

REELING IN GANG PROSECUTION:  
SEEKING A BALANCE IN GANG PROSECUTION

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*Gang violence is a severe problem across the United States. Spreading from their inner-city origins to surrounding suburbs, violent street gangs have proven all but impervious to legislative attempts to curb their growing influence. This Article examines the presence of gangs, as well as one of the landmark efforts to combat them, the Street Terrorism Enforcement and Prevention (“STEP”) Act. The Article explores the potential abuse of anti-gang legislation by prosecutors, such as overfiling and coercive plea-bargaining. Lastly, the Article offers solutions to curb such abuse, including a statewide prosecutorial review board, full discovery from time of initial filing, and a restriction on joining gang-related charges to other charges.*

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## INTRODUCTION

On a sunny afternoon in Los Angeles, a backyard barbeque at the Salinas residence was disrupted when several members of the rival Hernandez street gang entered the backyard and initiated a fight. During the fight, Ramon Hernandez, an active member of the Hernandez street gang, suffered a serious, nonfatal stab wound. The remaining Hernandez gang members fled prior to the police arrival. Ezequiel Salinas, a younger Salinas brother with no known gang involvement, was arrested along with his older brother Jesse, a known active member of the Salinas street gang. Both Ezequiel and Jesse Salinas were charged with assault with a deadly weapon<sup>1</sup> and a gang enhancement.<sup>2</sup>

Despite no direct proof that Ezequiel was a member of the Salinas gang or that Ezequiel inflicted the knife wound, the prosecutor was confident that his “gang expert” would be able to link Ezequiel to the gang. Moreover, the expert would be allowed to testify that the Salinas gang engaged in a “pattern of criminal gang activity” due to the gang enhancement charge.<sup>3</sup> The expert’s testimony could span a decade, detail violent events, and involve people Ezequiel had never heard of or known. The prosecutor, well aware that such evidence most likely would link Ezequiel by association to the Salinas gang and overwhelm the jurors’ ability to focus on the nuances of the fight that led to the stabbing, could file the charges with impunity even though the incriminating evidence was weak at best. Legitimate questions concerning Ezequiel’s non-involvement could easily be lost. Was Ezequiel merely present at the scene of the crime? Was he an aider and abettor? A co-conspirator? Or was he acting solely in self-defense? These types of nuanced questions can easily be ignored when overwhelmingly negative and frightening evidence is presented.

Beyond the consequences of the gang sentence enhancement if the case were to proceed to trial, there is the potential for coercive plea-bargaining before trial.<sup>4</sup> The potential punishment for assault could go from a two-year prison term to an additional two-, three-, four-, five-, or ten-year prison term following a sentence enhancement charge.<sup>5</sup> One can easily imagine the conundrum inside Ezequiel’s mind. Should he defend his innocence by going to trial and risk being sentenced up to twelve years in prison? Or should he take a plea deal and eat two years?

In considering this scenario, several thoughts most likely come to mind. First, we may consider that Ezequiel is at the blunt end of a very raw deal. Yet, we recognize the incalculable

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<sup>1</sup> CAL. PENAL CODE § 245(a)(1) (West 2015).

<sup>2</sup> *Id.* § 186.22(b).

<sup>3</sup> *Id.* § 186.22(e); see, e.g., Erin R. Yoshino, Note, *California’s Criminal Gang Enhancements: Lessons From Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 135-36 (2008) (“[T]he gang expert will often choose the most heinous and violent crimes to illustrate the gang’s pattern of criminal activity.”).

<sup>4</sup> See Brian Gregory, Comment, *Brady Is the Problem: Wrongful Convictions and the Case for “Open File” Criminal Discovery*, 46 U.S.F. L. REV. 819, 827 (2012) (“Taken together, *Bagley*, *Bordenkircher*, and *Ruiz* have created a reality in which prosecutors are free to make threats of long prison sentences or even death to induce a guilty plea . . . . These circumstances may lead even wholly innocent defendants to plead guilty in order to avoid the risk of conviction at trial.”).

<sup>5</sup> See CAL. PENAL CODE § 186.22(b)(1) (West 2015).

cost in human misery and economic waste that the horrific legacy of gangs has caused.<sup>6</sup> Violent gangs are a clear, present, and continuing danger, and significant measures are necessary to counter them. This battle being waged on urban streets occurs in criminal courtrooms as prosecutors attempt to deter criminal gang conduct.<sup>7</sup> Effectively prosecuting gang violence is an admirable goal, but there are concerns that the efforts of some prosecutors come at the expense of violating their higher calling and sworn ethical responsibilities.<sup>8</sup> Are the tools crafted by legislatures across the country being employed improperly? Are prosecutors abusing gang-related charges and enhancements in order to coerce pleas, a practice resulting in harsh sentences that are unwarranted?

This Article examines legislative and prosecutorial efforts utilizing anti-gang legislation. First, Part I explores the extent of the gang-related crime problems as well as the origins and evolution of anti-gang legislation. Part II analyzes the successes and failures of anti-gang legislation, focusing on the inherent constitutional challenges. Part III examines prosecutors' ethical boundaries, and Part IV tackles the potential for prosecutorial abuse of anti-gang legislation. Finally, Part V offers proposals designed to offset some of the abuses that have arisen in gang prosecution.

## I. GANGS AND ANTI-GANG LEGISLATION

Gangs, such as the Bloods, the Crips, Mara Salvatrucha (also known as MS-13), and 18th Street now have a nation-wide presence.<sup>9</sup> Not surprisingly, their presence has translated into

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<sup>6</sup> See David S. Rutkowski, Student Article, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 139 (1996) ("Gangs and gang crime pose an extraordinary threat to society at large; in gang-controlled communities, they can exert almost ubiquitous authority." (footnote omitted)); see also Alberto R. Gonzales, U.S. Attorney Gen., U.S. Dep't of Justice, Prepared Remarks of Attorney General Alberto R. Gonzales at the Los Angeles Gangs Press Conference (Mar. 31, 2006), available at [http://www.justice.gov/archive/ag/speeches/2006/ag\\_speech\\_060331.html](http://www.justice.gov/archive/ag/speeches/2006/ag_speech_060331.html) ("Mayors and U.S. Attorneys . . . know better than anyone that gangs have become an increasingly deadly threat to the safety and security of our Nation's citizens.").

<sup>7</sup> Jeffrey T. Wennar, *Ganging up on Gangs: The Steps Necessary for Effectively Prosecuting Gang Violence*, 5 CRIM. L. BRIEF, Spring 2010, at 3, 3 ("[Gangs] . . . bring a culture of violence and drugs to our doorsteps, creating an atmosphere of fear, diminishing the quality of life, and endangering the safety, well-being, and future of our children." (first alteration in original) (quoting MICHAEL B. MUKASEY, DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT TO CONGRESS ON THE GROWTH OF VIOLENT STREET GANGS IN SUBURBAN AREAS I (2008), available at <http://www.justice.gov/archive/ndic/pubs27/27612/27612p.pdf>)); see also Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 109 (2000) ("Violent gangs are now having a major impact on the quality of life of communities throughout the nation." (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT TO THE PRESIDENT: A COORDINATED APPROACH TO THE CHALLENGE OF GANG VIOLENCE: A PROGRESS REPORT I (1996))).

<sup>8</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991) (claiming that in criminal cases the "[c]odes of professional responsibility" treat prosecutors as "'ministers' having an ethical duty to 'do justice.'" (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983))).

<sup>9</sup> *Combating Youth Violence: What Federal, State and Local Governments Are Doing to Deter Youth Crime: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res. of the H. Comm. on Gov't Reform*, 109th Cong. 9 (2006) [hereinafter *Combating Youth Violence*] (statement of Robert B. Loosle, Special Agent in Charge, L.A. Criminal Div., FBI), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hrg45334/pdf/CHRG-109hrg45334.pdf>.

this country's most significant crime problem.<sup>10</sup> Often heavily armed and with strong ties to the illegal drug trade, gangs are "portrayed as an alien presence in otherwise stable communities."<sup>11</sup>

Gangs have been a part of American cityscape since the early nineteenth century.<sup>12</sup> Like modern gangs, the earlier incarnations had a reputation for being territorial and engaging in criminal activity.<sup>13</sup> Fueled by the influx of immigrants from Italy, Ireland, China, and other countries, these early gangs provided opportunities and their own sense of belonging to a group of people whom society largely ignored.<sup>14</sup> Gangs quickly spread, nearly unchecked by authorities, who were convinced that gangs were only a threat in "certain types of neighborhoods."<sup>15</sup> Predictably, these neighborhoods were low-income, with substantial immigrant and minority populations.<sup>16</sup>

Pop culture has established gangs as a part of inner city life.<sup>17</sup> Gang movies, such as *The Wild Ones* and *Rebel Without a Cause* glorified gang activities, as did the well-known 1957 Broadway musical, *Westside Story*.<sup>18</sup> The musical, a revamp of the classic Romeo and Juliet story, replaced the feuding Montague and Capulet families with the Jets and Sharks.<sup>19</sup> Despite the show's violent and tragic ending, one researcher characterized the show as creating the "image of a group of kids whose members were aggressive and rebellious—but appealing."<sup>20</sup>

Despite a momentary decline in gang activity in the late 1960s,<sup>21</sup> when authorities finally

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<sup>10</sup> NAT'L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 9 (2011), available at <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends> ("Gangs are responsible for an average of 48 percent of violent crime in most jurisdictions and up to 90 percent in several others . . ."); *id.* at 11 ("Neighborhood-based gangs continue to pose the greatest threat in most jurisdictions nationwide.").

<sup>11</sup> Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 31 (1998) (quoting Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 945 (1993)).

<sup>12</sup> David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 692 (1995).

<sup>13</sup> *Id.* at 692 & n.45.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 692-93; *id.* at 693 n.47 ("As gang research progressed, however, gangs were discovered in neighborhoods that were stable, though poor, where the same ethnic group had lived for an extended period of time."); *id.* at 693 n.49 ("Researchers generally have not found gangs, or have not looked for them, in places other than slums.").

<sup>16</sup> *Id.* at 693.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 693 n.50.

<sup>19</sup> *Id.*

<sup>20</sup> Joan Moore, *Gangs, Drugs, and Violence*, in *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES* 27, 28 (Scott Cummings & Daniel J. Monti eds., 1993).

<sup>21</sup> See HERBERT C. COVEY ET AL., *JUVENILE GANGS* 100 (1992). Several explanations have been suggested for the temporary decline of gang activity in the 1960s. See *id.* at 100-01. One is that increased drug use among gang members caused the decline. *Id.* at 101. Another argument is that traditional gang activity decreased as gang involvement increased in the politics of the 1960s. *Id.* at 100-01. Many of the same people previously active in gangs were instead participating in the political and civil strife of the 1960s. *Id.* at 100-01.

began to combat gang violence, gang presence had spread to nearly every major city in the United States.<sup>22</sup> A 2011 study estimated that there are about 1.4 million members in 33,000 active street gangs, motorcycle gangs, and prison gangs in the United States.<sup>23</sup> This marked “a 40 percent increase from an estimated 1 million gang members in 2009.”<sup>24</sup> Arizona, California, and Illinois have the highest number of gang members, but officials believe that the Northeast and Southeast regions increased the most in gang membership from 2009 to 2011.<sup>25</sup> In 2011, gangs were believed to be responsible for nearly half of violent crimes in some cities, and up to ninety percent in several others.<sup>26</sup> The National Gang Intelligence Center’s 2013 Report indicated that gang numbers have continued to increase since that time.<sup>27</sup> In a nationwide survey of law enforcement personnel the same year, fifty-three percent of respondents indicated that gang membership had increased in their jurisdiction since 2011.<sup>28</sup>

Los Angeles is the epicenter for gang activity in the United States.<sup>29</sup> The rise of gang activity in California was dramatic in the 1980s.<sup>30</sup> In 1981, an article in *Time* estimated that there were approximately 350 gangs comprised of 20,000 to 30,000 members in the Los Angeles area alone.<sup>31</sup> Today, recent studies indicate that over 1,000 active street gangs exist in the Los Angeles area, with as many as 175,000 members in the seven major counties of Los Angeles, San Luis Obispo, Santa Barbara, Ventura, Riverside, San Bernardino, and Orange.<sup>32</sup>

It should come as no surprise, then, that the crime rate associated with gang activity has shown a similar increase. One scholar notes that “[f]rom 1981 to 2001, there were approximately 10,000 gang homicides in the state of California, approximately seventy-five percent of which

<sup>22</sup> Matthew Hardwick Blumenstein, Note, *RICO Overreach: How the Federal Government’s Escalating Offensive Against Gangs Has Run Afoul of the Constitution*, 62 VAND. L. REV. 211, 212 (2009) (“There are gangs in every state and in the District of Columbia.” (citing MICHAEL B. MUKASEY, DEP’T OF JUSTICE, ATTORNEY GENERAL’S REPORT TO CONGRESS ON THE GROWTH OF VIOLENT STREET GANGS IN SUBURBAN AREAS 4 (2008), available at <http://www.justice.gov/archive/ndic/pubs27/27612/27612p.pdf>)).

<sup>23</sup> NAT’L GANG INTELLIGENCE CTR., *supra* note 10, at 9.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 11-12.

<sup>26</sup> *Id.* at 9.

<sup>27</sup> See NAT’L GANG INTELLIGENCE CTR., 2013 NATIONAL GANG REPORT 9 (2013), available at <http://www.fbi.gov/stats-services/publications/national-gang-report-2013/view> (“Survey respondents indicate gang membership and gang-related crime in the United States continue to increase steadily.”) In January of 2013, the number of individuals murdered in Chicago surpassed the number of American troops killed in Afghanistan within the same time frame. *Id.* at 10. Experts attribute the rise in Chicago’s murder rate to fractionalized gangs battling for turf control. *Id.*

<sup>28</sup> *Id.* at 9. Additionally, fifty-eight percent of respondents indicated that gang criminal activity increased either slightly or significantly since 2011. *Id.*

<sup>29</sup> *Combating Youth Violence*, *supra* note 9, at 9; see also *Gangs*, L.A. POLICE DEP’T, [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/1396](http://www.lapdonline.org/get_informed/content_basic_view/1396) (last visited June 18, 2015).

<sup>30</sup> Yoshino, *supra* note 3, at 117.

<sup>31</sup> Truman, *supra* note 12, at 694 n.57 (“A 1981 article in *Time* reported roughly 350 gangs with a total of 20,000-30,000 members in Los Angeles.”) (citing Jane O’Reilly & Benjamin W. Cate, *Combat at Hollywood and Vine*, TIME, Aug. 24, 1981, at 27).

<sup>32</sup> VIOLENCE PREVENTION COAL. OF GREATER L.A., FACT SHEET: GANG VIOLENCE (2007), available at [http://www.ph.ucla.edu/sciprc/pdf/GANG\\_VIOLENCE.pdf](http://www.ph.ucla.edu/sciprc/pdf/GANG_VIOLENCE.pdf) (citing *Combating Youth Violence*, *supra* note 9, at 9).

occurred in Los Angeles County.”<sup>33</sup> The California Department of Justice reports that “[f]rom 1998 to 2007, the number of gang related homicides increased by 16.1 percent.”<sup>34</sup> Other estimates suggest that violent gang crime in Los Angeles County claims an average of one life per day,<sup>35</sup> and costs California taxpayers more than two billion dollars annually.<sup>36</sup>

Law enforcement officials across the nation have attempted to find effective solutions to the gang problem.<sup>37</sup> In California, various methods have been explored, but the consistent growth in gang numbers belies any claims of success.<sup>38</sup> In response, “local and national law enforcement agencies have sharpened their focus on combating gangs.”<sup>39</sup> The Los Angeles police “renewed ‘crackdowns’ on gang activity and . . . increased ‘gang sweeps’ of neighborhoods where they believe[d] gang activity [was] high.”<sup>40</sup>

### A. California’s STEP Act

These methods were met with little success, as California earned the dubious title of “street gang capital of the United States.”<sup>41</sup> Even though the need for more assertive action was clear as early as the 1980s, it wasn’t until September 24, 1988, that California signed into law its first anti-gang bill, known as the Street Terrorism and Enforcement Act, or the “STEP Act.”<sup>42</sup> Declaring California in a “state of crisis” as a result of the activities of “violent street gangs whose members threaten, terrorize, and commit a multitude of crimes,” the STEP Act contained two key sections.<sup>43</sup> The first created a substantive crime for active participation 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

<sup>33</sup> Yoshino, *supra* note 3, at 117-18 (footnote omitted) (citing George Tita & Allan Abrahamse, *Gang Homicide in LA, 1981-2001*, AT THE LOC. LEVEL: PERSP. ON VIOLENCE PREVENTION, Feb. 2004, at 1, 2).

<sup>34</sup> EDWARD G. BROWN JR., CAL. DEP’T OF JUSTICE, HOMICIDE IN CALIFORNIA 21 (2008), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm07/preface.pdf>.

<sup>35</sup> *Introduction to Gangs*, L.A. POLICE DEP’T, [http://www.lapdonline.org/top\\_ten\\_most\\_wanted\\_gang\\_members/content\\_basic\\_view/23466](http://www.lapdonline.org/top_ten_most_wanted_gang_members/content_basic_view/23466) (last visited June 18, 2015) (“In Los Angeles County [the] violent acts [of gangs] claim an average of one life a day.”).

<sup>36</sup> ADVANCEMENT PROJECT, CITYWIDE GANG ACTIVITY REDUCTION STRATEGY: PHASE III REPORT 5 (2007), available at [http://advancementprojectca.org/sites/default/files/imce/p3\\_report.pdf](http://advancementprojectca.org/sites/default/files/imce/p3_report.pdf).

<sup>37</sup> See Blumenstein, *supra* note 22; Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 213 (1994).

<sup>38</sup> Yoo, *supra* note 37, at 214-15.

<sup>39</sup> Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 679 (2009).

<sup>40</sup> *Id.*

<sup>41</sup> Truman, *supra* note 12, at 686. As recently as 2007, former “Los Angeles Mayor Antonio Villaraigosa asked the federal government for an additional thirty-million dollars to aid in [another gang] crackdown, . . . [as then-] Governor Arnold Schwarzenegger declared the state of California [prepared] to ‘declare a war on gangs.’” Van Hofwegen, *supra* note 39, at 680.

<sup>42</sup> Truman, *supra* note 12, at 707.

<sup>43</sup> CAL. PENAL CODE § 186.21 (West 2015); *id.* §§ 186.22(a)-(b).

by members of that gang.”<sup>44</sup> The second imposed harsher punishments for crimes “committed for the benefit of, at the direction of, or in association with any criminal street gang.”<sup>45</sup> Although initially drafted with a sunset clause that would have repealed the STEP Act in 1992, the Act has been extended indefinitely.<sup>46</sup>

The California legislature was initially careful to limit the scope of the STEP Act, making prosecutions under the new law “very difficult to prove except in the most egregious cases,”<sup>47</sup> and taking careful note of the potential for infringement on the First Amendment freedom of association.<sup>48</sup> The language of the original STEP Act limited prosecution to gang members who commit crimes with (1) knowledge of the prior commission of (2) two or more serious felonies by members of their gang.<sup>49</sup> And while the Act’s text only requires knowledge for the substantive participation offense, a report from California’s Senate Judiciary Committee indicated the importance of that knowledge to the Act’s drafters.<sup>50</sup> Moreover, the original statutorily enumerated offenses were limited to seven felonies: “assault with a deadly weapon . . . ; robbery; homicide or manslaughter; sale, manufacture, and possession for sale of narcotics; shooting at an inhabited dwelling or occupied vehicle; arson; and witness and victim intimidation.”<sup>51</sup> Under these guidelines, only those people with knowledge of two “serious” offenses committed by their gang’s members faced prosecution under the STEP Act.<sup>52</sup>

<sup>44</sup> CAL. PENAL CODE § 186.22(a).

<sup>45</sup> *Id.* § 186.22(b).

<sup>46</sup> California Street Terrorism Enforcement and Prevention Act, 1988 Cal Legis. Serv. 1242 (West) (codified as amended at CAL. PENAL CODE §§ 186.20-186.34 (West 2015)) (providing for automatic repeal by 1992); Act of Oct. 3, 2013, 2013 Cal. Legis. Serv. Ch. 508 (West) (extending STEP Act to 2017, with possibility for further extension).

<sup>47</sup> Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 114 (2006) (quoting CAL. SENATE COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Record No. 29069, 1987-88 Reg. Sess., at 4 (1988) (on file with the *Berkeley Journal of Criminal Law*)).

<sup>48</sup> CAL. PENAL CODE § 186.21 (West 2015).

<sup>49</sup> Baker, *supra* note 47, at 114.

<sup>50</sup> By reference to “more severe” punishment of gang crimes:

[The sponsors of AB 2013] considered [the initial seven enumerated offenses] to be extremely serious crimes; in addition, they claim that these crimes are crimes which are typical of street gangs. Once a prosecutor established that any member of a gang had committed at least two of these crimes, the threshold for a pattern of criminal activity would be met. Any crime committed by a member *in addition* to this threshold would be punished more severely [under the provisions of the STEP Act].

*Id.* at 114-15 (alterations in original) (quoting CAL. SENATE COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Record No. 29069, 1987-88 Reg. Sess., at 4 (1988) (on file with the *Berkeley Journal of Criminal Law*)); *see also id.* at 103 n.10 (“The reason for the urgency [was] to provide the tools necessary for law enforcement to stem the tide of illegal gang warfare without infringing upon the constitutional rights of any individual, at the earliest possible time.” (alteration in original) (quoting CAL. SENATE COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Record No. 29069, 1987-88 Reg. Sess., at 4 (1988) (on file with the *Berkeley Journal of Criminal Law*))).

<sup>51</sup> Baker, *supra* note 47, at 114.

<sup>52</sup> *Id.* at 115.

### B. Legislation Across the Country

Following California's lead, all fifty states and the District of Columbia have codified some form of anti-gang measures.<sup>53</sup> Of the fifty states, thirty-one now have laws that enhance penalties for gang-related criminal acts, while twenty-eight states have passed gang-prevention laws.<sup>54</sup> Some states, such as Louisiana, Georgia, and Missouri, have enacted legislation that are nearly carbon copies of California's STEP Act, while others—like Florida, South Dakota, and Illinois—have moved in new directions.<sup>55</sup>

In 1990, Florida passed its own STEP Act, which moved beyond the California Act by defining the term “youth and street gang member,”<sup>56</sup> and offering a broader definition for the term “pattern of youth and street gang activity.”<sup>57</sup> Under Florida's STEP Act, “a person could meet the statutory definition of a gang member simply by living in [an area frequented by a gang and its participants], associating with [the gang's members], and being stopped in the company of gang members more than four times.”<sup>58</sup> While the creation of a definition for the term “youth and street

<sup>53</sup> See *Highlights of Gang-Related Legislation*, NAT'L GANG CENTER, <http://www.nationalgangcenter.gov/Legislation/Highlights> (last updated Aug. 2014).

<sup>54</sup> *Id.*

<sup>55</sup> Truman, *supra* note 12, at 710-11.

<sup>56</sup> FLA. STAT. ANN. § 874.03(2) (West 1990). Florida law originally defined “youth and street gang member” as:

[A] person who engages in a pattern of youth and street gang activity and meets two or more of the following criteria:

- (a) Admits to gang membership.
- (b) Is a youth under the age of 21 years who is identified as a gang member by a parent or guardian.
- (c) Is identified as a gang member by a documented reliable informant.
- (d) Resides in or frequents a particular gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known gang members.
- (e) Is identified as a 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 gang members for offenses which are consistent with usual gang activity.
- (g) Is identified as a gang member by physical evidence such as photographs or other documentation.
- (h) Has been stopped in the company of known gang members four or more times.

*Id.* This definition has now been replaced by “criminal gang member” and the criteria have been modified and expanded. See FLA. STAT. ANN. § 874.03(3) (West 2015).

<sup>57</sup> FLA. STAT. ANN. § 874.03(3) (West 1990). Rather than listing possible predicate offenses, Florida's STEP Act originally defined a “[p]attern of youth and street gang activity” as “the commission, attempted commission, or solicitation . . . of two or more felony or violent misdemeanor offenses on separate occasions within a 3-year period, for the purpose of furthering gang activity.” *Id.* This definition has been removed from the most recent version of Florida's STEP Act. See FLA. STAT. ANN. § 874.03 (West 2015).

<sup>58</sup> Truman, *supra* note 12, at 717. Currently, Florida's anti-gang measures fail to assign time-related



gang member” would seem to offer firmer constitutional constraints than California’s STEP Act, the term actually left Florida’s Act susceptible to challenges on freedom of association grounds.<sup>59</sup> The Florida Act did not establish a substantive gang-participation crime, but it did enhance sentences for gang-related felonies, similar to the sentence enhancements of California’s STEP Act.<sup>60</sup>

South Dakota’s anti-gang statute, passed not long after, models Florida’s. Although its definition of a “street gang member” omits Florida’s provision whereby a parent or guardian can identify an individual as a gang member,<sup>61</sup> the bill is susceptible to the same freedom of association challenges as Florida’s anti-gang laws.<sup>62</sup>

Illinois’s Streetgang Terrorism Omnibus Prevention Act (“STOP Act”) faces similar potential constitutional challenges for its definition of “gang member,” which includes “any person who . . . voluntarily associates himself with a course or pattern of gang-related criminal activity.”<sup>63</sup> Under this definition, a person who associates with gang members without actively participating in the gang itself could nevertheless face severe sentence enhancements.<sup>64</sup> Unlike other states, however, Illinois’s STOP Act created a civil cause of action in favor of any public authority affected by gang activity.<sup>65</sup> It additionally employed its own definitions for the terms “gang,”<sup>66</sup> “course or pattern of criminal activity,”<sup>67</sup> and “gang-related” crime.<sup>68</sup>

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boundaries to the qualification of being observed in the company of gang members more than four times, noting only that “[o]bservation in a custodial setting requires a willful association. It is the intent of the Legislature to allow this criterion to be used to identify gang members who recruit and organize in jails, prisons, and other detention settings.” FLA. STAT. ANN. § 874.03(2)(j) (West 2015).

<sup>59</sup> See Truman, *supra* note 12, at 717. The modern term, “criminal gang member,” is still just as susceptible. See FLA. STAT. ANN. § 874.03(3) (West 2015).

<sup>60</sup> FLA. STAT. ANN. § 874.04 (West 2015); see also Baker, *supra* note 47, at 114-15.

<sup>61</sup> See FLA. STAT. ANN. § 874.03 (West 2015); S.D. CODIFIED LAWS § 22-10A-1 (2014).

<sup>62</sup> Truman, *supra* note 12, at 717-18.

<sup>63</sup> 740 ILL. COMP. STAT. ANN. 147/10 (West 2015). Gang members include:

[A]ny person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, or who knowingly performs, aids, or abets any such activity.

*Id.*

<sup>64</sup> Active participation is not a required element stated under the Illinois STOP Act. See Truman, *supra* note 12, at 717.

<sup>65</sup> 740 ILL. COMP. STAT. ANN. 147/15(a) (2015) (creating a civil cause of action in favor of public authorities that have incurred costs due to criminal activity).

<sup>66</sup> *Id.* at 147/10 (defining “street gang” or “gang” as “any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining . . . of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity”).

<sup>67</sup> *Id.* (defining a “[c]ourse or pattern of criminal activity” as “2 or more gang-related criminal offenses,” at least one of which is a felony, “committed within 5 years of each other”).

<sup>68</sup> *Id.* Gang-related crimes include those committed:

Other states, like Indiana, offer different definitions for key terms,<sup>69</sup> and several states, like Arkansas, use entirely different approaches to codifying anti-gang measures by basing their legislation on the federal Continuing Criminal Enterprise (“CCE”) statute.<sup>70</sup> Unlike the Racketeer Influenced and Corrupt Organizations Act (or the “RICO Act,” which serves as the basis for anti-gang legislation such as California’s),<sup>71</sup> the CCE focuses on organizations that deal with drug trafficking and similar offenses.<sup>72</sup> Rather than focusing on participation in criminal gangs, Arkansas’ bill focuses on enhanced punishments for criminal gang activity and the real property used by criminal gangs, organizations, or enterprises.<sup>73</sup> Neither Indiana’s nor Arkansas’ efforts have been declared unconstitutional yet.<sup>74</sup> Indiana, in particular, has seen constitutional challenges specific to freedom of association interests, but since the state legislature amended the statute’s language in 1994,<sup>75</sup> it has been upheld as constitutional against all challenges.<sup>76</sup>

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- (1) with the intent to increase the gang’s size, membership, prestige, dominance, or control in any geographical area; or
  - (2) with the intent to provide the gang with any advantage in, or any control . . . over any criminal market sector, . . . ; or
  - (3) with the intent to exact revenge or retribution for the gang or any member of the gang;
  - (4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or
  - (5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership.

*Id.*

<sup>69</sup> See, e.g., IND. CODE ANN. § 35-45-9-1 (West 2015) (defining “criminal gang” as “a group with at least three . . . members that specifically: (1) either: (A) promotes, sponsors, or assists in; or (B) participates in; or (2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery.” (citation omitted)).

<sup>70</sup> Compare ARK. CODE ANN. § 5-74-104 (West 2015) with 21 U.S.C. § 848 (2012). See also Truman, *supra* note 12, at 712 n.151 (noting that “Arkansas’ Criminal Gang, Organization or Enterprise Act is modeled on the federal Continuing Criminal Enterprise statute”).

<sup>71</sup> Truman, *supra* note 12, at 712 n.151.

<sup>72</sup> 21 U.S.C. § 848 (2012); KENNETH CARLSON & PETER FINN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: PROSECUTING CRIMINAL ENTERPRISES 1 (1993).

<sup>73</sup> ARK. CODE ANN. § 5-74-104 (West 2015) (enhancing felony classifications); *id.* § 5-74-109 (declaring as a common nuisance “[a]ny premises, building, or place used to facilitate the commission of a continuing series of three . . . or more criminal violations”).

<sup>74</sup> See, e.g., Jones v. State, 969 S.W.2d 618, 620-21 (Ark. 1998) (upholding Arkansas’ statute against vagueness challenge because the law “conveys fair and sufficient warning when measured by common understanding.”).

<sup>75</sup> Act of Mar. 15, 1994, 1994 Ind. Legis. Serv. P.L. 140-1994 (West) (amending IND. CODE ANN. § 35-45-9-1 (West 1991)) (replacing the word “and” at the end of clause (1) with “or”).

<sup>76</sup> See, e.g., Klein v. State, 698 N.E.2d 296, 299-300 (Ind. 1998) (rejecting a freedom of association challenge and ruling that “neither the U.S. nor the Indiana Constitution protects associations made in furtherance of crimes or criminal conspiracies”).

### C. Expanding Anti-Gang Efforts

Amidst shifting precedents and amending legislation, California's STEP Act has increased exponentially in scope since its inception.<sup>77</sup> Beginning in 1996, the California Supreme Court suggested, in *People v. Gardeley*, that the second predicate offense may be charged contemporaneously with a count of active participation in a criminal street gang.<sup>78</sup> This ruling appeared to violate the legislature's original intent to put potential STEP Act violators on notice of liability, because in effect, it reduced the qualitative crime requirement to a single incident. Four years later in 2000, the California electorate, through Proposition 21, expanded the list of enumerated crimes listed in the STEP Act.<sup>79</sup> Additions by the legislature also increased the number of offenses.<sup>80</sup> Today, the original list of seven now encompasses thirty-three offenses, including the comparatively minor crimes of felony vandalism and automobile burglary.<sup>81</sup> A subsequent appellate decision expanded the STEP Act's scope even further, first by confirming that the predicate offenses do not have to be gang-related,<sup>82</sup> and then ruling that people who commit those predicate acts do not even have to be gang members at the time of commission.<sup>83</sup> Despite these efforts to expand the scope of the STEP Act, gang activity continues to rise in California, and the County and City of Los Angeles continue to be recognized as the "gang capital" of the United States.<sup>84</sup>

Given the enormity of gang violence, there was a need for legislation designed to cope with the problem. The rub, of course, is tailoring the remedy to meet the challenge, while not violating the constitutional rights of those who fall within its purview or abusing the vast discretion allotted to police and prosecutors. Nonetheless, given the very nature of the legislation, it is clear that constitutional challenges will continue to be mounted.

## II. CONSTITUTIONAL CHALLENGES

*"The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'"*<sup>85</sup>

Without question, the process of codifying anti-gang measures will continue to face

<sup>77</sup> See Baker, *supra* note 47, at 115.

<sup>78</sup> See *People v. Gardeley*, 927 P.2d 713, 725-26 (Cal. 1996) (identifying one episode of assault by gang members as "sufficient to establish not only the *commission* by gang members of assault with a deadly weapon, but also the *attempted commission* by gang members of murder").

<sup>79</sup> See Baker, *supra* note 47, at 115.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*; CAL. PENAL CODE § 186.22(e) (West 2015).

<sup>82</sup> *People v. Augborne*, 128 Cal. Rptr. 2d 258, 267 (Cal. Ct. App. 2002) (noting holding of *Gardeley*, 927 P.2d at 723).

<sup>83</sup> *Id.* at 263-64.

<sup>84</sup> See Truman, *supra* note 12, at 686 & n.13.

<sup>85</sup> *City of Chi. v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

challenges on several constitutional fronts, including concerns regarding freedom of association, vagueness, overbreadth, and due process. The problem with examining those issues separately is that constitutional challenges naturally bleed together; a statute that is vague or overbroad frequently will infringe First Amendment association rights, violate due process protections, or result in a combination thereof. This section will attempt to break those issues down, while recognizing their natural overlap.

The First Amendment declares: “Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble.”<sup>86</sup> Throughout history, various groups have successfully extended this First Amendment right, and have engaged in political, social, legal, economic, religious, and cultural activities without infringement by the government.<sup>87</sup> But what of criminal street gangs? On one level this inquiry is basic, because they are criminal and thus not involved in any “safe” or legal group dynamic. On another level, however, should citizens be denied their constitutional rights to freely assemble merely because of the classification of the group of people with whom they choose to associate? Ultimately, though, courts have long acknowledged that criminal street gangs are not owed First Amendment protection, as “the act of associating with compatriots in crime is not a protected associational right.”<sup>88</sup> The battle therefore is not over the protection of criminal street gangs, but rather who is included in the definition of the “gang” for purposes of prosecution. Further, the legislative challenge is not so much in identifying gangs, although that is a factor, but rather in determining which individuals are to be caught up in the gang dragnet.

#### *A. Freedom of Association: Gang Participation and Vagueness*

The United States Supreme Court first faced this issue in the 1950s, as the Cold War raged, and the country was immersed in the Red Scare.<sup>89</sup> *Scales v. United States* challenged the constitutionality of the Smith Act, which was passed by Congress in 1940 in the hope of combating the influence of the Communist Party of the United States (“CPUSA”).<sup>90</sup> The defendant, Junius Scales, the leader of the North Carolina branch of the CPUSA, was arrested under the Smith Act, which criminalized the actions of any person who “becomes or is a member of, or affiliates with, any such society, group, or assembly of persons”<sup>91</sup> or “who teach[es], advocate[s], or encourage[s] the overthrow or destruction of any such government by force or violence.”<sup>92</sup> Writing for the majority, Justice Harlan recognized that the First Amendment prevents any state from criminalizing mere association with any group, absent affirmative conduct

<sup>86</sup> U.S. CONST. amend. I.

<sup>87</sup> Alexander A. Molina, *California’s Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457, 463 (1993).

<sup>88</sup> *Helton v. State*, 624 N.E.2d 499, 506 (Ind. App. 1993).

<sup>89</sup> See generally *Yates v. United States*, 355 U.S. 66 (1957) (affirming conviction for contempt where witness refused to identify individuals as Communists); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conspiracy provisions of the Smith Act against First Amendment challenge).

<sup>90</sup> *Scales v. United States*, 367 U.S. 203 (1961).

<sup>91</sup> 18 U.S.C. § 2385 (2012).

<sup>92</sup> *Id.*; *Scales*, 367 U.S. at 244.

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by the individual,<sup>93</sup> but added that “[w]e can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this . . . forbidden advocacy, should receive any greater degree of protection from the guarantees of [the First] Amendment.”<sup>94</sup> The Court upheld the Act, concluding that it allowed punishment only where there is clear proof that a defendant “specifically intend[s] to accomplish [the aims of the organization] by resort to violence.”<sup>95</sup> Inherent in this requirement was specific knowledge by the prosecuted individual of the organization’s illegal advocacy, which the Court later noted “was intimately connected with the construction limiting membership to ‘active’ members.”<sup>96</sup> This limitation, the Court ruled, “does not cut deeper into the freedom of association than is necessary to deal with ‘the substantive evils that Congress has a right to prevent.’”<sup>97</sup>

Three years later, in *Aptheker v. Secretary of State*, the Court was asked to evaluate another law limiting the CPUSA. *Aptheker* focused on the constitutionality of a section of the Subversive Activities Control Act, which made it unlawful for any member of a registered Communist organization to apply for, use, or attempt to use a U.S. passport.<sup>98</sup> Recognizing that “freedom of travel is a constitutional liberty closely related to rights of free speech and association,”<sup>99</sup> the Court drew a clear distinction between the Smith Act’s limiting language, and the much broader scope of the Subversive Activities Control Act.

Where the Smith Act’s punishment required active participation, the Court in *Aptheker* noted that the Subversive Activities Control Act “renders irrelevant” a person’s degree of participation in an organization and “his commitment to its purpose.”<sup>100</sup> Most important, the Court emphasized the Smith Act’s requirement of specific knowledge, which it considered “intimately connected with the construction limiting membership to ‘active’ members.”<sup>101</sup> It cannot be assumed that all “members” of a group participate in its illegal activities simply based on their association.<sup>102</sup> Moreover, the Court noted that the idea that a person could regain the ability to travel with a U.S. passport by renouncing his or her Communist affiliations in “good faith” was not enough to mitigate the limiting effects of the legislation, because it intrinsically curtailed an individual’s right to associate freely.<sup>103</sup> This failure to distinguish between active participants and

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<sup>93</sup> *Scales*, 367 U.S. at 224-25 (explaining that “[m]embership, without more, in an organization engaged in illegal advocacy” is not “sufficiently substantial to satisfy the concept of personal guilt”).

<sup>94</sup> *Id.* at 229. Justice Harlan noted that there is a general protection for association under the First Amendment, but that protection does not extend to criminal associations. *See id.*

<sup>95</sup> *Id.* (alterations in original) (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

<sup>96</sup> *Aptheker v. Sec’y of State*, 378 U.S. 500, 511 n.9 (1964).

<sup>97</sup> *Scales*, 367 U.S. at 229 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

<sup>98</sup> *Aptheker*, 378 U.S. at 501-02; 50 U.S.C. § 785 (1988) (declaring that “it shall be unlawful for any member of [a Communist organization] . . . to make application for a passport, or . . . to use or attempt to use any such passport”) (repealed 1993).

<sup>99</sup> *Aptheker*, 378 U.S. at 517.

<sup>100</sup> *Id.* at 510.

<sup>101</sup> *Id.* at 511 n.9.

<sup>102</sup> The Court cited Justice Murphy who opined that “men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.” *Id.* at 510 (quoting *Schneiderman v. United States*, 320 U.S. 118, 136 (1943)).

mere sympathizers constituted a violation of First Amendment freedoms.<sup>104</sup>

Several years later, the Court invalidated another provision<sup>105</sup> of the Subversive Activities Control Act in *United States v. Robel*, ruling that it also failed to draw the distinction between peripheral members and leadership figures.<sup>106</sup> Chief Justice Warren, writing for the majority, stated that the statute “casts its net across a broad range of associational activities”<sup>107</sup> and “quite literally establishes guilt by association alone, without any need to establish that an individual’s association poses the threat feared by the Government in proscribing it.”<sup>108</sup>

Echoed throughout a number of opinions analyzing organizations and the First Amendment was the caveat that “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”<sup>109</sup> Since the 1950s, this caution has not changed, and has not been limited to cases involving political organizations.<sup>110</sup>

Perhaps recognizing the landscape shaped by the Supreme Court, the California legislature attempted to craft the STEP Act to punish gang members only when they actively, knowingly, and willfully participate in a gang’s criminal activity.<sup>111</sup> Because of this limiting language, California’s courts have consistently upheld the constitutionality of the STEP Act against freedom of association claims.<sup>112</sup> However, in *People v. Castenada*, the California Supreme Court was confronted with a gang conviction without a showing of actual gang membership.<sup>113</sup> Castenada was charged with criminal gang participation based on the fact that his alleged armed robbery took place in known gang territory, and because Castenada himself had been seen in the company of gang members several times previously.<sup>114</sup> Reasoning that to be

<sup>103</sup> *Id.* at 507 (“Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.”) (footnote omitted).

<sup>104</sup> *See generally id.* at 510-14 (finding the statute insufficiently narrowly tailored to survive strict scrutiny).

<sup>105</sup> 50 U.S.C. § 784(a)(1)(D) (1988) (repealed 1993) (making it unlawful for a member of a Communist organization “to engage in any employment in any defense facility”).

<sup>106</sup> *United States v. Robel*, 389 U.S. 258, 265 (1967).

<sup>107</sup> *Id.* at 265-66.

<sup>108</sup> *Id.* at 265; *see also id.* at 262 (“It is precisely because the statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.”).

<sup>109</sup> *Nat’l Ass’n for the Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (noting that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”). *See generally supra* notes 96-104 and accompanying text.

<sup>110</sup> *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 39-40 (2010) (upholding a statute criminalizing participation in a foreign terrorist organization because the law targeted active members with precision).

<sup>111</sup> *See CAL. PENAL CODE* § 186.22(a)-(e) (West 2015).

<sup>112</sup> *See, e.g., People v. Castenada*, 3 P.3d 278, 284-85 (Cal. 2000) (explaining that the STEP Act “imposes criminal liability not for lawful association, but only when a defendant ‘actively participates’ in a criminal street gang”).

<sup>113</sup> *Id.* at 285.

<sup>114</sup> *See id.* at 280 (“Seven times between August 1994 and October 16, 1995, the date of the crimes here, Santa Ana police officers saw defendant in the presence of known Goldenwest gang members; on three of these occasions they gave him written notice that Goldenwest was a criminal street gang. At those times, defendant bragged to the officers

convicted of gang participation, a defendant must actively participate both with knowledge *and* with the aim of furthering the gang's criminal conduct,<sup>115</sup> the California court lowered the threshold for active participation to only encompass "involvement with a criminal street gang that is more than nominal or passive."<sup>116</sup> The challenge then for the California courts was to further define not only the requisite active participation, but the other two key terms of "knowingly" and "willfully." Such inquiries lead directly to questions of vagueness and overbreadth.

Is California's STEP Act so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application?"<sup>117</sup> Given that statutory language must clearly define each element of criminal behavior and foreclose any discretionary interpretation by prosecutors or judges, it follows that vague statutes can have a profound effect upon freedom of association, as people may choose not to exercise this First Amendment protection, rather than risk violating a statute they cannot understand or interpret.

The U.S. Supreme Court, in *City of Chicago v. Morales*,<sup>118</sup> provided some clarity with which to gauge California's STEP Act. The Court examined a municipal ordinance in Chicago that levied fines and possible prison sentences on individuals found loitering—provided police officers believed the individual to be a gang member.<sup>119</sup> Noting that "the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member,"<sup>120</sup> the Court ruled the entire statute to be unconstitutionally vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather

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that he 'kicked back' with Goldenwest members and 'backed them up,' but he denied having been initiated into the gang" (alteration in original)).

<sup>115</sup> *Id.* at 282-83.

<sup>116</sup> *Id.* at 281. A California appellate court had previously interpreted the active participation requirement as requiring a showing of that the defendant "devote[d] all, or a substantial part of his time and efforts to the criminal street gang." *People v. Green*, 278 Cal. Rptr. 140, 146 (Cal. Ct. App. 1991) *abrogated by Castenada*, 3 P.3d 278.

<sup>117</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>118</sup> *City of Chi. v. Morales*, 527 U.S. 41 (1999).

<sup>119</sup> *Id.* at 47. At that time, the Chicago Municipal Code stated:

(a) 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.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this section:

(1) 'Loiter' means to remain in any one place with no apparent purpose

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal activity.

*Id.* at 46 n.2 (quoting CHI., ILL., MUN. CODE § 8-4-015 (1999) (internal quotation marks omitted).

<sup>120</sup> *Morales*, 527 U.S. at 57.

in the sense that no standard of conduct is specified at all.”<sup>121</sup> By failing to offer even minimal guidelines for appropriate enforcement,<sup>122</sup> the statute did not provide those crucial standards “sufficient to guard against the arbitrary deprivation of liberty interests.”<sup>123</sup>

Conversely, California’s STEP Act, according to California’s highest court, does not suffer from a similar lack of specificity. The California court concluded that by using the “plainly worded requirements” of criminal knowledge, willful promotion, and active participation,<sup>124</sup> the statute made it “reasonably clear what conduct is prohibited.”<sup>125</sup> By contrast, Chicago’s ordinance left the door open to broad interpretation as to the precise conduct that was deemed criminal.

In answer to vagueness concerns, as well as freedom of association concerns, the most common approach in anti-gang legislation has been for legislatures to require active participation in the gang as well as knowledge of the criminal activity by the gang.<sup>126</sup> Mere association with gang members without knowledge of the gang’s criminal activity is insufficient as vague.<sup>127</sup>

### B. Overbreadth Problems: Defining Gang Membership

The concept of overbreadth is not unlike that of vagueness: “[a] statute is considered to be overbroad if in addition to the undesirable behavior, it includes constitutionally protected activities, especially those related to free expression or free association.”<sup>128</sup>

Beyond those issues dealing with “gang participation” is the equally nettlesome issue of who is a gang member. It is of no help that California’s STEP Act does not define the term “gang member.”<sup>129</sup> Despite the conclusion of the California appellate court, in *People v. Green*, that the word “member” is a term of “ordinary meaning, and require[s] no further definition,”<sup>130</sup> the United States Supreme Court ruled that the term “known to be a member” was unconstitutionally

<sup>121</sup> *Id.* at 60 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)) (internal quotation marks omitted).

<sup>122</sup> *See Smiley v. Kansas*, 196 U.S. 447, 455 (1905) (“The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.”).

<sup>123</sup> *Morales*, 527 U.S. at 52 (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

<sup>124</sup> *People v. Castenada*, 3 P.3d 278, 285 (Cal. 2000).

<sup>125</sup> *Id.*

<sup>126</sup> *See* CAL. PENAL CODE § 186.22(a) (West 2015); GA. CODE ANN. § 16-15-4 (West 2015); IND. CODE ANN. § 35-45-9-3 (West 2015); IOWA CODE ANN. § 723A.2 (West 2015); MO. ANN. STAT. § 578.423 (West 2015); NEV. REV. STAT. ANN. § 193.168 (West 2014).

<sup>127</sup> In the author’s experience, courts, legislators, and scholars occasionally confuse the terms “vague” and “overbroad.” For a concise formulation of the overbreadth doctrine, see *People v. Rokicki*, 718 N.E.2d 333, 338 (Ill. App. Ct. 1999) (defining a statute as overbroad if it “(1) criminalizes a substantial amount of protected behavior, relative to the law’s plainly legitimate sweep, and (2) is not susceptible to a limiting construction that avoids constitutional problems.”). *See generally* *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (rejecting overbreadth challenge and delineating substantial overbreadth approach). For an example of a Supreme Court opinion invalidating a statute for vagueness, see *Morales*, 527 U.S. at 50-51 (holding that the city ordinance was unconstitutionally vague because it allowed enforcement against loiters engaged in entirely “innocent” activities).

<sup>128</sup> Bjerregaard, *supra* note 11, at 35.

<sup>129</sup> *See* CAL. PENAL CODE § 186.22 (West 2015).

<sup>130</sup> *People v. Green*, 278 Cal. Rptr. 140, 145 (Cal. Ct. App. 1991) *abrogated by* *People v. Castenada*, 3 P.3d 278 (Cal. 2000).



vague nearly half a century earlier in *Lanzetta v. New Jersey*.<sup>131</sup>

Lanzetta and two others were brought before the Court, accused of violating a New Jersey statute that read, in pertinent part: “Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . . is declared to be a gangster.”<sup>132</sup> Faced with five to ten years of hard labor following their conviction as “gangsters,” the defendants appealed, arguing that the language of the statute was unconstitutionally vague.<sup>133</sup> Noting that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,”<sup>134</sup> the *Lanzetta* Court found that the term “gang” and the phrase “known to be a member” were “so vague, indefinite and uncertain” as to constitute a clear violation of the Fourteenth Amendment.<sup>135</sup> In its decision, the Court cited a well-known rule from *Connally v. General Construction Co.*, requiring that the average person must be made aware of potential criminal liability.<sup>136</sup> A solution which would eliminate the constitutional challenges related to vagueness and overbreadth is for legislators to simply omit associative words like “member” and “membership” altogether from anti-gang legislation. Although “member” and “membership” have at times been deemed “terms of ordinary meaning,”<sup>137</sup> their definitions only relate to the word’s textual use, and leave the application of the word ambiguous. Specifically, in regards to the word “member,” who decides whether someone is a “member”? Using our earlier example, what if Ezequiel does not consider himself to be a member of the Salinas gang, but the leader of the Salinas gang does?<sup>138</sup> Conversely, what if Ezequiel believes himself to be a member of the gang, but the leader has not yet accepted him into the gang? At what point would Ezequiel be considered a member of the Salinas gang? And at whose discretion?<sup>139</sup> As discussed earlier, California’s STEP Act allows punishment for “[a]ny 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,

<sup>131</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939).

<sup>132</sup> *Id.* at 452.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 453.

<sup>135</sup> *Id.* at 458.

<sup>136</sup> *Id.* at 453 (“[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” (alteration in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))).

<sup>137</sup> *People v. Green*, 278 Cal. Rptr. 140, 145 (Cal. Ct. App. 1991) *abrogated by* *People v. Castenada*, 3 P.3d 278 (Cal. 2000).

<sup>138</sup> *See supra* Introduction.

<sup>139</sup> *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 621-22 (Cal. 1997) (“Law enforcement officials admit that there are many different levels of [gang] membership. . . . Thus, to simply identify a person as a ‘gang member’ conveys little about that person’s true level of involvement or activity.” (first alteration in original) (quoting Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 750 (1990)) (internal quotation marks omitted)).

further, or assists in any felonious criminal conduct by members of that gang.”<sup>140</sup> Thus, to punish a person for conducting criminal gang activity, California must determine and prove who the other members of the gang are, and that they either currently engage “or have engaged in a pattern of criminal gang activity.”<sup>141</sup> Simply omitting the membership requirement from the Act would eliminate any misunderstanding or confusion that arises from the complications associated with determining the membership status in a criminal street gang. California’s STEP Act, as it currently reads, permits an innocent person to be accused and convicted as a gang member, while a guilty “gangbanger” may roam free because of a prosecution’s potential failure to prove the gangbanger’s membership status. To avoid this inconsistency, the statute could be worded as follows: *Any person who actively and knowingly participates in any criminal gang activity (as defined under California Penal Code § 186.22(e)), and who willfully promotes, furthers, or assists another in committing any felonious criminal gang activity shall be punished . . . .* This simply-worded requirement would allow prosecutors to focus on prosecuting actual criminal gang activity without expending valuable time and resources determining who is or is not considered a “member” of a gang.

Unfortunately, rather than eliminating the problem by striking the membership requirement, California’s counties have spent a considerable amount of judicial time and resources attempting to address the membership question. The problem is that nearly all counties have addressed it differently. For example, a person may be arrested as a gang member in Stanislaus County for meeting two or more out of eight possible criteria—including past arrests on suspicion of offenses consistent with usual gang activity and identification by an informant as a gang member.<sup>142</sup>

In San Diego, however, there are nine total criteria to qualify as a gang member; a person must meet at least three upon a single contact with police, or one or more across successive contacts.<sup>143</sup> California defense attorney Martin Baker points out that “a person who has . . . been

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<sup>140</sup> CAL. PENAL CODE § 186.22(a) (West 2015).

<sup>141</sup> *Id.*

<sup>142</sup> All eight criteria are as follows:

1. Admit to being a gang member.
2. Have been arrested on suspicion of offenses consistent with usual gang activity.
3. Have been identified as a gang member by an informant.
4. Have been seen affiliating with documented gang members.
5. Have been seen displaying gang symbols [or] hand signs.
6. Have been seen wearing gang dress or having gang paraphernalia.
7. Have gang tattoos.
8. [Have been] seen frequenting gang areas.

Baker, *supra* note 47, at 110.

<sup>143</sup> San Diego’s criteria are as follows:

1. Subject has admitted to being a gang member.
2. Subject has been arrested alone or with known gang members for offenses consistent with usual gang activity.

contacted by police [three times] while visiting [a family member or friend] in a ‘gang area’ [could be arrested] as a gang member in San Diego, but not in Stanislaus County.”<sup>144</sup> In order to know with certainty, a person must research the gang criteria in any given county—a warning that is even posted on a Los Angeles Police Department website detailing gang member criteria in Los Angeles.<sup>145</sup> As it stands, therefore, an individual must guess—at peril to his liberty and property—as to whether he qualifies as a gang member in his jurisdiction.

One common method states use “to mitigate challenges of overbreadth is to explicitly exclude constitutionally protected activity from the scope of the statute.”<sup>146</sup> For example, anti-gang legislation in Arkansas, California, Florida, Georgia, Illinois, and Louisiana recognize “‘the right of every citizen to harbor and constitutionally 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,’ and that ‘it is not the intent of this subchapter to interfere with the constitutional exercise of the protected rights and freedoms of expression and association.’”<sup>147</sup> The rub with the above statement is the unnecessary use of the word “lawfully.” Does not the First Amendment protect the right of every citizen to constitutionally express his or her beliefs on any subject, regardless of the lawfulness of the subject?<sup>148</sup> And what about the right to associate?<sup>149</sup> And the right to petition for redress of grievances?<sup>150</sup> By inserting the words “lawful” and “lawfully,” the legislation enables the prosecutor to potentially restrict and define which types of constitutionally protected rights are “lawful.” To correct the legislation’s attempt to limit its citizens’ constitutional rights, the words “lawful” and “lawfully” should be removed from their current locations in the statute. In order to recapture the legislators’ likely intent, the statute could read, in pertinent part, “the

3. Subject has been identified as a gang member by a reliable informant [or] source.
4. Subject has been identified as a gang member by an untested informant.
5. Subject has been seen affiliating with documented gang members.
6. Subject has been seen displaying symbols [or] hand signs.
7. Subject has been seen frequenting gang areas.
8. Subject has been seen wearing gang dress.
9. Subject is known to have gang tattoos.

*Id.* at 111.

<sup>144</sup> *Id.*

<sup>145</sup> *How Are Gangs Identified*, L.A. POLICE DEP’T, [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/23468](http://www.lapdonline.org/get_informed/content_basic_view/23468) (noting that individuals looking for information about the identification of gang members outside the city of Los Angeles must “check with [their] local law enforcement agency for current information”) (last visited June 18, 2015).

<sup>146</sup> Bjerregaard, *supra* note 11, at 38.

<sup>147</sup> *Id.* at 38-39; (quoting ARK. CODE ANN. § 5-74-102(a) (2014)); *see also* CAL. PENAL CODE § 186.21 (West 2015); FLA. STAT. ANN. § 874.02(1) (West 2015); GA. CODE ANN. § 16-15-2(a) (West 2015); 740 ILL. COMP. STAT. ANN. 147/5(a) (West 2015); LA. REV. STAT. ANN. § 15:1402(A) (2014).

<sup>148</sup> U.S. CONST. amend. I.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

right of every *law-abiding* citizen”—thus still prohibiting any unlawful conduct (as defined by state statute), but also respecting the constitutional rights granted to each citizen by our country’s founders.

As one commentator sagely stated, “in many instances, legislatures attempt to address overbreadth *a priori* by explicitly indicating a compelling state interest and maintaining that the statutes do not infringe upon constitutionally protected rights.”<sup>151</sup> Often, these mitigating efforts attempt to protect legislation against both vagueness and overbreadth challenges.<sup>152</sup>

“As with vague laws, statutes that are overbroad may deter citizens from practicing their First Amendment rights and may grant law enforcement officials too much discretion, leading to arbitrary or discriminatory enforcement.”<sup>153</sup> As a result, anti-gang legislation must meet a heightened standard by including statutorily limiting constructions in an effort to protect constitutional freedoms.<sup>154</sup> Requiring active participation along with knowledge of the group’s criminal activities and imposing a specific intent requirement narrows the potential reach of the statute.

Furthermore, the right to associate to advance one’s beliefs and viewpoints is undeniably considered an aspect of “liberty” guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>155</sup> Not only does the First Amendment explicitly assure the right, but the “First Amendment . . . freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State.”<sup>156</sup>

### III. ETHICAL GUIDELINES FOR PROSECUTORS

*“The prudence of the careful prosecutor should not . . . be discouraged.”*<sup>157</sup>

Justice Sutherland, writing for the United State Supreme Court, once described the prosecutor as a “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”<sup>158</sup> Justice Douglas warned that “[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”<sup>159</sup>

In that dual role, a prosecutor must properly evaluate the weight of the evidence against a

<sup>151</sup> Bjerregaard, *supra* note 11, at 39.

<sup>152</sup> *Id.* (noting that “methods utilized by legislatures to avoid vagueness challenges also help to mitigate overbreadth challenges”).

<sup>153</sup> *Id.* at 35-36.

<sup>154</sup> See Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

<sup>155</sup> Molina, *supra* note 87, at 462.

<sup>156</sup> Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 107-08 (1981).

<sup>157</sup> Kyles v. Whitley, 514 U.S. 419, 440 (1995).

<sup>158</sup> Berger v. United States, 295 U.S. 78, 88 (1935).

<sup>159</sup> Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

particular defendant,<sup>160</sup> file only appropriate charges,<sup>161</sup> not engage in coercive plea negotiations,<sup>162</sup> comply with all discovery obligations,<sup>163</sup> and, should the matter go to trial, conduct herself not just as the defendant's adversary, but also as the "guardian of the defendant's constitutional rights."<sup>164</sup> She must not allow pressure from victims, supervisors, or the community to unfairly influence her prosecutorial decisions,<sup>165</sup> because, while a prosecutor has the right—and even the obligation—to "strike hard blows, [she] is not at liberty to strike foul ones. It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>166</sup>

The problem is that there are relatively few safeguards to protect against prosecutorial misconduct. Judicial opinions refer only to the abstract idea of a prosecutor's role, without the specificity needed to constitute guidance.<sup>167</sup> The American Bar Association's Model Rules of Professional Conduct ("Model Rules") are similarly vague, and place the dubious responsibility of reporting attorney misconduct on all lawyers: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."<sup>168</sup>

Noting the lack of guidance, the Model Rules adopted several general guidelines

<sup>160</sup> See Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2976 (2010).

<sup>161</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) ("A prosecutor is duty bound to exercise his best judgment . . . in deciding which suits to bring . . ."); see also *Prosecutorial Discretion*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 209, 220 (2007) ("[T]he Due Process Clause prohibits a prosecutor from bringing a more serious charge against a defendant who has pursued a statutory right of appeal from a conviction on a lesser charge for the same offense.") (citing *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974)); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 240 (2006) ("[P]rosecutors should only charge a defendant with those offenses that adequately describe the defendant's conduct, based on conduct that is not socially innocuous.").

<sup>162</sup> See Langer, *supra* note 161, at 237 (stating that a prosecutor should not bring or threaten charges "where admissible evidence does not exist to support the charges" or where she "has no good faith intention of pursuing" them (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.1(h) (3d ed. 1999) (internal quotation marks omitted))).

<sup>163</sup> See FED R. CRIM. P. 16(a).

<sup>164</sup> *People v. Sherrick*, 24 Cal. Rptr. 2d 25, 27 (Cal Ct. App. 1993) (quoting *People v. Trevino*, 704 P.2d 719, 725 (Cal. 1985)); see *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) ("The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.").

<sup>165</sup> See *Kojayan*, 8 F.3d at 1323 ("While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first.").

<sup>166</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>167</sup> See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63 (2011) (listing rules governing prosecutors behavior without explanation); see also Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 431 n.156 (2011) (characterizing the ABA Standards for Criminal Justice as a response to the dearth of guidance in state ethical codes).

<sup>168</sup> MODEL RULES OF PROF'L CONDUCT R. 8.3 (2008). The comment accompanying Rule 8.3 further clarifies that "[t]he term 'substantial' refers to the seriousness of the possible offense." *Id.* at cmt. 3.

regarding “the postures lawyers should take in a variety of situations,”<sup>169</sup> but the only distinction drawn between attorneys in general and prosecutors in particular was that “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”<sup>170</sup> The American Bar Association (“ABA”) Standards for Criminal Justice also developed a model set of standards for prosecutors, but those guidelines suffered from the same lack of specificity.<sup>171</sup> Neither offer concrete rules of conduct, nor do they outline specific consequences for errant behavior.

When prosecutors do not adhere to the rules, the criminal “justice” system ceases to mete out justice.<sup>172</sup> In 1999, two reporters at the Chicago Tribune explored the actions of prosecutors in the wake of *Brady v. Maryland*,<sup>173</sup> the seminal case requiring prosecutors to disclose exculpatory evidence.<sup>174</sup> The reporters opened a five-part series with a scathing critique: “With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases.”<sup>175</sup> Sadly, the article’s bitter truth is exemplified by the actions of former Judge Ken Anderson who, while still a Texas prosecutor, withheld exonerating evidence which led to the wrongful conviction of an innocent man.<sup>176</sup> In an all-too-rare occurrence,<sup>177</sup> Anderson was sentenced to ten days in jail.<sup>178</sup>

By its nature, the criminal justice system places tremendous discretion in the hands of

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<sup>169</sup> Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224 n.2 (1993).

<sup>170</sup> KATHLEEN RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, 44 (2010) (quoting ABA MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) (internal quotation marks omitted)).

<sup>171</sup> The only guidelines offered by the ABA Standards for Criminal Justice are invectives “to guard the rights of the accused and those of society.” See *id.* at 90 n.97; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 cmt. (3d. ed. 1993) (“[I]t is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.”).

<sup>172</sup> See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 10, 1999), [http://articles.chicagotribune.com/1999-01-10/news/9901100269\\_1\\_retrials-and-appeals-conviction-prosecutors](http://articles.chicagotribune.com/1999-01-10/news/9901100269_1_retrials-and-appeals-conviction-prosecutors) (“Since a 1963 U.S. Supreme Court ruling designed to curb misconduct by prosecutors, at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false. Of all the ways that prosecutors can cheat, those two are considered the worst by the courts. And that number represents only a fraction of how often such cheating occurs.”).

<sup>173</sup> 373 U.S. 83 (1963).

<sup>174</sup> *Id.* at 87; see Armstrong, *supra* note 172.

<sup>175</sup> Armstrong, *supra* note 172.

<sup>176</sup> Associated Press, *Ex-Prosecutor in Texas is Punished for a Wrongful Conviction*, N.Y. TIMES (Nov. 9, 2013), <http://www.nytimes.com/2013/11/10/us/ex-prosecutor-is-punished-for-a-wrongful-conviction.html>.

<sup>177</sup> See, e.g., Armstrong, *supra* note 172 (noting that not a single prosecutor was convicted of a crime despite the finding of 381 wrongful homicide convictions between the years of 1963 and 1999 and a declaration by the U.S. Supreme Court that “such [*Brady*] misconduct by prosecutors [is] so reprehensible that it warrants criminal charges and disbarment”).

<sup>178</sup> Chuck Lindell, *Ken Anderson to Serve 10 Days in Jail*, STATESMAN (Nov. 8, 2013, 5:02 PM), <http://www.statesman.com/news/news/ken-anderson-to-serve-10-days-in-jail/nbmsH/>.

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prosecutors. Prosecutors are the only actors entitled to all of the evidence generated by law enforcement and, absent a court order, they choose when and what information to release. Prosecutors hold the exclusive power, acting under the umbrella of the executive branch, to “determine whom to charge with public offenses and what charges to bring.”<sup>179</sup> And, because of the separation of powers, a prosecutor’s discretion in charging is generally “not subject to supervision by the judicial branch.”<sup>180</sup> When used appropriately, this discretion allows for those prosecutors most familiar with the cases to make the initial charging decision in light of “the complex considerations necessary for the effective and efficient administration of law enforcement.”<sup>181</sup> Problems arise, however, when prosecutors abuse this discretion.

#### IV. THE POTENTIAL ABUSE OF ANTI-GANG LEGISLATION

Anti-gang legislation, with its array of potential charges and enhancements, is an area ripe for the abuse of prosecutorial discretion. Such abuse is most often generated by filing charges and enhancements unwarranted or disproportionate to the conduct of the accused.<sup>182</sup> Overfiling can result in a number of abuses. First, it can (and often does) lead to coercive plea-bargaining.<sup>183</sup> Second, inclusion of any gang-related charges allows for the introduction of otherwise impermissible and highly prejudicial testimony.<sup>184</sup> Finally, should an accused opt for trial and suffer a conviction, the sentence could well reflect the enhanced charges. Each of these concerns is addressed below.

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<sup>179</sup> *Manduley v. Superior Court*, 41 P.3d 3, 13 (Cal. 2002) (quoting *People v. Birks*, 960 P.2d 1073, 1089 (1998)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (quoting *People v. Keenan* 758 P.2d 1081, 1098 (1988) (quoting *People v. Haskett*, 640 P.2d 776, 788 (1982)) (internal quotation marks omitted).

<sup>182</sup> See H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 62 (2013) (“Charging a greater offense than the defendant’s conduct warrants, or adding an enhancement of little merit, gives an unfair advantage to the prosecutor.”).

<sup>183</sup> *Id.* at 63 (“Overcharging to gain a competitive advantage in the give-and-take of plea bargaining is an insidious abuse of the prosecutor’s power.”); see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.” (footnote omitted)).

<sup>184</sup> See Mitchell Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 4 (2014) (“It is fair to say that when the word ‘gang’ is used in Los Angeles County, one does not have visions of the characters from the ‘Our Little Gang’ series. The word gang . . . connotes opprobrious implications.” (internal quotation marks omitted) (alteration in original) (quoting *People v. Perez*, 170 Cal. Rptr. 619, 623 (Cal. Ct. App. 1981))).

### A. Overfiling and Coercive Plea-Bargaining

Plea-bargaining is “an essential component of the administration of justice.”<sup>185</sup> Plea- and sentence-bargaining—conducted by prosecutors adhering to their ethical obligations—is critical to the functioning of our criminal justice system. Indeed, without wholesale disposition of cases, the system would fall in on itself.<sup>186</sup> Plea- and sentence-bargaining dominate modern criminal prosecution in the United States.<sup>187</sup> However, as set forth at this Article’s outset, when the threat of a lengthy sentence pressures an accused individual to plead to trumped-up offenses or to agree to a sentence still disproportionate to his actual criminal conduct, the practice loses all value.

Overfiling sets the stage for coercive plea-bargaining by allowing prosecutors to begin the bargaining process with their foot on the neck of the accused.<sup>188</sup> Reverting back to the Ezequiel Salinas hypothetical, Ezequiel was charged with an underlying felony of assault with a deadly weapon.<sup>189</sup> And since the STEP Act allows a gang enhancement to the assault charge, Ezequiel faces at minimum a two-year enhancement on any felony conviction. For serious felonies<sup>190</sup> and violent felonies, someone like Ezequiel faces a sentencing enhancement of five years and ten years, respectively.<sup>191</sup>

Ezequiel and his brother were both charged with assault with a deadly weapon with an attached gang enhancement. According to the statute, if Ezequiel proceeds to trial he could face four years or a \$10,000 fine on the underlying felony.<sup>192</sup> If convicted on the underlying felony, Ezequiel’s sentence could double—up to eight years—because of the gang enhancement.<sup>193</sup> Instead of receiving an offer of less than a year in jail or even summary probation for simply being involved in a fight, Ezequiel will likely receive an offer closer to three years in prison.<sup>194</sup>

In this hypothetical scenario, the gang enhancement significantly changes his bargaining position and potential exposure. Instead of a maximum four-year sentence—which in all

<sup>185</sup> Santobello v. New York, 404 U.S. 257, 260 (1971); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 75 (2011).

<sup>186</sup> See Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (“[Plea-bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.”).

<sup>187</sup> See, e.g., *Missouri*, 132 S. Ct. at 1407 (“In today’s criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”).

<sup>188</sup> See, e.g., Caldwell, *supra* note 185, at 65 n.13 (“[V]ast prosecutorial discretion at the charging stage’ can impinge on a defendant’s free will to choose whether or not to plead guilty to the proposed charges.” (quoting Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 866 (1995))).

<sup>189</sup> See *supra* Introduction.

<sup>190</sup> For a list of serious felonies, see CAL. PENAL CODE § 1192.7(c) (West 2015).

<sup>191</sup> See *id.* § 186.22(b)(1)(B); *id.* § 186.22(b)(1)(C).

<sup>192</sup> *Id.* § 245(a)(1).

<sup>193</sup> *Id.* § 186.22(b)(1)(A).

<sup>194</sup> See Yoshino, *supra* note 3, at 118 (stating that California Penal Code § 186.22(a) “creates a substantive offense and provides for the punishment of up to three years for anyone ‘actively participat[ing]’ in a criminal street gang as either a felony or misdemeanor” (alteration in the original)).



likelihood would not be meted out at sentencing—Ezequiel, because of the enhanced charges, must bargain from a far inferior position. Even if Ezequiel did not participate in the fight, the potential sentence of twelve years could well lead a reasonable person to take a plea deal of three years rather than run the risk of losing at trial and being sentenced to an additional ten years. A defense attorney might even suggest that Ezequiel take the plea deal rather than go to trial, noting that the prosecutor will most likely attempt to introduce evidence to prove up the gang enhancement.<sup>195</sup> The harmful effect of the gang evidence, even if only tenuously supported, could well prejudice a jury into believing that Ezequiel was just another gangbanger like his brother.<sup>196</sup> It is not unreasonable to suggest that the introduction of such gang evidence could be enough to result in a guilty verdict when its absence would otherwise lead to an acquittal.

At trial, a prosecutor might have a difficult time proving that a man without any gang tattoos and no criminal record fits the build of a hardened criminal committing crimes to benefit the Salinas gang. But, as discussed above, the gang enhancement can significantly impact the bargaining position of an accused as early as filing. Although the prosecution must prove the gang enhancement at a preliminary hearing, the applicable standard is probable cause—not beyond a reasonable doubt.<sup>197</sup> Because of the low standard at a preliminary hearing, the gang enhancement could well survive the preliminary hearing<sup>198</sup> or the grand jury hearing.<sup>199</sup> A prosecutor working the case may well realize that proving the gang enhancement beyond a reasonable doubt would be difficult, but would recognize the benefit of attaching the enhancement to gain leverage in the inevitable plea and sentence discussions.<sup>200</sup>

The problem is that even if the prosecutor is unable to prove to the jury that Ezequiel

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<sup>195</sup> See *id.* at 140 (“Because gang enhancements can add such a significant amount of time to one’s sentence, defendants will often accept the certainty of the prosecutor’s plea bargain rather than gamble with not only conviction and sentencing for the underlying crime, but also the possibility of adding an additional five years, ten years, or life sentence to his term.”); *id.* at 138 (“Gang enhancements have caused a drastic change in the advice that an attorney gives a client because they impose significantly higher sentences and the mere allegation is so highly prejudicial.”).

<sup>196</sup> See *infra* Part IV.B (providing a detailed discussion of the prejudicial impact of gang testimony).

<sup>197</sup> To establish probable cause, the prosecution must make some showing regarding the existence of each element of the charged offense. *Williams v. Superior Court*, 458 P.2d 987, 990 (Cal. 1969).

<sup>198</sup> See Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 676-77 (2011) (“The purpose of a preliminary hearing is for the trial court to determine whether probable cause exists to bind a defendant over for trial. . . . The court may base its finding of probable cause entirely on inadmissible evidence, including hearsay or unlawfully obtained evidence.” (citing FED. R. CRIM. P. 5.1(e) and FED. R. EVID. 1101(d)(3))).

<sup>199</sup> See John P. Martin, *Department: Practice Tips: Representing Clients Before Federal Grand Juries*, 20 L.A. LAW. 16, 17 (1997) (stating that after hearing the evidence against the accused, the grand jury determines the probability that a crime has been committed, and upon the grand jury’s “belief that there is sufficient information to hold an accused to answer at trial” it will issue an indictment); see also, e.g., STUART TAYLOR JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 177* (2007) (“[G]rand juries are rubber stamps. The notion that they protect defendants—any defendants—against prosecutorial abuse is a fraud.”).

<sup>200</sup> Yoshino, *supra* note 3, at 132-33, 137-38 (discussing various incentives a prosecutor might have for filing a gang enhancement, including increasing the pressure on the defendant to plead, judges’ concerns for judicial efficiency, using the defendant’s gang membership as evidence of his motive to commit the crime, political pressure, permitting the admission of gang evidence against a defendant, and getting federal money to combat gang violence that is granted to prosecutors who have a demonstrated gang problem).

committed assault with a deadly weapon “for the benefit of”<sup>201</sup> his brother’s criminal street gang “with the specific intent to promote, further, or assist in any criminal conduct by gang members,”<sup>202</sup> the jury is arguably more likely to convict Ezequiel of the underlying felony regardless of his actual involvement because of his association with his brother. Additionally, should the case go to trial, Ezequiel may even be tried at the same time as his brother, further associating him with a gang member.<sup>203</sup> Knowing this, Ezequiel’s defense counsel may suggest that the best course of action is to take a plea deal rather than proceed to trial.<sup>204</sup> A defendant in Ezequiel’s position will plead if “the value of the plea, less the costs associated with transacting the plea bargain and serving the offered sentence, is worth more to the defendant than what he or she might gain at trial.”<sup>205</sup>

Using anti-gang legislation to overfile charges and enhancements to benefit prosecutors during plea and sentence negotiations constitutes raw abuse of prosecutorial powers, and can (and frequently does) result in pleas and sentencing grossly disproportionate to the conduct of the accused.<sup>206</sup>

### B. Prejudicial Impact of Gang Testimony at Trial

The potentially prejudicial effect of gang testimony at trial is seen in Ezequiel’s journey through the criminal justice system. As mentioned above, a prosecutor can attach a gang allegation or enhancement, proceed past the preliminary hearing stage because of the low probable cause standard, and introduce evidence of a defendant’s affiliation—however loose—with a particular gang. Even if the jury is not convinced of the involvement of gang activity, the introduction of gang evidence will almost certainly affect the jury’s view of the underlying felony count, should the case proceed to trial.

In decades past, the word “gang” did not carry the sinister impact it now conveys. In *People v. Zammora*, a case from the 1940s, a California appellate court concluded that the use of

<sup>201</sup> CAL. PENAL CODE § 186.22(b)(1) (West 2015).

<sup>202</sup> *Id.*

<sup>203</sup> See FED. R. CRIM. P. 8(b) (“The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction . . . .”); see also *United States v. McVeigh*, 169 F.R.D. 362, 371 (D. Colo. 1996) (ordering separate trials due to the “unacceptable risk” of violating the Confrontation Clause should Timothy McVeigh and Terry Nichols be tried jointly).

<sup>204</sup> See Yoshino, *supra* note 3, at 139 (“The mere possibility of having a gang enhancement added at the preliminary hearing may cause [a public defender] to advise his client to take the prosecution’s offer because: (1) the addition of the gang enhancement increases the client’s sentencing exposure significantly; (2) the prejudicial nature of the gang enhancement will often lead to the client’s conviction based on his alleged gang membership without proper consideration of the facts; and (3) the client is left only with the defense that he was a minor gang member, or only an associate, which is hardly a reliable defense on which to stake one’s liberty.”).

<sup>205</sup> Caldwell, *supra* note 185, at 70.

<sup>206</sup> It is interesting to note that § 1192.7 of the California Penal Code prohibits plea-bargaining for any serious felony “unless[, among other reasons,] there is insufficient evidence to prove the people’s case.” CAL. PENAL CODE § 1192.7(a)(2) (West 2015). However, under the notion that we are all innocent until proven guilty (beyond a reasonable doubt), plea-bargaining a serious felony charge when the prosecutor does not have enough evidence to prove guilt is essentially plea-bargaining an innocent individual, as he has not yet been proven guilty, and thus is presumed innocent.

the word “gang” carried no more weight than its literal meaning as a group of “the usual and ordinary crowd of young people living in any particular neighborhood, who associate themselves together, and from time immemorial has been referred to as a ‘gang.’”<sup>207</sup> The world has clearly changed since the 1940s.

Just shy of four decades after hearing *People v. Zammora*, the California Supreme Court reached a different conclusion about the meaning and impact of introducing gang evidence in *People v. Cardenas*.<sup>208</sup> In *Cardenas*, the court held that the trial court had abused its discretion by permitting the prosecution to introduce evidence of common gang membership, because proof of such affiliation had “limited probative value, [and] its admission created a substantial danger of undue prejudice.”<sup>209</sup> Two years later, in *Williams v. Superior Court*, the California Supreme Court stated that “evidence of common gang membership . . . is arguably of limited probative value while [also] creating a significant danger of unnecessary prejudice.”<sup>210</sup> Additionally, the court stated that “[t]he implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders.”<sup>211</sup> Thus, although the court in *Cardenas* and *Williams* specifically addressed the admissibility of evidence of common gang membership, it takes no stretch of logic to conclude that the reason the court suppressed the evidence was the connotation of the word “gang,” and that even the mere use of the word could unduly prejudice a jury against the defendant.<sup>212</sup> As a California appellate court, in *People v. Perez*,<sup>213</sup> stated “[i]t is fair to say that when the word ‘gang’ is used in Los Angeles County, one does not have visions of the characters from the ‘Our Little Gang’ series. The word gang . . . connotes opprobrious implications.”<sup>214</sup> Supporting this conclusion, a 2014 study of 212 participants in a simulated trial found that “the introduction of testimony indicating any sort of association with a gang, even a

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<sup>207</sup> *People v. Zammora*, 152 P.2d 180, 205 (Cal. Ct. App. 1944). In *Zammora*, the Delgadillo family was hosting a birthday party at their home, and had twenty or thirty invited guests in attendance. *Id.* at 184. After the party had begun winding down, a group of uninvited guests, known only as the “boys from Downey,” joined in an altercation with several of the younger Delgadillo guests down by a small pond located on the Delgadillo property. *Id.* As a result of the fight, one victim was killed and two victims were severely injured. *Id.* at 185. The indictment charged twenty-two defendants, each with murder and assault with a deadly weapon. *Id.* at 184. The trial court found three of the defendants guilty of first-degree murder and nine of the defendants guilty of second-degree murder. *Id.* Upon review, the California appellate court remanded the case due to the lack of a fair trial received by the defendants. *Id.* at 216. One of the factors considered during review was the prejudicial impact of the repeated use of the word “gang.” *Id.* at 204-05. Although appellants contend that the frequented reference to their involvement in the “38th Street Gang” resulted in their prejudice, the appellate court did not agree because “the term was not used in such a manner as to convey any opprobrious or sinister implications.” *Id.* at 205. In coming to that resolve, the court reflected on the “ages of the members . . . coupled with the nature and character of their association.” *Id.*

<sup>208</sup> *People v. Cardenas*, 647 P.2d 569 (Cal. 1982).

<sup>209</sup> *Id.* at 572.

<sup>210</sup> *Williams v. Superior Court*, 683 P.2d 699, 705 (Cal. 1984).

<sup>211</sup> *Id.* at 706.

<sup>212</sup> See Rutkowski, *supra* note 6, at 148 (“Given the various statutory provisions, theories of prosecution, and psychological ‘gang’ factors, it is important to label correctly particular actors and acts as gang involved.”).

<sup>213</sup> *People v. Perez*, 170 Cal. Rptr. 619 (Cal. Ct. App. 1981).

<sup>214</sup> *Id.* at 623.

weak one, can have a significant prejudicial effect on jury verdicts.”<sup>215</sup>

In 2004, the Ninth Circuit Court of Appeals, in *Kennedy v. Lockyer*,<sup>216</sup> reversed a trial court and held that allowing “testimony regarding gang membership ‘creates a risk that the jury will [probably] equate gang membership with the charged crimes’”<sup>217</sup> and that “the use of gang membership evidence to imply ‘guilt by association’ is impermissible and prejudicial.”<sup>218</sup> As a result of the introduction of gang evidence’s prejudicial impact, the Ninth Circuit reversed the district court’s denial of the petition for writ of habeas corpus and remanded the matter.<sup>219</sup>

## V. STRIKING A BALANCE IN ANTI-GANG PROSECUTION

Legislatures across the country have given prosecutors powerful tools to combat the scourge of gang violence.<sup>220</sup> Such power wielded by overzealous prosecutors can wreak serious damage on a system striving to strike a balance between public safety and individual liberty.<sup>221</sup>

<sup>215</sup> Eisen et al., *supra* note 184, at 8, 12.

<sup>216</sup> *Kennedy v. Lockyer*, 379 F.3d 1041 (9th Cir. 2004). In *Kennedy*, the defendant, Robert Kennedy, was tried twice for selling a substance in lieu of cocaine. *Id.* at 1042. During the first trial, the court granted defense counsel’s motion to “exclude all references to any gangs and any gang affiliation,” unless allowed by the court. *Id.* at 1044. In addition, the judge told the prosecutor that he would “have to be pretty convincing before [the judge would] let that [evidence] come in.” *Id.* (second alteration in original) (quoting transcript) (internal quotation marks omitted). The first trial judge’s reasoning behind prohibiting the gang references was that “the introduction of evidence tending to show gang affiliation on the part of Kennedy would be highly prejudicial.” *Id.* at 1055. After the first trial resulted in a hung jury, Kennedy twice requested a copy of the complete transcript from the state court, and was subsequently denied such a copy. *Id.* at 1042-43. During the second trial the prosecutor (who happened to be the same prosecutor as was present in the first trial) introduced gang-related evidence, and Kennedy’s newly acquired counsel, not being aware of the first trial judge’s motion to exclude gang-related evidence, failed to object. *Id.* at 1043. The jury found Kennedy guilty, and because he had “two prior serious or violent offenses, he was sentenced for the \$20 sale of a non-drug to a prison term of twenty-five years to life.” *Id.* Upon review, the Ninth Circuit Court of Appeals held that the case law “make[s] it clear that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error. Evidence of gang membership may not be introduced . . . to prove intent or culpability.” *Id.* at 1055.

<sup>217</sup> *Kennedy v. Lockyer*, 379 F.3d at 1056 (alteration in original) (quoting *United States v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000)).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1057-58. California’s state courts have largely followed the Ninth Circuit’s lead in this respect. As recently as 2010, in *People v. Memory*, a California appellate court reversed defendant Memory’s conviction for voluntary manslaughter following a trial that saw extensive testimony regarding the nature of the Jus Brothers Motorcycle Gang, of which Memory was a member. *People v. Memory*, 105 Cal. Rptr. 3d 353, 376-77 (Cal. Ct. App. 2010). Noting that “[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense,” *id.* at 372 (quoting *People v. Sanchez*, 69 Cal. Rptr. 2d 16, 26 (Cal. Ct. App. 1997) (internal quotation marks omitted)), the appellate court concluded that allowing “expert” testimony connecting Jus Brothers with Hell’s Angels allowed “unreasonable inferences to be made by the trier of fact that the [defendant] was guilty of the offense on the theory of ‘guilt by association.’” *Id.* at 373 (alteration in original) (quoting *In re Wing Y.*, 136 Cal. Rptr. 390, 395-96 (Cal. Ct. App. 1977) (internal quotation marks omitted)).

<sup>220</sup> See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992) (“The power and prestige of the American prosecutor have changed dramatically over the past twenty years. . . . [P]rosecutors wield vastly more power than ever before.”).

<sup>221</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor] is in a peculiar and very definite

With that balance in mind and without suggesting wholesale change, there are aspects of the criminal justice system that could be rethought to better achieve that sought-after balance. I offer three proposals. The first seeks independent review of prosecutorial misconduct. Second, there should be full and complete discovery from the time of initial filing continuing on an expedited basis throughout pre-trial and into trial. And third, in joining crimes arising from completely independent events where at least one of the alleged crimes involves gang involvement, the burden should shift from the defense to the prosecution to establish a lack of prejudicial impact due to the joinder.

*A. Establish a Statewide Prosecutorial Review Board*

“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.”<sup>222</sup>

In making recommendations to improve the ethical prosecution of gang-related cases, we must start with the simple admonition for prosecutors entrusted with these serious cases to follow the ethical guidelines to which they are sworn.<sup>223</sup> Doing so would most likely obviate the need for further recommendations. The unfortunate reality, however, is that in the often combative and competitive world of criminal prosecution, there is so often the tendency to lose sight of the goals of the system—namely, that justice be done.<sup>224</sup> And so, with a nod to reality, I propose a statewide prosecutorial review board to investigate and, when appropriate, sanction prosecutor misconduct.

Prosecutors who abuse anti-gang legislation to obtain disproportionate pleas and sentences or to gain tactical advantage should be directly sanctioned.<sup>225</sup> This is a bold proposition but realistic and necessary.<sup>226</sup> Currently, the occurrence of any form of direct sanction against an errant prosecutor is so remote as to be freakish and, even then, only when circumstances are egregious and the resulting hardship is unfair.<sup>227</sup> As discussed earlier, one such freakish event

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sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”)

<sup>222</sup> *Id.*

<sup>223</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008) (stating that prosecutors are “minister[s] of justice”); see also Zacharias, *supra* note 8 (claiming that, in criminal cases, the “codes” treat prosecutors as “ministers having an ethical duty to do justice”) (internal quotation marks omitted).

<sup>224</sup> See *Berger*, 295 U.S. at 88 (stating that a prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

<sup>225</sup> See Caldwell, *supra* note 182, at 89; see also Sara Gurwitsch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 316 (2010) (“The disciplining of lawyers who commit misconduct . . . provides an appropriate vehicle for punishing prosecutors who violate *Brady*.”).

<sup>226</sup> See generally Caldwell, *supra* note 182.

<sup>227</sup> See Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, CRIM. JUSTICE, Spring 2008, at 24, 37 (noting a study’s finding that in most cases of misconduct “prosecutors suffered no consequences and were not held accountable or even reprimanded for their behavior”); see also *In re Peasley*, 90 P.3d 764 (Ariz. 2004) (disbarring prosecutor for using false testimony from a jailhouse informant to obtain convictions and death sentences for all three defendants in a triple-murder trial); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL.

occurred in 2013, when Texas judge Ken Anderson was sent to jail because of his actions while a prosecutor.<sup>228</sup> In prosecuting defendant Michael Morton, Anderson intentionally withheld evidence; Morton was convicted, and subsequently served nearly twenty-five years in prison.<sup>229</sup> Texas dusted off an underutilized “court of inquiry,” a procedure typically used to hold elected officials accountable, and brought it to bear on Anderson.<sup>230</sup> Unfortunately, this rare instance of calling out a prosecutor was only due to the significant publicity the case had generated.<sup>231</sup> Nonetheless, Texas officials used the procedure to examine and sanction the former prosecutor’s conduct.<sup>232</sup>

With the exception of this aberrational circumstance in Texas, no state has a mechanism to effectively examine and sanction instances of prosecutorial misconduct.<sup>233</sup> One commentator recently noted that “[n]o institution or entity has yet established a system to examine the large percentage of wrongful convictions due to prosecutorial misconduct and to attempt to make recommendations to deter such misconduct.”<sup>234</sup>

Curiously, while there are judicial misconduct boards in virtually all states to examine allegations of judicial misconduct and mete out appropriate sanctions, no such mechanism exists in any state to examine prosecutorial misconduct and impose appropriate sanctions.<sup>235</sup>

Other than internal controls within each prosecuting office, prosecutors are virtually free to go about their business with impunity.<sup>236</sup> For the most part, the only time any instance of misconduct by a prosecutor comes to light is in appellate decisions. It is not unusual for appellate courts to cite to instances of misconduct but uphold the conviction because the prosecutor’s

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W. L. REV. 373, 373-74 (2009) (noting that, of six named prosecutors in California death penalty cases reversed for prosecutorial misconduct, “[f]ive have ‘no public record of discipline,’ and one is a sitting judge”).

<sup>228</sup> *Supra* notes 176 & 178.

<sup>229</sup> See Scott Ehlers, *State Criminal Justice Network Legislative Update: Lessons Learned from Legislative Victories in the Lone Star State*, CHAMPION, May 2014, at 47, 47 (2014) (“Exoneree [Michael Morton] . . . spent nearly a quarter-century in prison until DNA evidence proved that he was innocent.”).

<sup>230</sup> See TEX. CODE CRIM. PROC. ANN. art. 52.01 (West 2015).

<sup>231</sup> See Ehlers, *supra* note 229, at 48 (“The national Innocence Project requested the court of inquiry. NACDL [National Association of Criminal Defense Lawyers] Past Presidents Barry Scheck, Cynthia Orr, and Gerald Goldstein played a critically important role in the court of inquiry that resulted in criminal charges being filed against Anderson and his ultimate conviction for contempt of court.”) (footnotes omitted).

<sup>232</sup> See generally *In re Honorable Ken Anderson*, No. 12-0420-K26 (26th Dist. Ct., Williamson Cnty., Tex. Apr. 19, 2013), available at <http://www.innocenceproject.org/files/imported/andersonfindings.pdf/view>.

<sup>233</sup> See Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 919 (2012) (“When [prosecutorial] misconduct is uncovered, few jurisdictions provide adequate and consistent means of addressing it.”).

<sup>234</sup> Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 285 (2004).

<sup>235</sup> See Yaroshefsky, *supra* note 233, at 919 (“[P]rosecutors often escape censure for repeated disclosure violations, even in their own workplaces.”).

<sup>236</sup> See *Burns v. Reed*, 500 U.S. 478, 487-96 (1991) (holding that a prosecutor is absolutely immune from liability for false statements in a probable cause hearing); see also *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (holding that a prosecutor is absolutely immune from liability for using false testimony at trial).

misconduct was deemed “harmless error.”<sup>237</sup> And, even in such instances, the prosecutor’s misconduct results in no adverse consequences to the prosecutor.<sup>238</sup>

Given such a lack of actual sanction and the protection of “harmless error” doctrine, gang prosecutors are free to abuse anti-gang legislation. A meaningful step in preventing abuses of anti-gang legislation would be to directly sanction abusive prosecutors.

### *B. Full Discovery from Time of Initial Filing and Throughout Pretrial and Trial*

The criminal justice system is at its fairest and most effective when both the prosecution and defense have full knowledge of the facts and probable evidence in the charged offense.<sup>239</sup> *Brady v. Maryland* offered this promise, but, through various judicial permutations, has fallen short of that promise.<sup>240</sup> Full disclosure from the filing of charges would render the inevitable plea negotiation a more evenhanded affair. Defense counsel would be in a better position to fairly evaluate the case and, should the case be over-charged, call out the prosecutor. *Brady* established the precedent for prosecutorial conduct regarding the suppression of evidence by declaring, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>241</sup> *Brady* was extended by *United States v. Agurs*, in which the Supreme Court required federal prosecutors to voluntarily provide exculpatory material to the defense, regardless of whether the defense specifically requests the information or not.<sup>242</sup> The Court has held that evidence is material only if a reasonable probability exists that, “had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>243</sup> The question of materiality is often speculative and, unfortunately, the decision whether to release information is typically left in the hands of the prosecutor.<sup>244</sup>

*Brady* does not go far enough, and several states have been bold enough to implement policies designed to facilitate fuller discovery. Ohio, for example, recently revamped its criminal discovery rules at the urging of the Ohio Innocence Project.<sup>245</sup> Ohio’s new rules now require

<sup>237</sup> See, e.g., *Hooks v. Oklahoma*, 19 P.3d 294, 314 (Okla. Crim. App. 2001), *postconviction relief denied*, 22 P.3d 231 (Okla. Crim. App.), *aff’d in part sub nom. Hooks v. Workman*, 606 F.3d 715 (10th Cir. 2010); *Duckett v. Oklahoma*, 919 P.2d 7, 19 (Okla. Crim. App. 1995), *aff’d sub nom. Duckett v. Mullin*, 306 F.3d 982 (10th Cir. 2002).

<sup>238</sup> See cases cited *supra* note 237.

<sup>239</sup> See Caldwell, *supra* note 182, at 54 (“The American criminal justice system is at its fairest when both sides adhere to the rules.”).

<sup>240</sup> See *Connick v. Thompson*, 131 S. Ct. 1350, 1363 (2011) (concluding that the Supreme Court does not “assume that prosecutors will always make correct *Brady* decisions”); *id.* at 1367 (“*Brady* mistakes are inevitable.”) (J. Scalia, concurring); see also *Gregory*, *supra* note 4, at 830 (“[T]he lack of meaningful enforcement of the *Brady* rule by the courts, coupled with the near total absence of corresponding repercussions for prosecutors who violate *Brady*, renders the rule itself moot.”).

<sup>241</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>242</sup> See *United States v. Agurs*, 427 U.S. 97, 110-11 (1976).

<sup>243</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985).

<sup>244</sup> See *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (“In the typical case . . . it is the State that decides which information must be disclosed.”).

<sup>245</sup> *Gregory*, *supra* note 4, at 847-48.

“disclosure of a large amount of material beyond that which is ‘favorable to the defendant and material to guilt or punishment.’”<sup>246</sup> In addition, Ohio’s reform requires that “double-blind”<sup>247</sup> procedures take place when asking eyewitnesses to identify suspects.<sup>248</sup> Minnesota and North Carolina have implemented an “open-file discovery” rule.<sup>249</sup> Under open-file discovery, the prosecution is required to disclose all non-privileged evidence and information related to the case, whether in actual or constructive possession of the prosecution team, to the defense and to the court.<sup>250</sup> The disclosure must occur in a timely manner,<sup>251</sup> continue throughout the course of the trial,<sup>252</sup> and full disclosure must be made<sup>253</sup> prior to the defendant entering a guilty plea.<sup>254</sup> The benefit of an open-file discovery rule is twofold. First, it allows the defendant to be fully aware of the State’s case against him. Common law jurisprudence holds each defendant innocent until proven guilty,<sup>255</sup> thus giving the “innocent” defendant every opportunity to defend his innocence by being fully aware of the state’s case against him. Second, it removes the burden, and therefore the responsibility, of the prosecutor to make decisions regarding what evidence or information must be disclosed to the defense.<sup>256</sup> While the open-file discovery rule may not be an all-

<sup>246</sup> *Id.* (quoting OHIO R. CRIM. P. 16(B)(5)).

<sup>247</sup> See Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 862 (2007) (defining double blind procedures as those in which “the experimenter does not know which participants are in the experimental and control groups”).

<sup>248</sup> OHIO REV. CODE ANN. § 2933.83 (West 2015).

<sup>249</sup> Gurwitch, *supra* note 225, at 315 n.52. “Alabama, Colorado, Florida, Maryland, New Hampshire and Oregon, require open file discovery in capital cases.” *Id.*

<sup>250</sup> *Id.* at 315.

<sup>251</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11(a) (3d ed. 1993) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”); see also ABA MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2008) (“The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .”).

<sup>252</sup> See *United States v. Manthei*, 979 F.2d 124 (8th Cir. 1992) (stating that *Brady* is not violated when the *Brady* material is made available to the defendants before start of the trial); see also Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused*, 158 A.L.R. FED. 401, § 2a (1999) (“[A] *Brady* violation can occur if the prosecution delays in transmitting evidence during trial . . .”) (citing *United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991)).

<sup>253</sup> See Binimow, *supra* note 252, § 2a (“[A]s long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence, due process is satisfied.”) (citing *United States v. Allain*, 671 F.2d 248 (7th Cir. 1982); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996)).

<sup>254</sup> See generally *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecutor’s suppression of material evidence favorable to an accused violates due process).

<sup>255</sup> See *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (“This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of an official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.”).

<sup>256</sup> Although I suggest broad open-file discovery practices in order to help curb *Brady* violations, I still acknowledge and agree that disclosure should not be made if such disclosure “could result in substantial harm to an individual or to the public interest.” MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 3 (2008).



encompassing solution to curbing some aspects of prosecutorial misconduct, it is a promising start. Full disclosure from the earliest aspects of a case would assist with the problem of coercive plea-bargaining. For instance, should a prosecutor attach a gang enhancement on less-than-compelling evidence, full discovery would allow defense counsel to more fairly and accurately assess the evidence against her client and respond accordingly.

In summary, if our hypothetical Ezequiel decides to defend his innocence and fight the charges, needless to say he will be in for an uphill battle. California does not practice “open-file discovery,” and prosecutorial misconduct can be as easy as sweeping exculpatory evidence under the rug. In order for Ezequiel to have a fighting chance and be given a fair trial, he has to hope that his prosecuting attorney favors justice over winning. Justice Souter said it best that “disclosure [of a favorable piece of evidence to the defense] will serve to justify trust in the prosecutor as ‘the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’”<sup>257</sup>

*C. Shift the Burden to the State to Establish Lack of Undue Prejudice  
When Joining Gang-Related Charges to Other Charges*

Consider the following addendum to the Ezequiel hypothetical: Two years prior to the Salinas-Hernandez fight, nineteen-year-old Ezequiel raped a seventeen-year-old. Although he was not immediately apprehended, DNA evidence was gathered in the rape case. However, there was no DNA evidence to match against that found at the scene, and consequently the rape case was left unresolved. Following Ezequiel’s alleged participation in the Salinas-Hernandez fight, Ezequiel’s DNA was taken and entered into the Combined DNA Index System (“CODIS”)<sup>258</sup> and he was linked to the rape.

The prosecutor then filed both crimes in one charging document with every intention of trying the two completely unrelated cases in one trial before one jury. A clever prosecutor would lead with the very strong DNA evidence in the rape case and follow with the more tentative evidence in the assault case. The concern, of course, is that the evidence in the rape case will surely prejudice the jurors against Ezequiel, which would most likely result in his conviction on the assault charge. Although studies have shown that a defendant’s chances of conviction increases by more than ten percent if he stands trial on more than one count,<sup>259</sup> there remains a strong legislative preference for joinder.<sup>260</sup> The rationale: “Trials are expensive, time consuming, and burdensome on witnesses and victims.”<sup>261</sup> This legislative preference for joinder is also based in part on the belief that joinder helps “avoid needless harassment of defendants and . . .

<sup>257</sup> *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (omissions in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

<sup>258</sup> Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 STAN. L. REV. 751, 760 (2011) (“Combined DNA Index System (CODIS) [is] a central database into which participating states and agencies can ‘load’ the genetic profiles they lawfully acquire and search among the profiles made available by other jurisdictions.”).

<sup>259</sup> Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 347, 401 (2006).

<sup>260</sup> *See United States v. Pierce*, 733 F.2d 1474, 1477 (11th Cir. 1984) (“Joinder is favored for reasons of judicial economy.”); *United States v. Nolan*, 700 F.2d 479, 482 (9th Cir. 1983) (“Joinder remains the rule rather than the exception in criminal cases.”).

<sup>261</sup> Leipold & Abbasi, *supra* note 259, at 354.

prevent[s] piecemeal enforcement of the law, thus saving the public the time and expense of redundant trials.”<sup>262</sup>

While addressing the topic of joinder, the Second Circuit in *United States v. Smith* stated, “Congress has authorized consolidation . . . [i.e. joinder] in the belief that public considerations of economy and speed outweigh possible unfairness to the accused.”<sup>263</sup> There is, however, a fine line between the benefits of joinder to society and the burden imposed on the defendant. As voiced by the California Supreme Court, “the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.”<sup>264</sup>

The rub in every joinder scenario is that the more charges filed, the greater the prejudice to the accused.<sup>265</sup> It benefits the prosecutor to have more than one charge against an accused.<sup>266</sup> One may recall the old adage, “Where there is smoke . . .” Recognizing the goal of justice in criminal cases, is it fair to stack the deck when there is a real concern of prejudice because of joinder? Curiously, once a prosecutor makes the decision to file cases jointly it then remains for the accused to carry the burden that prejudice will result from joinder.<sup>267</sup> Given the concerns of prejudice, should the burden be on the accused to establish prejudice as a result of joinder or on the prosecution to establish a lack of prejudice?

Joinder is considered to be proper and thus presumably non-prejudicial in one of three settings: “First, joinder is allowed if the alleged crimes are based on the ‘same act or transaction.’”<sup>268</sup> For example, the charges against a defendant who assaults a store clerk while robbing a grocery store can be joined. “Second, joinder is permitted if the alleged crimes are part of a ‘common scheme or plan,’ such as when a middleman buys drugs from a supplier then sells them to a distributor.”<sup>269</sup> And third, “charges can be joined if they are of the ‘same or similar character.’”<sup>270</sup> A defendant who robs a gas station in December and then again in July may have the two charges joined, “even if the two charges are distant in time and location and even if they are not part of an overarching criminal plan.”<sup>271</sup>

In determining the prejudicial impact of joinder, most courts conclude that non-cross-admissible charges<sup>272</sup> should be severed if the inflammatory nature of one of the offenses, or of a

<sup>262</sup> MICHAEL G. MILLMAN ET AL., CALIFORNIA CRIMINAL DEFENSE PRACTICE § 52.01 (2014) (citing Kellett v. Superior Court, 409 P.2d 206, 209 (Cal. 1966)).

<sup>263</sup> Leipold & Abbasi, *supra* note 259, at 360 (internal quotation marks omitted) (quoting *United States v. Smith*, 112 F.2d 83, 85 (2d Cir. 1940)).

<sup>264</sup> *Williams v. Superior Court*, 683 P.2d 699, 706 (Cal. 1984).

<sup>265</sup> Leipold & Abbasi, *supra* note 259, at 355 (“[T]he more counts in the indictment, the quicker the jury may be to assume that the accused must be guilty of *something*.”).

<sup>266</sup> *See id.* at 369 (“Joining additional charges increases the conviction rate . . .”).

<sup>267</sup> *See* 1A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 223, at 489 (4th ed. West 2015) (“The burden is on the defendant to make a strong showing of prejudice to obtain the relief permitted by Rule 14.”).

<sup>268</sup> Leipold & Abbasi, *supra* note 259, at 353.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> To determine cross-admissibility of the evidence of each joined charge, one must determine whether

distinctive common factor, could have a prejudicial effect on the jury in a joint trial,<sup>273</sup> or if joinder of a strong case with a weak one, or of two weak cases, would create a likelihood that the jury would impermissibly aggregate the evidence.<sup>274</sup> However, because of the policy favoring joinder, the burden falls to the defense to establish undue prejudice due to joinder.<sup>275</sup> Given the significant prejudicial concern involving gang-related charges the burden should shift to the state to establish a lack of undue prejudice due to joinder of a gang-related case to any other charge.

## VI. CONCLUSION

Efforts to protect those caught up in the criminal justice system are unpopular. The level of crime and devastation generated by gang culture in the United States makes this especially true for efforts to curb the growing influence of anti-gang legislation and the agents who enforce such legislation, public prosecutors. Yet, it is not criminals who would be protected by the changes suggested in this Article. It is not Jesse Salinas, a known member of a violent street gang, who would benefit. Rather, it would be people like Ezequiel, whose only “crime” was being related to his brother.

Implementation of the proposals set forth would strike a balance in gang prosecutions such that only those gang participants meriting the harsh consequences of the legislation would feel the appropriate wrath of the law.

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“evidence on each of the joined charges would have been admissible . . . in separate trials on the others.” *People v. Kraft*, 5 P.3d 68, 99 (Cal. 2000). In addition, if the trial court finds the evidence is in fact cross-admissible, then “[s]uch cross-admissibility would ordinarily dispel any inference of prejudice.” Jacki Brown Evans, *Issues of Severance, Cross-Admissibility and Sua Sponte Instructions in Sexual Offense Cases*, 19 W. ST. U. L. REV. 107, 112 (1991) (quoting *People v. Miller*, 790 P.2d 1289, 1306 (1990)); see also *United States v. Soto-Beníquez*, 356 F.3d 1, 29-30 (1st Cir. 2003); *United States v. Hart*, 273 F.3d 363, 370 (3d Cir. 2001).

<sup>273</sup> The concern with a disparity of evidence between two charges is that the jury could logically conclude that because “[the defendant] did it before, he must have done it again.” *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985). On the other hand, the concern with inflaming the jury is that the jury might become so emotionally outraged due to the defendant’s evidenced guilt for one crime, that they would punish him with a guilty charge for another crime as well.

<sup>274</sup> When a “weak” case is joined with a “strong” case or with another “weak” case, the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges, in essence making two plus two equal five. As mentioned earlier, the concern is that the jury might logically, as opposed to emotionally, conclude that because “[the defendant] did it before, he must have done it again.” *Id.*

<sup>275</sup> See *People v. Johnson* 764 P.2d 1087, 1091 (Cal. 1988) (“[D]efendant can predicate [joinder] error only on a clear showing of potential prejudice.”).