

Preventing and Suppressing Gang Crimes through Comprehensive Anti-Gang Legislation: A Solution to Nebraska's Gang Problem

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I. INTRODUCTION

In the early morning hours of March 16, 2008, between ten and twenty members of the 18th Street and 13th Street gangs engaged in a street fight at the intersection of 15th and Erie Streets.¹ The gangs played for keeps as they fought with knives, beer bottles, and machetes.² Brandishing a knife, seventeen-year-old Fermin Aldana repeatedly stabbed unarmed twenty-year-old Ramiro Prado-Reyes.³ After the fight, Prado-Reyes' friends carried him to a nearby house and called an ambulance⁴—he died a short time later.⁵ An autopsy revealed that he had been stabbed six times from his scalp down to above his kneecap.⁶ A five-inch deep puncture wound to Prado-Reyes' chest literally cut his life short.⁷ As Prado-Reyes' former assistant principal stated, the young man's death was "senseless."⁸

Later in the day of March 16, 2008, police officers found and arrested a blood-spattered Aldana at a hospital after he confessed that he had stabbed "someone."⁹ At Aldana's juvenile hearing, he "openly stared at [Prado-Reyes'] family without expression."¹⁰ The presiding judge

¹ Danny Gruber, *Murder Suspect to be Tried as an Adult*, LEXINGTON CLIPPER-HERALD, March 31, 2008 [hereinafter "Gruber, *Murder Suspect*"], available at http://www.lexch.com/site/index.cfm?newsid=19440455&BRD=284&PAG=461&dept_id=558509&rfi=8.

² *Id.*

³ *Id.*

⁴ Danny Gruber, *Lex Woman: Knife Fight Not Gang Related*, LEXINGTON CLIPPER-HERALD, March 18, 2008, available at http://www.lexch.com/site/index.cfm?newsid=19402670&BRD=284&PAG=461&dept_id=558509&rfi=8.

⁵ *Id.*

⁶ Danny Gruber, *Murder Suspect*, *supra* note 1.

⁷ *Id.*

⁸ Betsy Friedrich et al., *Gang Fight Leaves One Dead*, LEXINGTON CLIPPER-HERALD, March 17, 2008, available at http://www.lexch.com/site/index.cfm?newsid=19398732&BRD=284&PAG=461&dept_id=558509&rfi=8 (quoting Lexington High School Assistant Principle Ray Otereo).

⁹ Danny Gruber, *Murder Suspect*, *supra* note 1.

¹⁰ *Id.*

chose to arraign Aldana as an adult.¹¹ Now, Aldana faces up to forty years in prison for Prado-Reyes' murder.¹²

One may jump to the conclusion that the above events took place in South-Central Los Angeles. After all, the gang-related numbers “18” and “13” received their infamy on the mean streets of Los Angeles—a city commonly known for gangs.¹³ However, these events took place in Lexington, Nebraska—a small central-Nebraska town with only 10,000 inhabitants.¹⁴ Given that Lexington is a small town nestled in the heart of rural Nebraska, one may then jump to the conclusion that the Prado-Reyes murder was an isolated event. However, just four months after Prado-Reyes' death, members of the 18th and 13th Street gangs clashed again, resulting in the stabbing of one 18th Street gang member.¹⁵ Unfortunately, Lexington is not alone. Gang-related crime has spread across Nebraska¹⁶—a state known for its slow pace, family values, and

¹¹ *Id.*

¹² *Id.*

¹³ See AL VALDEZ, NAT'L ALLIANCE OF GANG INVESTIGATORS' ASS'NS, 18TH STREET: CALIFORNIA'S MOST VIOLENT EXPORT (2000) [hereinafter “VALDEZ, 18TH STREET”], available at <http://www.nagia.org/Gang%20Articles/18th%20Street.htm> (explaining that the 18th Street gang formed in Los Angeles in the 1960s); AL VALDEZ, NAT'L ALLIANCE OF GANG INVESTIGATORS' ASS'NS, MARA SALVATRUCHA: A SOUTH AMERICAN IMPORT (2000) [hereinafter “VALDEZ, MARA SALVATRUCHA”], available at <http://www.nagia.org/Gang%20Articles/Mara%20Salvatrucha.htm> (explaining that Mara Salvatrucha, or MS-13, formed in the early 1980s and has become a rival of the 18th Street gang); NAT'L ALLIANCE OF GANG INVESTIGATORS' ASS'NS, NATIONAL GANG THREAT ASSESSMENT 8 (2005) [hereinafter “NAGIA”] (discussing California-based SUR 13 gang), available at http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf.

¹⁴ U.S. CENSUS BUREAU, *Fact Sheet: Lexington, Nebraska* (2000), available at http://factfinder.census.gov/home/saff/main.html?_lang=en (type Lexington, Nebraska in the “Factfinder Access to Information” field).

¹⁵ Danny Gruber, *Carranza Brother Arraigned in District Court*, LEXINGTON CLIPPER-HERALD, August 22, 2008, available at http://www.lexch.com/site/index.cfm?newsid=20087658&BRD=284&PAG=461&dept_id=558509&rft=8 (discussing arraignment of Ricardo Carranza, a 13th Street gang member, who stabbed a rival 18th Street gang member on July 13, 2008).

¹⁶ See, e.g., Michelle Bandur, *You Tube Video Shows Gang Celebration After Shooting*, ACTION 3 NEWS, August 29, 2008 (discussing gang-related shooting of an Omaha police officer and a video of the gang members' celebration subsequently placed on YouTube.com), available at http://www.action3news.com/Global/story.asp?S=8923761&nav=menu550_2; Jim Osborn, *Shootings Were Gang-Related*, COLUMBUS TELEGRAM, August 21, 2008 (discussing drive by shooting in rural Columbus, Nebraska); Lori Pilger, *Police Chief Says Teenage Gang Had Busy Summer*, LINCOLN J. STAR, October 13, 2007, available at <http://journalstar.com/articles/2007/10/14/news/local/doc47114fbb2d619372160076.txt> (discussing Dudley Boyz gang's theft of firearms in Lincoln, Nebraska area); JoAnne Young, *Officials See Signs of Gang Activity in Schools*,

“Good Life.” In fact, states all across America are reporting similar gang activity in both cities and rural areas.¹⁷

The spread of gangs across the United States calls for the states to act.¹⁸ To answer this call, most states (not including Nebraska) have enacted at least some form of anti-gang legislation to prevent and/or suppress gang activity.¹⁹ The author proposes that the Unicameral enact comprehensive anti-gang legislation to address Nebraska’s growing gang problem. Simply put, the Unicameral cannot afford to sit idly by, fail to pass such legislation, and allow gangs to destroy the “Good Life” for the peaceful citizens of Nebraska. To fully understand the need for such legislation, one must first have a basic understanding of gangs. Therefore, Part II provides background on the general nature of gangs, discusses the unique dangers of gang crime, focuses on a few specific gangs, and outlines Nebraska’s gang problem. Part III then examines statutes some states have enacted to prevent and/or suppress gang activity. Next, Part IV provides rationale for passing anti-gang legislation in Nebraska and proposes comprehensive anti-gang legislation for Nebraska. Finally, Part V concludes with a few final remarks.

II. KNOW THY ENEMY

To fully comprehend the pressing necessity of anti-gang legislation in Nebraska, legislators must step back and gain an understanding of the gangs they wish to fight. Therefore,

LINCOLN J. STAR, October 13, 2007, *available at* <http://journalstar.com/articles/2007/10/14/news/local/doc47115d07ae157198151086.txt>.

¹⁷ *Congressional Testimony Before the Subcomm. on the W. Hemisphere H. Int’l Relations Comm.*, 109th Cong. (2005) (statement of Chris Swecker, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation) (“The Department of Justice estimates there are approximately 30,000 gangs, with 800,000 members, impacting 2,500 communities across the U.S.”), *available at* <http://www.fbi.gov/congress/congress05/swecker042005.htm>.

¹⁸ The Federal Government is also involved in prosecuting gang members, but after the September 11th attacks, it has diverted more resources to fighting terrorism. See Andrew Romano, *The Most Dangerous Gang in America*, NEWSWEEK, Oct. 16, 2007, *available at* <http://www.newsweek.com/id/49255>. Thus, because the Federal Government cannot cure the nation’s gang problem on its own, states must step up and zealously prosecute gangs in their respective jurisdictions.

¹⁹ Institute for Intergovernmental Research, *Highlights of Gang Related Legislation* (Spring 2008) (last visited November 12, 2008) (reporting that 46 states and the District of Columbia have passed “some sort of legislation relating to gangs”), *at* <http://www.iir.com/nygc/gang-legis/highlights-gang-related-legislation.htm>.

subsection (A) discusses gang definitions, subsection (B) ponders gang formation theories, subsection (C) discusses the gravity of gang crimes, subsection (D) provides a snapshot of four national gangs present in Nebraska, subsection (E) discusses the international gang phenomenon, and subsection (F) outlines Nebraska’s current gang problem.

A. Defining “Gang”

The first logical step in understanding gangs is defining “gang.” Though this may seem like a relatively simple task, “there has been much debate over the term ‘gang’”²⁰ In fact, law enforcement agencies often apply different definitions of “gang,” even within the same state.²¹ Surveying and comparing definitions of “gang” in jurisdictions throughout the United States is far beyond the scope of this Article. However, this subsection discusses the two general types of “gang” definitions and gives examples of how the Omaha Police Department and California legislature have defined “gang.”

“Gang” definitions fall into two general categories.²² First, a “process-based” gang definition generally focuses on “why and how a gang is formed”²³ Thus, such definitions emphasize factors such as the group’s number of members, organizational structure, community characteristics, and recruitment methods.²⁴ Given that pure process-based definitions

²⁰ Cheryl L. Maxon, *Gang Members on the Move*, JUV. JUST. BULL. 1 (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice October 1998), available at <http://www.ncjrs.gov/pdffiles/171153.pdf>; see also NAGIA, supra note 13, at ix (“[T]he lack of a national definition of *gang* and *gang-related crime* acceptable to law enforcement and the political establishment compounds the problem [of measuring gang violence].”).

²¹ See, e.g., Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 110–111 (2006) (discussing differences between the Stanislaus County, California Sheriff’s Department’s definition of “gang member” and the San Diego, California Police Department’s definition of “gang member”).

²² NAT’L DIST. ATTORNEYS ASS’N, PROSECUTOR’S COMPREHENSIVE GANG RESPONSE MODEL 6 (Sept. 2007) [hereinafter “NDAA”], available at http://www.ndaa.org/gang/gang_response_model.php.

²³ *Id.*

²⁴ *Id.*

concentrate solely on why and how gangs are formed, such definitions are ideal for creating and implementing gang prevention and intervention programs.²⁵

Consider the following process-based gang definition:

[A] group whose members meet together with some regularity over time, on the basis of group-defined criteria of membership and group-determined organizational structure, usually with (but not always . . .) some sense of territoriality.²⁶

Note that the above definition does not focus on the existence, nature, or scope of groups' criminal activity. Thus, under this purely process-based definition, the Boy Scouts or a political group could conceivably qualify as a "gang."²⁷

Conversely, a "crime-based" gang definition focuses on "whether . . . a group of individuals are involved in more or less serious criminal activities."²⁸ Unlike process-based gang definitions, crime-based definitions are used primarily to identify and suppress gang crime.²⁹

Consider the following crime-based definition: a group that engages in a "continuous course of criminal activity."³⁰ Note that this definition does not focus on groups' number of members, organizational structure, or identifying characteristics (i.e. symbols, names, or colors). Therefore, under a pure crime-based definition, a loose group of friends that often commit crimes may qualify as a "gang."

The shortfalls of both process-based and crime-based gang definitions demonstrate the need for law enforcement agencies and legislatures to incorporate elements of both definitions

²⁵ *Id.*

²⁶ Beth Bjerregaard, *Self-Definitions of Gang Membership and Involvement in Delinquent Activities*, 34 *YOUTH & SOC'Y* 31, 35 (2002) (quoting J.F. SHORT, *DELINQUENCY AND SOCIETY* 239 (1990)).

²⁷ Based on the author's personal knowledge as an Eagle Scout, the Boy Scouts (1) meet with some regularity over time, (2) have group-defined membership criteria, (3) have group-determined organizational structure, and (4) given that several Boy Scout "troops" may exist in the same city, may have a sense of territoriality.

²⁸ NDAA, *supra* note 22, at 6.

²⁹ *Id.* at 6–7.

³⁰ Bjerregaard, *supra* note 26, at 37.

into a hybrid definition.³¹ In other words, a “holistic and balanced” definition of “gang” should address both gangs’ organizational structure and criminal nature.³² Law enforcement agencies and prosecutors could use such definitions for both preventing and suppressing gang activity.

Consider the following hybrid gang definition used by the Omaha Police Department (“OPD”): “A group of three or more individuals, who engage in criminal behavior, have a common identifier (name/sign/symbol) [and] . . . associate with each other on a continuous and or regular basis.”³³ Note this definition’s process-based elements: “three or more individuals,” a “common identifier,” and continuous or regular association. Furthermore, note the definition’s crime-based element: “engage in criminal behavior.” Thus, unlike a pure process-based definition, the OPD definition’s requirement for the group to engage in criminal behavior would prevent the Boy Scouts from qualifying as a “gang.” In the same vein, unlike a pure crime-based definition, the OPD’s organizational requirement of a “common identifier” would likely prevent a loose group of delinquent friends from being classified as a “gang” (assuming the group has not adopted a name, sign, or symbol).

The California legislature also adopted a hybrid gang definition,³⁴ which numerous other legislatures have adopted in whole or in part.³⁵ Under CAL. PENAL CODE §186.22(f),

“criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts] . . ., having a

³¹ NDAA, *supra* note 22, at 7.

³² *Id.*

³³ E-mail from Officer Donlan, Omaha Police Department (Oct. 21, 2008, 2:20 CST) (on file with author).

³⁴ CAL. PENAL CODE § 186.22

³⁵ See ALASKA STAT. § 11.81.900(b)(13); ARK. CODE ANN. 5-74-103(3); COLO. REV. STAT. § 18-23-101(1); DEL. CODE ANN. tit. 11, § 616(a)(1); IDAHO CODE ANN. § 18-8502(1); 740 ILL. COMP. STAT. 147/10; IOWA CODE § 723A.1(1); LA. REV. STAT. ANN. § 15:1404(A); MINN. STAT. § 609.299 (subdivision 1); MO. REV. STAT. § 578.421(1); MONT. CODE ANN. § 45-8-402(1); N.Y. COMP. CODES R. & REGS. tit. 9, § 301.3; OHIO REV. CODE ANN. § 2923.41(A); S.D. CODIFIED LAWS § 22-10A-1(1); TENN. CODE ANN. § 40-35-121(a)(1); TEX. PENAL CODE ANN. § 71.01(d); VA. CODE ANN. § 18.2-46.1; WIS. STAT. § 932.22(9).

common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Note this definition’s process-based elements: “ongoing,” “organization, association, or group,” “three or more persons,” “formal or informal,” and “common name . . . identifying sign or symbol.” Furthermore, note this definition’s crime-based elements: committing an enumerated criminal act must be a “primary activity,” and the group’s members must engage in a “pattern of gang activity.”

Although the California statutory definition and OPD definition share the same basic hybrid structure, the California statutory definition is far narrower than the OPD definition. Unlike the OPD definition, the California statutory definition requires that one of the group’s *primary* activities must be the commission of *specific* crimes such as drug manufacturing/distribution, murder, money laundering, drive-by shootings, or carrying a concealed weapon.³⁶ To understand how these enumerated offenses affect which groups are considered “gangs,” consider the following hypothetical.

Assume that both Los Angeles and Omaha are home to a group of (1) twenty or more individuals, who (2) call themselves the “Racers,” (3) primarily engage in illegal street racing, and (4) meet every Friday night to illegally street race. Note that the group’s basic organizational structure would satisfy elements of both the OPD and California legislature definitions: the group (a) is composed of three or more individuals, (b) is ongoing or meets regularly, and (c) has a common identifier—the “Racers.” However, this group would not be considered a “gang” under the California statutory definition because the group’s primary criminal activity—street racing—is not an enumerated criminal act.³⁷ However, this illegal street

³⁶ For a complete list of enumerated offenses, see CAL. PENAL CODE § 186.22(e)(1)–(33).

³⁷ See *id.*

racing group would technically be a gang under the OPD definition, which merely requires the group to engage in “criminal behavior.”

Thus, given that even similar gang definitions can have vastly different effects in practice, law enforcement agencies and legislatures should devote a great deal of time and care to crafting sound gang definitions. As the National District Attorneys Association urges, law enforcement agencies and legislatures should ultimately adopt “a robust [‘gang’] definition that accurately captures the gang-related activity in [their] jurisdiction[s].”³⁸ Thus, if a state legislature wishes to adopt the California statutory gang definition, it should draft its own list of enumerated crimes to coincide with criminal acts gangs commit within its jurisdiction. Given that gangs within a jurisdiction may evolve and engage in new types of criminal activity, such enumerated crimes should be “continuously reviewed and revised when needed.”³⁹

B. Gang Formation and Recruitment

In July 2006, the Office of Juvenile Justice and Delinquency Prevention published a survey of America’s gangs from 1999 to 2001.⁴⁰ According to the survey, approximately 731,500 gang members and 21,600 gangs were active in the United States in 2002.⁴¹ In 2001, sixty-seven percent of such gang members were eighteen years old or older.⁴² Furthermore, approximately fifty percent of gang members were Hispanic/Latino, thirty-three percent were African-American, and ten percent were Caucasian.⁴³ Finally, approximately ninety percent of

³⁸ NDAA, *supra* note 22, at 8.

³⁹ *Id.* For example, some gangs have evolved along with technology and now use the internet to steal others’ identity. See NAGIA, *supra* note 13, at 9.

⁴⁰ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, NATIONAL GANG YOUTH SURVEY: 1999 TO 2001 i (2006).

⁴¹ *Id.* at v.

⁴² *Id.*

⁴³ *Id.* at vi.

all gang members were male.⁴⁴ Thus, “[t]raditionally, the typical gang member is male, lives in the inner city, and is a member of a racial or ethnic minority.”⁴⁵

The above statistics are interesting, but do little to explain how gangs form or why citizens join gangs. After all, not all Hispanic males over the age of eighteen living in inner cities are involved in gang activity. Likewise, some upper-class, suburban Caucasian youth are involved in gang activity.⁴⁶ To effectively prevent and combat gang activity, one must move past mere statistics and stereotypes to understand the root of the gang problem in the United States. Therefore, this subsection outlines several theories that help explain why some people living in the United States form and join gangs.

1. Utilitarian Perspective

Some researchers explain gang involvement from a “utilitarian” perspective.⁴⁷ Such researchers theorize that some individuals join gangs because “the benefits of gang involvement . . . outweigh its costs”⁴⁸ Actual or perceived benefits such individuals gain from street gangs include financial gain,⁴⁹ excitement,⁵⁰ protection from other gangs,⁵¹ and “social camaraderie.”⁵² Conversely, the potential costs of gang involvement include injury, death, and/or imprisonment. In fact, members of MS-13, a notorious street gang discussed in

⁴⁴ *Id.*

⁴⁵ Finn-Aage Esbense, *Preventing Adolescent Gang Involvement*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice Sept. 2000), available at http://www.ncjrs.gov/html/ojjdp/2000_9_2/page2.html.

⁴⁶ See Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 311 (2008) (describing a gang called “Malibou Locals Only,” “whose members are suspected to include children of . . . wealthy and famous Malibou residents”).

⁴⁷ DOUGLAS R. KENT & GEORGE T. FELKENES, CULTURAL EXPLANATIONS FOR VIETNAMESE YOUTH INVOLVEMENT IN STREET GANGS 5 (Report to the U.S. Dep’t of Justice, June 1998).

⁴⁸ *Id.*

⁴⁹ See Ludeke *supra* note 46, at 322 (“[P]overty may make gang-related crimes like drug sales attractive to poor youths seeking an escape from poverty.”)

⁵⁰ KENT & FELKENES, *supra* note 47, at 5 (“[A]s early as 1927 . . . , it has been suggested that youth are motivated to participate in street gangs, at least in part, to obtain the ‘thrills and excitement’ that gangs offer.”)

⁵¹ *Id.* at 7 (pointing out the possible benefits of “physical protection, social power, and respect from others”)

⁵² *Id.* at 5.

subsection (D) below, often tattoo a group of three dots on their hands to signify the three inevitable destinations of all MS-13 members: the hospital, prison, or the grave.⁵³ Thus, under this utilitarian theory, individuals lacking in wealth, excitement, protection, and/or social camaraderie may join gangs because they perceive that the gang's ability to satisfy such deficit(s) outweighs the risk of injury, death, and/or imprisonment.

2. *Social Problems Perspective*

Some researchers explain gang involvement from a “social problems” perspective.⁵⁴ Such researchers theorize that “societal-level” factors such as minority status, poverty, unemployment, and lack of social opportunity create “underclass youth groups” which turn into street gangs.⁵⁵ In other words, gangs are created “as a response to youths’ frustration with their lack of opportunity to attain financial status and social gain through legitimate channels.”⁵⁶ Thus, under this theory, such frustrated youth would not likely join gangs if they had the opportunity to legitimately attain social power and wealth through quality education and/or employment.

3. *Institution Perspective*

Under the “institution” perspective, researchers theorize that some individuals join gangs because gangs have become an established institution in their neighborhood.⁵⁷ Thus, for some citizens, joining the neighborhood gang “becomes akin to a family tradition” with “second- and third-generation gang members.”⁵⁸ In such a pervasive gang environment, youth may also feel the need to join the neighborhood gang “to protect themselves from reprisal from the gang[] for

⁵³ Samuel Logan & Ashley Morse, *MS-13 Organization and U.S. Response*, at 14 (February 2007), at <http://www.samuellogan.com/publications.html>.

⁵⁴ KENT & FELKENES, *supra* note 47, at 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Ludeke, *supra* note 46, at 324.

⁵⁸ *Id.*

their refusal to join”⁵⁹—i.e. “if you can’t beat ‘em, join ‘em.” Generally, such gang institutionalization occurs in poor, urban neighborhoods where parents may be financially unable to move their children to a safer neighborhood.⁶⁰

4. *Ethnic Self-Protection Perspective*

Under the “ethnic self-protection” perspective, researchers theorize that citizens form gangs along ethnic lines to protect their property and ethnic groups from other groups or gangs.⁶¹ Such gangs generally form because of the actual or perceived refusal of law enforcement to protect their ethnic groups from outsiders.⁶² Thus, under this theory, an African-American gang may form in response to law enforcement’s inability or unwillingness to protect the African-American community from a nearby Hispanic gang.

5. *Surrogate Family Perspective*

Under the “surrogate family” perspective or “missing protector factor,”⁶³ researchers theorize that individuals join street gangs because of “[t]he failure of family and similar support mechanisms”⁶⁴ This theory suggests that when youth encounter crises, they turn to their families for support. However, “rising divorce rates, [and] increasing numbers of mothers in the workforce” often leave youth without a steady support structure at home. Thus, youth may turn to gangs as surrogate families for support and guidance to fill this familial void.⁶⁵

As demonstrated above, gangs may form and effectively recruit members due to a variety of factors. To effectively prevent gang crime, legislators and other government officials must study and address the factors that led to gangs’ formation in their jurisdictions. If legislators and

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 325–26.

⁶² *Id.* at 326 (citing the 18th Street gang and Malibou Locals Only as examples).

⁶³ Gang author and expert Dan Korem coined this phrase. *Id.* at 330.

⁶⁴ *Id.*

⁶⁵ *Id.* at 331–32.

law enforcement officials neglect such factors and focus solely on gang crime suppression, they only treat the gang problem's symptoms and do not cure the underlying disease.⁶⁶ Thus, a government cannot eradicate gangs from its jurisdiction unless it focuses on eradicating or minimizing factors that lead to gang formation.

C. The Gravity of Gang Crimes

To truly understand the gang problem in the United States and Nebraska, one must understand the unique dangers of gang crime. Therefore, this section discusses several factors that make gang crime graver than isolated non-gang crime. The following discussion demonstrates the gravity of gang crime by looking beyond isolated crimes to see the “big picture” effects of such crimes.

First, the organized nature of criminal street gangs makes gang crime graver than isolated non-gang crime. Like the mafia in New York City,⁶⁷ street gangs use their organizational structure and strength in numbers to threaten and intimidate innocent citizens in their neighborhoods.⁶⁸ Thus, through their individual members' numerous violent crimes and intimidation tactics, gangs can create a perception of omnipresence,⁶⁹ spreading a crippling fear—not unlike terrorism⁷⁰—through their neighborhoods and cities. For example, consider the following statement by Chicago resident D'Ivory Gordon:

When I walk out my door, these [gang members] are out there They watch you They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point

⁶⁶ NDAA, *supra* note 22, at 16 (“[L]egislatures should attempt to address fundamental social and economical conditions that give rise to gangs and provide for programs designed to control, supervise, and treat serious or habitual juvenile offenders.”).

⁶⁷ *Hearing on LB 159 Before the Judiciary Comm.*, 96th Legis., 1st Sess. 8 (Neb. 1999) (statement of Sen. Jon C. Bruning).

⁶⁸ *Id.* at 10 (statement of Hastings Chief of Police Thoren) (As Mr. Thoren explained, gangs “thrive[] on intimidation . . .”).

⁶⁹ See discussion *supra* Part II.B.3 (discussing institution perspective of gang formation and membership).

⁷⁰ As the California Legislature explained, “the organized nature of street gangs . . . [is a] chief source of terror created by street gangs.” CAL. PENAL CODE § 186.21.

now that I carry a meat cleaver to work with me I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them.⁷¹

Such fear obviously reduces citizens' quality of life and morale. Unfortunately, such fear can also help gangs grow. As mentioned above, some gangs threaten neighborhood youth and their families to force such youth to join their gangs.⁷² Such threats are likely more persuasive when neighborhood youth have knowledge of the gang's track record for violent crimes. In this way, a gang may utilize violent crimes previously committed by existing or former members to bolster its violent reputation and gain new members. Furthermore, youth may join neighborhood gangs to protect themselves from other gangs.⁷³ In these ways, violent gang crimes help create new gang members. Finally, citizens' fear of gang retaliation may also reduce their willingness to report crimes or testify against gang members.⁷⁴ Thus, gangs may elude prosecution for future crimes through citizens' knowledge of their members' past violent crimes.

Furthermore, the organized nature of street gangs allows such gangs to commit more sophisticated crime with greater success. For example, as America's gangs have become more organized, they have become connected with Mexican drug trafficking organizations.⁷⁵ As a result, America's gangs have "evolve[d] from primarily retail-level distributors of drugs to significant smugglers, transporters, and wholesale distributors."⁷⁶ In fact, gangs are now "the

⁷¹ Shawn P. Napier, Note, *America Responds to Criminal Gang Activity; Taking Back Our Streets: A Critical Analysis of City of Chicago v. Morales*, 29 CAP. U. L. REV. 719, 719 (2002).

⁷² See discussion *supra* Part II.B.3; NDAA, *supra* note 22, at 10.

⁷³ See discussion *supra* Parts II.B.1, 4 (discussing protection from other gangs as a benefit under the utilitarian perspective of gang formation and membership and forming gangs along ethnic lines to protect ethnic group from other gangs, respectively).

⁷⁴ See discussion *infra* Part II.F (reporting that gangs in Omaha were responsible for eleven intimidation of witness offenses between 2002 and 2007).

⁷⁵ NAT'L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT: 2006 (Jan. 2006) [hereinafter "NDIC, NATIONAL ASSESSMENT 2006"], available at <http://www.usdoj.gov/ndic/pubs11/18862/gangs.htm>.

⁷⁶ *Id.*

primary distributors of drugs throughout the United States.”⁷⁷ This new level of sophistication has allowed gangs to expand and successfully introduce drugs such as methamphetamine into suburban and rural areas.⁷⁸ Unfortunately, increased violence often accompanies gangs’ expansion into new drug markets.⁷⁹

Some gangs also use their international connections to smuggle other illicit goods. As discussed below, some gangs with Central American ties have created sophisticated and successful auto theft and weapons smuggling schemes.⁸⁰ As a result, weapons such as M-16 assault rifles and grenades from Central America have found their way to America’s streets.⁸¹ Thus, crimes committed by gang members are graver than typical non-gang related crimes because such crimes are often just a small piece of a larger, more sophisticated criminal scheme.⁸²

Finally, unlike general violent crimes committed by non-gang members, violent gang crime often begets retaliatory violent gang crime. For example, Grape Street Crips leader Brandon “B.L.” Bullard⁸³ was shot and wounded in Watts, California by a rival gang member in 2006.⁸⁴ The incident triggered a staggering twenty-five gang-related shootings.⁸⁵ Then, Bullard

⁷⁷ NAGIA, *supra* note 13, at vi.

⁷⁸ NDIC, NATIONAL ASSESSMENT 2006, *supra* note 75.

⁷⁹ *Id.*

⁸⁰ See discussion *infra* Part II.E (discussing illicit goods pipeline created by international gangs such as 18th Street and MS-13).

⁸¹ See discussion *infra* Part II.E

⁸² For example, assume the following facts: Gang A distributes methamphetamine and crack and gang B distributes only crack. A member of gang A murders gang B’s leader to expand gang A’s methamphetamine market into gang B’s territory. The author proposes that this murder is graver than, for example, a case where a husband and an accomplice murder his wife for infidelity. The wife’s murder cannot be traced back to a larger, more sophisticated criminal scheme, while the gang member’s act may cause the introduction of methamphetamine into a neighborhood, potentially damaging the lives of the drug’s users and leading to more violence.

⁸³ Interestingly, Bullard is the brother of Nebraska Cornhuskers defensive back, Ricky Thenarse. Thenarse’s other brother, Kejuan Bullard, was shot and killed in a drive-by shooting in March 2008. See Jonathon Crowl, *Thenarse working through tragedy*, DAILY NEBRASKAN, April 2, 2008, available at <http://media.www.dailynebraskan.com/media/storage/paper857/news/2008/04/02/Sports/Thenarse.Working.Through.Tragedy-3297329.shtml>.

⁸⁴ Richard Winton, *Watts beset by retaliatory shootings*, LOS ANGELES TIMES, January 30, 2008, available at <http://articles.latimes.com/2008/jan/30/local/me-watts30>.

was shot and killed two years later in January 2008.⁸⁶ His death triggered more retaliation, leaving two dead and thirteen wounded.⁸⁷

Thus, gang crime is more dangerous than unorganized, non-gang crime because (1) it spreads fear throughout neighborhoods and cities, damaging citizens' quality of life and morale and facilitating gangs' recruitment and elusion of prosecution, (2) it is often connected to a larger, more sophisticated criminal scheme, and (3) it can trigger more violent crime.

D. Selected National Gangs

The above discussion focused primary on generic "gangs." However, each gang has its own formation story, organizational structure, and *modus operandi*. Therefore, this subsection provides examples of several gangs with nationwide membership that are present in Nebraska.

1. The Bloods and Crips

In the early 1960s, poor, black youth in Los Angeles banded together in gangs to fight "against local white youth that did not want these children of black southern [migrants] in their neighborhood."⁸⁸ The "Slausons" gang became the "largest and most prominent" of such black street gangs in Los Angeles during the 1960s.⁸⁹ Interestingly, two Slausons leaders—Alprentice Carter and John Huggins—became political activists and founded the Los Angeles-based chapter of the Black Panther Party ("BPP").⁹⁰ However, both the Slausons and the BPP were dealt a heavy blow in 1969 when Carter and Huggins were gunned down by a rival gang on the University of California at Los Angeles campus.⁹¹ In the wake of such violence, the Federal Bureau of Investigation ("FBI") and the Los Angeles Police Department ("LAPD")

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ WAYNE CAFFEY, NAT'L ALLIANCE OF GANG INVESTIGATORS' ASS'NS, CRIPS AND BLOODS (2006), available at <http://www.nagia.org/Gang%20Articles/Crips%20and%20Bloods.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

“systematically disbanded the BPP.”⁹² Thus, angry Los Angeles black youth looked to join other groups to fight against both black and white oppressors.⁹³

Raymond Washington, a former member of a Los Angeles gang called the “Avenues,” recruited black youth to join a new gang—the “Baby Cribs.”⁹⁴ Over time, the gang’s name evolved from the “Baby Cribs” to the “Crips.”⁹⁵ The Crips began using the color blue to distinguish themselves from other Los Angeles street gangs.⁹⁶ To counterbalance the Crips’ power, several Los Angeles gangs⁹⁷ merged and created the “Bloods,” using red handkerchiefs as their symbol.⁹⁸ During the mid-1970s, the Crips and Bloods fought for territory in California’s streets, jails, and prisons.⁹⁹ The gangs grew as black youth joined one gang or the other as a means of survival on the increasingly violent streets of Los Angeles.¹⁰⁰ Interestingly, Crips from different parts of Los Angeles even began fighting amongst themselves in “turf and honour based feuds” in the late 1970s.¹⁰¹ “Since that time, more Crip gang members have been killed by other Crip gang members from rival sets than are killed by Blood gang members.”¹⁰²

In the 1980s, the introduction of crack cocaine to Los Angeles created a lucrative trafficking business for the Bloods and Crips.¹⁰³ Moreover, as the U.S. Government’s War on Drugs stifled drug trafficking in Florida, Columbian drug cartels began smuggling powder

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* According to Detective Caffey, the “California Youth Authority gave handkerchiefs to inmates in youth correctional settings. The Crips began using the blue bandannas as their symbol.” *Id.*

⁹⁷ These gangs were the LA Brims, Denver Lanes, Inglewood Family, Swans, Pueblo Bishops, and Piru Street Boys. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON. L. REV. 601, 618 (2004).

¹⁰¹ *Id.* at 619 (quoting Christopher Adamson, *Defensive Localism in White and Black: A comparative History of European-American and African-American Youth Gangs*, 23 ETHNIC & RACIAL STUD. 272, 284 (2000)); CAFFEY, *supra* note 88.

¹⁰² CAFFEY, *supra* note 88.

¹⁰³ *Id.*

cocaine into California, using Bloods and Crips as distributors.¹⁰⁴ The lucrative distribution business encouraged the gangs to expand their territory throughout California and beyond.¹⁰⁵ Surprisingly, some neighboring Blood and Crip cliques formed alliances to protect their drug markets. As Detective Wayne Caffey of the Los Angeles County Sheriff's Office recalls, "It was not uncommon in this era to find kids on a corner wearing a blue shoestring in one shoe and a red shoestring in the other."¹⁰⁶ The expansion of such gangs and the drug trade across the nation made "[g]ang units and the war on drugs a federal priority."¹⁰⁷ During the late 1980s and early 1990s, "gangsta rap" music and gang-related movies gave the general American public its "first look at the lifestyle of street gang members," boosted the mystique of the Bloods and Crips, and helped spread criminal street gang culture across the United States.¹⁰⁸ In 1996, the National Drug Intelligence Center ("NDIC") identified "180 jurisdictions in 42 states with gangs claiming affiliation with the Bloods and/or Crips."¹⁰⁹

The Bloods and Crips have evolved a great deal since their founding in the late 1960s and early 1970s. Detective Caffey reports that the Bloods and Crips have become "more monetarily driven" and fragmented.¹¹⁰ Though such gang members may still identify themselves as Bloods or Crips, "their loyalty [is] given to a select few homeboys from their peer group within their larger gang."¹¹¹ Thus, "profits from criminal ventures are generally shared only with the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see, e.g., *BOYZ N THE HOOD* (Columbia Pictures Corp. 1991) (starring Laurence Fishburne, Cuba Gooding, Jr., and Ice Cube, and depicting difficulties of South Central Los Angeles youth growing up in gang culture); *COLORS* (Orion Pictures Corp. 1988) (starring Sean Penn and Robert Duvall and depicting several Los Angeles street gangs, including the Bloods and Crips); ICE-T, *O.G. Original Gangster*, on *O.G. ORIGINAL GANGSTER* (Sire 1991); N.W.A., *Boyz N The Hood*, on *N.W.A. AND THE POSSE* (Macola Records 1987).

¹⁰⁹ Maxon, *supra* note 20, at 5.

¹¹⁰ CAFFEY, *supra* note 88.

¹¹¹ *Id.*

individuals involved and are not distributed to all the members of the larger gang.”¹¹² Furthermore, internal power struggles between older and younger gang members within the same gangs has caused Blood-on-Blood and Crip-on-Crip violence, further fragmenting the gangs.¹¹³ Thus, while sects of the Bloods and Crips are found in cities and towns across the United States, such sects are only loosely connected, if connected at all.¹¹⁴

2. *The 18th Street Gang*

Like the Bloods and Crips, the 18th Street gang formed in Los Angeles during the 1960s.¹¹⁵ During the 1960s, the “Clanton Street” gang was a well-established Los Angeles Hispanic street gang.¹¹⁶ As Hispanic immigrants moved to Los Angeles, the gang denied membership to both non-U.S. citizens and U.S. citizens without pure Hispanic heritage.¹¹⁷ As a result, undocumented immigrants and youth of mixed ancestry created their own gang in the Clanton Street neighborhood.¹¹⁸ The new gang took the name “18th Street” because one of its founding members lived on 18th Street, just four blocks from Clanton Street in the Rampart section of Los Angeles.¹¹⁹

The 18th Street gang was the first Hispanic street gang to include members of mixed races.¹²⁰ Inclusion of such members allowed the gang to grow quickly and substantially.¹²¹ The gang was also the first Hispanic street gang to send its members outside the State of California

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Maxon, *supra* note 20, at 5 (explaining that although some Bloods and Crips have interstate connections, the majority do not); see also Bart H. Rubin, Note, *Hail, Hail, The Gangs Are All Here: Why New York Should Adopt A Comprehensive Anti-Gang Statute*, 66 FORDHAM L. REV. 2033, 2037 (1998) (“Authorities agree . . . that the New York Bloods bear little resemblance to their Los Angeles counterparts or other New York gangs. Police believe that New York’s Bloods have no official affiliation with the Los Angeles Bloods, and that they are much less organized and fraternal than established New York City gangs like the Latin Kings and the Netas.”).

¹¹⁵ VALDEZ, 18TH STREET, *supra* note 13; NAGIA, *supra* note 13, at 9.

¹¹⁶ VALDEZ, 18TH STREET, *supra* note 13.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; NAGIA, *supra* note 13, at 9.

on recruiting missions.¹²² Such recruiters often target elementary and middle schools to expand the gang's numbers.¹²³ Thus, the 18th Street gang is sometimes referred to as the "Children's Army."¹²⁴ As a result of such recruitment efforts, the 18th Street gang "has migrated up the West Coast and over the Midwest to the East Coast."¹²⁵ Unfortunately, 18th Street gang members rarely leave the gang. As one member explained, according to the gang's rules, "[t]here is only one way out, and that's in a body bag."¹²⁶

Like the Bloods and Crips, the 18th Street gang has ties with Mexican drug cartels¹²⁷ and the West Coast Mexican Mafia.¹²⁸ Furthermore, the gang is "known to have counterparts in Mexico and throughout Central America."¹²⁹ Therefore, the 18th Street gang is both a national and international street gang.¹³⁰

The 18th Street gang is known for distributing "[crack], marijuana, tar heroin, and methamphetamine."¹³¹ Furthermore, the gang uses "tax collection"—charging both legal and illegal businesses in their territory a "tax"—to raise revenue.¹³² Such tax collection often breeds deadly violence. For example, in 1994, the Los Angeles County District Attorney's Office prosecuted 18th Street gang members for thirty murders related to citizens' failure to pay "taxes."¹³³ More recently, in September 2007, "one DVD vendor stood up to the gang. He was

¹²² VALDEZ, 18TH STREET, *supra* note 13.

¹²³ NAGIA, *supra* note 13, at 9.

¹²⁴ VALDEZ, 18TH STREET, *supra* note 13.

¹²⁵ NAGIA, *supra* note 13, at 9.

¹²⁶ VALDEZ, 18TH STREET, *supra* note 13.

¹²⁷ *Id.*

¹²⁸ *Id.*; NAGIA, *supra* note 13, at 9.

¹²⁹ VALDEZ, 18TH STREET, *supra* note 13; NAGIA, *supra* note 13, at 9.

¹³⁰ See Tara Pinkham, Note, *Assessing the Collateral International Consequences of the U.S.' Removal Policy*, 12 BUFF. L. REV. 223, 234–35 (2006) (attributing the gang's growth in Central America to the United States' deportation of Los Angeles gang members to Central America).

¹³¹ VALDEZ, 18TH STREET, *supra* note 13.

¹³² *Id.*; Mandalit del Barco, *Feds Aim to Dismantle L.A.'s 18th Street Gang*, NAT'L PUB. RADIO, Sept. 6, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=91105501>.

¹³³ VALDEZ, 18TH STREET, *supra* note 13.

shot, as was a 23-day-old baby in a stroller nearby.”¹³⁴ In addition to such barbaric violence, the gang has also engaged in sophisticated crimes such as “creating fraudulent . . . immigration papers, credit cards, bus passes, and even food stamps.”¹³⁵

The 18th Street gang’s involvement in the national drug trade and its recruitment efforts has made it “one of the largest, most well-known Hispanic street gangs in the nation.”¹³⁶ Though the gang shows some signs of evolving a “higher level of sophistication and organization,”¹³⁷ it is currently composed of numerous cliques with as many as 30,000 total members in the United States and Central America.¹³⁸ As Investigator Al Valdez of the Orange County District Attorney’s Office reports, “Law enforcement projections and intelligence indicate that 18th Street gang membership will continue to grow, especially outside of California as new drug markets are established. The gang’s propensity for violence is also expected to increase.”¹³⁹

3. *Mara Salvatrucha (MS-13)*

In the 1980s, some Salvadorians fled a bloody civil war in El Salvador and settled in Los Angeles.¹⁴⁰ Some of the immigrants had ties with “La Mara,” a violent Salvadorian street gang.¹⁴¹ Other immigrants were former members of the Farabundo Marti National Liberation Front (“FMNL”), a Salvadorian paramilitary group with weapons and explosives training that fought during the civil war.¹⁴² When these immigrants reached the streets of Los Angeles, they were often intimidated by local Hispanic gangs.¹⁴³ Consequently, the Salvadorian refugees banded together and formed Mara Salvatrucha, or “Street-Tough Salvadorian Posse,” in the late

¹³⁴ del Barco, *supra* note 132.

¹³⁵ VALDEZ, 18TH STREET, *supra* note 13.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ del Barco, *supra* note 132.

¹³⁹ VALDEZ, 18TH STREET, *supra* note 13.

¹⁴⁰ Romano, *supra* note 18; NAGIA, *supra* note 13, at 8; VALDEZ, MARA SALVATRUCHA, *supra* note 13.

¹⁴¹ VALDEZ, MARA SALVATRUCHA, *supra* note 13.

¹⁴² *Id.*

¹⁴³ *Id.*

1980s.¹⁴⁴ The gang often uses the acronym “MS-13”¹⁴⁵ to identify itself.¹⁴⁶ Though the gang once only accepted Salvadorians, it now accepts members from Ecuador, Guatemala, Honduras, and Mexico.¹⁴⁷

Like the 18th Street gang, MS-13 is known for trafficking drugs such as cocaine, heroin, marijuana, and methamphetamine, and placing taxes on prostitutes and drug dealers in its neighborhoods.¹⁴⁸ Furthermore, the gang often steals cars and ships them back to Central America in exchange for drugs.¹⁴⁹ In fact, in 2000 it was estimated that “80% of the cars driven in El Salvador were stolen in the United States.”¹⁵⁰

Though MS-13 and the 18th Street gang share many similarities, the gangs are bitter rivals and MS-13 has been known to attack the 18th Street gang on sight.¹⁵¹ MS-13 members have used grisly tactics to intimidate such rival gangs, including beheading and the use of grenades and machetes in attacks.¹⁵² The gang has also attacked law enforcement officers, resulting in the “execution of three federal agents and numerous shootings of law enforcement officers across the country.”¹⁵³ Apparently using military tactics learned from fighting in the El Salvadorian civil war, MS-13 members have also used grenades to booby-trap structures housing

¹⁴⁴ *Id.*; Romano, *supra* note 18.

¹⁴⁵ MS stands for “Mara Salvatrucha” and the “13” signifies that the gang was formed in southern California. Romano, *supra* note 18.

¹⁴⁶ VALDEZ, MARA SALVATRUCHA, *supra* note 13.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Kara Jakes Jordan, *Crackdown Nets 103 Members of MS-13 Gang*, LINCOLN J. STAR, March 14, 2005, available at <http://journalstar.com/articles/2005/03/14/nation/doc4235fac0099ad104701157.txt>; see also Romano, *supra* note 18 (reporting that a former MS-13 associate who had turned in information on the gang was found “repeatedly stabbed and her head nearly severed”).

¹⁵³ VALDEZ, MARA SALVATRUCHA, *supra* note 13.

drug stashes “on the assumption that [such] structures will be searched by law enforcement [officers].”¹⁵⁴

Like the 18th Street gang, MS-13 has made a conscious effort to spread across the United States. In 1993, MS-13 sent three members from Los Angeles to Northern Virginia and Washington D.C. to recruit new members.¹⁵⁵ By April 25, 2005, the FBI reported that MS-13 had a presence in more than thirty-one states and Washington D.C.¹⁵⁶ The gang’s influence now stretches from Washington D.C. to Omaha; from Omaha to Los Angeles; and from Los Angeles to El Salvador.¹⁵⁷ Though the gang has “no clear hierarchy or structure,” the National Drug Intelligence Center reported in 2004 that the gang “may be increasing its coordination [between] MS-13 chapters in Los Angeles, Washington, D.C./Northern Virginia, and New York City, possibly signaling an attempt to build a national command structure.”¹⁵⁸ Thus, with as many as 50,000 members throughout the United States and Central America, Mara Salvatrucha is a force to be reckoned with.¹⁵⁹ As one commentator explained, “[Mara Salvatrucha is] considered the fastest-growing, most violent and least understood of [America’s] street gangs”¹⁶⁰

E. International Gang Phenomenon

As discussed above, both the 18th Street gang and Mara Salvatrucha have spread across the United States and into Latin America. The gangs’ spread across the United States is due, at least in part, to the gangs’ targeted recruiting efforts and spreading drug markets. However, the

¹⁵⁴ *Id.*

¹⁵⁵ *Congressional Testimony Before the Subcomm. on the W. Hemisphere H. Int’l Relations Comm.*, 109th Cong. (2005) (statement of Chris Swecker, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress05/swecker042005.htm>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Romano, *supra* note 18.

¹⁵⁹ Robert J. Lopez et al., *MS-13: An International Franchise*, LOS ANGELES TIMES, October 30, 2005, available at <http://www.latimes.com/news/nationworld/world/la-me-gang30oct30,0,6990792.story>.

¹⁶⁰ Romano, *supra* note 18.

gangs' introduction to Latin America is likely the unforeseen result of the United States' deportation policy.¹⁶¹

Beginning in the early 1990s, the U.S. government began deporting thousands of undocumented aliens to Central America.¹⁶² Between 1993 and 2005, U.S. immigration authorities “logged more than 50,000 deportations of immigrants with criminal records to Central America, including untold numbers of gang members”¹⁶³ Members of the 18th Street and Mara Salvatrucha gangs—many of whom grew up in the U.S. and did not even speak Spanish—were among such deportees.¹⁶⁴ Members of the gangs “failed to reintegrate” into their native communities, banded together, and began recruiting local teens.¹⁶⁵ Unfortunately, the gangs took root and grew rapidly. As one MS-13 deportee named Francisco “E.T.” Campos recalled, during one month in 1993, 300 teens in San Salvador, El Salvador joined MS-13.¹⁶⁶ Campos personally initiated forty such members in one day by beating them repeatedly with his fists.¹⁶⁷

The surge of gang-related crimes that followed such mass deportations overwhelmed El Salvador's prison system.¹⁶⁸ In fact, between 2001 and 2006, El Salvador's inmate population doubled.¹⁶⁹ Members of rival gangs often clashed in such prisons, causing the Salvadorian

¹⁶¹ See Pinkham, *supra* note 130, at 234–35; Jennifer M. Chacon, *Whose Community Shield?: Examining The Removal of the “Criminal Street Gang Member”*, 2007 U. CHI. LEGAL F. 317, 352–56 (2007).

¹⁶² Lopez et al., *supra* note 159; Pinkham, *supra* note 130, at 234–35.

¹⁶³ Lopez et al., *supra* note 159.

¹⁶⁴ Pinkham, *supra* note 130, at 234–35.

¹⁶⁵ *Id.* at 235.

¹⁶⁶ Lopez et al., *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Pinkham, *supra* note 130, at 236.

government to segregate prisons to house members of only one gang.¹⁷⁰ For example, Ciudad Barrios prison in San Miguel houses only MS-13 members.¹⁷¹

Such segregated prisons have become “nerve centers” for MS-13 and the 18th Street gang.¹⁷² Gang members often successfully bribe prison guards to smuggle cell phones into the prisons and then use the phones to communicate with gang members throughout Central America and the United States.¹⁷³ For example, one reporter explained that an MS-13 member in southern Maryland called an MS-13 leader in Ciudad Barrios to get permission to give an interview.¹⁷⁴ Also, Ciudad Barrios officials have “intercepted letters ordering gang members to murder rivals.”¹⁷⁵

Members of MS-13 and the 18th Street gang also use the Salvadorian prison system as a type of “college” to educate their members in the gangs’ rules, drug trafficking, and gang violence.¹⁷⁶ As a result, the gangs have become quite sophisticated in El Salvador.¹⁷⁷ As one Salvadorian Government official explained, MS-13 is now “highly organized and disciplined . . . with semi-clandestine structures and vertical commands.”¹⁷⁸ This is not good news for Americans as gang members are deported from the United States, receive a Salvadorian prison gang “education,” and illegally return to the United States. As El Salvador’s Vice Minister of Security explained, “It’s a merry-go-round.”¹⁷⁹ Unfortunately, there is no end to the merry-go-round in sight. According to law enforcement officials and gang members alike, Central

¹⁷⁰ Lopez et al, *supra* note 159.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; Pinkham, *supra* note 130, at 240.

¹⁷⁷ Pinkham, *supra* note 130, at 238.

¹⁷⁸ Lopez et al, *supra* note 159.

¹⁷⁹ *Id.*

American gang expansion and harsh anti-gang legislation is encouraging even more Central American gang members to illegally enter the United States.¹⁸⁰

The international nature of MS-13 and the 18th Street gang has created a two-way pipeline of illicit goods between the United States and Central America. In El Salvador, hand grenades cost between one and two U.S. dollars and M-16 assault rifles cost between two hundred and two-hundred-twenty U.S. dollars.¹⁸¹ Conversely, handguns are often in short supply in El Salvador.¹⁸² Therefore, U.S. MS-13 gang members often exchange handguns and/or cash for grenades and M-16 rifles with Salvadorian MS-13 members.¹⁸³ Furthermore, as discussed above, U.S. MS-13 members frequently steal cars in the United States in exchange for Central American drugs.¹⁸⁴

Finally, MS-13 has taken a bold step to further unite its international members. MS-13 recently held a “gang summit” in Honduras.¹⁸⁵ According to the FBI, the meeting was set to “discuss international leadership issues within the group.”¹⁸⁶ Though some media reports alleged that gang leaders met with members of al-Qaida, the FBI reported that such allegations were not supported by credible sources and were likely false.¹⁸⁷ That is not to say, however, that MS-13 has not resorted to terror tactics. For example, in February 2005, U.S. law enforcement personnel arrested an MS-13 member in Texas who allegedly blew up a bus in Honduras, killing twenty-two adults and six children.¹⁸⁸ The FBI reported that “the massacre was in retaliation

¹⁸⁰ *Id.*

¹⁸¹ VALDEZ, MARA SALVATRUCHA, *supra* note 13.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Congressional Testimony Before the Subcomm. on the W. Hemisphere H. Int’l Relations Comm.*, 109th Cong. (2005), (statement of Chris Swecker, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress05/swecker042005.htm>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

against laws targeting gang members in Honduras”¹⁸⁹ Again, MS-13’s use of terror tactics is not good news for Americans in light of the deportee “merry-go-round,” illicit goods pipelines running between the United States and Central America, and the gang’s push for international unity.

F. Nebraska’s Gang Problem

As discussed above, gangs such as the Bloods, Crips, MS-13, and the 18th Street gang have spread from California across the U.S., causing a national gang problem. Additionally, gangs such as MS-13 and the 18th street gang have even spread to Latin America, causing an international gang problem. Unfortunately, Nebraska—though nestled in the center of America’s Heartland—is not immune to such national and international gangs.

Omaha—Nebraska’s largest city—first began experiencing gang problems in the mid-1980s.¹⁹⁰ Such problems were confined to Omaha until 1990, when gang problems arose in other parts of Nebraska.¹⁹¹ Thus, studying Omaha’s current gang problem provides at least some insight into Nebraska’s overall gang problem.

According to the National Drug Intelligence Center (“NDIC”), Omaha is a strategic regional distribution center for cocaine, methamphetamine, and marijuana.¹⁹² Interstates 29 (running north and south) and 80 (running east and west) intersect just outside of Omaha in Council Bluffs, Iowa.¹⁹³ This intersection provides Mexican drug trafficking organizations “with easy access to the Kansas City metropolitan area and national drug markets in California and

¹⁸⁹ *Id.*

¹⁹⁰ NEB. CRIME COMM’N, NEBRASKA’S STATEWIDE CRIMINAL JUSTICE DRUG AND VIOLENT CRIME STRATEGY FOR 1997–2000 2 (1997) [hereinafter “NEB. CRIME COMM’N, STATEWIDE STRATEGY 1997–2000”], *available at* http://www.nlc.state.ne.us/docs/pilot/pubs/Drug_Crime.pdf.

¹⁹¹ *Id.*

¹⁹² NAT’L DRUG INTELLIGENCE CTR., DRUG MARKET ANALYSIS: MIDWEST 13 (2008) [herein after “NDIC, MIDWEST”].

¹⁹³ *Id.*

Southwestern states.”¹⁹⁴ Mexican drug trafficking organizations use their connections throughout Nebraska in towns such as Fremont, Grand Island, Lexington, and Norfolk to smuggle drugs into Omaha.¹⁹⁵ Such cities hold “large numbers of Mexican nationals [who] have sought employment in meatpacking and poultry processing plants.”¹⁹⁶ Once drugs arrive in Omaha, they are either distributed in Omaha or to other states such as Iowa and South Dakota.¹⁹⁷

Given that (1) Omaha is a regional drug distribution hub and (2) gangs are the primary drug distributors in the United States,¹⁹⁸ it is not surprising that gangs formed in Omaha. According to the NDIC, African American and Hispanic gangs are the primary retail drug distributors in Omaha.¹⁹⁹ Specifically, Omaha’s gangs include the Bloods, Crips, and MS-13—the city’s fastest-growing Hispanic street gang.²⁰⁰ A look at Omaha’s gang statistics helps depict the impact such gangs have had on the city.

In 2002, the OPD suspected that twenty-one gangs with a total of 1,843 members operated within Omaha’s city limits.²⁰¹ At the present time, the OPD suspects that twenty-nine gangs with 2,595 members operate within Omaha’s city limits.²⁰² Thus, in only six years, the number of gangs in Omaha increased by thirty-eight percent and the number of gang members increased by forty percent. In 2002, the OPD determined that gangs were responsible for a total of 2,466 criminal offenses.²⁰³ In 2007, the OPD determined that gangs were responsible for a

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ NDAA, *supra* note 22, at vi.

¹⁹⁹ NDIC, MIDWEST, *supra* note 192, at 13.

²⁰⁰ *Id.*

²⁰¹ OMAHA POLICE DEP’T, SECOND QUARTER 2003 DETAIL REPORT (April–June 2003), *available at* <http://www.opd.ci.omaha.ne.us/NEWS/STATS/>.

²⁰² OMAHA POLICE DEP’T, SECOND QUARTER 2008 DETAIL REPORT (April–June 2008), *available at* <http://www.opd.ci.omaha.ne.us/NEWS/STATS/>.

²⁰³ OMAHA POLICE DEP’T, FOURTH QUARTER 2003 DETAIL REPORT (Oct.–Dec. 2003), *available at* <http://www.opd.ci.omaha.ne.us/NEWS/STATS/>.

total of 3,587 criminal offenses.²⁰⁴ Thus, in just five years the number of gang offenses in Omaha increased by forty-five percent. The above statistics demonstrate that Omaha has experienced a significant increase in number of gangs, gang members, and gang activity over the past five to six years.

A closer look at Omaha's crime statistics reveals the nature of Omaha gangs' criminal activities. Between 2002 and 2007, gangs were responsible for a total of forty-seven criminal homicides in Omaha.²⁰⁵ Thus, gangs were responsible for twenty-eight percent of Omaha's 170 criminal homicides between those years.²⁰⁶ Notably, in 2003, gangs were responsible for fifteen criminal homicides, or a staggering forty-three percent of Omaha's thirty-five criminal homicides that year.²⁰⁷ Furthermore, between 2002 and 2007, Omaha gangs were responsible for 242 drive-by assaults, 24 sexual assaults, 58 robberies, 84 burglaries, 1,214 drug possession/trafficking offenses, and 11 intimidation of a witness offenses.²⁰⁸ Finally, a University of Nebraska-Omaha study revealed that during a ten-month period in 2007, sixty to seventy percent of "Omaha's gun violence involved a victim or suspect who was in a gang."²⁰⁹

Clearly, Omaha has an established gang presence. Unfortunately, a survey of recent newspaper headlines from across Nebraska suggests that Nebraska's gang problem is not confined to Omaha: gang-related stabbings in Lexington,²¹⁰ a gang-related theft of more than

²⁰⁴ OMAHA POLICE DEP'T, FOURTH QUARTER 2008 DETAIL REPORT (Oct.–Dec. 2008), *available at* <http://www.opd.ci.omaha.ne.us/NEWS/STATS/>.

²⁰⁵ I tabulated these statistics by looking at the Omaha Police Department's fourth-quarter year-to-date crime reports from 2002 to 2007. *See* <http://www.opd.ci.omaha.ne.us/NEWS/STATS/>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Christopher Burbach, *Violence is a constant risk for gang unit*, OMAHA WORLD HERALD, August 21, 2008.

²¹⁰ *See* Betsy Friedrich et al., *Gang Fight Leaves One Dead*, LEXINGTON CLIPPER-HERALD, March 17, 2008, *available at* [http://www.lexch.com/site/index.cfm?newsid=19398732&BRD=284&PAG=461&dept_id=558509&rfi=8](http://www.lexch.com/site/index.cfm?newsid=19398732&BRD=284&PAG=461&dept_id=558509&rfi=8;); Danny Gruber, *Carranza Brother Arraigned in District Court*, LEXINGTON CLIPPER-HERALD, August 22, 2008, *available at* http://www.lexch.com/site/index.cfm?newsid=20087658&BRD=284&PAG=461&dept_id=558509&rfi=8

eighty firearms in Lincoln,²¹¹ and a gang-related drive-by shooting in Columbus.²¹² Such occurrences may surprise those who grew up in rural Nebraska and remember the days when few, if any, gangs existed in their agricultural state. However, as early as 1997, the Nebraska Crime Commission recognized that gangs had “spread to other Nebraska communities”—even as far west as Scottsbluff.²¹³ In 2004, the Crime Commission reported that between 1999 and 2004, Nebraska’s gang database grew to “include the names of 48,440 known gang members and associates.”²¹⁴ Thus, it appears that the overwhelming majority of Nebraska’s gang members live outside Omaha’s city limits and in other Nebraska cities and rural towns.²¹⁵

For example, in 2001 the Dawson County Sheriff’s office reported that the following gangs were active in Lexington, Nebraska: the 18th Street gang (65 members), SUR 13, aka “the 13th Street gang” (45 members), MS-13 (27 members), and the Winton Side Locos (11 members).²¹⁶ Notably, MS-13 ran a successful auto theft ring in Lexington during the early 1990s, resulting in an astonishing twenty-four auto thefts in 1992 alone.²¹⁷ Such statistics are shocking given that Lexington is a rural central-Nebraska town—home to only 10,000 inhabitants²¹⁸ and bordered by cornfields.

Thus, Nebraska’s current gang problem stretches from Scottsbluff in the West to Omaha in the East and infests both cities and rural towns. The above discussion demonstrates how

(discussing arraignment of Ricardo Carranza, a 13th Street gang member, who stabbed a rival 18th Street gang member on July 13, 2008).

²¹¹ Lori Pilger & Cory Mattson, *Police Chief Says Teenage Gang Had Busy Summer*, LINCOLN J. STAR, Oct. 13, 2007, available at <http://journalstar.com/articles/2007/10/13/news/local/doc47114fbb2d619372160076.txt>.

²¹² Jim Osborn, *Shootings Were Gang-Related*, COLUMBUS TELEGRAM, August 21, 2008.

²¹³ NEB. CRIME COMM’N, STATEWIDE STRATEGY 1997–2000, *supra* note 190, at 2.

²¹⁴ NEB. CRIME COMM’N, STATEWIDE CRIMINAL JUSTICE DRUG AND VIOLENT CRIME STRATEGY FOR 2004–2008 4 (2004) [HEREINAFTER “NEB. CRIME COMM’N, STATEWIDE STRATEGY 2004–2008”] available at <http://www.nlc.state.ne.us/epubs/L2500/B016-2004.pdf>.

²¹⁵ NEB. CRIME COMM’N, STATEWIDE STRATEGY 1997–2000, *supra* note 190, at 2.

²¹⁶ Thomas P. McCarty, *The Impact of Meatpacking Plants on Crime Rates*, at 15 (2005), available at <http://www.unk.edu/uploadedFiles/academics/gradstudies/ssrp/2005/McCarty%20Paper.pdf>.

²¹⁷ *Id.* at 18, fig. 7.

²¹⁸ See *supra* note 14 and accompanying text.

gangs in Nebraska breed drugs and violence,²¹⁹ wreaking havoc in Nebraska's communities. Therefore, Nebraska must recognize its gang problem and take steps to eradicate gangs from its borders. The following Part provides examples of how some states' legislatures have recognized their respective gang problems and enacted anti-gang legislation to prevent and suppress gang crime.

III. States' Legislative Response

Forty-six states and the District of Columbia have enacted some form of anti-gang legislation to combat gang activity.²²⁰ Discussing each state's anti-gang legislation is beyond the scope of this Article. However, this section first briefly discusses California's anti-gang legislation because California was the first state to adopt comprehensive anti-gang legislation. Then, this section surveys anti-gang statutes from states surrounding Nebraska. Finally, this section examines anti-gang legislation proposed in Nebraska.

A. California

In 1988, the California legislature passed the California Street Terrorism Enforcement and Prevention Act ("STEP")²²¹—the first comprehensive state anti-gang legislation in the United States.²²² The legislature enacted STEP because "the State of California [was] in a state of crisis which ha[d] been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."²²³ Thus, through STEP, the legislature sought "the eradication of criminal activity by street gangs, by

²¹⁹ In fact, the Nebraska Crime Commission reported that "[i]llegal drugs, violence and gang ties are present in a large percentage of crimes committed [in Nebraska]." NEB. CRIME COMM'N, STATEWIDE STRATEGY 2004–2008, *supra* note 214, at 4.

²²⁰ Institute for Intergovernmental Research, Highlights of Gang Related Legislation (Spring 2008) (last visited November 12, 2008) (reporting that 46 states and the District of Columbia have passed "some sort of legislation relating to gangs"), at <http://www.iir.com/nygc/gang-legis/highlights-gang-related-legislation.htm>.

²²¹ See CAL. PENAL CODE § 186.20–186.33.

²²² Bjerregaard, *supra* note 26, at 32.

²²³ CAL. PENAL CODE § 186.21.

focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.”²²⁴ To achieve these goals, the California legislature based STEP loosely on the federal Racketeering Influenced and Corrupt Organizations Act (“RICO”), which the U.S. Government has used to successfully fight organized crime syndicates.²²⁵ Since California first enacted STEP, numerous other states have passed STEP-based anti-gang legislation to combat street gang activity within their borders.²²⁶

STEP contains two main provisions: a substantive offense for active participation in a criminal street gang,²²⁷ and a sentencing enhancement for enumerated gang-related crimes.²²⁸ Under the active participation provision, it is a criminal offense for anyone to “actively participate[] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and . . . [to] willfully promote[], further[], or assist[] any felonious criminal conduct by members of that gang.”²²⁹ Prosecutors may charge an active gang participant with either a misdemeanor or felony under this provision.²³⁰ If the participant is charged with a misdemeanor, he faces a sentence of up to one year in a county jail.²³¹ Conversely, if the participant is charged with a felony, he faces a sentence of up to three years in a state prison.²³²

²²⁴ *Id.*

²²⁵ J. Franklin Sigal, Comment, *Out of Step: When the California Street Terrorism Enforcement and Prevention Act Stumbles into Penal Code Limits*, 38 GOLDEN GATE U. L. REV. 1, 11 (2007).

²²⁶ See e.g., ARK. CODE ANN. § 5-74-101 to -109; GA. CODE ANN. §§ 16-15-1 to -10; IND. CODE ANN. §§ 35-45-9-1 to -6; LA. REV. STAT. ANN. §§ 15:1401–1407; MINN. STAT. § 609.229; MISS. CODE ANN. § 97-44-1 to -19; NEV. REV. STAT. § 193.168; N.D. CENT. CODE 12.1-06.2-01 to -04.

²²⁷ CAL. PENAL CODE § 186.22(a).

²²⁸ *Id.* §186.22(b); see Baker, *supra* note 21, at 104.

²²⁹ CAL. PENAL CODE § 186.22(a).

²³⁰ See Baker, *supra* note 21, at 103.

²³¹ CAL. PENAL CODE § 186.22(a).

²³² *Id.* In California, “[a] felony is a crime which is punishable with death or by imprisonment in state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.” Baker, *supra* note 21, at 104 (quoting Cal. PENAL CODE § 17).

Under STEP’s enhancement provision, the sentence of “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” is increased by a number of years dependant on the crime.²³³ For example, if one who qualifies under this enhancement commits an enumerated “serious felony”²³⁴ his base prison sentence is increased by an additional five years.²³⁵ Furthermore, if one who qualifies under this enhancement commits an enumerated “violent felony”²³⁶ his prison sentence is increased by an additional ten years.²³⁷ Finally, if the individual commits a felony that does not qualify as a “violent” or “serious” felony, his base prison sentence is increased by two to four years.²³⁸

As one commentator pointed out, such enhancements exceed the base maximum penalty of some felonies.²³⁹ For example, one generally faces a maximum six-year prison sentence for First Degree Robbery under California’s penal code.²⁴⁰ However, STEP enhances the base sentence of robbery—classified as a “violent” felony—by ten years.²⁴¹ Thus, one who commits a non-gang related robbery generally faces up to six years imprisonment, whereas one who commits a gang-related robbery faces up to sixteen years imprisonment (assuming he otherwise qualifies under the STEP enhancement).²⁴²

B. States Surrounding Nebraska

²³³ CAL. PENAL CODE § 186.22(b)(1).

²³⁴ For a comprehensive list of “serious felonies,” see *id.* § 1192.7(c).

²³⁵ *Id.* § 186.22(b)(1)(B).

²³⁶ For a comprehensive list of “violent felonies,” see *id.* § 667.5.

²³⁷ *Id.* § 186.22(b)(1)(C).

²³⁸ *Id.* § 187.22(b)(1)(A).

²³⁹ See Baker, *supra* note 21, at 105.

²⁴⁰ CAL. PENAL CODE § 213(a)(1)(B). Note that this example is a modification of the example briefly explained by Baker, *supra* note 21, at 105 n.29.

²⁴¹ CAL. PENAL CODE § 186.22(b). Baker, *supra* note 21, at 105.

²⁴² Baker, *supra* note 21, at 105 n. 29 (citing CAL. PENAL CODE § 213(a)(2)).

1. Colorado

In 2001, the Colorado legislature took a direct role in fighting against the spread of gangs when it criminalized “recruitment of a juvenile for a criminal street gang.”²⁴³ Specifically, the legislature made it a Class 1 misdemeanor—punishable by six to eighteen months imprisonment and/or a \$500 to \$3,000 fine²⁴⁴— for a person eighteen years old or over to:

- (a) Knowingly solicit[], invite[], recruit[], encourage[], coerce[], or otherwise cause[] a person younger than eighteen years of age to actively participate in or become a member of a criminal street gang; or
- (b) By use of force, threat, or intimidation directed at any person, or by the infliction of bodily injury upon any person, knowingly prevent[] a person younger than eighteen years of age from leaving a criminal street gang.²⁴⁵

Thus, the above statute criminalizes both gang recruitment and violent and/or intimidating gang retention efforts.

Furthermore, the Colorado legislature enacted a statute that specifically targets drive-by shootings.²⁴⁶ Under the statute, a person who knowingly or intentionally discharges a firearm from a motor vehicle into an inhabited building or vehicle may be charged with a Class 5 felony²⁴⁷—punishable by one to two years imprisonment and a mandatory two years of parole.²⁴⁸ Note that this crime is relatively easy for prosecutors to prove because it does not require the shooter to be a “gang member” or the shooting to benefit a “criminal street gang.” Rather, this statute implicitly attacks gang violence by criminalizing a common gang tactic.²⁴⁹

2. Iowa

²⁴³ COLO. REV. STAT. § 18-23-102.

²⁴⁴ *Id.* § 18-1.3-501(1)(a)

²⁴⁵ *Id.* § 18-23-102. Note that this statute is similar to California’s anti-gang recruitment statute. See CAL. PENAL CODE §186.26.

²⁴⁶ See COLO. REV. STAT. § 18-12-107.5.

²⁴⁷ *Id.* § 18-12-107.5(1), (3).

²⁴⁸ *Id.* § 18-1.3-401(V)(A)

²⁴⁹ Tiffany Sykes, Note, *Much Ado About Something: Reconciling Roper v. Simmons with the Gang Deterrence and Community Protection Act of 2007 and the Possibility of Inconsistent Jurisprudence*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 170 (2008) (“No longer are fists and jeers the [gangs’] weapons of choice. Now drive-by shootings with semi-automatics, brutal group beatings, and machete attacks are the standard.”)

The Iowa legislature followed the California legislature’s lead and criminalized “gang participation.”²⁵⁰ Specifically, the Iowa legislature made it a Class D felony—punishable by up to five years imprisonment and a \$750 to \$7,500 fine²⁵¹—for a person to actively participate or be a member of a “criminal street gang” and “willfully aid[] and abet[] any criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang”²⁵² Notice that unlike STEP, this Iowa “gang participation” statute explicitly targets both active gang participants and “gang members.”

Furthermore, like the Colorado legislature, the Iowa legislature criminalized gang recruitment.²⁵³ Specifically, the Iowa legislature made it a Class C felony—punishable by up to ten years imprisonment and a \$1,000 to \$10,000 fine²⁵⁴—for a person to “solicit[], recruit[], entice[], or intimidate[] a minor to join a criminal street gang.”²⁵⁵ Furthermore, the legislature made it a Class D felony for a person to “conspire[] to solicit, recruit, entice, or intimidate a minor to join a criminal street gang.”²⁵⁶ Note that unlike Colorado’s anti-gang recruitment statute, Iowa’s statute includes a conspiracy offense and does not create a specific offense for violent gang retention activities.

3. *Kansas*

In Kansas, the legislature passed a type of gang enhancement statute which requires courts to “presume imprisonment” when sentencing offenders who have committed “any felony violation for the benefit of, at the direction of, or in association with any criminal street gang,

²⁵⁰ IOWA CODE § 723A.2.

²⁵¹ *Id.* §723.1(5).

²⁵² *Id.* § 723A.2

²⁵³ *Id.* § 723A.3(1).

²⁵⁴ *Id.* § 723.1(4).

²⁵⁵ *Id.*

²⁵⁶ *Id.* §723A.3(2).

with specific intent to promote, further or assist any criminal conduct by gang members”²⁵⁷ Thus, if an offender qualifies under this section, the court must impose a prison sentence, absent “substantial and compelling reasons” that would justify a non-prison sentence.²⁵⁸ Note that unlike the STEP Act’s enhancement provision, which increases prison sentences for gang-related felonies, this Kansas statute merely requires courts to presume that prison sentences will be imposed in gang-related felony cases.

4. *Missouri*

Missouri, like California, enacted comprehensive anti-gang legislation, complete with “active participation” and “enhancement” provisions. Under Missouri’s “active participation” provision, it is a crime for a person to actively participate in a criminal street gang “with knowledge that its members engage in or have engaged in a pattern of criminal street gang activity, and . . . promote[], further[] or assist[] in any felonious criminal conduct by gang members.”²⁵⁹ Under this provision, defendants may be sentenced to up to one year in county jail or one, two, or three years in a state prison.²⁶⁰ Furthermore, prosecutors charging juveniles aged fourteen to seventeen under this provision may transfer the juvenile’s case from juvenile court to “a court of general jurisdiction.”²⁶¹

Under the “enhancement” provision, a person who commits a felony or misdemeanor “for the benefit of, at the direction of, or in association with, any criminal street gang, with specific intent to promote, further, or assist in any criminal conduct by gang members”²⁶² faces the following increased penalties:

²⁵⁷ KAN. STAT. ANN. § 21-4704(k).

²⁵⁸ KAN. STAT. ANN. § 21-4704(d).

²⁵⁹ MO. REV. STAT. § 578.423.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* § 578.425.

- (1) For underlying misdemeanor offenses—imprisonment of up to one year in county jail, or imprisonment of one, two, or three years in a state prison;²⁶³
- (2) For underlying felony offenses (Class B felonies and lower)—imprisonment in a state prison for one, two, or three years served “in addition and consecutive to the punishment prescribed for the felony of which he has been convicted.”²⁶⁴ However, if the felony is committed within one thousand feet of a school, the “additional term shall be two, three, or four years”²⁶⁵
- (3) For Class A felonies punishable by death or life imprisonment—imprisonment in a state prison for a minimum of fifteen calendar years.²⁶⁶

Furthermore, the Missouri statutes provide that in first degree murder cases, the trier of fact shall consider whether the murder was committed “during the commission of a crime which is part of a pattern of criminal street gang activity” when deciding whether to impose the death penalty.²⁶⁷

Like the Colorado statutes discussed above, the Missouri statutes also criminalize drive-by shootings. Under Missouri’s statutes, a defendant who conducts a drive-by shooting that does not cause the injury or death of another “shall be sentenced to the maximum authorized term of imprisonment for a Class B felony,”²⁶⁸—fifteen years imprisonment.²⁶⁹ However, if the drive-by shooting injures or kills another person, the defendant “shall be sentenced to an authorized disposition for a Class A felony,”²⁷⁰—ten to thirty years imprisonment, or life imprisonment.²⁷¹ Thus, if a defendant conducted a drive-by shooting in St. Louis and merely grazed a victim with a bullet, he could face life in prison under this statute.

5. *South Dakota*

The South Dakota legislature enacted a gang enhancement provision to fight against gang activity. The provision simply provides that “[t]he penalty for conviction of any offense shall be

²⁶³ *Id.* § 578.425(1).

²⁶⁴ *Id.* § 578.425(2).

²⁶⁵ *Id.*

²⁶⁶ *Id.* § 578.425(3).

²⁶⁷ *Id.* § 656.032(2)(17)

²⁶⁸ *Id.* § 571.030(7), (8).

²⁶⁹ *Id.* § 558.011(1)(2).

²⁷⁰ *Id.* § 571.030(7).

²⁷¹ *Id.* § 558.011(1).

reclassified to the next highest classification in the penalty schedule if the commission of such offense is part of a pattern of street gang activity.”²⁷² Thus, if a defendant commits a Class 1 felony—punishable by up to fifty years imprisonment and up to a fifty thousand dollar fine²⁷³—as part of a pattern of street gang activity, this provision would reclassify the crime as a Class C felony—punishable by up to life imprisonment and a fifty thousand dollar fine.²⁷⁴ Similarly, if a defendant commits a Class 2 misdemeanor—punishable by up to thirty days in jail and/or up to a five hundred dollar fine²⁷⁵—as a part of a pattern of street gang activity, this provision would reclassify the crime as a Class 1 misdemeanor—punishable by up to one year in jail and/or up to a two thousand dollar fine.²⁷⁶

6. *Wyoming*

The Wyoming legislature has not enacted anti-gang legislation. However, in early 2008, Representative William Steward proposed House Bill 0076 to fight against gang activity. Specifically, HB 76 included the substantive offense of “intimidation in furtherance of the interests of a criminal street gang”—a felony punishable by one to ten years imprisonment.²⁷⁷ Furthermore, HB 76 included an enhancement provision which would have increased by three years the minimum and maximum punishments for felonies committed with the intent to promote, further, or assist a gang’s criminal conduct.²⁷⁸ The bill is still under the legislature’s consideration.²⁷⁹

C. **Nebraska**

²⁷² S.D. CODIFIED LAWS § 22-10A-2.

²⁷³ *Id.* § 22-6-1(4).

²⁷⁴ *Id.* § 22-6-1(5).

²⁷⁵ *Id.* § 22-6-2(2).

²⁷⁶ *Id.* § 22-6-2(1).

²⁷⁷ H.R. 0076, 59th Leg., Budget Sess. (Wyo. 2008) (as introduced by Representative Steward), *available at* <http://legisweb.state.wy.us/2008/Introduced/HB0076.pdf>.

²⁷⁸ *Id.*

²⁷⁹ As of March 7, 2008, the bill was placed on the Senate’s general file but had not been considered by the Senate. *See* <http://legisweb.state.wy.us/2008/Status/STATUS.pdf>.

As mentioned above, the Unicameral has not enacted anti-gang legislation. However, some legislators have proposed such legislation. For example, in 1999, then-Senator Jon Bruning introduced a gang enhancement bill to the Nebraska Unicameral Judiciary Committee.²⁸⁰ At that time, seventeen states and the federal government had adopted the same or similar legislation.²⁸¹ Specifically, the enhancement provided that “[a] person convicted of a felony committed in the course of gang activity²⁸² shall be subject to the penalty for the felony classification one level higher than that otherwise prescribed . . . for the crime committed.”²⁸³ Thus, this enhancement provision closely resembled South Dakota’s crime reclassification enhancement provision. On February 12, 1999, Senator Bruning explained to the Judiciary Committee that he would amend the enhancement to apply to crimes classified as Class IC felonies and below.²⁸⁴ He reasoned that he did not intend the enhancement “to punish gang related crimes to the level of the death penalty.”²⁸⁵

After Senator Bruning finished explaining his proposed enhancement to the Judiciary Committee, Senator Brashear commented, “[W]e have heard this or similar legislation before.

²⁸⁰ LB 159, 96th Leg., 1st Session (Neb. 1999).

²⁸¹ *Hearing on LB 159 Before the Jud. Comm.* 96th Legis., 1st Sess. 7 (Neb. 1999) (statement of Sen. Bruning).

²⁸² The bill defined “gang” as follows:

[A]n ongoing group, club, organization, or association of five or more persons that (a) has as one of its primary purposes the commission of or conspiracy to commit any felony involving controlled substances, the commission of or conspiracy to commit any felony offense of violence or which has as an element the use or attempted use of physical force against a person, or any combination of such felonies and (b) the members of which engage or have engaged within the past five years in a continuing series of the felony offenses listed in subdivision (a) of this subdivision

LB 159, 96th Leg., 1st Session 4–5 (Neb. 1999). Furthermore, the bill defined “gang activity” as:

[A]n action committed by a person who (a) participates in a gang with knowledge that its members engage or have engaged in a continuing series of felony offenses or conspiracy to commit felony offenses involving controlled substances, felony offenses or conspiracy to commit felony offenses of violence or which have as an element the use or attempted use of physical force against a person, or any combination of such felonies and (b) intends to promote or further the felonious activities of the gang or maintain or increase his or her position in the gang through the felonious activities committed

²⁸³ *Id.* at 3.

²⁸⁴ *Hearing on LB 159 Before the Jud. Comm.* 96th Legis., 1st Sess. 7 (Neb. 1999) (statement of Sen. Bruning).

²⁸⁵ *Id.*

One of the issues that always arises and intrigues me and I think is a problem is proof of membership. [Gang members] typically don't carry membership cards or get enrollment agreements or those kinds of things."²⁸⁶ Senator Bruning conceded that determining who is a member of a gang is "one of the biggest challenges prosecutors will face."²⁸⁷ However, he argued, "[S]ociety [has] an interest in preventing gangs that outweighs" such difficulties.²⁸⁸

Senator Brashear also commented that the Judiciary Committee had just moved a bill to the floor that increased sentences for accessories to felonies. He explained that prosecutors told the Judiciary Committee that "increasing the penalties for accessory to a felony would be the greater and more effective aid in dealing with [gang] issues" because "of the ease of proof as opposed to proving gang membership"²⁸⁹ The Unicameral ultimately enacted the accessory bill.²⁹⁰

Unfortunately, the Judiciary Committee failed to move Senator Bruning's gang enhancement to the floor. Based on Senator Brashear's remarks, the Judiciary Committee apparently killed Senator Bruning's gang enhancement bill because (1) prosecutors would have difficulty proving gang membership, and (2) the enhancement for accessory to a felony would more effectively address Nebraska's gang problem. As a result, Nebraska remains surrounded by states that have passed, or are currently considering, anti-gang legislation, but does not have anti-gang legislation of its own.

IV. Nebraska Should Enact Comprehensive Anti-Gang Legislation

The author proposes that Nebraska, like surrounding states and California, should enact comprehensive anti-gang legislation as a tool to help prosecutors and law enforcement agencies

²⁸⁶ *Id.* (statement of Sen. Brashear).

²⁸⁷ *Id.* at 8 (statement of Sen. Bruning).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 10 (Sen. Brashear).

²⁹⁰ *See* NEB. REV. STAT. § 28-204.

both prevent and suppress gang crime. Therefore, section (A) explains why Nebraska should enact anti-gang legislation to address its gang problem, and section (B) proposes a draft of such legislation with accompanying explanations.

A. Rationale

1. To Attack the Organized Nature of Criminal Street Gangs

First, Nebraska should enact comprehensive anti-gang legislation to attack the organized nature of criminal street gangs. As discussed above, gangs use their organizational structure to intimidate peaceful citizens and commit more sophisticated crimes with greater success.²⁹¹ The penal nature of anti-gang legislation attacks such organization by taking gang members and leaders off the streets and placing them in prison. Such punishment would at least temporarily disrupt gang operations, especially if high-level gang leaders are imprisoned.

Opponents to such rationale may point to prisons in El Salvador and argue that placing gang members in prison does not disrupt gangs' organization. In fact, prisons such as Ciudad Barrios have actually become gang "nerve centers" and increased gangs' organization.²⁹² However, one must recognize that unlike prisons in El Salvador, American prisons are not segregated based on gang membership. Furthermore, prisons in the United States are likely more secure than prisons in El Salvador, where prison guards are routinely bribed and contraband and information passes between the public and prisoners virtually at will.²⁹³ That is not to say that prisons in the United States are completely secure.²⁹⁴ Indeed, as Nebraska prisons take in more gang members, prison officials should place a greater focus on separating fellow gang members

²⁹¹ See discussion *supra* Part II.C.

²⁹² See *supra* note 172 and accompanying text.

²⁹³ See *supra* note 173 and accompanying text.

²⁹⁴ In *Hudson v. Palmer*, 468 U.S. 517, 528 (1984), the U.S. Supreme Court acknowledged that American prison administrators are engaged in a "constant fight against the proliferation of knives and guns, illicit drugs, and other contraband."

and preventing contraband and illicit information (i.e. hit lists) exchanges between prisoners and the public.

Furthermore, the author acknowledges that prison sentences alone will not eradicate Nebraska's gang problem. If Nebraska merely places gang members in prison, it merely treats the gang problem's symptoms instead of attacking the underlying disease.²⁹⁵ Thus, along with anti-gang legislation, the state and private parties should also consider designating more resources to fighting the factors which lead to gang formation—lack of economic opportunity, lack of job skills, lack of quality education, failed families, and lack of social camaraderie.²⁹⁶ For example, the state could offer more grants to private groups to host afterschool programs and create job skills training programs in economically challenged neighborhoods. A detailed discussion of specific programs or how to implement such programs is far beyond the scope of this Article.

Finally, some may argue that the Unicameral already sufficiently attacked gangs' organizational structure in 1999 when it increased sentences for accessory crimes. However, as discussed above, gangs are still alive and well in Nebraska.²⁹⁷ In fact, the number of gangs, gang members, and gang crimes has substantially increased in Omaha since 2002.²⁹⁸ Furthermore, as stated above, between 1999 and 2004, Nebraska's state-wide gang database grew to include the names of 48,440 gang members and associates.²⁹⁹ Thus, the 1999 accessory statute clearly did not dismantle Nebraska's gangs or prevent such gangs' growth.

2. To Reflect the Gravity of Gang Crime in Nebraska's Statutes

²⁹⁵ See *supra* note 66 and accompanying text.

²⁹⁶ See discussion *supra* Part II.B.

²⁹⁷ See discussion *supra* Part II.F.

²⁹⁸ See discussion *supra* Part II.F.

²⁹⁹ See *supra* note 214 and accompanying text.

Next, Nebraska should enact anti-gang legislation to reflect the gravity of gang-related crime in Nebraska's statutes. At the present time, gang-related crimes are prescribed the same penalties as non-gang-related crimes under Nebraska's statutes. Thus, Nebraska's current statutes do not reflect that gang-related crime is generally graver than non-gang-related crime due to gangs' organized nature and the fact that violent gang crime often triggers violent gang crime.³⁰⁰

As mentioned above, the Nebraska legislature increased penalties for accessory crimes in 1999 to address Nebraska's gang problem. Some may agree with the 1999 legislature's rationale and argue that Nebraska's existing accessory and/or conspiracy statutes already penalize organized crimes, and thus reflect the gravity of gang-related crime. However, such conspiracy and accessory statutes do not address situations where a gang member acts completely on his own, yet for the benefit of his gang.³⁰¹ Consider the following example. A Crip decides to conduct a drive-by shooting at a known Blood hangout to boost the Crips' reputation and expand the Crips' drug market in the area. The Crip uses his own weapon, does not consult or include other Crips before committing the crime, and proceeds to shoot at a Blood's house through his vehicle's driver's-side window while driving by. The accessory and conspiracy statutes would not apply to this Crip because his crime did not include two or more individuals. Although the Crip's drive-by shooting was not *organized* (i.e. did not involve more than one person in planning, carrying-out, or concealing the crime), the shooting was graver than a non-gang related drive-by shooting because the Crip conducted the shooting to benefit his criminal *organization*.

Likewise, gang-related accessory and conspiracy crimes are graver than non-gang related accessory and conspiracy crimes. For example, assume the Crip in the above example had a

³⁰⁰ See discussion *supra* Part II.C.

³⁰¹ See NEB. REV. STAT. § 28-204 (1) (accessory to a felony) (requiring someone to aid another person in concealing a felony or avoiding arrest); *id.* § 28-202(1)(a) (conspiracy) (requiring an agreement between two or more persons).

fellow Crip destroy his weapon after the drive-by shooting to help avoid prosecution. Also, assume that across town, a husband killed his neighbor over a property dispute and then has his wife destroy the weapon to avoid prosecution. Both cases involve accessory crimes.³⁰² However, the Crip's accessory crime is graver than the wife's accessory crime because the Crip's crime is tied to his criminal organization's much larger criminal scheme—intimidating neighboring gangs to gain a new drug market. Thus, the Crip's organized crime is graver than the husband's organized crime because the Crip's crime benefits a criminal organization.

Finally, Nebraska's existing accessory and conspiracy statutes do not account for the fact that the Crip's crime will likely trigger Bloods' retaliatory shootings.³⁰³ In the example above, the husband's slaying of his neighbor is an isolated incident and would not likely trigger multiple retaliatory shootings. Conversely, the Crip's drive-by shooting could set off an untold number of retaliatory shootings, putting Bloods, Crips, and innocent bystanders at risk.

3. To Fill Nebraska's Anti-Gang Legislation Void

As discussed above, Nebraska is one of four states without some sort of anti-gang legislation.³⁰⁴ If the Wyoming legislature passes anti-gang legislation currently under its consideration, Nebraska will be completely surrounded by states with anti-gang legislation. This obviously demonstrates that Nebraska has not followed the anti-gang legislation trend. Unfortunately, Nebraska's failure to pass anti-gang legislation may actually encourage gangs to settle and remain in Nebraska.

³⁰² See NEB. REV. STAT. § 28-204 (1)(c).

³⁰³ See discussion *supra* Part II.C. (discussing slaying of Crips leader B.L. Bullard and subsequent retaliatory shootings).

³⁰⁴ See *supra* note 220.

As Wyoming State Representative William Steward explained, “[National gangs] have found somewhat of a niche in Wyoming because [Wyoming’s] statutes are void.”³⁰⁵ In other words, gangs may establish themselves in states without anti-gang statutes to avoid prosecution under relatively harsh anti-gang laws in neighboring states. Consider the following real-life example from Central America. To address the growing problems created by gangs such as MS-13 and the 18th Street gang, Central American countries have enacted harsh anti-gang legislation known as “Mano Dura,” or “Firm Hand.”³⁰⁶ Some Central American countries’ Mano Dura laws allow prosecutors to imprison citizens for merely having a gang tattoo.³⁰⁷ Not surprisingly, such laws resulted in the arrests of thousands of Central American gang members.³⁰⁸ Unfortunately, both law enforcement personnel and gang members have reported that more and more Central American gang members are fleeing to the United States to avoid such harsh legislation.³⁰⁹ Thus, it is not a stretch to conclude that gang members may similarly flee to Nebraska from states such as Missouri, Iowa, South Dakota, or even California to avoid harsh gang laws.

Furthermore, as discussed above, gangs such as MS-13 and the 18th Street gang deliberately send members to chosen cities to recruit and form new chapters of their respective gangs.³¹⁰ Given the growing sophistication of such gangs and their familiarity with Central America’s Mano Dura laws, it is conceivable that the existence (or non-existence) of anti-gang legislation may factor into gang leaders’ decision of where to escalate recruitment efforts or form

³⁰⁵ Jared Miller, *Bill Targets Gang Activity*, CASPER STAR-TRIB., February 27, 2008, available at <http://www.trib.com/articles/2008/02/27/legislature/news/doc47c4d27c8b10d180118420.txt>.

³⁰⁶ Lopez et al., *supra* note 159.

³⁰⁷ Pinkham, *supra* note 130, at 235.

³⁰⁸ *Id.* (explaining that, “[a]fter the passage of the mano dura laws in El Salvador, the Salvadoran police” arrested 19,275 persons on gang-related charges between 2003 and 2004 alone).

³⁰⁹ Lopez et al. *supra* note 159.

³¹⁰ See discussion *supra* Part II.D.2–3.

new chapters. To understand this point, consider the following hypothetical as if you were a high-ranking MS-13 leader.

At an MS-13 summit in Honduras, you spread a map of the United States across a table surrounded by other MS-13 leaders from the United States and Central America. The map has circles around Los Angeles and Northern Virginia—MS-13’s strongholds on the United States’ coasts.³¹¹ The other leaders and you have decided that MS-13 must begin taking steps to connect these dots and create a unified, nationwide command structure in the U.S.³¹² As you trace your finger along major U.S. arteries, you notice that at the center of the map, I-80 (running east and west) intersects with I-29 (running north and south) just outside of Omaha, Nebraska.³¹³ A fellow MS-13 leader explains that Omaha is a regional drug distribution center³¹⁴ and that MS-13’s influence is growing in the city.³¹⁵ Still, you ask the other leaders, “Why not Kansas City or Council Bluffs?” They inform you that in Kansas City and Council Bluffs, MS-13 members receive harsher penalties for gang-related crimes under Missouri and Iowa law.³¹⁶ However, MS-13 members in nearby Omaha are punished the same as non-gang members under Nebraska law. With Mano Dura’s wrath lurking just outside your Honduran meeting place, this factor helps tip the scales and you are persuaded to send more MS-13 members to Omaha to create a Midwestern MS-13 command center.

4. To Send a Message to both Gangs and Peaceful Citizens

Nebraska should pass anti-gang legislation to send a symbolic message to both gangs and peaceful citizens. As the National District Attorney’s Association explains, enacting anti-gang

³¹¹ See *supra* note 158 and accompanying text.

³¹² See *supra* note 158 and accompanying text.

³¹³ See *supra* note 193 and accompanying text.

³¹⁴ See *supra* note 192 and accompanying text.

³¹⁵ See *supra* note 200 and accompanying text.

³¹⁶ See discussion *supra* Part III.B.2, 4.

statutes sends a symbolic message “even if the gang statutes are rarely charged or utilized.”³¹⁷ First, the enactment of anti-gang legislation would send gangs and citizens the message that Nebraska has recognized its gang problem. Next, passing such legislation would place Nebraska’s “gangs on notice that their behavior and criminal activities are not acceptable and will not be tolerated.”³¹⁸ Finally, the enactment of anti-gang legislation would let Nebraska’s peaceful citizens know that the state is taking steps to eradicate gangs from the “Good Life” state.³¹⁹

Obviously, such messages will have little lasting effect if prosecutors do not actually charge and convict gangs under the new statutes. After all, talk is cheap—especially to hardened, violent gang members and citizens who are tired of gang violence destroying their cities. Thus, to send a lasting, powerful message to both Nebraska’s gangs and peaceful citizens, prosecutors across Nebraska must “buy in” and zealously prosecute gang members under anti-gang statutes in their jurisdictions.

Some, like Unicameral Senator Brashear, may argue that gang crimes are too difficult for prosecutors to prove. Thus, placing gang members behind bars under anti-gang statutes is a noble, but virtually impossible task. However, as then-Senator John Bruning argued, the gang problem in Nebraska is far too great to kill anti-gang legislation merely because gang crimes are difficult to prove. Furthermore, the Orange County District Attorney’s Office (“OCDAO”) has successfully placed gang members behind bars under the California STEP Act’s active participation and sentencing enhancement provisions. In 2007 alone, the OCDAO prosecuted “over a thousand gang members . . . and over 80% of these gang members were also charged

³¹⁷ NDAA, *supra* note 22, at 18.

³¹⁸ *Id.*

³¹⁹ *See id.*

with STEP Act allegations or enhancements, significantly increasing their time behind bars.”³²⁰ Furthermore, the OCDAO “has an impressive 93% conviction rate in gang cases”³²¹ Thus, while anti-gang legislation may be complicated and place a hefty burden on prosecutors, such challenges are not insurmountable.

5. *To Prevent Gang Formation and Recruitment*

Anti-gang legislation may also help prevent gangs from forming and may disrupt gang recruitment activities. Obviously, legislation that criminalizes gang recruitment may directly help achieve such goals.³²² Furthermore, placing gang members in prison under other anti-gang legislation provisions indirectly attacks gang recruitment and formation by effectively taking gang recruiters off the streets.

Placing gang members in prison may also help prevent others from wanting or feeling they need to join a gang. Under the utilitarian perspective of gang formation discussed above, citizens join gangs because the benefits of gang membership appear to outweigh its costs.³²³ Anti-gang legislation effectively increases the costs of gang membership by criminalizing active gang participation and increasing prison sentences for gang-related crimes. Thus, if Nebraska passes comprehensive anti-gang legislation and aggressively prosecutes gang members, fewer citizens may join Nebraska’s gangs under a utilitarian theory.

Next, under the institution perspective discussed above, citizens join gangs because a gang is entrenched in their neighborhood and they believe they must join the gang to appease the gang.³²⁴ As discussed above, anti-gang legislation helps disrupt gangs’ organizational structure

³²⁰ Orange County Dist. Attorney’s Office, Welcome to the Orange County DA Office–Law, <http://orangecountyda.com/home/index.asp?page=98> (last visited November 13, 2008).

³²¹ *Id.*

³²² See discussion *infra*, Part IV.B.6.

³²³ See discussion *supra* Part II.B.1.

³²⁴ See discussion *supra* Part II.B.3.

by placing gang members and leaders behind bars for extended periods of time. Thus, if Nebraska passes anti-gang legislation and aggressively prosecutes gang members and leaders, gangs may become less institutionalized in neighborhoods. As a result, fewer citizens would feel the need to join such gangs for appeasement purposes.

Additionally, under the ethnic self-protection perspective discussed above, citizens form and join gangs to protect themselves and fellow ethnic group members from other gangs.³²⁵ Such citizens join gangs because of the actual or perceived refusal of law enforcement to protect their ethnic group from gangs.³²⁶ First, anti-gang legislation would give prosecutors and law enforcement personnel the tools they need to *actually* protect ethnic groups from gang oppression. Furthermore, such legislation may reduce ethnic groups' *perceptions* that law enforcement will not or cannot protect them from gangs, especially if gang prosecutions in their neighborhoods are highly publicized. Thus, if Nebraska passes and enforces anti-gang legislation, fewer citizens may find the need to join gangs under the ethnic self-protection perspective.

However, even if Nebraska enacts and zealously enforces the anti-gang legislation proposed below, gangs would continue to form and successfully recruit new members without additional government and/or private action. After all, penal anti-gang legislation does not address situations where citizens join or form gangs as surrogate families because their families have failed.³²⁷ Likewise, such legislation does not address situations where citizens join or form gangs because they feel that they have few, if any, legitimate economic opportunities.³²⁸ Thus, while punishing gang members under anti-gang legislation would help address some gang

³²⁵ See discussion *supra* Part II.B.4.

³²⁶ See discussion *supra* Part II.B.4.

³²⁷ As discussed in Part II.B.5 *supra*, this theory of gang formation is called the “surrogate family” perspective.

³²⁸ As discussed in Part II.B.2 *supra*, this theory of gang formation is called the “social problems” perspective.

formation theories, the state and/or private groups must also take steps to minimize broken homes, provide increased access to positive “surrogate families,”³²⁹ minimize unemployment, and increase job skills education to prevent citizens from joining and forming gangs.

B. “Nebraska Street Terrorism Enforcement and Prevention Act”

As established in subsection (A), Nebraska should enact comprehensive anti-gang legislation for a variety of reasons. This section proposes such legislation and provides explanations for each provision. Note that the following legislation, like surrounding states’ legislation, is based largely on California’s STEP Act. However, the proposed legislation also draws from surrounding states’ anti-gang statutes to tailor the proposed legislation to address Nebraska’s gang problem. As you read the proposed provisions below, the underlined text signals an addition or amendment to Nebraska’s statutes. Conversely, plain text—found only in subsection (B)(7)—signals existing statutory language.

1. Title

Section 28-1601. Act; how cited. Sections 28-1601 to 28-1606 shall be cited as the Nebraska Street Terrorism Enforcement and Prevention Act.

The name of this Act is obviously a nod to California’s Street Terrorism Enforcement and Prevention Act.³³⁰ This name is appropriate because California’s STEP Act largely inspired the proposed statutes below. Furthermore, the phrase “street terrorism” accurately depicts the intimidating nature of criminal street gang activity and the debilitating fear it spreads throughout Nebraska’s neighborhoods. Finally, the author crafted the provisions below intending to create robust and balanced anti-gang legislation that will both prevent and suppress gang activity.

³²⁹ For example, the state could provide more incentives for law-abiding citizens to become foster parents. Also, the state could provide grants for groups such as the Boy Scouts, Girl Scouts, and 4-H to recruit in underprivileged neighborhoods and act as an alternative to gang membership.

³³⁰ See CAL. PENAL CODE § 186.20.

Therefore, it is only fitting that words such as “enforcement” and “prevention” are included in this Act’s title.

2. *Legislative Findings and Declaration*

Section 28-1602. Legislative findings and declaration.

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

However, the Legislature further finds that violent street gangs have terrorized and threatened the peaceful citizens of the State of Nebraska. These same violent street gangs have facilitated the illicit drug trade within Nebraska’s borders and beyond, committing an untold number of crimes in Nebraska’s rural towns and urban cities along the way. The above activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

It is the intent of the Legislature in enacting this Act to aid in the eradication of criminal street gang activity by focusing on both suppressing and deterring criminal gang activity and dismantling the organized nature of street gangs, which is the chief source of terror created by street gangs.

The first paragraph in proposed section 28-1602 is taken from CAL. PENAL CODE § 186.21. This paragraph is a general statement of the rights of the peaceful citizens of Nebraska. First, the peaceful citizens of Nebraska have a right to avoid gang intimidation and violence. Such citizens also have a constitutional right to (1) associate with and join non-criminal groups, such as the Boy Scouts, political parties, and labor unions, and (2) to express themselves in a lawful manner.³³¹ In fact, as discussed above, the existence of such groups is necessary to provide citizens a productive alternative to gangs as “surrogate families” or for social

³³¹ States often include language similar to the first paragraph of proposed section 28-1602 in anti-gang statutes to avoid constitutional overbreadth claims. Bjerregaard, *supra* note 26, at 38.

camaraderie.³³² Thus, this statute is not intended to have a chilling effect on citizens joining or establishing legal associations, organizations, and/or groups, or to stifle legal expression such as voting or engaging in peaceful political dissent. Rather, this Act is solely intended to eradicate (1) groups whose primary purpose is to engage in criminal activity, and (2) unlawful expression such as the use of threats to recruit citizens to join a gang.

The second paragraph publically recognizes the detrimental effects Nebraska's gangs have had on the citizens of Nebraska. In other words, this paragraph acknowledges that Nebraska has a gang problem. The author believes this declaration is important because, as many alcoholics have found, admitting that a problem exists is often the first step in curing that problem.³³³ As discussed above, the Unicameral has failed to directly confront Nebraska's statewide gang problem through anti-gang legislation since the problem arose in the early 1990s.³³⁴ This declaration signals the current legislature's departure from previous legislatures. Note that the author tailored this paragraph to depict gang problems specific to Nebraska, mentioning gangs' involvement in the drug trade and presence in both urban and rural areas.

The second paragraph also demonstrates that the Unicameral has made eradicating gangs a priority. In fact, this paragraph's use of terms such as "clear and present danger" demonstrates that the Unicameral has determined that eradicating gangs from Nebraska is a compelling interest—the highest level of legislative priority.³³⁵ This declaration, along with the enactment of the legislation below, both (1) places gangs on notice that their "activities are not acceptable

³³² See discussion *supra* Part IV.A.5.

³³³ See 12 Step.org Homepage, <http://www.12step.org/> ("Step 1: We admitted we were powerless over our addiction—that our lives had become unmanageable.") (last visited Nov. 20, 2008).

³³⁴ See discussion *supra* Part III.C. (discussing the Unicameral Judiciary Committee's failure to pass anti-gang legislation to the floor in 1999).

³³⁵ States include such language in anti-gang legislation to preclude overbreadth challenges, which trigger strict scrutiny and require a compelling state interest. Bjerregaard, *supra* note 26, at 38.

and will not be tolerated in the community”³³⁶ and (2) reassures citizens “that something is being done about the [gang] problem”³³⁷

The third paragraph specifically declares that (1) the proposed anti-gang legislation focuses both on gang crime prevention and suppression,³³⁸ (2) gang crimes are graver than non-gang crimes, due largely to gangs’ organizational structure,³³⁹ and (3) gangs must be eradicated from Nebraska.

3. *Definitions*

Section 28-1602. Terms defined. As used in the Nebraska Street Terrorism Enforcement Prevention Act:

- (1) “Criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts enumerated in paragraphs (a) through (f) of subdivision (2), and which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in a pattern of criminal street gang activity.
- (2) “Pattern of criminal street gang activity” means the commission, attempted commission, or solicitation of two or more of the following offenses, provided at least one of those offenses occurred after the effective date of this chapter, and the offenses are committed on separate occasions, or by two or more persons:
 - (a) Any of the following Crimes Against the Person:
 - (i) Murder, as defined in sections 28-303 and 28-304;
 - (ii) Manslaughter, as defined in section 28-305;
 - (iii) First or Second Degree Assault, as defined in sections 28-308 and 28-309, respectively, or Strangulation as defined in section 28-310.01;
 - (iv) Terroristic Threats, as defined in 28-311.11;
 - (v) Kidnapping, as defined in section 28-313;
 - (vi) False Imprisonment, as defined in sections 28-314 and 28-315;
 - (vii) Sexual Assault, as defined in sections 28-318 through 28-320.02; or
 - (viii) Robbery, as defined in section 28-324.
 - (b) Any of the following Drugs and Narcotics Crimes:
 - (i) Manufacturing, Distributing, Delivering, or Dispensing a Controlled Substance, as defined in section 28-416(1)(a);

³³⁶ NDAA, *supra* note 22, at 18.

³³⁷ *Id.*

³³⁸ See discussion *supra* Part IV.A.1.

³³⁹ See discussion *supra* Part II.C.

- (ii) Possession of a Controlled Substance with Intent to Manufacture, Distribute, Deliver, or Dispense, as defined in section 28-416(1)(a);
- (iii) Creating or Distributing a Counterfeit Controlled Substance, as defined in section 28-416(1)(b); or
- (iv) Possessing a Counterfeit Controlled Substance with Intent to Distribute, as defined in section 28-416(1)(b).
- (c) Any of the following Crimes Against Property:
 - (i) Arson, as defined in section 28-502 through 28-504;
 - (ii) Burglary, as defined in section 28-507;
 - (iii) Felony Theft, as defined in section 28-518;
 - (iv) Felony Criminal Mischief, as defined in section 28-519;
- (d) Any of the following Offenses Involving Fraud:
 - (i) Unlawful Manufacture of a Financial Transaction Device, as defined in section 28-627; or
 - (ii) Unlawful Circulation of a Financial Transaction Device, as defined in sections 28-622 and 28-623.
- (e) Any of the following Offenses Involving Integrity and Effectiveness of Government Operation:
 - (i) Tampering With a Witness, Informant, or Juror, as defined in section 28-919; or
 - (ii) Assault on an Officer, as defined in sections 28-929 through 28-931.01.
- (f) Any of the following Offenses Against Public Health and Safety:
 - (i) Carrying a Concealed Weapon, as defined in section 28-1202;
 - (ii) Transportation or Possession of Machine Guns, Short Rifles, or Short Shotguns, as defined in section 28-1203;
 - (iii) Unlawful Transfer of a Firearm to a Juvenile, as defined in section 28-1404.01;
 - (iv) Using a Deadly Weapon to Commit a Felony, as defined in section 28-1205;
 - (v) Unlawful Discharge of a Firearm, as defined in section 28-1212.02;
 - (vi) Unlawful Possession of Explosive Materials, as defined in section 28-1215 and 28-1216.
 - (vii) Unlawful Sale of Explosives, as defined in section 28-1217
 - (viii) Using Explosives to Commit a Felony, as defined in section 28-1222;
 - (ix) Using Explosives to Damage or Destroy property, as defined in section 28-1223; or
 - (x) Using Explosives to Kill or Injure a Person, as defined in section 28-1224.

This section’s “criminal street gang” definition is modeled after the gang definition in California’s STEP Act.³⁴⁰ The above definition is a holistic and balanced definition, including

³⁴⁰ Cf. Cal. Penal Code § 186.22(f). Notably, section 186.22(f)’s definition withstood a void for vagueness challenge before the California Court of Appeals. *People v. Gamez*, 286 Cal. Rptr. 894, 902–903 (Cal. App. 4th Dist. 1991).

both process-based and crime-based components.³⁴¹ Thus, the definition will aid prosecutors and law enforcement personnel in both preventing and suppressing gang crime.³⁴²

Specifically, the definition requires a “gang” to be an association, organization, or group of “three or more persons.” As demonstrated above, gangs such as the Crips and MS-13 were founded by small groups of youth that banded together to fight against oppressors.³⁴³ The “three or more persons” definitional requirement recognizes that only a handful of founding members created such powerful national and international gangs. Thus, this definition allows prosecutors to apply this Act to punish gangs in their foundational stages and prevent a would-be local, national, or even international gang from forming in their communities. After all, a definitional requirement of “ten or more persons” would allow an Omaha prosecutor to charge MS-13 members under this Act, but would prevent the prosecutor from charging a violent upstart gang with three confirmed members.

Next, the proposed definition requires that one of the group’s “primary activities” be the commission of at least one enumerated offense. The “primary activity” requirement prevents groups such as the Boy Scouts from qualifying as a “gang” under this Act.³⁴⁴ For example, if a member of Lexington Boy Scout Troop 88 committed a drive-by shooting, Troop 88 would not qualify as a “gang” under this statute—despite the fact that its member committed an enumerated crime—because committing such crimes is not one of Troop 88’s primary activities. Consequently, the proposed definition reaffirms the legislative declaration in proposed section 28-1602 that this Act is not intended to interfere with citizens’ right to associate with lawful groups.

³⁴¹ See discussion *supra* Part II.A.

³⁴² See discussion *supra* Part II.A.

³⁴³ See discussion *supra* Part II.D.1, 3.

³⁴⁴ See discussion *supra* Part II.A. (explaining that crime-based definitional elements help distinguish productive, law abiding groups and criminal organizations).

Additionally, the proposed definition requires the gangs' primary activity to be the commission of one or more "enumerated criminal acts." Given that several of Nebraska's gangs—MS-13, the 18th Street gang, the Bloods, and the Crips—were founded in Los Angeles, the author closely followed the STEP Act's enumerated list of crimes.³⁴⁵ Therefore, the proposed enumerated list includes the same or similar crimes under Nebraska's statutes. The author followed this method based on the assumption that such California-based gangs commit similar crimes in Nebraska.

However, note that the proposed enumerated list does deviate from the STEP Act's enumerated crimes to include explosives offenses. The author made this decision based on the fact that MS-13—a gang known for trafficking and using grenades and other explosives³⁴⁶—is the fastest growing Hispanic street gang in Omaha.³⁴⁷ Though the author is not aware of MS-13 using explosives in Nebraska, the gang's national and international connections make such activity a possibility in the future. Thus, including explosives offenses on the enumerated list is a preventative measure and an example of how the Unicameral can adapt the list to address gang problems specific to Nebraska. Indeed, the proposed enumerated crimes should not be set in stone. Gangs evolve and may not always conduct the same crimes in different states.³⁴⁸ Thus, the Unicameral should often review and revise the proposed enumerated crimes to adequately address gang crimes in Nebraska.

Note that the proposed gang definition's specific "enumerated criminal acts" requirement differs from the OPD gang definition, which merely requires a group to "engage in criminal

³⁴⁵ See CAL. PENAL CODE § 186.22(e)(1)–(33).

³⁴⁶ See discussion Part II.D.3 *supra*.

³⁴⁷ See *supra* note 200 and accompanying text.

³⁴⁸ Romano, *supra* note 18 (discussing differences in MS-13's activity depending on location) ("'Everything gets bastardized as it leaves the center,' says Wes McBride, president of the California Gang Investigators Association. While machete attacks might occur on the East Coast, they're rare on the West Coast. While car thefts and drug trafficking might be big in North Carolina, gang-on-gang violence predominates in Virginia. It's that decentralized nature of MS-13—with no clear hierarchy or structure--that makes it so vexing to authorities.'").

behavior.”³⁴⁹ As discussed above, the “enumerated criminal acts” requirement prevents a group of street racers who otherwise satisfy this Act’s definition from being qualified as a street gang, whereas the OPD definition would technically include such street racing groups.³⁵⁰ Though street racing groups engage in reckless driving and pose a threat to the public’s welfare, such groups are not the focus of this Act—the eradication of violent criminal street gangs that terrorize peaceful citizens. Thus, the “enumerated criminal acts” requirement narrows the Act’s application to ensure that the Act only applies to such street gangs.

Next, the proposed gang definition requires the group to have a common identifier such as a sign, symbol, or name. As discussed above, gangs such as the Bloods and Crips use both their names and symbolic colors to distinguish themselves from other gangs.³⁵¹ Thus, this “common identifier” definitional requirement helps prosecutors and law enforcement personnel distinguish mere groups of criminal friends from organized criminal street gangs.³⁵²

Additionally, the proposed gang definition requires the group’s members to “individually *or* collectively” engage in a pattern of criminal street gang activity. This requirement recognizes that gang members sometimes commit crimes alone, yet for the benefit of their gang. Thus, the main focus of this Act is to eradicate criminal *organizations*, not necessarily all organized crime.³⁵³

Finally, the proposed gang definition requires that the group’s members “engage in a pattern of criminal street gang activity.” This element requires the group’s members to commit, attempt to commit, or solicit two or more enumerated criminal offenses within a three-year period. Thus, the Act does not “throw the book” at groups for committing only one enumerated

³⁴⁹ See *supra* note 33.

³⁵⁰ See discussion *supra* Part II.A.

³⁵¹ See discussion *supra* Part II.D.1.

³⁵² See discussion *supra* Part II.A.

³⁵³ Indeed, this Act only targets organized crimes when such crimes are also tied to a criminal organization.

criminal offense in a three year period or a handful of criminal offenses over a long period of time. Therefore, this requirement helps distinguish true criminal street gangs from groups of friends who pretend to be in a gang. Also, note that the “within three years” requirement essentially rewards groups for ceasing criminal activity. For example, if for some reason the Omaha MS-13 chapter decided to end its criminal activity and pursue a peaceful civil rights agenda, it would drop its “gang” status within three years.³⁵⁴

Note that a group may satisfy the “two or more offenses” requirement in two general ways. First, one or more group members may commit two or more offenses *on separate occasions* within three years. For example, if one MS-13 member committed a burglary in 2008 and another MS-13 member committed a murder in 2010, MS-13 would satisfy this requirement. Furthermore, if Crip A committed two murders on May 4, 2009 and May 5, 2009, respectively, the Crips would satisfy this requirement. Therefore, this requirement demonstrates that one of the Act’s purposes is to punish recurring gang activity. Note that one of the requisite criminal acts may have occurred before the Act is passed. This caveat gives prosecutors and law enforcement personnel a head start in eradicating gangs from Nebraska.

Second, a group may satisfy the “two or more offenses” requirement if two or more gang members commit two or more enumerated offenses *on the same occasion*. Thus, if Blood A and Blood B conduct a drive-by shooting together and murder two Crips on May 4, 2009, the Bloods would satisfy the “two or more offenses” requirement. Therefore, this requirement reflects that one of the Act’s purposes is to suppress and deter organized gang activity.

4. Active Participation Offense

Section 28-1603. Active Participation in a Criminal Street Gang; penalty.

³⁵⁴ Obviously, this would be an unlikely occurrence.

- (1) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal street gang activity, as defined in section 28-1602(2), and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be guilty of a Class IV felony and shall serve not less than one year in a state prison.³⁵⁵
- (2) As used in this section, “actively participates,” means more than nominal or passive involvement.³⁵⁶

This provision, which makes “active participation in a criminal street gang” a criminal offense, is based almost entirely on the STEP Act’s active participation provision.³⁵⁷ Under Nebraska law, those convicted of typical Class IV felonies can be sentenced to up to five years imprisonment and/or a \$10,000 fine.³⁵⁸ However, this provision includes a mandatory minimum sentence of one year imprisonment. This minimum sentence ensures that gang members convicted under this provision will serve at least some time in prison.

To prove the elements of this crime, a prosecutor must first demonstrate that an individual “actively participated” in a criminal street gang. As subdivision (2) explains, “active participation” means more than mere nominal or passive involvement. Thus, a prosecutor must focus his or her attention on individuals’ *participation* in street gangs and not their *status* within the gang (i.e. gang associate, member, leader, etc.).

³⁵⁵ The California Supreme Court held that STEP’s active participation statute—which requires (1) active gang participation, (2) knowledge of the gang’s pattern of criminal activity, and (3) willful promotion, furtherance, or assistance of felonious criminal conduct—“exceed[s] the due process requirement of personal guilt that the United States Supreme Court articulated in *Scales* [v. United States, 367 U.S. 203 (1961)].” *People v. Castenada*, 3 P.3d 278, 283 (Cal. 2000). “Under *Scales*, the due process requirement that criminal liability rest on personal guilt means simply that a person convicted for active membership in a criminal organization must entertain ‘guilty knowledge and intent’ of the organization’s criminal purposes.” *Castenada*, 3 P.3d at 282 (citing *Scales*, 367 U.S. at 228). See Carol J. Martinez, *The Street Terrorism Enforcement and Prevention Act: Gang Members and Guilt by Association*, 28 PAC. L.J. 711, 713 (1997) (Given that the active participation provision punishes gang members “only when they actively, knowingly, and willfully participate in the gang’s criminal activity [T]he Step Act does not appear to violate the right of association.”).

³⁵⁶ This is a codification of the California Supreme Court’s ruling in *Castenada*, 3 P.3d at 284, where the Court decided whether “actively participate” required defendants to have a leadership role in a gang or merely a “more than nominal or passive” role. The Court held that “active participation” means “more than nominal or passive” involvement. *Id.*

³⁵⁷ See CAL. PENAL CODE § 186.22(a).

³⁵⁸ See NEB. REV. STAT. § 28-105(1).

By requiring more than nominal or passive gang involvement, the “active participation” definition prevents mere “wannabes”—individuals who merely label themselves as gang members³⁵⁹—from being prosecuted under this section. After all, the Act is intended to punish actual, dangerous gang members and not misguided youth who are merely fascinated with gang culture. For example, assume a middle school student desperately wishes to avoid bullies at school. To achieve this goal, the student (1) wears all blue clothing, (2) labels himself a “Crip,” and (3) even gets Crip tattoos. However, the student does not actually associate or commit crimes with the Crips. This student would not qualify as an “active gang participant” under this section because his “participation” in the Crips does not rise above nominal or passive participation. Note that this provision is far more lenient than some Central American *Mano Dura* laws, which would place the above “wannabe” in prison for merely displaying his Crip tattoos.³⁶⁰

Next, a prosecutor must prove that the active gang participant knew that the gang’s members engage in or have engaged in a pattern of criminal activity. This knowledge requirement prevents an ignorant friend of gang members from being charged as an active gang participant. For example, assume A is friends with Bloods B, C, D, and E. Despite the fact that A, B, C, D, and E routinely hang out together and commit petty crimes, A does not know that B, C, D, and E are Bloods or that B, C, D, and E have engaged in a pattern of criminal street gang activity. One day, A, B, C, D, and E commit a robbery together. A would not be charged as an “active gang participant” under the proposed provision because he did not have knowledge of his friends’ pattern of criminal street gang activity. However, B, C, D, and E could be charged as

³⁵⁹ Cathy Wang, Note, *Gang Injunctions Under Heat From Equal Protection: Selective Enforcement as a Way to Defeat Discrimination*, 35 HASTINGS CONST. L.Q. 287, 301 (2008) (explaining that “wannabes” are those “who are not a part of a gang but may nonetheless assert membership”).

³⁶⁰ See *supra* note 306 and accompanying text.

active gang participants under the provision. Again, the proposed provision reflects the Act's intended purpose of punishing actual gang members and not oblivious friends of gang members.

Finally, the active gang participation offense requires the active participant to willfully promote, further, or assist in any felonious criminal conduct by members of his gang. Thus, to be convicted of "active gang participation" an active gang participant must do more than merely associate with gang members—he or she must promote or aid and abet gang members' criminal conduct. This requirement essentially prevents fringe gang participants who associate with gangs for social camaraderie, but do not engage in criminal conduct, from being charged under this section. For example, assume that A (1) identifies himself as an 18th Street gang member, (2) routinely hangs out with members of the gang, and (3) knows members of the gang engage in a pattern of criminal street gang activity. However, A never engages in criminal activity with other 18th Street gang members. A would not be charged as an active gang participant under this provision. After all, the Act's purpose is to punish individuals for engaging in or promoting gang activity, not to punish individuals for merely having criminal friends.

The overarching purpose of the active gang participation provision is to prevent and suppress gang activity by placing active gang participants behind bars and sending a symbolic message to gang members and citizens that gang participation will not be tolerated in Nebraska. Some may argue that this relatively lenient Class IV felony offense, even with a mandatory one-year prison sentence, will not disrupt gangs' organizational structure, or deter or suppress gang activity. After all, a gang member charged under this section could be out on the streets just a year after his conviction. However, given that this offense requires the defendant to promote or aid and abet other felonious activity, the author envisions the active participation provision being used by prosecutors as a tack-on offense. In other words, this offense would allow prosecutors to

place another charge at the end of a gang member's felony information and (1) seek a conviction to increase the defendant's overall prison sentence by at least one year, or (2) use the charge as fodder in a plea negotiation with the gang member's attorney to ensure conviction of another, more serious charge. This would allow prosecutors more flexibility in their charging strategies and place them in a position of greater strength during plea negotiations.

5. *Enhancement Provision*

Section 28-1604. Felony or Misdemeanors Committed to Promote or Assist a Criminal Street Gang; enhanced penalties. The penalty of any person who is convicted of a felony or misdemeanor which is committed for the benefit of, at the direction of, or in association with, any criminal street gang as defined in section 28-1602(1), with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be reclassified to the next higher classification prescribed for the crime by section 28-105 for felonies and section 28-106 for misdemeanors. In no case, however, shall a person's penalty be enhanced higher than a Class IB felony under this provision.

The proposed gang enhancement provision's basic structure and language is based on the STEP Act's enhancement provision.³⁶¹ However, the proposed provision also includes elements from both South Dakota's enhancement statute,³⁶² Missouri's enhancement statute,³⁶³ and Senator Jon Bruning's 1999 proposed enhancement statute.³⁶⁴

First, note that this enhancement provision applies to "any person." Thus, a prosecutor need not demonstrate that the defendant is a gang leader, member, associate, or even a "wannabe" under this provision. Rather, like the proposed active participation offense, the proposed enhancement provision focuses on a person's *actions*, not his *status* within the gang. Furthermore, like Missouri's enhancement statute, the proposed enhancement provision applies to both misdemeanors and felonies.³⁶⁵ Not limiting the enhancement to just felonies³⁶⁶ or

³⁶¹ Cf. CAL. PENAL CODE § 186.22(b)(1).

³⁶² S.D. CODIFIED LAWS § 22-10A-2.

³⁶³ MO. REV. STAT. § 578.425.

³⁶⁴ Cf. LB 159, 96th Leg., 1st Session (Neb. 1999).

³⁶⁵ See MO. REV. STAT. § 578.425.

felonies and *violent* misdemeanors³⁶⁷ recognizes that, as discussed above, all gang-related crimes are generally graver than non-gang-related crimes because they benefit a criminal organization.³⁶⁸

Next, the proposed provision requires that a crime be committed for the benefit of, at the direction of, or in association with a criminal street gang. Thus, this provision would not enhance a gang member's sentence if he commits a crime on his own and totally unrelated to his gang affiliation. For example, a gang member's sentence for murder would not be enhanced if he killed his neighbor in a boundary dispute—a crime totally unrelated to his gang. After all, a gang member's crime is only graver than the same non-gang-related crime if the crime is gang-related (i.e. tied to his criminal organization).

Furthermore, the proposed provision requires that the person's misdemeanor or felony be committed with the specific intent to promote, further, or assist gang activity. This intent requirement prevents an ignorant criminal, who unknowingly commits a crime in association with gang members, from having his sentence enhanced under this section. For example, assume A, B, and C are Crips and plan to burglarize a house to economically benefit the Crips. They recruit D to help them in the burglary, but D does not know A, B, and C are Crips or intend that the crime benefits the Crips. A, B, and C's actions would fulfill the specific intent requirement, but D's actions would not—D did not specifically intend to assist, promote, or further gang members' criminal conduct.

Next, the proposed enhancement provision's crime reclassification scheme follows South Dakota's enhancement statute³⁶⁹ and Senator Jon Bruning's 1999 proposed enhancement

³⁶⁶ See CAL. PENAL CODE. § 186.22(b)(1).

³⁶⁷ See S.D. CODIFIED LAWS § 22-10A-2.

³⁶⁸ See discussion *supra* Part II.C.

³⁶⁹ Cf. S.D. CODIFIED LAWS § 22-10A-1.

provision.³⁷⁰ Thus, the proposed enhancement simply reclassifies gang-related crimes to the next highest crime classification. For example, assume a defendant is charged with the following crimes in Nebraska:

- Count (1): Third Degree Assault, Class I misdemeanor,³⁷¹
- Count (2): Delivery of a Schedule IV Controlled Substance, Class IIIA felony,³⁷² and
- Count (3): Using Explosives to Injure a Person, Class II felony.³⁷³

If the defendant's crimes qualify for enhancement under the proposed provision, the defendant's crimes would be reclassified as follows:

- Count (1): Third Degree Assault, Class IV felony,
- Count (2): Delivery of a Schedule IV Controlled Substance, Class III felony, and
- Count (3): Using Explosives to Injure a Person, Class ID felony.³⁷⁴

The author chose this reclassification scheme over the STEP Act's enhancement scheme—which increases crimes' base penalties by a crime-specific number of years³⁷⁵—because it conforms with the reclassification schemes found in Nebraska's other enhancement statutes.³⁷⁶ Accordingly, Nebraska's prosecutors would likely be familiar with the proposed reclassification scheme and find it relatively easy to apply. Perhaps more importantly, the relatively simple reclassification scheme may also be easier for citizens to understand. This is important for those contemplating gang-related crimes to understand the costs of their actions³⁷⁷ and for citizens to understand exactly how Nebraska is addressing the gang problem.³⁷⁸

³⁷⁰ Cf. LB 159, 96th Leg., 1st Session (Neb. 1999).

³⁷¹ NEB. REV. STAT. § 28-310.

³⁷² *Id.* § 28-416(1), (2)(c).

³⁷³ *Id.* § 28-1224(1), (3).

³⁷⁴ For misdemeanor classification of penalties, see *id.* § 28-106. For felony classifications, see *id.* § 28-105.

³⁷⁵ See CAL. PENAL CODE § 186.22(b).

³⁷⁶ See, e.g., NEB. REV. STAT. § 28-111 (hate crime enhancement); *id.* § 28-115 (crime against pregnant woman enhancement).

³⁷⁷ As discussed in Part II.B.1 *supra*, this sort of contemplation is assumed under the utilitarian perspective of gang formation.

³⁷⁸ See discussion *supra* Part IV.A.4 (explaining that anti-gang legislation sends a message to peaceful citizens that something is being done about the gang problem).

Note that the proposed provision also follows Senator Bruning’s recommendation that gang crimes not be reclassified higher than Class IB felonies.³⁷⁹ Thus, under the proposed enhancement, gang-related felonies cannot be reclassified to felonies requiring life imprisonment without parole,³⁸⁰ or death.³⁸¹ This restriction is necessary to place the enhancement in conformity with Nebraska’s other major enhancement statutes—the hate crimes enhancer³⁸² and the crimes against pregnant women enhancer.³⁸³

The primary goal of the enhancement provision is to place citizens engaged in gang-related crime behind bars for an extended period of time.³⁸⁴ To understand how the proposed enhancements help achieve this goal, reconsider the above hypothetical where the defendant faces (1) a Class I misdemeanor, punishable by up to one year in jail and/or a \$1,000 fine,³⁸⁵ (2) a Class IIIA felony, punishable by up to up to five years in prison and/or up to a \$10,000 fine,³⁸⁶ and (3) a Class II felony, punishable by one to fifty years in prison.³⁸⁷ The defendant faces a total of one to fifty-six years in prison and up to an \$11,000 fine. However, under the gang enhancement provision, the defendant faces (1) a Class IV felony, punishable by up to five years in prison and/or a \$10,000 fine,³⁸⁸ (2) a Class III penalty, punishable by one to twenty years in prison and up to a \$25,000 fine,³⁸⁹ and (3) a Class ID felony, punishable by three to fifty years in

³⁷⁹ *Hearing on LB 159 Before the Jud. Comm.* 96th Legis., 1st Sess. 7 (Neb. 1999) (statement of Sen. Bruning).

³⁸⁰ NEB. REV. STAT. § 28-105(1) (punishment for a class IA felony).

³⁸¹ *Id.* § 28-105(1) (punishment for a class I felony).

³⁸² *Id.* § 28-111 (restricting hate crime enhancements beyond IB felonies)

³⁸³ *Id.* § 28-115 (restricting crime against pregnant woman enhancements beyond IB felonies).

³⁸⁴ *See* discussion *supra* Part IV.A for a discussion of how using prison sentences also help achieve other goals.

³⁸⁵ NEB. REV. STAT. § 28-106(1).

³⁸⁶ *Id.* § 28-105(1).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

prison.³⁹⁰ Thus, the defendant faces a significantly larger penalty under the gang enhancement—four to seventy-five years in prison and up to a \$35,000 fine.

6. *Recruitment and Retention Provision*

Section 28-1605. Recruitment and Retention of Another to Actively Participate; use of coercion or violence; penalties.

- (1) Any person who knowingly solicits, invites, recruits, encourages, coerces, or otherwise causes a minor to actively participate in a criminal street gang, as defined in section 28-1602(1) shall be guilty of a Class IV felony, and shall serve a sentence of not less than one year in a state prison.
- (2) Any person who by use of force, threat, or intimidation directed at any person, or by the infliction of bodily injury upon any person, knowingly prevents another from leaving a criminal street gang, as defined in section 28-1602(1) shall be guilty of a Class IV felony, and shall serve a sentence of not less than one year in a state prison.

Subsection (1)'s proposed recruitment provision is based on similar anti-recruitment statutes in Colorado³⁹¹ and Iowa.³⁹² This provision criminalizes gang recruitment to directly attack gang recruitment and stifle gangs' growth.

Specifically, this provision applies to those causing a minor to join a street gang. This qualification recognizes that gangs such as the 18th Street gang often target children in their recruiting efforts.³⁹³ After all, children are arguably more susceptible to threats, peer pressure, or other coercion than adults. Gang recruitment is classified as a Class IV felony to conform to the proposed active participation provision's penalty and to match Iowa's punishment of gang recruitment.³⁹⁴

³⁹⁰ *Id.*

³⁹¹ COLO. REV. STAT. § 18-23-102(1)(a).

³⁹² IOWA CODE § 723A.3.

³⁹³ See *supra* note 124 and accompanying text (explaining that the 18th Street gang earned the name "Children's Army" for actively recruiting children in elementary and middle schools).

³⁹⁴ In Iowa, gang recruitment is a class D felony, punishable by up to five years imprisonment and a \$750 to \$7,500 fine. IOWA CODE §723.1(5). This is the statutory equivalent to Nebraska's class IV felony, punishable by up to five years imprisonment and/or up to a \$10,000 fine. NEB. REV. STAT. § 28-105(1).

Subsection (2)'s retention provision is based on Colorado's gang retention provision.³⁹⁵

This provision recognizes that in some gangs, such as the 18th Street gang and MS-13, gang members are taught to believe that "[t]here is only one way out [of the gang], and that's in a body bag."³⁹⁶ This statute intends to penalize such threats and offer gang members a chance to leave gangs alive. Given that most gang members in the United States are eighteen years old and over,³⁹⁷ this provision applies to both minors and adults. The gang retention offense is classified as a Class IV felony to conform to the proposed recruitment provision's classification.³⁹⁸

7. *Unlawful Discharge of a Firearm Amendment*

Section 28-1212.02. Unlawful Discharge of a Firearm; penalties. (1) Any person who intentionally discharges a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle as defined in section 60-339,³⁹⁹ occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801 shall be guilty of a Class III felony. (2) Any person who intentionally discharges a firearm from a motor vehicle as defined in section 60-339, at an inhabited dwelling house, occupied building, occupied motor vehicle as defined in section 60-339, occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801, shall be guilty of a Class III felony, and shall serve a sentence of not less than fifteen years in a state prison.

³⁹⁵ COLO. REV. STAT. § 18-23-102(1)(b).

³⁹⁶ VALDEZ, 18TH STREET, *supra* note 13 (quoting an 18th Street gang member); *see also supra* note 51 (explaining that MS-13 members tattoo three dots on their hands to symbolize the eventual destination of all MS-13 members: the hospital, prison, or the grave).

³⁹⁷ *See supra* note 42 and accompanying text.

³⁹⁸ Note that Colorado's statutes also classify gang recruitment and gang retention at the same level. COLO. REV. STAT. § 18-23-102(2). However, unlike Nebraska's proposed provisions, both offenses are Class 1 misdemeanors in Colorado. *Id.*

³⁹⁹ Under NEB. REV. STAT. § 60-339, "motor vehicle" is defined as follows:

[A]ny vehicle propelled by any power other than muscular power except (1) mopeds, (2) farm tractors, (3) self-propelled equipment designed and used exclusively to carry and apply fertilizer, chemicals, or related products to agricultural soil and crops, agricultural floater-spreader implements, and other implements of husbandry designed for and used primarily for tilling the soil and harvesting crops or feeding livestock, (4) power unit hay grinders or a combination which includes a power unit and a hay grinder when operated without cargo, (5) vehicles which run only on rails or tracks, (6) off-road designed vehicles, including, but not limited to, golf carts, go-carts, riding lawnmowers, garden tractors, all-terrain vehicles, snowmobiles registered or exempt from registration under sections 60-3,207 to 60-3,219, and minibikes, (7) road and general-purpose construction and maintenance machinery not designed or used primarily for the transportation of persons or property, including, but not limited to, ditchdigging apparatus, asphalt spreaders, bucket loaders, leveling graders, earthmoving carryalls, power shovels, earthmoving equipment, and crawler tractors, (8) self-propelled chairs used by persons who are disabled, (9) electric personal assistive mobility devices, and (10) low-speed vehicles.

The above amendment to Nebraska's Unlawful Discharge of a Firearm offense is based on Missouri's statute requiring a penalty of fifteen years imprisonment for drive-by shootings.⁴⁰⁰ As discussed above, gangs were responsible for a staggering 242 drive-by assaults in Omaha between 2002 and 2007.⁴⁰¹ Thus, Nebraska's gangs frequently use drive-by assaults to further their criminal agendas.

Note that the proposed amendment does not require a prosecutor to prove that the actor is an active participant in a gang or that the drive-by shooting was gang-related. Rather, a prosecutor need only prove that the actor discharged a firearm from a motor vehicle at an inhabited house, building, motor vehicle, aircraft, or camper. Thus, prosecutors may find that the proposed drive-by shooting offense is an attractive way to combat gangs without facing the evidentiary burdens of the proposed active participation offense and/or gang enhancement.⁴⁰² However, if the prosecutor can fulfill such burdens, the drive-by shooting offense may be enhanced and/or accompanied by an active participation offense.

The author chose the fifteen-year penalty to match Missouri's punishment of drive-by shootings and help fill Nebraska's anti-gang legislation void. Consider the following example. Assume that a Blood in Kansas City, Missouri drives by a rival gang member's inhabited house, points an automatic pistol out his driver's side window, and sprays the house with bullets, resulting in no injuries or deaths. Once convicted of the drive-by shooting crime, the Blood would receive a mandatory fifteen-year prison sentence under Missouri's statutes. However, if the Blood committed the same crime in Omaha, he would be charged with a Class III felony—

⁴⁰⁰ See MO. REV. STAT. § 571.030(8)(1) (requiring drive-by shootings to be punished by the maximum authorized penalty for a class B penalty). Under Missouri's statutes, the maximum penalty for a class B penalty is fifteen years in prison. *Id.* § 558.011(1)(1).

⁴⁰¹ See *supra* note 208 and accompanying text.

⁴⁰² Obviously, this provision would not help fight against gangs that do not conduct drive-by shootings.

punishable by one to twenty years imprisonment⁴⁰³—under Nebraska’s existing Unlawful Discharge of a Firearm statute.⁴⁰⁴ Thus, the Blood in Missouri would receive a guaranteed fifteen year prison sentence, whereas the Blood could conceivably walk away with a one-year prison sentence in Nebraska for the same crime.

The mandatory fifteen-year sentence also reflects that an actor’s use of a vehicle increases the gravity of an Unlawful Discharge of a Firearm crime. Unlike a situation where an actor stands in an inhabited building’s front lawn and sprays the building with bullets, an actor shooting at the same building from a vehicle can readily flee to avoid arrest and use his vehicle as protection against retaliation from individuals inside the building.⁴⁰⁵ Assuming the vehicle is moving, the actor’s use of the vehicle may also reduce his or her accuracy, increasing the risk of death or injury to innocent bystanders.⁴⁰⁶ Finally, an actor’s use of a vehicle is especially grave because the vehicle allows him to kill or injure from afar and leave little physical evidence at the crime scene.⁴⁰⁷

V. CONCLUSION

American gangs have become increasingly organized, sophisticated, and violent. In response to this increasing threat, forty-six states, Washington, D.C., and several Central American countries have enacted anti-gang legislation. However, Nebraska’s Unicameral has stood idly by since the mid-1980s, watching Nebraska’s gangs spread from Omaha in the East to

⁴⁰³NEB. REV. STAT. § 28-105(1).

⁴⁰⁴*Id.* § 28-1212.02.

⁴⁰⁵ See Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 264 n.21 (2004) (“An additional reason why the homicidal means of poison, explosives, or drive-by shootings are so dangerous is that they enable the murderer to kill from a distance. This reduces the likelihood the murderer will face resistance, be observed, apprehended, or connected through blood or other physical evidence to the crime.”).

⁴⁰⁶ *Id.* at 264 (quoting *People v. Thompson*, 29 Cal. Rptr. 2d 847, 851–852 (Ct. App. 1994) (noting that drive-by shootings, like the use of explosives devices, “can inflict indiscriminate and multiple deaths . . .”).

⁴⁰⁷ See *id.* at 264 n.21. (noting that the use of vehicles in shootings allows an actor to kill from afar, reducing his ability to be connected to the crime scene through “blood or other physical evidence to the crime”).

Scottsbluff in the West without directly engaging Nebraska's gang problem through anti-gang legislation. Now, MS-13—a bona fide international threat—is gaining a foothold in Omaha and other Nebraska cities and towns. Thus, the Unicameral can no longer afford to sit on its hands. Nebraska must follow the lead of surrounding states, engage gangs head-on, and pass anti-gang legislation to prevent and suppress gang activity. Until then, gangs such as MS-13 will continue to gain power in Nebraska, selling drugs, killing Nebraska's teenagers, and intimidating Nebraska's peaceful citizens.