleged offender either is a gang member or has knowledge that he or she is assisting known gang members. A gang member is typically defined as “a person who engages in a pattern of criminal street gang activity and who meets two or more of a list of enumerated criteria,” most often

including self-admission, identification by a parent/guardian, information from a reliable informant or an informant plus corroboration, physical evidence, photographs, tattoos, clothing style, colors, residence in an area frequented by gang members, use of hand signs, and being stopped in the company of or arrested with gang members a number of times (e.g., Arizona Rev. Stat. Ann., 1996).

Under Florida and South Dakota laws, a person could potentially meet the statutory definition of a gang member simply by living in a gang area, associating with known gang members, and being stopped in the company of gang members more than four times. (Truman, 1995, p. 717)

There are several problems inherent in this type of definition. First, social science researchers recognize that there are varying levels of participation in gangs and that membership in some types of gangs is evasive (Covey et al., 1997, p. 12). Researchers have found that gang membership is relatively unstable and that many individuals drift in and out of gang involvement (Esbensen & Huizinga, 1993; Thornberry, Krohn, Lizotte, & Chard-Wierschem, 1993). Additionally, leading gang scholars have recognized that there are several different types of gang members whose participation and commitment to the gang vary (Klein, 1995). Core members are much more actively involved in the gang than fringe members or “wannabees” who are not considered to be true gang members by their peers. Therefore, identification of an individual by a third party and even self-identification may not be reliable indicators of gang members without more objective criteria.

Second, and even more problematic, is the fact that several of the enumerated gang indicators are extremely open to interpretation and provide law enforcement officers with little guidance and broad discretion in enforcing these statutes. Herein lies the crux of the problem. The flexibility provided by such broad definitions gives law enforcement officers a fair amount of discretion in enforcing these statutes. In fact, a certain amount of discretion is necessary for officers to be able to do their jobs efficiently and effectively. However, discretion also opens the door to the possibility of abuse. Racism in the criminal justice system has frequently hidden behind the cloak of discretion (Herman, 1993).

The race of a suspect may influence an officer’s decision to stop and potentially arrest in a number of different ways. First, because the majority of gangs are composed primarily of minority members and because law enforcement efforts to eradicate gangs are primarily conducted in inner-city

minority communities, they are the individuals who are most likely to be subjected to this law. Whereas police officers, as well as judges, would agree that approaching and/or detaining a suspect solely on the basis of his or her race would be illegal, police also admit that race is often a factor that contributes to their decision to detain a suspect (S. L. Johnson, 1983). African Americans and other ethnic minorities frequently “reside and work in areas associated with criminal activity thereby increasing the likelihood of [police contact]” (Harris, 1994, pp. 677-678).

The definition is constructed in such a way that it allows officers to compose profiles of potential or likely gang members. Race and/or ethnicity would likely be one of the factors included in such a profile. This practice has already been noted with drug courier profiling (Allen-Bell, 1997). There is evidence that suggests many police officers believe that minority status correlates with a general propensity to commit crime and that this belief can influence their decisions to investigate and/or detain a suspect (S. L. Johnson, 1983). One commentator has argued that using race as a proxy for criminality “results from a self-fulfilling prophecy: racial stereotypes influence police to arrest minorities more frequently than non-minorities, thereby generating statistically disparate arrest patterns that in turn form the basis for further selectivity” (“Developments in the Law,” 1988, pp. 1507-1508). It also follows that if police make minorities more vulnerable to stops and questioning, then minorities will have “more reason to fear the police, regardless of their compliance with the law” (Maclin, 1998, p. 391). Examples are numerous. In Hartford, Connecticut, young Hispanic males who matched police profiles of gang members were subjected to frequent police stops and interrogations (Anonymous, 1994). In Denver, Colorado, police compiled a list of suspected gang members that included approximately two thirds of the African American males in the city between the ages of 12 and 24 (D. Johnson, 1993). There is evidence from other cities that some law enforcement gang sweeps resulted in virtually every Black male in the vicinity being arrested despite the fact that many were later proven not to be gang members (Burrell, 1990). Mayer (1993) points out that

overbroad definitions will provide little more than a license to arrest or investigate youths for whom no other rational basis for an investigation exists. Given the disparate treatment of teenagers of different races, such a license will result in the disparate classification of minority teenagers as gang members . . . regardless of their individual culpability. (p. 972)

One result of these discriminatory practices is that minority youth often “become gang members based on law enforcement guesswork. A childhood

nickname may be transformed into a gang 'moniker' and neighborhood playmates into 'homeboys'" (Burrell, 1990, p. 751). Identification of just one youth as a gang member could lead to all of his friends being identified as fellow gang members (Mayer, 1993). By definition, this practice has the potential to wrongly identify innocent citizens as gang members and to create gangs where no gangs exist. Unguided discretion simply heightens the risk of discriminatory enforcement, which, in turn, increases the risk of damaging already fragile police-community relations (Browning, Cullen, Cao, Kopache, & Stevenson, 1994).

### **Clothing, Colors, and Tattoos**

Almost all definitions of gang members utilize clothing, colors, and/or tattoos as several of the criteria that can be utilized to demonstrate that a suspect is a gang member. The difficulty is that more and more of the clothing and styles associated with the gang culture have worked their way into teen fashions (Joseph, 1997; McCorkle & Miethe, 2002; Stover, 1986). Many of the fashions once thought to be reliable indicators of gang membership, such as baggy pants, oversized T-shirts, baseball caps worn backwards, and even tattoos are now considered fashionable (Salt Lake City Sheriff's Department, n.d.; Texas Youth Commission, n.d.). In fact, "gang attire" has become so popular that authorities from law enforcement to school officials in suburbs have noted the fact that many students are adopting this style of dress (Burrell, 1990). This has, in part, been fueled by the hip-hop culture, and shows such as MTV, which help to shape teen fashions. Arguably, even pagers and handguns can no longer be thought to distinguish gang members from nongang youth (Armor & Jackson, 1995).

This problem is further complicated by the fact that "many gangs adopt designer labels or insignia of sports teams" (Burrell, 1990, p. 754). Both professional and sports clothing items are now popular with gangs, and several gangs have adopted particular teams to symbolize their gang. The gangs are attracted to such clothing for several reasons. First, several of the sports teams have colors that match gang colors. For example, the Gangster Disciples have adopted Duke's blue and black colors ("Chicago Gangs Adopt Duke," 1999), and the Neighborhood Crips prefer U.N.C.'s light blue and white colors. Additionally, the Neighborhood Crips logo is used to symbolize their gang name (Etter, 1998). Likewise, certain designer clothes or brand names have been adopted by gangs. For example, Calvin Klein has been adopted by the Bloods and is said to denote "Crip Killer" whereas British Knights said to indicate "Blood Killer" are worn by Crips. This type of

attire offers the added benefit that it is popular among all types of persons and therefore does not necessarily operate as a conspicuous identifier for police officers.

Utilizing these indicators of gang membership has great potential for abuse. First, because so many youth are using gang symbols and clothing to “fit in,” it is difficult to say that these signs carry as much weight in today’s society as they did several years ago. For example, in the state of Arizona, having a tattoo and wearing blue Adidas would identify one as a gang member (Pintado-Vertner & Change, 2000, p. 4). Second, wannabees or youth who hope to join the gang will frequently adopt the gang attire although they are not yet seriously involved in the gang or the gang’s criminal activities (“An Urban Ethnology,” 1999). Others may wear such clothing to obtain status or to protect themselves from other gangs (Burrell, 1990; Mayer, 1993; McCorkle & Miethe, 1998). Tattoos are left as a permanent legacy to a youth’s gang membership even long after he or she has left the gang. As Susan Burrell (1990) points out, the “dangers of acting on appearance alone are particularly acute where gang membership is the sole basis for detention” (p. 754). It introduces the possibility that youth in inner cities will be subjected to regular investigation simply because they look like a gang member,<sup>2</sup> thus opening the door to possible discrimination (Burrell, 1990).

The primary problem with these definitions is that they have the possibility of being overly inclusive and identifying innocent juveniles or those who reside in criminally infested neighborhoods or who have social affiliations with criminals as gang members. Conversely, if the definitions are too narrow, they do little to advance the tools available to law enforcement agents beyond those of existing criminal statutes. The challenge facing both social scientists and practitioners is to develop a pragmatic, operational definition of gang membership.

### **Pattern of Criminal Activity**

Additionally, for a group to be defined as a gang, either the group or its members must have engaged in a pattern of criminal activity. Appellate courts have held that a pattern of criminal activity can be demonstrated by an individual committing a series of offenses or by multiple offenders committing one or more offenses in a single incident (*In re Leland D.*, 1990; *In re Lincoln J.*; 1990; *In re Nathaniel C.*, 1991). For example, if two gang members break into a home and steal a television (burglary and larceny), they have displayed a “pattern” of criminal activity. The courts have also held that the criminal activity does not even have to be gang related (*People*

v. *Gardeley*, 1996, p. 716). Both of these judicial interpretations have essentially made it easier to define a group as a gang.

### SUGGESTIONS FOR IMPROVING LEGISLATION

Although gang-related legislation has been extensively enacted and over 70% of all states now have some form of legislation related to gangs (National Youth Gang Center, n.d., p. 1), there is evidence that such legislation has not been the panacea it was once thought to be. McCorkle and Miethe (2002), studying the development of such legislation in the state of Nevada, examined court data to determine the extent to which this new legislation was being utilized. They found that, with a few exceptions, the new laws were “rarely and sometimes, never used” (p. 193).

Although the stated intent behind the antigang statutes is admirable, the swift reaction of the legislatures and the lack of reliance on established criminological theory and research leaves open the possibility that such legislation will ultimately fail in achieving its purpose. Even more disturbing is the possibility that these approaches could backfire and actually exacerbate the problem. We must be especially sensitive to the impact that these statutes will have in the minority communities inasmuch as these are the populations that will be most affected by these laws.

Carefully constructed laws that safeguard the constitutional rights of citizens and provide safeguards against inequitable application can be a valuable tool for both law enforcement agents and court personnel. These laws can provide criminal justice personnel with additional apparatus to address the problems facing many of these communities. Furthermore, they provide a way to attack the core problem of gang membership by facilitating the incapacitation of core gang members and of those who are engaging in criminal activities as a part of their gang membership. Such laws can, if drafted and utilized appropriately, assist communities in providing safer environments for its residents. The last section of this manuscript will provide suggestions for improving our current antigang legislation to address the issues discussed above.

### Improving Definitions

First and foremost, we must strive to ensure that these statutes are not written in such a fashion as to be vague or overbroad. Although the appellate courts have almost unanimously held that the terminology defined within the existing statutes is not unconstitutionally vague, this is an area in which

legislatures would benefit from consulting social science research and experts in the study of gangs. As one commentator noted, “for a statute to have a reasonable expectation of achieving its intended goal, those crafting it must have knowledge of the behavior that they are attempting to alter” (Holland, 1995, p. 278). At this point in time, law enforcement agencies, legislatures, and sociologists often employ vastly different definitions of gangs and gang-related activity. Although it is beyond the scope of this article to create the perfect definition, there are several ways in which existing definitions can be improved.

### **Gang Membership**

First, there should not be an overemphasis on the social ties of the individual or on his or her area of residence. Although both of these factors may be related to gang membership, they should not by themselves define an individual as a gang member. By identifying youth as gang members if they meet two or more of the enumerated criteria, one can be identified solely on the basis of these criteria.

Likewise, there should be a tempered focus on the juvenile’s attire. The Portland Police Department employs a definition that both recognizes that attire can be a sign of gang membership and narrows the criteria so that sole reliance on basic attire is not acceptable. Their definition states that “an individual [must] display clothes, jewelry, hand signs and/or tattoos *unique* to gang affiliation; clothing color alone is *not sufficient* for designation” [italics added] (quoted in Mayer, 1993, p. 973).

Definitions should attempt to focus on hard-core, committed gang members. Additionally, laws should be aimed toward groups with clear criminal agendas. Legislatures should be careful to restrict their definitions of gang membership to include only individuals who are actively and not peripherally involved in the gangs, thereby excluding wannabees and fringe members from their statutes. There are several ways that this could be accomplished. One is to examine factors such as the frequency of association. Commitment can also be demonstrated by emphasizing the individual’s intent to further the criminal purpose of the group. Ensuring that the statute requires specific intent helps to ensure that only blameworthy individuals are targeted by the legislation. If legislatures are going to rely on an enumerated list of indicators, they should require the presence of at least three of these criteria so that no two factors such as clothing and area of residence are enough to identify someone as a gang member.

## Gangs

In terms of defining a criminal gang, reconceptualizing the requirement of a “pattern of criminal activity” would help to ensure that the individual criminal behavior of one or two individuals does not become the shared responsibility of all youth who associate with them. This would reduce the risk of all members being treated as presumptively culpable. Furthermore, the enumerated offenses should be serious offenses. Similarly, to punish someone for his or her gang involvement, the enumerated offenses should be restricted to gang-related offenses. Finally, legislatures should clearly define this term to exclude concurrent activities and to require that this element can only be met by repeated violations of the law, demonstrated by at least two separate offenses.

The adoption of a narrower, more specific, definition of gang membership is beneficial for a number of reasons. First, it ensures that the legislation is targeting serious, involved gang members. This will help preserve police-community relations as well as guard against such possibilities as increasing gang cohesion and/or inappropriately labeling juveniles as gang members and potentially increasing their criminal involvement and perhaps contributing to a breakdown in respect for the law. Finally, narrow definitions operate to curtail police discretion and therefore reduce the possibility that the laws will be applied in a discriminatory fashion.

Additionally, any time the possibility of discriminatory application of a law exists, we should strive to employ stricter standards of review to ensure that this will not occur. The U.S. Supreme Court recognized as far back as their decision in *Terry v. Ohio* (1968) that certain investigative techniques resulted in tensions between urban citizens and the police. Whenever evidence exists that racial profiling might have occurred or that race played a significant role in the decision to label an individual as a gang member, courts should employ a heightened level of scrutiny to these cases. Judges should carefully screen these cases to ensure that independent evidence against the defendant exists. Kennedy (1997) suggests that race should be prohibited from entering into the decision-making process, except in those cases when the state can offer a compelling justification for its existence.

## Antigang Legislation as an Effective Tool

Perhaps the biggest problem with these approaches is that they provide only temporary solutions and ignore the real problems that have contributed to the increase in both gangs and gang-related activity in our society. By

focusing on gang suppression, we take the emphasis off of identifying and eradicating the ultimate causes of gang development and gang membership. Thus, these strategies fall short of offering meaningful solutions to the problem (Shelden, Tracy, & Brown, 1997). In many communities, gangs represent a survival strategy for some youth (Covey et al., 1997). Gangs are not created only to commit criminal acts. If gangs are eradicated in these neighborhoods, we need to think about what will replace the gang in these youths' lives. Likewise, gang suppression techniques may simply temporarily reduce membership in the gang. Without addressing the causes of gang involvement, other youth will be there to simply replace, or at least supplement, the incarcerated member.

Current gang initiatives should decrease the emphasis on suppression by increasing the commitment to prevention. It is vitally important to utilize research to identify the factors that place a juvenile at risk for gang involvement and to initiate programs to help control these factors. To effectively address the issue of gang membership, we need to focus on the root causes of gang membership rather than expending our efforts in trying to control gangs once they are formed. Inasmuch as the causes of gang membership are extensive and interrelated, dealing with gangs requires a comprehensive, multifaceted approach. We have a good deal of social science research to help guide policy in this regard. Although there is much that can be done at the individual level, such as providing youth with alternatives to gang involvement, strengthening of family ties, and educational commitment, to institute large-scale reforms, change must take place at the societal level. Hagedorn (1988) suggests deemphasizing the criminal justice system as a method of handling the gang problem. Instead, he suggests we should focus our efforts on providing meaningful employment opportunities and improving education. We need to develop programs that will address housing conditions in our inner cities, promote economic revitalization in minority communities, and primarily reduce economic and social inequality in our society (Joseph, 1997). McKenzie (1996) suggests that the best place to initiate these policies might be the inner suburban rings of metropolitan areas. Gang problems are not as well established in these areas and also these communities may have some of the features that would enhance successful implementation; these include substantial tax bases, a core group of residents with solid ties to the community and the proximity to the large city. These areas also have more heterogeneous populations that would allow for a multicultural approach.

To be successful, any intervention strategy will need to include systematic evaluation as a necessary component. A key problem is that there have

been no real systematic evaluations of any of these strategies. What we currently know has been pieced together from a variety of sources. With appropriate evaluation, we can enhance and elaborate policies that are successfully meeting their goals, eliminate those that are not, and rework those that are struggling.

Programs designed to attack the root causes of gang membership are going to be complex and costly. Additionally, the results of these programs are not going to be realized immediately. Currently, there is a "deep-rooted reluctance to face up to the implications of the social context of gang life" (Covey et al., 1997, p. 313). In fact, Anonymous (1994, p. 1707) points out that by implementing our current strategies, we as a society have overreacted to the gang problem in what she also terms a moral panic. She feels that this panic is, at least in part, driven by our lack of empathy for the problems facing inner-city youth and our images of minorities as criminals. Moore (1993, pp. 28-29) also identifies some of the most common stereotypes concerning gangs. She states that these stereotypes contribute to our moral panic. These stereotypes, coupled with a lack of research to address their validity, contribute to our lack of ability to address the problem effectively. We should educate our law enforcement personnel so that they are not susceptible to these clichés and therefore not prone to typecast.

Prosecutors and police officers can also rely on existing legislation to attack the substantive crimes committed by gang members, deemphasizing the use of antigang legislation because its deterrent value is at the least questionable. This would move police officers away from the difficult and potentially dangerous task of having to identify gangs and gang members and would place the emphasis back on the substantive crime being committed by the individual, regardless of his or her status as a gang member. Most jurisdictions already have in place "three strikes you're out" legislation, which would allow prosecutors to attack offenders with subsequent offenses more harshly.

At a minimum, these issues should be taken seriously. We need to allocate the resources necessary to deal with these issues and be committed to developing and implementing long-term strategies that will benefit future generations. All of us, academicians, social science researchers, legislators, and practitioners alike should work together to address this issue. The gang problem needs to be addressed in a comprehensive and deliberate manner. For any solution to be ultimately effective, it must not only address the root causes of the problem, but it must also ensure that it operates in such a way as to protect the rights of innocent citizens. Although the task may seem

overwhelming at first, it is one that we must tackle if we are to advance and improve our society.

## NOTES

1. McCorkle & Miethe (2002, pp. 11-12) point out that the claims makers are often sincere and convinced they are pursuing noble goals.
2. An important notable exception to this is the recent Supreme Court decision, *City of Chicago v. Morales et al.* (1999) where the Court held that the definition of loitering used by the city of Chicago was impermissibly vague.

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