

STALKING THE JETS AND THE SHARKS: EXPLORING  
THE CONSTITUTIONALITY OF THE GANG DEATH  
PENALTY ENHANCER

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INTRODUCTION

Death penalty jurisprudence in the thirty-seven states exacting that particular sanction has reached the peculiar circumstance that nearly *every murder* involves circumstances authorizing the death penalty.<sup>1</sup> Scholars of death penalty jurisprudence could most likely draft a hypothetical murder involving no death qualifying circumstances, but the accomplishment would come at considerable effort. The proliferation of death qualifiers, and the reticence of reviewing courts to limit the application of these qualifiers, has led to a paradoxical scenario—the narrowing requirement set forth by the seminal 1972 Supreme Court decision in *Furman v. Georgia*<sup>2</sup> has been overrun by a myriad of seemingly tailored, yet broadly applied, exceptions. Indeed the expansion of the parameters of these death qualifiers has per-

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<sup>1</sup> For instance, California has twenty-two death qualifying circumstances: (1) intentional murder carried out for financial gain; (2) murder with a prior murder; (3) multiple murder; (4) murder by means of a destructive device, bomb, or explosive; (5) murder while attempting an escape; (6) murder committed by a destructive device or bomb delivered or sent through the mail; (7) murder of a peace officer; (8) murder of a federal law enforcement officer; (9) murder of a firefighter; (10) murder in which the victim was a witness to a crime who was killed to prevent his or her testimony; (11) murder of a prosecutor; (12) murder of a judge carried out in retaliation for, or to prevent the performance of, the victim's official duties; (13) murder of a public official carried out in retaliation for, or to prevent the performance of, the victim's official duties; (14) murder that was especially heinous, atrocious or cruel; (15) murder by means of lying in wait; (16) murder because of race, color, religion, nationality, or country of origin; (17) felony murder (robbery, kidnapping, rape, sodomy, lewd acts upon a child, oral copulation, burglary, arson, train wrecking, mayhem, rape by instrument, and carjacking); (18) murder involving the infliction of torture; (19) murder by poison; (20) murder of a juror in retaliation, or to prevent the performance of the victim's official duties; (21) murder by "drive-by" shooting; and (22) murder carried out to further the activities of a criminal street gang. CAL. PENAL CODE § 190.2(a) (West Supp. 2004). Florida has 14 death qualifying circumstances. FLA. STAT. ANN. § 921.141(5) (West 2001). Indiana has 16 death qualifying circumstances. IND. CODE ANN. § 35-50-2-9(b) (Michie Supp. 2003). Missouri has 17 death qualifying circumstances. MO. ANN. STAT. § 565.032(2) (West 1999).

<sup>2</sup> 408 U.S. 238 (1972) (per curiam).

haps had a greater impact than their sheer number. The “lying in wait” qualifier, for instance, has become so encompassing as to include a front door entry<sup>3</sup> or a face-to-face encounter in which the culprit stabs the victim.<sup>4</sup> “Murder for financial gain” has been found to include plans for a paramilitary takeover of a county.<sup>5</sup> Furthermore, though ultimately unsuccessful, state representatives have argued that carving up a body after death<sup>6</sup> and the circumstance of a drug deal gone bad<sup>7</sup> make murder heinous or cruel. This veritable bonanza of “special circumstances,” coupled with their vast scope, has given prosecutors the means to seek capital punishment in a virtually limitless range of murder scenarios.<sup>8</sup>

The seven out of ten Americans who currently favor capital punishment<sup>9</sup> would most likely applaud this state of affairs; a life for a life, an eye for an eye, an execution for a murder. Nonetheless, vitiating against this popular mandate is the directive of the United States Supreme Court in *Furman*—that any death penalty scheme must narrowly define which murderers are to be executed from the host of murderers who are to be dealt with otherwise.<sup>10</sup> In *Furman*, the Supreme Court acted decisively on its concerns that legislative mandates give excessive discretion to juries, and judges to determine, not only if death penalty charges would be filed against a particular defendant, but also whether or not that particular defendant actually would be sentenced to death.<sup>11</sup> The Court, recognizing that the potential for discrimination and abuse became a reality, struck down the death penalty schemes of the various states.<sup>12</sup> Yet now, given the explosion

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<sup>3</sup> See, e.g., *People v. Michaels*, 49 P.3d 1032, 1049 (Cal. 2002); *People v. Hardy*, 825 P.2d 781, 825 (Cal. 1992).

<sup>4</sup> *People v. Hillhouse*, 40 P.3d 754, 775 (Cal. 2002).

<sup>5</sup> *People v. Hoover*, 231 Cal. Rptr. 203, 208 (Cal. Ct. App. 1986).

<sup>6</sup> *People v. Franc*, 267 Cal. Rptr. 109 (1990).

<sup>7</sup> *In re Smith*, 134 Cal. Rptr. 2d 781, 787 (Cal. Ct. App. 2003) (citing Governor Gray Davis’ arguments for overruling the parole board’s decision to grant parole to convicted murder).

<sup>8</sup> California’s most recent death-qualifier was added by a majority of the voters in 2000. See 2000 Cal. Legis. Serv. Prop. 21 §2(a) (West).

<sup>9</sup> 74% of Americans favor the death penalty for convicted murderers. See Gallup Poll, May 19, 2003, at <http://www.gallup.com/content/login.aspx?ci=8419> (last visited July 15, 2004).

<sup>10</sup> *Furman*, 408 U.S. 238 (1972) (per curiam).

<sup>11</sup> Kimberly A. Orem, Note, *Roach v. Angelone* 176 F.3d 210 (4th Cir. 1999), 12 CAP. DEF. J. 227 (1999). See *Furman*, 408 U.S. at 313-14 (1972) (per curiam) (White, J., concurring) (holding that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment when applied broadly and indiscriminately); (Douglas, J., concurring) (noting the inherent flaw in the Court’s prior decision in *McGautha v. California*, 402 U.S. 183 (1971), which left discretion of sentencing to juries absent clearer guidelines.) In *Furman*, Douglas’ concurrence notes the perspicacity of Justice Brennan’s dissent in *McGautha* (in which he joined) and observes further the disparity of application of extreme penalties between social strata and the various races.

<sup>12</sup> Three state court decisions imposing the death penalty were reversed. See *Furman v. State*, 225 Ga. 253 (1969) (imposing the death penalty for murder); *Jackson v. State*, 225 Ga. 790 (1969) (impos-

of state instituted death penalty qualifiers that emerged in the three decades since *Furman*,<sup>13</sup> it is time for the Court to examine critically this accumulated glut of death qualifying circumstances and determine if they violate the narrowing function of *Furman*.

While it may be argued that any number of these qualifiers run afoul of *Furman* and thus merit close scrutiny, the focus of this article will be on one of the more recent efforts to expand death qualifying circumstances, specifically “murder committed on behalf or associated with gang activity.”<sup>14</sup>

Four states—Florida, Missouri, Indiana, and California—now include gang related murder in their death schemes.<sup>15</sup> At first blush, such a qualifier seems a legitimate effort to strike at the heart of the terrible cost in human misery associated with gang violence.<sup>16</sup> Indeed, the four states that now include gang-related murder in their death penalty schemes have long suffered at the hands of gang activity.<sup>17</sup> Under such circumstances, a credible argument can be made for identifying and executing those responsible.<sup>18</sup> However, based on the *Furman* mandate that death penalty schemes must sort systematically and fairly those most deserving of execution from the whole host of other murderers, this “qualifier” presents serious obstacles. Is “gang-related” such a nebulous, and thus potentially expansive concept, that it virtually invites abuse over who will be death charged? Does the “gang-related” qualifier comport to the *Furman* narrowing requirement if a significant percentage of murders are “gang-related”? Since this death qualifier requires a pre-existing association with a criminal street gang, will

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ing the death penalty for rape); *Branch v. State*, 447 S.W.2d 932 (Tx. Crim. App. 1969) (imposing the death penalty for rape). More generally however, the decision in *Furman* caused at least thirty-five states to reconstruct their death penalty statutes.

<sup>13</sup> See, e.g., CAL. PENAL CODE § 190.2(a) (West Supp. 2004); FLA. STAT. ANN. § 921.141(5) (West 2001); IND. CODE ANN. § 35-50-2-9(b) (Michie Supp. 2003); MO. ANN. STAT. § 565.032(2) (West 1999).

<sup>14</sup> E.g., CAL. PENAL CODE § 190.2(a)(22) (West Supp. 2004).

<sup>15</sup> As of July, 2003, California, Indiana, Florida, and Missouri had gang association as a qualifier for the death penalty. CAL. PENAL CODE § 190.2(22) (West 1999); FLA. STAT. ANN. § 921.141(5)(n) (West 2001); IND. CODE ANN. § 35-50-2-9(b)(1)(I) (Michie Supp. 2003); MO. ANN. STAT. § 565.032(2)(17) (West 1999).

<sup>16</sup> See 2000 Cal Legis. Serv. Prop. 21 §2(a) (West) (expressing this rationale for California’s gang association death penalty qualifier).

<sup>17</sup> See generally U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS at <http://www.ojp.usdoj.gov/bjs> (last visited July 15, 2004).

<sup>18</sup> One of the arguments made to the voters of California when they were asked to vote on adding the death-qualifying gang activity to the penal code was as follows: “gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity.” 2000 Cal. Legis. Serv. Prop. 21 §2 (h)(West).

such a negative association predispose states to seek death charges in violation of *Furman*? These are tough questions requiring serious answers.

This article examines the special circumstance of “gang-related” killing and determines if, by virtue of its broad potential for imposing capital punishment, it is a legitimate death qualifying event. There are three separate and distinct inquiries. First, if the percentage of gang deaths as compared to all murders is so high, is that exclusivity demanded by *Furman* lost? Second, are the parameters of “gang-related” murder specific enough to withstand constitutional attack for vagueness? And finally, given the pre-existing gang association requirement, might prosecutors be predisposed to seek death sentences simply by virtue of that pre-existing association?

Part I of this article hones the serious constitutional questions raised by the “gang-related” death qualifier. Part II reviews the mandate of the United States Supreme Court in *Furman v. Georgia*—that any death penalty law must sufficiently narrow that class of individuals deserving of execution so as not to run afoul of the cruel and unusual punishment prohibition of the Eighth Amendment.<sup>19</sup> Part III traces a brief overview of gangs and gang violence in this country and examines their origins, their motivations, and in particular, the nature of gang violence, to determine if singling out “gang-related” murder is mandated or justified. Part IV examines the empirical data setting forth the prevalence of “gang-related” murder as compared to all murders to ascertain if that exclusivity demanded in *Furman* is met. Part V examines what constitutes a “criminal street gang” and the related question, can “gang” and “gang-related” be objectively—constitutionally—defined? Finally, Part VI fathoms whether “gang-related” murder, with its gang membership precondition, predisposes gang murderers to death charges and is a kind of signature event meriting the most extreme punishment.

## I. HONING THE QUESTIONS

“West Side Story” revisited Shakespeare’s masterpiece, *Romeo and Juliet*, and added a romanticized, gangland flavor.<sup>20</sup> The Puerto Rican

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<sup>19</sup> 408 U.S. 238, 276-77 (1972) (per curiam) (Brennan, J., concurring) (“If . . . the infliction of a severe punishment is ‘something different from that which is generally done’ in such cases, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the [cruel and unusual punishment] Clause, is inflicting punishment arbitrarily.”) (citations omitted). The leading dissent opinion also makes clear that the crux of the argument in *Furman* is that “the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern.”) *Id.* at 398-99 (Burger, J., dissenting).

<sup>20</sup> WEST SIDE STORY (MGM 1961).

Sharks and “American” Jets were rival gangs on the streets of New York. Tony, a Jet who had grown away from the gang, falls in love with Maria, the fiancé of Shark-member Chino and the Puerto Rican sister of Bernardo, the head of the Sharks. Tony gets caught up in a fight between the gangs and stabs Bernardo amidst the melee. Chino now has twin motives to kill Tony. When Chino acts on his hatred, does he kill for the sake of his gang, or is he more personally motivated? His divergence of motives highlights one problematic characteristic of the “gang-enhancer.”

In the movie all was done within the Byzantine world of the gangs. Yet that murder within the mythical world of “West Side Story” would give the prosecutor leeway to institute capital charges simply by virtue of the gang association; specifically that the murder was “on behalf of or associated with gang activity.”<sup>21</sup> However, was Chino’s murder of Tony gang-related? Did he kill because Tony had stabbed the leader of his gang, Bernardo, thus qualifying the killing as a capital “gang-related” murder? Or did he kill out of jealousy because Tony dared to date Maria, rendering the homicide personal, outside of gang considerations and without the potential of execution. Take away the Hollywood sparkle and the Jets and Sharks, and all we are left with are Tony and Chino. Was it “just” murder or was it a “gang related” death penalty murder?<sup>22</sup>

The United States Supreme Court has instructed that the purpose of a death penalty scheme is to properly categorize those who deserve to die from those who do not.<sup>23</sup> There are certainly an abundance of murderers in this country,<sup>24</sup> but which are to be singled out and executed, and which are to be spared? Surely factors such as race, ethnicity, economic status, religion and gender must be eliminated from consideration,<sup>25</sup> and yet as a nation we have woefully failed to weed out those very factors in determining who is to be executed.<sup>26</sup> In fact, the one constant of the American death penalty

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<sup>21</sup> CAL. PENAL CODE § 190.2(a)(22) (West Supp. 2004).

<sup>22</sup> Tony’s actions are clearly part of a gang confrontation. However, the movie leaves open the question of whether Chino shot and murdered Tony out of personal jealousy or from a sense that Tony should not be dating a girl from his gang. *See* WEST SIDE STORY (MGM 1961).

<sup>23</sup> *See infra* text accompanying note 47.

<sup>24</sup> Although the Department of Justice has noted a steady decline in homicides since 1991, there were still 15,533 homicides nationwide in 1999. With an average of 5.7 homicides per 100,000 people, this percentage applied to the current population of 287,889,982 would provide for an estimate of 16,409 homicides this year. *See* JAMES A. FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE U.S. [hereinafter FOX & ZAWITZ (DOJ)], available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm> (last visited July 15, 2004).

<sup>25</sup> *See Furman*, 408 U.S. at 364-66 (Marshall, J., concurring) (discussing evidence that “capital punishment is imposed discriminatorily against certain identifiable classes of people.”).

<sup>26</sup> *See Furman*, 408 U.S. at 293 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.”).

is its very arbitrariness.<sup>27</sup> The death penalty schemes of the thirty-seven capital punishment states, as well as the federal death statute, are so fraught with generalities that arbitrariness thrives among their many nuances.<sup>28</sup> Death penalty laws that allow vast discretion in who is capitally charged and sentenced and who is not, fail in the “narrowing requirement” mandated by the Eighth Amendment.<sup>29</sup>

Murder by itself will not necessarily qualify the murderer for capital punishment. There must be circumstances beyond murder that will single out a particular murderer for capital punishment from the vast majority of murderers who will not be so charged.<sup>30</sup> Those circumstances must be rational, nonselective, and nonarbitrary so that only those very few select murderers will stand trial for their lives.<sup>31</sup> Does “gang related” select out those few? Gang associated killing is rightly perceived as a particularly serious threat to public safety.<sup>32</sup> Indeed, gang killing necessarily raises troubling and disturbing concerns. Group-sanctioned violence strikes fear into the hearts and minds of all thoughtful people. However, should any death qualifying circumstance come to be so broadly encompassing as to include a significant percentage of all murderers, has then its inclusion as a death qualifying event lost its legitimacy as a death qualifying act?<sup>33</sup> If a

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<sup>27</sup> See *id.*

<sup>28</sup> See *supra* note 19.

<sup>29</sup> See *Furman*, 408 U.S. at 294 (Brennan, J., concurring).

When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.

*Id.*

<sup>30</sup> See, e.g., CAL. PENAL CODE § 190.2 (West 2001); MO. REV. STAT. § 565.032(2) (West 2002); IND. CODE ANN. § 35-50-2-9(b)(1)(I) (West 2004); FLA. STAT. ANN. § 921.141(5) (West 2003).

<sup>31</sup> See *infra* text accompanying note 47.

<sup>32</sup> Statistics for 1998 through 2002 from the FBI Uniform Crime Report show gang related murder rising 40% during those five years. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 2002, CRIME IN THE UNITED STATES [hereinafter UNIFORM CRIME REPORTS 2002] 27 (Table 2.14: Circumstances 1998-2002), available at <http://www.fbi.gov/ucr/02cius.htm> (last visited July 15, 2004).

<sup>33</sup> See *Furman*, 408 U.S. at 270 (Brennan, J., concurring) (“Judicial enforcement of the [Eighth Amendment] . . . cannot be evaded in invoking the obvious truth that legislatures have the power to prescribe punishments for crimes”). See also Merrill K. Albert, *Murder by Lying in Wait*, 42 CALIF. L. REV. 337, 341 (offering an enlightening syllogism):

1. If, before a lying in wait murder can be found, the jury is required to find beyond a reasonable doubt that the defendant watched and waited for his victim before murdering him, then any further finding as to premeditation and deliberation would be superfluous because the modus operandi itself demonstrates that the murder was a deliberate and premeditated act.
2. But were the concept of lying in wait unduly relaxed so that substantial evidence of prior watching and waiting are not required, then the act of lying in wait would no longer be the equivalent of an act of deliberation and premeditation.
3. Thus, were a defendant convicted under such an inadequate showing of lying in wait, he would have been found guilty

death qualifier lacks that particular specificity demanded by *Furman*, does it invite abuse? Furthermore, does any death qualifier that looks to a pre-existing association in some “outlaw” organization predispose prosecutors to file death penalty charges beyond the tight parameters demanded by *Furman*? If any death qualifier becomes nothing more than a thin veil of constitutionality to cover the specter of killing autonomy possessed by the state, it must be exposed and extinguished. Under such circumstances, the death qualifier’s distinctiveness in setting forth who shall be singled out for execution is lost, and it lapses into meaninglessness. Does “gang-related” murder withstand such scrutiny?

This article shall examine the special circumstance of “gang-related” killing and determine if, by virtue of its broad potential for imposing capital punishment, it is a legitimate death qualifying event. There are three separate and distinct inquiries. First, if the percentage of gang deaths as compared to all murders is so high, is that exclusivity demanded by *Furman* lost? Second, are the parameters of “gang-related” murder specific enough to withstand constitutional attack for vagueness? And finally, given the pre-existing gang association requirement, might prosecutors be predisposed to seek death sentences simply by virtue of that pre-existing association?

## II. THE NARROWING REQUIREMENT OF *FURMAN V. GEORGIA*

The *Furman* decision consolidated three cases: Furman, who killed a man after entering the man’s home;<sup>34</sup> Jackson, who committed rape;<sup>35</sup> and Branch, who also raped.<sup>36</sup> All three men were black.<sup>37</sup> All three were sentenced to death. The question before the Supreme Court was why these men were condemned to die and not the dozens, hundreds, and even thousands of other murderers or rapists who were not sentenced to die for *their* acts.<sup>38</sup>

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of first degree murder without a showing of deliberation or premeditation or its statutory equivalent.

*Id.*

<sup>34</sup> *Furman*, 408 U.S. at 252 (Douglas, J., concurring).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 253 (Douglas, J., concurring).

<sup>37</sup> The Court in *Furman* used the term “black.” *See id.* This Article refers to this racial characteristic as both “black” and “African-American.”

<sup>38</sup> *Id.* at 240 (Douglas, J., concurring) (“[The appellants] are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute [sic] ‘cruel and unusual punishment’ within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.”); *see also id.* at 309-310 (Stewart, J., concurring) (stating that “[O]f all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact

Were the death penalty laws of Georgia and Texas, the states from which *Furman* arose, as written and carried out, in violation of the “cruel and unusual punishment” clause of the Eighth Amendment?<sup>39</sup> More specifically, the Court was concerned with whether the death sentences of Furman, Jackson, and Branch were the product of the arbitrary and prejudicial application of the death penalty.<sup>40</sup> Were these men singled out and sentenced to die because they were black?<sup>41</sup>

In the four decades preceding the *Furman* decision there were 3,859 executions in the United States: 1,721 of those executed were white and 2,066 were black.<sup>42</sup> Of the 455 individuals executed for rape without murder; 48 were white and 405 were black.<sup>43</sup> Keeping in mind that African-Americans comprised roughly ten to eleven percent of the American population during this period, the disproportionality of the percentage of African-Americans executed was staggering.<sup>44</sup> While the *Furman* Court noted that such numbers alone may not provide conclusive evidence that the death penalty was arbitrarily meted out, the numbers were significant enough to at least raise the question.<sup>45</sup>

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been imposed.”).

<sup>39</sup> *Id.*

<sup>40</sup> See *Furman v. Georgia*, 408 U.S. 238, 249-253 (1972) (per curiam) (Douglas, J., concurring) (citing studies showing that application of the death penalty is unequal and implicating discrimination in the jury convictions of the three defendants).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 364 (Marshall, J., concurring). Justice Douglas also cites one study in Texas which found that:

Application of the death penalty is unequal: most of those executed were poor, young, and ignorant. Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were codefendants, the white was sentenced to life imprisonment or a term or years, and the negro was given the death penalty. Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

*Id.* at 250-51 (Douglas, J., concurring) (citing Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969)).

<sup>43</sup> *Id.* at 364 (Marshall, J., concurring).

<sup>44</sup> The percentage of African-Americans among the total population in 1930 was 9.6%; in 1940 it was 9.7%; in 1950 it was 9.8%; in 1960 it was 10.3%. See Historical Census Browser, University of Virginia Library: Geospatial and Statistical Data Center, at <http://fisher.lib.virginia.edu/collections/stats/histcensus/> (last visited July 15, 2004) (providing source of statistical data).

<sup>45</sup> See *Furman*, 408 U.S. at 250 n.15 (Douglas, J., concurring) (citing H. Bedau’s observation in *THE DEATH PENALTY IN AMERICA* (1967 rev. ed.) that “something more than chance has operated over the years to produce this racial difference. . . . Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided.”).



In overturning the death sentences of the three men, *Furman* established that the constitutional requirements of the Eighth Amendment serve to protect against the arbitrary imposition of the death penalty.<sup>46</sup> Justice Douglas represented the view of four of the five concurring Justices in *Furman* when he stated:

[T]he high service rendered by the 'cruel and unusual punishment clause' of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily [sic] to unpopular groups.<sup>47</sup>

The *Furman* Court's most pressing concern was not the per se unconstitutionality of the death penalty (addressed and discarded in *Gregg v. Georgia*),<sup>48</sup> or the equal protection implication (addressed and discarded in *McCleskey v. Kemp*),<sup>49</sup> but rather the dire need for legislative restraints on

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<sup>46</sup> See *infra* text accompanying note 47.

<sup>47</sup> *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

<sup>48</sup> 428 U.S. 153 (1976). In the *Gregg* case the Supreme Court considered whether the imposition of the death penalty under Georgia law violated the U.S. Constitution. *Id.* at 158. The defendant in *Gregg* was charged with committing armed robbery and murder. *Id.* at 159. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage . . . . The trial judge "charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation." *Id.* at 161. Furthermore, the trial judge instructed the jury that:

[I]t would not be authorized to consider imposing the penalty of death unless it first found beyond a reasonable doubt one of these aggravating circumstances: One: That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of Simmons and Moore. Two: That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment. Three: The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of the mind of the defendant.

*Id.* at 161 (internal quotations omitted). Finding the first and second of these circumstances, the jury returned verdicts of death on each count. *Id.* Answering the defendant's contention that the death penalty is unconstitutional per se, the Court held:

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

*Id.* at 186-87.

<sup>49</sup> 481 U.S. 279 (1987). *McCleskey* involved a black man who was "convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978." *Id.* at 283. *McCleskey's* convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. *Id.* at 283-84. The jury found two aggravating circumstances to exist beyond a reasonable doubt: "the murder was committed during the course of an armed robbery, and the murder was committed upon a peace officer engaged in the performance of his duties." *Id.* at 284-85 (internal citations omitted). *McCleskey* was sentenced to death. *Id.* at 285. The Court stated:

how the death penalty may be administered and the insistence that, “this restraint upon legislatures possesses an expansive and vital character that is essential to the rule of law and the maintenance of individual freedom.”<sup>50</sup>

Justices Douglas, Brennan, Stewart, White and Marshall found that the death penalty laws of Georgia and Texas failed to ensure that the death penalty was administered in a rational, evenhanded and nondiscriminatory manner.<sup>51</sup> The death penalty schemes of those states both had allowed selection of jurors with certain prejudices and permitted the death penalty for a variety of crimes.<sup>52</sup> Given that the Georgia and Texas death penalty schemes were typical of the schemes of the other death penalty states, the *Furman* decision essentially invalidated all death penalty schemes throughout the United States, since those laws similarly failed to extinguish arbitrariness in the imposition of death.<sup>53</sup>

The death penalty, if it is not to run afoul of the Eighth Amendment must, in an evenhanded, nondiscriminatory manner, narrowly define those individuals designated for execution from the broader class of murderers and, in some cases, rapists.<sup>54</sup> Indeed, there must be an identifiable and rational means of distinguishing who is to be capitally charged from those who might be capitally eligible.<sup>55</sup> The fear is not just that a black man will be capitally charged, convicted, and sentenced when a similarly situated white man would not, but also that the various death schemes do not sufficiently narrow the type and manner of crime befitting capital punishment.<sup>56</sup> While *Furman* specifically dealt with race discrimination in meting out the

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Because McCleskey’s sentence was imposed under Georgia sentencing procedures that focus discretion “on the particularized nature of the crime and the particularized characteristics of the individual defendant,” we lawfully may presume that McCleskey’s death sentence was not “wantonly and freakishly” imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

*Id.* at 308 (internal citations omitted).

<sup>50</sup> *Furman*, 408 U.S. at 267 (Brennan, J., concurring) (quoting in part *Weems v. United States*, 217 U.S. 349, 376-77 (1910) (internal quotations omitted)).

<sup>51</sup> *See id.* at 256-57 (Douglas, J., concurring); 305-06 (Brennan, J., concurring); 309-10 (Stewart, J., concurring); 313-14 (White, J., concurring); 370-71 (Marshall, J., concurring).

<sup>52</sup> *Branch v. State*, 447 S.W.2d 932 (1969); *Furman v. State*, 225 Ga. 253 (1969).

<sup>53</sup> *See supra* note 12.

<sup>54</sup> *See supra* text accompanying note 47.

<sup>55</sup> *See id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

<sup>56</sup> *See id.* at 253 (Douglas, J., concurring).

[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

*Id.*

death penalty, the holding was a clarion call against any arbitrary institution of that sanction.<sup>57</sup> The Court demanded that death penalty schemes, as set forth and interpreted by judicial review, must provide clarity and guidance against any arbitrary or discriminatory abuse of the scheme.<sup>58</sup>

In outlining just how courts are to put constitutional restraints on the legislature's ability to prescribe punishments for crimes, Justice Brennan in *Furman* set forth two imperatives: the punishment must not be degrading to human dignity, and it must not be arbitrarily imposed.<sup>59</sup> These two statements seem somewhat of a tautology. What could be more degrading to human dignity than standing those convicted of wrongdoing against a wall and rolling dice to see whose body and mind will be forever washed from the earth? Even the most liberal legal mind could imagine a scenario in which capital punishment would be appropriate for certain individuals. But to impose punishment *arbitrarily* upon another human being seems to be the most inhuman act of all, falling outside all bounds of human dignity. Arbitrary imposition of a penalty that allows no moral leeway for mistake is a practice that "everyone would ineffably find to be repugnant to all civilized standards."<sup>60</sup> It is this arbitrariness, so foreign to human dignity, which the Court in *Furman* sought to preclude.<sup>61</sup>

It would be fair to reason that no contemporary American legislative body would intentionally authorize arbitrary or discriminatory punishment.<sup>62</sup> However, when those laws, through judicial interpretation or actual implementation, cede power to a prosecutor, judge, or jury to use that law in an arbitrary manner, that action becomes unconstitutional.<sup>63</sup> That is precisely what occurred in *Furman*. The death penalty laws of Georgia and Texas were race neutral, but the Supreme Court understood that in the charging process and in the jury process, African-Americans were selected

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<sup>57</sup> See MICHAEL A. FOLEY, *ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION AND THE DEATH PENALTY* (2003).

<sup>58</sup> See *supra* text accompanying note 47; see also *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.").

<sup>59</sup> *Furman*, 408 U.S. at 271-74 (Brennan, J., concurring).

<sup>60</sup> *Id.* at 385 (Burger, J., dissenting).

<sup>61</sup> See *id.* at 256-57 (Douglas, J., concurring).

<sup>62</sup> See *id.* at 255 (Douglas, J., concurring) ("In a nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement.").

<sup>63</sup> See *id.* at 255 (Douglas, J., concurring).

[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

*Id.*

out for execution at a vastly disproportionate rate.<sup>64</sup> In *Furman*, Justice Douglas agreed with the notion that a jury's "untrammelled discretion . . . to pronounce life or death in capital cases is offensive," and that juries must "be given standards by which that discretion should be exercised."<sup>65</sup> Douglas reasoned, "[W]hat the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community."<sup>66</sup>

Justice White perhaps best summed up the Court's concern: "The death penalty is exacted with great infrequency even for the most atrocious crimes and there is no *meaningful basis* for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>67</sup> Can it be said that the "special" circumstance of gang-related murder meets the "meaningful basis" *Furman* standard? Given the empirical data establishing the frequency of gang murder,<sup>68</sup> prosecutors armed with a gang-related death qualifier have broad license to file death penalty charges. If that is the case, does a gang related qualifying circumstance lose its legitimacy as a *Furman* narrowing mechanism because it may be wielded by prosecutors at their discretion to capitally charge in an arbitrary manner? A related question concerns whether the existing death qualifiers are already comprehensive enough to punish the murderers who kill under the gang umbrella.<sup>69</sup> For example, a drive by shooting of a rival gang-member after a territorial dispute involving drug-territory could be charged under the gang enhancement statute—it clearly "furthers the activities of a criminal street gang." But the same murder could have already been charged as a capital offense as a "murder carried out for financial gain"<sup>70</sup> or a "murder by 'drive-by' shooting."<sup>71</sup>

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<sup>64</sup> See *id.* at 249-50, 253 (Douglas, J., concurring). Though Justice Douglas stated that the court could not say "from the facts disclosed in [the] records that [the instant] defendants were sentenced to death because they were black," he cited studies indicating that discriminatory application of the death penalty was normal practice in Texas and in U.S., generally, including one by the President's Commission on Law Enforcement and Administration of Justice that found that "the death penalty is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." *Id.*

<sup>65</sup> *Furman v. Georgia*, 408 U.S. 238, 247 (1972) (Douglas, J., concurring) (quoting *McGautha v. California*, 402 U.S. 183, 207 (1971)).

<sup>66</sup> *Id.* at 249 (Douglas, J., concurring).

<sup>67</sup> *Id.* at 313 (White, J., concurring) (emphasis added).

<sup>68</sup> See *supra* note 32.

<sup>69</sup> In the four states that have gang death qualifiers, the other qualifiers cover such activities as premeditated murder, murder related to other felonies, murder for financial gain, and murder to conceal a felony. Two common examples of gang activity, already covered by statutes imposing the death penalty, are drive by shootings and robbery. See *supra* note 1.

<sup>70</sup> See, e.g., *People v. McLead*, 276 Cal. Rptr. 187 (Cal. Ct. App. 1990).

<sup>71</sup> See, e.g., *Douglas v. State*, 951 P.2d 651 (Okla. Crim. App. 1997).

### III. GANG VIOLENCE: A LONG AND MEAN HISTORY

Before moving on to whether the various gang murder death qualifiers comport with the *Furman* narrowing mandate, it makes sense to explore the nature and history of gangs and gang violence. This will assist in determining if singling out gang-related murders for capital punishment is mandated or justified. It will also help answer the related question concerning whether the death qualifiers already on the books are sufficient in themselves to punish the murderers who kill under the gang umbrella?<sup>72</sup> Scholars and researchers have identified three types of gangs: organized crime gangs, youth gangs and, finally, criminal street gangs. Some of these have legitimate social purposes, but most quickly cross over into illegal activities. The three types of gangs are labels supplied by researchers and not self-designated terms that the gangs use.

Briefly, the accepted definitions of the three types of gangs are actions committing the crime, specific definitions of a criminal street gang, and blending of actions and definitional criteria. This section explores the research in gangs in order to find the background for today's legal definition of "criminal street gang."

#### A. *Historical Perspective*

"Gang activity" in the United States dates back before the nineteenth century, although the precise "when" and "how" have been lost in the murky recesses of history.<sup>73</sup> Those murky origins gave way to the well chronicled, if not often fictionalized, gangs and gang violence of the twentieth century.<sup>74</sup> The organized efforts of the prohibition era bootleggers and the "crime families" that started consolidating in the urban setting were just a couple of organized criminal enterprises that began to surface.<sup>75</sup> But were they even criminal street gangs by today's standards?

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<sup>72</sup> See *supra* notes 1 and 69 and accompanying text.

<sup>73</sup> See Jeffrey Fagan, *Gangs, Drugs, and Neighborhood Change*, in *GANGS IN AMERICA*, 39 (C. Ronald Huff, 2d ed., 1996); MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY I* (1991).

<sup>74</sup> For fictionalized accounts, see *BONNIE & CLYDE* (Warner 1969) and *THE UNTOUCHABLES* (Paramount Pictures 1987).

<sup>75</sup> See FREDERIC THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* 252-57 (2d ed. 1936).

While gang activity has been studied in this country since the 1920s,<sup>76</sup> it was not until the 1970s, with the advent of the modern street gang, that the gang phenomenon came under careful scrutiny.<sup>77</sup> Although as early as 1927, one noted researcher saw gang activity as “one manifestation of the disorganization incident to cultural conflict among diverse nations and races gathered together in one place.”<sup>78</sup> Many researchers have concluded that the rapid increase in gang membership that came about in the 1970s was related to the demand for illegal drugs, which had outstripped the existing structures for their delivery, rather than cultural conflict.<sup>79</sup> These researchers concluded that the profits of the drug trade were the catalyst for gang involvement.<sup>80</sup> At this time, gangs also became more defined, organized and dangerous, with the name “criminal street gangs” coming to signify groups whose main purpose was criminal activity, not social acceptance or identity.<sup>81</sup> Even so, “many gangs still look like the delinquent adolescent peer groups of the industrial era.”<sup>82</sup>

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<sup>76</sup> See Louis Holland, *Can Gang Recruitment be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-gang Legislation*, 21 J. CONTEMP. L. 259, 267 (1995). Thrasher’s study (originally published in 1927) is the most well known of the early part of the century, but throughout the 1920s, scholars explored the social factors leading to gang development. *Id.* at 267. Early studies revealed that most gang youths were seeking adventure rather than criminal enterprise. *Id.* at 267-68.

<sup>77</sup> JAMES C. HOWELL, U.S. DEPT. OF JUSTICE, JUVENILE JUSTICE BULLETIN, YOUTH GANGS: AN OVERVIEW 2 (1998), available at <http://www.ncjrs.org/pdffiles/167249.pdf> (last visited July 15, 2004) [hereinafter HOWELL (DOJ)]. As guns were becoming more widespread in the 1970s, gang activity was becoming more violent and more dangerous, sparking new studies of gang membership and activity. *Id.*; see also John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 CRIME & JUST. 365, 369 (1998) (listing the classic studies of gang activity).

<sup>78</sup> THRASHER, *supra* note 75, at 220. Though this article cites to the 1936 edition, Thrasher’s study was originally published in 1927.

<sup>79</sup> Hagedorn, *supra* note 77, at 368 (“[T]he spread of guns and unsettled cocaine markets are also related to increases in gang violence.”).

<sup>80</sup> In a 1998 study, one gang member was quoted as saying, “Money is more the reason people get into gangs now.” *Id.* at 365. Chinese gangs in particular are described as having monetary gain as their primary motive, and they resemble adult criminal organizations more than the stereotypical youth gangs. See David R. Truman, *The Jets and the Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 697, n.71 (1995). And Vietnamese gangs generally look to such crimes as car theft for their wealth rather than drug sales. *Id.*

<sup>81</sup> The term “criminal street gangs” is used in many articles and recent studies, though “youth gangs” has also been used to describe gangs with similar behavior. See, e.g., HOWELL (DOJ), *supra* note 77 at 1. Because the definition of “gang” has been so varied throughout history and attempts to define it have been inadequate, the term “criminal street gang” seems to be the prevalent name to indicate gangs whose main focus is criminal activity. See, for example, the following state statutes defining gangs, all but a few of them using the term ‘criminal street gang’: ALA. CODE § 13A-6-26 (Michie Supp. 2003); ALASKA STAT. § 11.81.900 (Michie Supp. 2003); ARIZ. REV. STAT. ANN. § 13-105 (West 2001); ARK. CODE ANN. § 5-74-202 (Michie 1997); CAL. PENAL CODE § 186.22(e),(f) (West 1999); COLO. REV. STAT. ANN. § 18-23-101 (West 2004); FLA. STAT. ANN. § 874.03 (West 2000); GA. CODE ANN. § 16-15-3 (2003); ILL. COMP. STAT. 147/10 (West 2002); IND. CODE ANN. § 35-45-9-1 (Michie 1998); IOWA

As early as the late 1700s, gangs were becoming a problem in American cities.<sup>83</sup> However, these youth gangs did not have the same characteristics and motivations as contemporary criminal street gangs. These early gangs were multi-ethnic in nature, but the ethnicities were all white.<sup>84</sup> Gangs in such early urban settings as Philadelphia and New York integrated Dutch, English, Scottish, Irish Catholic, German and Polish youth to “defend” a neighborhood they all shared.<sup>85</sup> Drinking and fighting were the predominant activities.<sup>86</sup> These multi-ethnic gangs continued to exist through the nineteenth century and into the early twentieth century as European immigration continued and American cities grew.<sup>87</sup> Members of the gangs often rejected the desire to achieve conventional lower-class status, and instead, graduated to the illegitimate “opportunities” found in the gang.<sup>88</sup> These gangs “helped politicians to get the vote out and intimidated opposition candidates. Young toughs assisted both union leaders and factory workers to protect their interests.”<sup>89</sup> They kept “strangers, especially blacks, off their streets and beaches, and out of their parks, baseball diamonds, swimming pools, saloons and dance halls.”<sup>90</sup> These early gang

CODE ANN. § 723A.1 (West 2003); KAN. CRIM. CODE ANN. § 21-4704 (k) (West 1995); LA. REV. STAT. ANN. §15:1404 (West 1992); Mass. Gen. Laws ch. 265.44 (2000); MINN. STAT. ANN. § 609.229 (West 2003) ;; MISS. CODE ANN. § 97-44-3 (1999); MO. ANN. STAT. § 578.421 (West 2003); NEV. REV. STAT. 193.168 (2001); N.J. STAT. ANN. § 2C:44-3 (West 1995); N.Y. PENAL LAW § 120.06 (McKinney 1998); N.D. CENT. CODE 12.1-06.2-01 (1997); OHIO REV. CODE ANN. § 2923.41 (Anderson 2003); OKLA. STAT. ANN. tit. 21 §856(F) (West 2002); S.D. CODIFIED LAWS § 22-10-14 (Michie 2003); TENN. CODE ANN. § 40-35-121(a) (2003); TEXAS PENAL CODE ANN. § 71.01 (Vernon 2003); UTAH CODE ANN. § 78-57-102(2) (2002); VA. CODE ANN. § 16.1-299.2 (Michie 2001).

<sup>82</sup> Hagedorn, *supra* note 77, at 368.

<sup>83</sup> Christopher Adamson, *Defensive Localism in White and Black: A Comparative History of European-American and African-American Youth Gangs*, 23 ETHNIC & RACIAL STUD. 272, 273 (2000).

<sup>84</sup> *See*. The term “white” is used to denote people of non-Hispanic, European ancestry.

<sup>85</sup> *Id.* According to Adamson, “territory was often more important than ethnicity in shaping the formation of white youth gangs.” *Id.*

<sup>86</sup> Roger Lane, *Murder in America: A Historian’s Perspective*, 25 CRIME & JUSTICE 191, 201 (1999). In smaller cities where the Industrial Revolution had not yet taken hold, gangs were formed by the restless early immigrants who had trouble finding work and food. As such, the homicide rate was the highest of the nineteenth century between 1853 and 1859. *Id.*

<sup>87</sup> IRVING SPERTEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 8 (1995) [hereinafter “SPERTEL, A COMMUNITY APPROACH”]. *See also* Hagedorn, *supra* note 77, at 370 (“[M]any different kinds of gangs formed in response to the massive economic and social upheavals accompanying industrialization and immigration.”).

<sup>88</sup> RICHARD CLOWARD & LLOYD OHLIN, DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS 61 (1960).

<sup>89</sup> SPERTEL, A COMMUNITY APPROACH, *supra* note 87.

<sup>90</sup> Adamson, *supra* note 83, at 278. The adults tended to ignore youth gang activity to a certain extent in order to reap what would be considered the benefits of having the gang in the neighborhood. *Id.*

youth were discouraged by the politically powerful adults from such activities as “breaking windows, reporting false fire alarms, cutting cable lines, defacing street signs, disturbing the peace at night, insulting people on the sidewalk, pilfering from stores, breaking into private dwellings, and looting factory yards and construction sites.”<sup>91</sup> Territory was more significant than ethnicity, and feuds were usually about turf rather than ethnic identity.<sup>92</sup>

In the nineteenth century, black youth gangs were not much of a factor.<sup>93</sup> Northern cities had only small black populations until the early part of the twentieth century. Although “the appearance of boisterous gangs of black teenagers on street corners, even in areas inhabited by blacks, [it] would have been dangerously provocative” for these black youth gangs to have engaged in territorial claims.<sup>94</sup> In the late 1800s, “white gang boys looked upon black Americans as a people to whom the rules of honour-based conflict did not apply, and viciously assaulted inoffensive black women and elderly black men during riots.”<sup>95</sup> Ethnic acceptance only extended to other “Europeans,” and not to black or Latin American ethnicities.

Much of the antipathy towards blacks was due to competition for jobs.<sup>96</sup> Youth gangs at the time “were shaped by both the class structure and the varying means of access by ethnic groups to industrial jobs.”<sup>97</sup> Working blacks had to cross hostile Irish and Polish areas to get to their jobs, risking injury and hatred from the politician-sponsored neighborhood athletic clubs that acted as headquarters for white gangs.<sup>98</sup> Violence against blacks was viewed as one way for immigrants to assimilate into an American life of mixed cultures, in a sense “becoming white.”<sup>99</sup> According to one historian, “[i]ndustrial-era gangs were an adolescent by-product of the difficulties experienced by immigrant and migrant groups in realizing the American

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<sup>91</sup> *Id.* at 278. Although many adults were against these practices by the youth, the gangs were still seen as a key in neighborhood defense by these same adults. *Id.*

<sup>92</sup> *Id.* at 277. Because neighborhoods were so ethnically diverse, it would have been difficult for gangs to develop along ethnic lines without conflict within the neighborhood. Instead, the ethnicities banded together for the common territory, ignoring or at least tolerating ethnic differences. *Id.* But see Truman, *supra* note 80, at 692 n.45 (claiming that early gangs were organized along racial and ethnic lines).

<sup>93</sup> THRASHER, *supra* note 75, at 192-93.

<sup>94</sup> Adamson, *supra* note 83, at 273. According to Adamson, “[i]n the nineteenth century, the assumptions of caste militated against the formation of territorial gangs of free black youth.” *Id.*

<sup>95</sup> *Id.* at 275. Those in white neighborhoods were afraid of “nativist invaders” and appreciated the white gangs’ attacks on inferior blacks. *Id.*

<sup>96</sup> *Id.* Jobs were scarce, and blacks were taking jobs on “the docks, shipyards and building construction sites,” which took these jobs away from whites looking for work. *Id.*

<sup>97</sup> Hagedorn, *supra* note 77, at 371.

<sup>98</sup> THRASHER, *supra* note 75, at 15-17.

<sup>99</sup> JANKOWSKI, *supra* note 73, at 84-87.



Dream.”<sup>100</sup> The power found in gangs allowed those adolescents to protect their turf while degrading others' social standing.

As the cities grew, however, the black population grew as well, and so did the number and size of black youth gangs.<sup>101</sup> According to one historian, this phenomenon makes sense because blacks were “barred from unionized factory jobs, clerical positions and even unskilled, part-time positions.”<sup>102</sup> Nowhere were the black populations big enough to defend their “turf” or garner support from their communities, and they certainly did not have the support of politicians, as did the white gangs that were transitioning into organized crime gangs.<sup>103</sup> These white gangs had acquired control over much of the illegal income from prostitution, gambling and the provision of bootleg alcohol.<sup>104</sup>

### B. *Contemporary Gang Activity*

Well into the twentieth century, white organized crime gangs continued their reign over the less organized and less “connected” black gangs, deriving support from “political leaders and organized crime figures.”<sup>105</sup> White youth gangs continued to be multi-ethnic European groups, and their traditional role as defenders of the neighborhood was “particularly strong and persistent in California and [the] Southwest.”<sup>106</sup> Both of these types of white gangs still garnered support from the neighborhood adults, many of whom were against racial integration.<sup>107</sup> Also, members of youth gangs could get away with things that the adults could not, such as “throw[ing] stones and bottles at the newcomer’s house, pil[ing] garbage on his lawn,

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<sup>100</sup> Hagedorn, *supra* note 77, at 371. According to studies of the time, “the gang was a product of the lack of controls over youthful play, but it was also a kind of anticipatory rebellion by boys against a dreary future life as men in the factory and by girls against a dreary future life as housewives.” *Id.*

<sup>101</sup> THRASHER, *supra* note 75, at 191-93. According to Thrasher’s early research, African-American boys were approximately 3.8% of Chicago’s total boy population, African-Americans were 7.4% of the total gang population in the city. *Id.*

<sup>102</sup> Adamson, *supra* note 83, at 279.

<sup>103</sup> *Id.* at 280. Adamson points out that many black domestic servants lived in alleys and streets behind their white employers in the early days of the 20<sup>th</sup> century. *Id.* And in cities, very few streets were “entirely Negro” before the settlement of Harlem. *Id.*

<sup>104</sup> Fagan, *supra* note 73, at 39-74.

<sup>105</sup> Adamson, *supra* note 83, at 281.

<sup>106</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 8.

<sup>107</sup> Adamson, *supra* note 83, at 281. In Chicago in 1947 and 1949, youth gangs hauled blacks out of streetcars and attacked University students who were suspected of supporting racial integration. They also targeted neighborhoods undergoing integration, and were apparently “spurred on to greater efforts by adults of the area who offered advice and encouragement.” *Id.*

block[ing] his driveway or slash[ing] his tires.”<sup>108</sup> In contrast to white gangs, black youth gangs were suffering from a “process of destructive socialization” which reflected larger social changes within the African-American community.<sup>109</sup> In addition, African-American citizens, and even African-American gangs, suffered under this dominance of the white gangs.<sup>110</sup>

As the suburbs grew around America’s large cities in the 1970s and 1980s, the number of white youth gang members as compared to minority youth gang members<sup>111</sup> continued to decline because white families moved out of the conflict-plagued cities and neighborhoods. As white gang activity declined, black and Hispanic gang activity sharply increased.<sup>112</sup> The black and Hispanic youth gangs would evolve differently than the traditional white youth gangs, and to a large extent, that was a function of the economic position of the various communities. White youth had significantly greater access to work. Consequently, they tended to leave gang activity behind at an earlier age and move into the mainstream. As one researcher noted, “boys with jobs were more likely to leave the gang in their early twenties.”<sup>113</sup> Unlike their white predecessors, these black and Hispanic youth gangs, “received little concrete political or economic support because of the relative powerlessness of adults in disadvantaged black communities.”<sup>114</sup>

Although initially the black gangs fought the white gangs, “extreme ghettoization ultimately cut off black youth from white areas of the city so that black youth gangs began to prey on each other.”<sup>115</sup> Some of these gangs went from youth gangs who defended their turf to criminal street gangs produced income for members. The criminal street gang is broadly defined as at least three people joined together for the purpose of committing criminal acts. It was during this time, in the late 1960s and early 1970s, that the notorious Crips and Bloods were beginning to form in south Los Angeles.<sup>116</sup> By the 1980s, “not only were Crips fighting Bloods, but differ-

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<sup>108</sup> *Id.* at 282. The adults felt “hostile” toward the blacks and Puerto-Ricans who were more rapidly moving into their neighborhoods.

<sup>109</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 62.

<sup>110</sup> Adamson, *supra* note 83, at 282. White youth typically terrorized black newcomers in traditionally white neighborhoods to show their supremacy. *Id.*

<sup>111</sup> *Id.* at 286. The white youth gangs that remained were still “positively sanctioned by politically powerful adults for their role in upholding the racial order.” *Id.*

<sup>112</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 58-59.

<sup>113</sup> Adamson, *supra* note 83, at 287.

<sup>114</sup> *Id.* at 282.

<sup>115</sup> *Id.* at 282. Turf-oriented black gangs preyed on each other as “black spatial isolation” doubled in northern cities. *Id.* at 283. According to Adamson, “black-on-black gang warfare was endemic to the massive public housing estates constructed in the middle of slum neighbourhoods.” *Id.*

<sup>116</sup> Truman, *supra* note 80, at 694-95. The Crips began in the Compton area of Los Angeles, at

ent Crips sets were also locked in deadly turf-and-honour based feuds.”<sup>117</sup> Many black youth survived on the streets by aligning themselves with one group or another.<sup>118</sup> Black gangs became an established phenomenon in many inner cities and many now met the definition of criminal street gang.

The growth of black gangs also revealed the “profound differences in the social organization of white and black” communities.<sup>119</sup> Black parents were unable to intervene with their children as successfully as white parents, so black youth often had “insufficient social support at home from separated, alienated, or unemployed parents.”<sup>120</sup> In addition to joblessness, black youth were forced to contend with family disorganization and lack of parental figures in the home.<sup>121</sup>

Not surprisingly, in the latter decades of the twentieth century, the vast majority of gang members in America were either black or Hispanic.<sup>122</sup> Those on the lower end of the economic spectrum were finding it hardest to resist the lure of gangs.<sup>123</sup> This may be explained by the fact that, “[i]n general, the poor desire a proportionately larger increase in income than do persons in higher strata.”<sup>124</sup>

While black gangs grew gradually over time, Hispanic gangs grew rapidly and, in some cities, soon came to outnumber black gangs.<sup>125</sup> Many

Washington High School, and used blue, Washington’s school color, as identification. *Id.* at 695 n.59. The Bloods, rivals to the Crips, began as the Pirus—named after Piru street in Compton – and took their color, red, from another local high school, Centennial High. *Id.* at 695 n.60-61. Both gangs are now national organizations. *Id.* at 695. By the early 1990s, the Crips and the Bloods were the “most widely known juvenile gangs operating in the United States.” *Id.* at 694 n.58. Though more recently, these groups are not considered traditional gangs but “far-flung [drug] distribution networks . . . with elaborate organizations and a murderous profit motive for eliminating the competition.” *Id.* at 695 n.63.

<sup>117</sup> Adamson, *supra* note 83, at 284. As neighborhoods underwent racial segregation, turf-oriented black gangs formed and began fighting each other. *Id.*

<sup>118</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 63.

<sup>119</sup> Adamson, *supra* note 83, at 285. Whereas white gangs were influenced by those with political power, “the growing joblessness, political powerlessness and social disorganization of inner-city black neighborhoods made it far more difficult for adults in those neighborhoods to prevent young people from fighting over turf and honour.” *Id.* at 286.

<sup>120</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 62.

<sup>121</sup> Adamson, *supra* note 83, at 287-88. Blacks are more often incarcerated on drug offenses than whites, and such incarceration deprives black teenagers of parental guidance in the home. *Id.* at 288. Also, the incarceration of black teenagers has led to “future joblessness by isolating them from job networks and exposing them to the gangs operating behind bars.” *Id.*

<sup>122</sup> According to surveys performed in 1991 and 1989, 87% of gang members are either black or Hispanic, which is “a percentage far greater than their numbers in the general population.” Truman, *supra* note 80, at 696 n.68.

<sup>123</sup> THRASHER, *supra* note 75, at 37-41.

<sup>124</sup> CLOWARD & OHLIN, *supra* note 88, at 89.

<sup>125</sup> According to a 1998 sheriffs’ department estimate, Los Angeles County has more than 1,300

of the early members of these Hispanic gangs were Mexicans, who arrived in American cities with few financial and educational resources.<sup>126</sup> Southern California was a predominant area of Mexican immigration.<sup>127</sup> Research has shown Hispanic gangs “are characterized by their longevity, both of the gang unit and its members, and are also known for vengefulness and violence.”<sup>128</sup> Because gangs have existed for several generations in some Hispanic communities, gang membership may stem primarily from a sense of community.<sup>129</sup> Hispanic gangs have been around in some areas, namely Los Angeles, since even before the black gangs in those areas.<sup>130</sup>

Unlike the multi-ethnic white youth gangs of yesteryear, contemporary gangs “tend to be internally racially homogeneous,” with “a gang for every ethnic group in America.”<sup>131</sup> Some studies, however, have produced conflicting information regarding ethnic make-up of various gangs.<sup>132</sup> In fact, demographic characteristics vary among the many studies of gang activity over the last few decades.<sup>133</sup> Since “few systematic data are collected rou-

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gangs, of which 667 are Hispanic, 386 are black, 151 are Asian, and only 14 are white motorcycle and skinhead gangs, which are pushed to the rural regions. Kathy Braidhill, *Where the Boyz Are: Gang Activity in Los Angeles Metropolitan Area*, LOS ANGELES MAGAZINE, Jan. 1998, available at [http://www.findarticles.com/cf\\_0/m1346/n1\\_v43/20179536/p1/article.jhtml?term=](http://www.findarticles.com/cf_0/m1346/n1_v43/20179536/p1/article.jhtml?term=) (last visited July 15, 2004).

<sup>126</sup> As far back as 1846, when the Mexican-American war took place, Mexicans were living in organized communities or barrios in Northern Mexico, territory that is now part of America. As the racial make-up of that area changed from primarily Mexican to primarily European-American, established Mexicans banded together. See generally Laura E. Gomez, *Race, Colonialism, & Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC’Y REV. 1129 (2000) [hereinafter Gomez, *Race, Colonialism, & Criminal Law*].

<sup>127</sup> Holland, *supra* note 76, at 269. Mexican barrios, or Spanish-speaking neighborhoods, were formed among the immigrants, and much Hispanic gang activity still revolves around the barrio. *Id.* at 270.

<sup>128</sup> Truman, *supra* note 76, 697 n.68. Even in the 1980s, at least half of Los Angeles County’s gangs were Hispanic. *Id.*

<sup>129</sup> See James Vigil and Steve Yun, *Southern California Gangs: Comparative Ethnicity & Social Control*, in GANGS IN AMERICA, 145-146 (C. Ronald Huff, 2d ed., 1996).

<sup>130</sup> Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 109 (2002). Strosnider notes that Los Angeles was the first city to introduce anti-gang legislature with the STEP Act in 2000. *Id.*

<sup>131</sup> Truman, *supra* note 80, at 685 n.9. Ethnic gangs are divided by national origin as well as ethnic identity, so we see gangs as specific as Puerto Rican, Cuban, and Mexican rather than simply Hispanic, and Vietnamese, Chinese, and Japanese rather than just Asian. *Id.*

<sup>132</sup> HOWELL (DOJ), *supra* note 77, at 2. One study showed ethnicity levels in gangs varying from 48% African-American, 43% Hispanic, 5% white, and 4% Asian whereas a student survey found that of nearly 6,000 eighth graders who admitted to being in gangs, only 31% were African-American, 25% were Hispanic, a whopping 25% were white, and 5% were Asian. *Id.*

<sup>133</sup> For example, the average age of gang members is stated as 17 to 18 years old generally but

tinely on youth gangs at the city or county level,”<sup>134</sup> assessing the gang problem in America has proven difficult and inconsistent.<sup>135</sup> Many cities actually believe they do not have a gang problem because gang activity there does not take such traditional forms as murder and robbery.<sup>136</sup>

The Department of Justice collects gang-related numbers from many cities.<sup>137</sup> It does not define what a gang is, nor does it give guidelines for determining when the crime is one that is gang-related. Each reporting agency is left to define gang and gang-activity for itself.<sup>138</sup> Most state penal statutes define gangs, but these tend to be technical elements that need to be proved in court, rather than being a comprehensive definition to be used in reporting data.<sup>139</sup> That is, the statutes often use terms of legal significance, such as felony and misdemeanor, rather than a more general concept, such as gang activity that covers criminal as well as social events. Thus, it is fairly simple for a municipality to report low gang numbers for political reasons, ranging from keeping property values high to boosting the reelection efforts of the mayor. Indeed, even some sociologists believe that cities that acknowledge their gang problems may not address them adequately because of public misperceptions.<sup>140</sup> Although blacks and Hispanics seem to constitute a much larger proportion of gang membership than any other ethnic group, this does not necessarily mean that they have a “special

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tends to be older in big cities where gangs have been around longer. *Id.* Also, though male members far outnumber female gang members, many recent studies focus on girl gangs as a new phenomenon, though even early gangs have had “female satellite gangs.” Hagedorn, *supra* note 77, at 372 (discussing various possibilities why females might join gangs). However, girls are less likely to stay in gangs after adolescence, mainly because many become mothers at a young age--more than 90% before their mid-twenties. *Id.* at 387.

<sup>134</sup> HOWELL (DOJ), *supra* note 77, at 4.

<sup>135</sup> *Id.* at 3-4. *See also* Hagedorn, *supra* note 77, at 370 (noting that consistent data on gangs was not kept by law-enforcement officials, making it difficult to estimate the gang problem in America with any accuracy).

<sup>136</sup> Additionally, many cities surveyed reported that their gang problems started only recently, with 1994 being the year most often cited. HOWELL (DOJ), *supra* note 77, at 4.

<sup>137</sup> *Id.*

<sup>138</sup> It is left up to the state and local agencies to determine what are “gang related” and many use their state statutes to make that determination. G. DAVID CURRY, CHERYL L. MAXSON, & JAMES C. HOWELL, DEP’T OF JUSTICE, YOUTH GANG HOMICIDES IN THE 1990S, FACT SHEET, MARCH 2001 #03 [hereinafter CURRY (DOJ)], available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200103.pdf> (last visited July 15, 2004).

<sup>139</sup> *See supra* note 81 (citing the relevant statute sections).

<sup>140</sup> Holland, *supra* note 76, at 264. Because media can exaggerate when reporting, often the public’s perceptions of gang problems do not reflect the reality of gang activity. *Id.* at 263-64.

predisposition to gang membership.”<sup>141</sup> More likely, they “simply are over represented in those areas most likely to lead to gang activity.”<sup>142</sup>

### C. *What Motivates Gang Membership?*

Though sociologists give many reasons for youth gang involvement,<sup>143</sup> the general consensus seems to point to low socioeconomic status as the prevalent factor.<sup>144</sup> Other risk factors include: the availability of drugs and firearms in the neighborhood; family disorganization, such as coming from a broken home or parental drug use; academic failure or apathy toward school, including trouble at school and low educational aspirations; having a deviant attitude; and having friends who use drugs or who are in gangs.<sup>145</sup> A youngster may be influenced by one or many of these factors, and respond by joining a neighborhood gang.<sup>146</sup>

Additionally, difficulties in a youth’s personal life can be a factor. A young person may be unable to find adults that assist him in seeing “a structure of opportunities leading to adult success.”<sup>147</sup> Or a youth may join a gang to defend himself against conflict or to “make order out of a chaotic world.”<sup>148</sup> Youth may also join gangs to gain self-esteem, especially if they have been socially rejected in the past.<sup>149</sup> Although social factors influence gang membership, several studies concluded that peer pressure is less a factor since those adolescents likely to join gangs may look up to older gang members in their families and neighborhoods.<sup>150</sup>

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<sup>141</sup> HOWELL (DOJ), *supra* note 77, at 2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* The Department of Justice report consolidates many studies, mainly sociological, of gang members and gang activity in the United States. The studies date back to 1958 though the majority took place between 1988 and 1996. *See Id.*

<sup>144</sup> *Id.* at 6. Sociologists do not always agree on the other factors, causing some confusion among the results. However, the studies take place in different cities, at different times, and with different samples, so it is not unusual that various theories have emerged from differing schools of thought. Most look to Frederick Thrasher’s studies (1927 and 1963) as the beginning of gang investigation. Other classic fieldwork studies include Miller (1973), Yablonsky (1966), and White (1943) and theoretical analyses include Cohen (1955), Miller (1958), and Cloward and Ohlin (1960). Hagedorn, *supra* note 77, at 369.

<sup>145</sup> HOWELL (DOJ), *supra* note 77, at 6-7. The report includes information from such studies as Miller, 1958; Short and Strodbeck, 1965; Curry and Spergel, 1992; Bjerregaard and Smith, 1993; and Kosterman et al., 1996. *Id.*

<sup>146</sup> CLOWARD & OHLIN, *supra* note 88, at 19.

<sup>147</sup> *Id.* at 25.

<sup>148</sup> Truman, *supra* note 80, at 701 n.82.

<sup>149</sup> THRASHER, *supra* note 75, at 257-61.

<sup>150</sup> CLOWARD & OHLIN, *supra* note 88, at 30. Jankowski rejects this theory and believes that youth join gangs as a dependable source of income and as a statement of community. JANKOWSKI, *supra* note

Some have suggested that a factor in gang involvement is the inconsistency of policing policies. These observers maintain that inconsistencies in policing ranging from very lax enforcement of criminal laws to irrationally severe enforcement have created “an atmosphere of danger on the streets.”<sup>151</sup> For instance, youth in St. Louis indicated that they chose gang membership over living “without some form of protection against the violence of rival gangs in nearby” communities.<sup>152</sup> This unpredictability, it is argued, has caused some youth to seek the protection afforded by gang association.

However, a growing number of sociologists are now convinced that the historic motivations for gang membership are beginning to give way to a desire for monetary gain.<sup>153</sup> According to Irving Spergel, “[p]articipation in . . . gangs may be motivated by instrumental goals of profit rather than the cultural or territorial affinities that unified gangs in earlier decades.”<sup>154</sup> The fruits of gang-related crime are higher and the risk lower than if the individual were on his own.<sup>155</sup> Working together, the gang members can cover more territory, act as lookouts for each other, and better organize their criminal efforts, all of which lower the risk of being caught and reduces the likelihood of punishment. Even if caught, gangs may effectively

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73, at 39-47.

<sup>151</sup> Adamson, *supra* note 83, at 287-88. It was reported that in the late 1970s in Chicago, city police officers “rarely got out of their cars after dark,” and “frequently ignored reports of gang shootings.” *Id.* at 292 n.13. In St. Louis in the early 1990s, police “did not always respond to calls from residents, and often failed to file reports or follow up on assaults and vandalism.” *Id.*; see also Irving A. Spergel, *Youth Gangs: An Essay Review*, *Social Service Review* 121, 131 (Mar. 1992) [hereinafter “Spergel, *An Essay Review*”] (“The excessive labeling by authorities, the media, and the community led to an intensification of gang participation and further development of gang structure.”). *But see* Holland, *supra* note 76, at 264 (“[T]he risk of inaccurate media coverage must be balanced against the damage caused by inadequate media coverage.”).

<sup>152</sup> Adamson, *supra* note 83, at 288.

<sup>153</sup> Jankowski rejects theories of gang involvement such as coming from a broken home, lack of strong family unit or male role model, lack of education or poor job opportunities leaving gang members with nothing to do, and children idolizing older gang members. His theory involves the gang as more of a subculture where one can defend himself against others, and gang membership can provide a dependable income. Truman, *supra* note 80, at 701 n.82-85. Chinese gangs are “closely associated with powerful community organizations and are often part of national or international networks as well.” *Id.* at 687-98 n.71. Vietnamese gangs have monetary gain as their main motivation, though they prefer car theft and robbery to drug dealing. *Id.*

<sup>154</sup> Spergel, *An Essay Review*, *supra* note 151, at 129. Spergel describes “new” gangs as made up of older members, in their twenties, and with more members having prison records, thus bringing monetary goals seeing the gang as a way to support their desired lifestyle, rather than preserving a given territorial control. *Id.*

<sup>155</sup> THRASHER, *supra* note 75, at 92-98.

function to intimidate potential witnesses.<sup>156</sup> Some even argue that the rise of street gangs in the late twentieth century, using drug trafficking as a primary vehicle, is similar to the emergence of the Mafia during Prohibition.<sup>157</sup>

D. *What is the Gang's Organizational Structure?*

The same sociologists who identified the likely reasons for joining gangs describe gangs as criminal enterprises, with organized structures within the gang to keep things running smoothly.<sup>158</sup> These criminal enterprises are not sophisticated organizations. "Gangs are probably less rather than more organized, and none certainly approaches the degree of integration and efficiency of most large organizations or legitimate corporations in society."<sup>159</sup> The white organized crime gangs are different from the African-American and Hispanic criminal street gangs. The latter have structures that provide stability to youth and older members that are otherwise lacking in their social environment.<sup>160</sup>

One sociologist describes three types of organizational structures for the modern criminal street gang.<sup>161</sup> First, there is the vertical/hierarchical structure that divides leadership into a chain of command, such as a president, vice president, warlord, and treasurer.<sup>162</sup> This structure is generally used by gangs with leaders who have special skills, talents or other unique qualities.<sup>163</sup> This structure is prevalent among the larger street gangs because of the greater number of members and the need for consensus.<sup>164</sup>

The second structure is horizontal/commission which bestows specific responsibilities on officers, but no officer has more or less authority than any other officer. This type of organization resembles a ruling commission or council.<sup>165</sup> This horizontal structure is useful when the gang's primary

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<sup>156</sup> Truman, *supra* note 80, at 685 n.12. Gangs have been described as "a unique problem in prosecution," partly because of the "phenomenon of group [crime]" and the difficulty of punishing it effectively. Additionally "[w]itnesses to gang-related crimes are often reluctant to testify or even to come forward with information for fear of reprisal from the gangs." *Id.*

<sup>157</sup> Spergel, *An Essay Review*, *supra* note 151, at 134-137.

<sup>158</sup> These organizational structures may vary depending on the goals of the gang, but characteristics generally include intense competitiveness, mistrust of others, a strong sense of self-reliance, social isolation, and an air of defiance. Truman, *supra* note 80, at 699-700.

<sup>159</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 81.

<sup>160</sup> Truman, *supra* note 80, at 699.

<sup>161</sup> JANKOWSKI, *supra* note 73, at 89-115.

<sup>162</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 78.

<sup>163</sup> *Id.* at 78.

<sup>164</sup> JANKOWSKI, *supra* note 73, at 91.

<sup>165</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 78.



interest is not financial gain, but rather on maintaining power over a given territory.<sup>166</sup> This was found to be the primary structure among Hispanic gangs, partly because a large number of family members within a single gang made hierarchy difficult.<sup>167</sup>

Finally, there is the influential structure that is popular among smaller gangs.<sup>168</sup> These gangs seem to have found that structured, central leadership is less important. Instead they have informal leadership, with no written formal duties.<sup>169</sup> As with any enterprise that involves more than three people, structure is present even if unidentified by members of the enterprise. For criminal street gang enterprises, as organizational structure develops, it functions to increase the criminal opportunities for economic gain for both the first and third types of structures.<sup>170</sup> With an established structure, criminal violence becomes more than a defensive reaction, it can become an offensive weapon used to further the ends of the criminal street gang.

#### E. *Gang Violence*

Gang violence is certainly not a new phenomenon. Indeed, violence and criminal behavior have been the common denominator among gangs from various time periods in America's history at least as far back as the Civil War.<sup>171</sup> Early on in the American West, settlement was accompanied by high rates of violence that frequently included gang-type activity.<sup>172</sup> What would today be perceived as gang activity in the 'Wild West' was mainly due to the influx of single European-American males into an area of the country where there were few social or familial ties. Not surprisingly, "violent behavior would generally ensue when the men became drunk, which happened frequently."<sup>173</sup>

With the widespread use of the automobile in the 1920s, the homicide rate in the country escalated.<sup>174</sup> The statistics for the period from 1915 through 1935 reveal that the homicide rate climbed from 5.9 per 100,000 in

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<sup>166</sup> JANKOWSKI, *supra* note 73, at 89-91.

<sup>167</sup> *Id.* at 115.

<sup>168</sup> THRASHER, *supra* note 75, at 58-76.

<sup>169</sup> JANKOWSKI, *supra* note 73, at 96-97.

<sup>170</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 77.

<sup>171</sup> See Hagedorn, *supra* note 77, at 371. Since little data exists as to early gang violence, "all we can reliably conclude is that there was less lethal gang violence before the 1970s than today." *Id.*

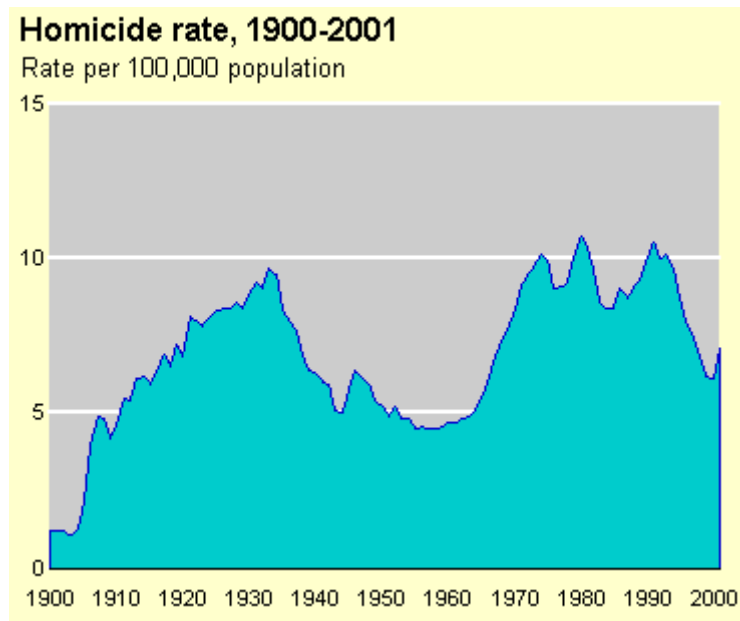
<sup>172</sup> Gomez, *Race, Colonialism, & Criminal Law*, *supra* note 126, at 1163-64.

<sup>173</sup> *See id.* at 1164.

<sup>174</sup> Lane, *supra* note 86, at 2004-2005. Lane attributes to automobiles the rise of criminal enterprise among gangs, such as Al Capone's in Chicago, because gang members could arrive at a location, shoot, and escape quickly, with less likelihood of being caught by police or opposing gangs. *Id.*

1915, peaking at 9.7 per 100,000 in 1933, and then dropping to 8.3 per 100,000 in 1935.<sup>175</sup> This twenty-year period increase reflects the rise of the automobile in society and in the use of criminal activity.<sup>176</sup> Yet, only recently have gangs emerged as criminal enterprises,<sup>177</sup> not simply as “Wild West” outlaws or groups of restless teenagers reminiscent of the gang mov-

<sup>175</sup> DEP’T OF JUSTICE, KEY FACTS AT A GLANCE, HOMICIDE RATE TRENDS, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/hmrttab.htm> (last visited July 15, 2004). The chart of these data, below, is available at <http://www.ojp.usdoj.gov/bjs/glance/hmrt.htm> (last visited July 15, 2004).



<sup>176</sup> Professor Stanley K. Schultz, University of Wisconsin, writes: “Nowhere was the psychology of consumption more evident than in the automobile industry. Annual automobile production rose from 2 million in 1920s to 5.5 million in 1929. By the late 1920s, there was one automobile for every five Americans, allowing, theoretically, everyone in the nation to go for a ride to Martha’s house at the same time.” See <http://www.us.history.wisc.edu/hist102/lectures/> (last visited July 15, 2004).

<sup>177</sup> Though public awareness of gang activity was heightened in the 1950s and mass media took notice in the 1960s, it wasn’t until the 1970s that gangs started evolving into organized criminal activity rather than merely the ritualistic gang violence for which they had been known in the past. See Truman, *supra* note 80, at 694. Though Truman uses the term criminal street gang to describe the gangs of the early nineteenth century, our definition of criminal street gang excludes these early forms of gangs in the United States.

ies of the 1960s.<sup>178</sup> As the gangs shifted to these criminal enterprises, violence became less and less the binding fabric of the gang.<sup>179</sup>

Early twentieth century gangs were certainly violent, but their violence had fewer peripheral consequences, as it was mainly isolated between themselves and other gangs.<sup>180</sup> This early 20th century gang violence was primarily a function of adolescence, with most violent tendencies disappearing by age twenty-two.<sup>181</sup> Much of this early gang violence was attributed to lack of job opportunities and income, with young adult males acting out to gain social status.<sup>182</sup> Gang violence resulted from a deprivation of *any* social status or the desire to achieve higher social status.<sup>183</sup> The roots of some gang violence were originally related to the gang itself, like in turf wars or defense of neighborhoods.<sup>184</sup> Furthermore, some gang leaders used violence as a way to assert their power and stay in control, thus solidifying the gang.<sup>185</sup>

As the 20th century wore on, Italian-Americans wrested control of most illegal operations in urban areas, leaving many African-American youth, who had run numbers or worked as bouncers, without jobs.<sup>186</sup> Many of the criminals involved in organized crime came from the youth gangs where they learned the traditions and skills needed to function in organized

<sup>178</sup> Truman, *supra* note 80, at 693 n.50. Throughout the 1950s, gangs were portrayed in such movies as *The Wild Ones*, *Rebel Without a Cause*, and *West Side Story*. The latter movie is still one of the most popular movies to portray gang activity, with the fictional Jets and Sharks being the best-known gang names in the country, even above the Bloods and the Crips. *Id.*

<sup>179</sup> Fagan, *supra* note 73, at 57-59.

<sup>180</sup> According to Thrasher's well-known studies, violence in early gangs could be at least partially attributed to peer groups fighting over turf and defending the neighborhood, consolidating the group. THRASHER, *supra* note 75, at 37.

<sup>181</sup> Hagedorn, *supra* note 77, at 373. Miller's 1969 study indicated that violence was not dominant among gang members but was in response, as defense of honor or territory, not just violence for the sake of violence. Also, he found that, in 1960s gangs, whites were twice as likely to be violent as African-Americans. *Id.*

<sup>182</sup> JANKOWSKI, *supra* note 73, at 138. *See also* Hagedorn, *supra* note 77, at 373. According to Miller's study, "gang violence was fundamentally a lower-class male cultural response to threats to honor and prestige" and was undertaken to defend "the honor of males; to secure and defend the reputation of their local area and the honor of their women." *Id.* Yablonsky, Cloward and Ohlin argued that gang violence was the result of "desperation," and "the product of the lack of both legitimate and illegitimate opportunities." *Id.* at 374.

<sup>183</sup> JANKOWSKI, *supra* note 73, at 138.

<sup>184</sup> *See* Hagedorn, *supra* note 77, at 371-72. According to Thrasher, gangs were "integrated by conflict," and violence was exciting and helped to consolidate the group. THRASHER, *supra* note 75, at 288-89.

<sup>185</sup> Hagedorn, *supra* note 77, at 372.

<sup>186</sup> *Id.* at 371. *See also* Adamson, *supra* note 83, at 284. By 1940, Italian gangsters had control of most illegal operations in big cities, leaving most African-American youth, who had run numbers or worked as bouncers, without jobs and without hope. *Id.*

crime groups.<sup>187</sup> Rather than the sporadic crime that characterized the younger group, late adolescent and young adult men found their occupation in organized and continuous predatory efforts.<sup>188</sup>

The 1950s brought more violence from gangs, as “sociopathic” outbursts rather than lower-class male cultural responses.<sup>189</sup> Some observers saw these gangs as lacking empathy and adult role models, which in turn created “hysterical, mob-like cliques, that kill and maim for no logical purpose.”<sup>190</sup> One researcher maintained that early television shows, such as westerns, “influenced sociopathic behavior by justifying violence” by both the good and bad guys. He theorized that these shows, combined with ineffective parenting, contributed to increased violence.<sup>191</sup> Additionally, the “greater social disorganization of black neighbourhoods made it more difficult for adults to control the violence of young people.”<sup>192</sup> Violence seemed to be perpetrated often for its own sake.<sup>193</sup>

More recently, gang activity underwent a sea of change as illegal drug trafficking surged to the forefront of gang activity.<sup>194</sup> By the 1990s,<sup>195</sup> “the gang [was] seen as an organized drug enterprise staffed by unpredictably aggressive and rebellious young people.”<sup>196</sup> It was predictable that violence would follow. “Violence in the drug business can be conceptualized as social control and self-help in an area of commerce that the state has decided not to regulate as it does other business.”<sup>197</sup> Consequently, lethal drug violence is ‘systemic’ because it is “tied to the unregulated nature of the drug sales transaction.”<sup>198</sup> Some argue, however, that it is not the drug market

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<sup>187</sup> THRASHER, *supra* note 75, at 409-10.

<sup>188</sup> *Id.* at 414-15.

<sup>189</sup> Fagan, *supra* note 73, at 41.

<sup>190</sup> Hagedorn, *supra* note 77, at 373. Yablonsky felt that “emotionally disturbed youths” were drawn to gangs since they were “unable to fulfill the demands required for participation in more normal groups.” *Id.*

<sup>191</sup> *Id.* at 374. Yablonsky argued that the “stable slum” had been replaced by the “disorganized slum” which bred sociopathic behavior and violent tendencies in youth. *Id.*

<sup>192</sup> Adamson, *supra* note 83, at 285. The differences in behavior between white and black youth gangs in the 1960s “reflected the profound differences in the social organization of white and black neighbourhoods.” *Id.*

<sup>193</sup> CLOWARD & OHLIN, *supra* 88, at 20.

<sup>194</sup> SPERGEL, A COMMUNITY APPROACH, *supra* note 87, at 53.

<sup>195</sup> Movies such as *Scarface* (Universal Studios 1983), *Colors* (MGM 1988), and *New Jack City* (Warner 1991) portrayed American gangs in a new light: as “cold-blooded minority gangsters shooting it out in drive-bys or disputes over drugs; . . . to the established image of violent gang rivalries was added a lethal mix of drugs, guns, and easy money.” Hagedorn, *supra* note 77, at 366.

<sup>196</sup> Truman, *supra* note 80, at 693 n.50.

<sup>197</sup> Hagedorn, *supra* note 77, at 394. Moreover, as described by New York City police in the late 1980s, the “drug game” is “capitalism gone mad.” *Id.*

<sup>198</sup> *Id.* at 394. More structured drug operations may be more likely to use violence to intimidate and control others, especially rivals, employees, and customers. *Id.*

itself that is violent; rather, it is the recruitment of “people who already have a proclivity for violence” into drug trafficking that creates the appearance of disproportionate amounts of violence surrounding the illegal drug industry.<sup>199</sup>

Gangs also became more dangerous, both to themselves and to the public at large, due to the increased availability of guns.<sup>200</sup> According to some researchers, major gangs now have weapons superiority over most police forces.<sup>201</sup> Not surprisingly, it is not just the drug market that influences the type and number of weapons a gang member will have, but also “the status that the sophisticated weapons provide.”<sup>202</sup> Additionally, violence ‘internal to the gang’ will help “to intensify the bonds among members.”<sup>203</sup> According to the U.S. Department of Justice, juvenile males who have guns for protection (rather than for sport) are,

six times more likely to carry guns, eight times more likely to commit a crime with a gun, four times more likely to sell drugs, almost five times more likely to be in a gang, and three times more likely to commit serious and violent crimes than youth who do not own guns for protection.<sup>204</sup>

By the close of the twentieth century, gang violence and gang murder were established facts.<sup>205</sup>

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<sup>199</sup> Hagedorn, *supra* note 77, at 395. *But see* Spergel, *An Essay Review*, *supra* note 151, at 133 (concluding that the relationship between drugs and violence is “unclear.”).

<sup>200</sup> HOWELL (DOJ), *supra* note 77, at 2.

<sup>201</sup> Fagan, *supra* note 73, at 41. Morganthau indicates that we see a breakdown here of the comparison of modern gangs to Prohibition era Mafia activity. Truman, *supra* note 80, at 704 n.103.

<sup>202</sup> Truman, *supra* note 80, at 704 n.103.

<sup>203</sup> HOWELL (DOJ), *supra* note 77, at 9. Most gang violence is “dictated by a code of honor that stresses the inviolability of one’s manhood and defines breaches of etiquette.” *Id.*

<sup>204</sup> *Id.* at 10.

<sup>205</sup> “Studies of large urban samples show that gang members are responsible for a large proportion of violent offenses. Rochester, New York, gang members (30 percent of the sample) self-reported committing 68 percent of all adolescent violent offenses; in Seattle, gang members (15 percent of the sample) self-reported committing 85 percent of adolescent robberies; and in Denver, gang members (14 percent of the sample) self-reported committing 79 percent of all serious violent adolescent offenses.” T.P. Thornberry, *Membership in youth gangs and involvement in serious and violent offending*. In *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* 158-159 (R. Loeber & D.P. Farrington, eds., 1998).

#### IV. “GANG-RELATED” MURDER: IS THERE AN ARBITRARINESS PROBLEM?

While the vast majority of states have specifically legislated against gang-related activity at various levels, only four states have taken the extraordinary measure of legislating “gang-related” murder as a capital event. Have these four states got it right? To begin to answer, we ask, how do “gang-related” murders compare to all murders? This question is critical to a *Furman* analysis. Having determined the ratio, we then look to see if it meets the narrowing and sifting process requirements of *Furman*.

##### A. *What is the Ratio of “Gang-Related” Murders to All Murders?*

The Bureau of Justice Statistics (“BJS”)<sup>206</sup> and the National Youth Gang Center (“NYGC”),<sup>207</sup> both run by the Department of Justice, provide comprehensive accumulations of statistical materials on gangs.<sup>208</sup> It is essential to initially note that “gangs” are defined by each reporting law enforcement agency according to their own local practice.<sup>209</sup> There is no single, consistent definition, let alone one that corresponds to any of the various statutory definitions of a “criminal street gang.”<sup>210</sup> The Department of

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<sup>206</sup> The Bureau of Justice Statistics is a part of the U.S. Department of Justice and collects statistics from various law enforcement bodies. See U.S. Dep’t of Justice, Bureau of Justice Statistics, Contact Information, at <http://www.ojp.usdoj.gov/bjs/contact.htm> (last visited July 15, 2004).

<sup>207</sup> NYGC is part of the Institute for Intergovernmental Research. “The purpose of the NYGC is to assist policymakers, practitioners, and researchers in their efforts to reduce youth gang involvement and crime by contributing information, resources, practical tools, and expertise towards the development and implementation of effective gang prevention, intervention, and suppression strategies.” The Center assists state and local jurisdictions in the collection, analysis, and exchange of information on gang-related demographics, legislation, literature, research, and promising program strategies, and coordinates activities of the OJJDP Youth Gang Consortium—a group of federal agencies, gang program representatives, and other service providers. It also provides technical assistance to two OJJDP Programs: Rural Gang Initiative and Gang-Free Schools and Communities Initiative. See generally, <http://www.iir.com/nygc/maininfo.htm> (last visited July 15, 2004). For the Rural Gang Initiative see <http://www.iir.com/nygc/rgi.htm> (last visited July 15, 2004); and for Gang-Free Schools, see [http://www.iir.com/nygc/gang\\_free\\_schools.htm](http://www.iir.com/nygc/gang_free_schools.htm) (last visited July 15, 2004).

<sup>208</sup> The most current statistics are available on these agencies’ web sites. See <http://www.ojp.usdoj.gov/bjs/> (last visited July 15, 2004); <http://www.iir.com/nygc/> (last visited July 15, 2004).

<sup>209</sup> For an extensive examination of the problem of different definitions of gang activity, see Cheryl Maxson and Malcolm Klein, *Defining Gang Homicide: An Updated Look at Member and Motive Approaches* in *GANGS IN AMERICA*, 3-20 (C. Ronald Huff, ed., 2d ed., 1996).

<sup>210</sup> For example, Arkansas defines criminal gang activity as “any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses which are undertaken in concert with each other.” ARK. CODE ANN. § 5-74-202 (Michie 1997). While Louisiana defines

Justice collects and disseminates information about many types of homicides as well as other violent acts.<sup>211</sup> Data is collected from all fifty states and federal jurisdictions. It is collated and analyzed in a myriad of ways,<sup>212</sup> including breakdowns by nature of offense, victim age, offender age, and size of reporting area (i.e., city, county, and state).<sup>213</sup> The information collected is critical in that “[r]esource allocation and public concern (i.e. fear of gang crime) are largely shaped by reports of the magnitude of the problem.”<sup>214</sup> And, of course, a major reason for including gang-related murder as a death penalty qualifier is the statistical report of increasing gang shootings.<sup>215</sup>

The actual number of homicide victims of gang-related murder (as reported by the Dept. of Justice) has increased since the FBI and BJS began keeping track. In 1998, there were 698 murder victims of gang-related violence out of a total of 14,209 murders.<sup>216</sup> By the end of 2002, the number of murder victims of gang-related violence rose to 984, which represents an increase of 40% in 5 years, while the total number of murders actually decreased slightly to 14,054.<sup>217</sup> These numbers include both gangland killings and juvenile youth gang killings. The former refers to adult, mob-style homicides and the latter to murders committed by those under 18 years old.<sup>218</sup>

According to the BJS, the highest average rates of gang-related homicide are in the southern part of the United States, including such states as

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criminal gang activity as “commission or attempted commission of two or more of the following offenses . . .” adding a list of felonies that qualify for this section. LA. REV. STAT. ANN. § 15:1404 (West 1992). Mississippi takes a different approach and defines criminal street gang as a “conjoining, in law or fact, of three or more persons with an established hierarchy that, through its membership or through the agency or any member, engages in felonious criminal activity.” MISS. CODE ANN. § 97-44-3 (1999).

<sup>211</sup> Much of this information is available via the Internet on the website maintained by the Bureau of Justice Statistics (BJS). See *supra* note 208 (citing website address).

<sup>212</sup> Seventy years ago the Uniform Crime Reporting Program began collecting and publishing criminal statistics from law enforcement agencies. The FBI publishes data from this program annually. See U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, available at <http://www.fbi.gov/ucr/ucr.htm#cius> (last visited July 15, 2004).

<sup>213</sup> See, e.g., U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS 2003 (preliminary), CRIME IN THE UNITED STATES, available at <http://www.fbi.gov/ucr/ucr.htm#cius> (last visited July 15, 2004) [hereinafter UNIFORM CRIME REPORTS 2003 (preliminary)].

<sup>214</sup> Finn-Aage Esbensen et al., *Youth Gangs and Definitional Issues, When is a Gang a Gang and Why Does It Matter?* 47 CRIME & DELINQ. 105, 106 (2001).

<sup>215</sup> See, e.g., 2000 Cal. Legis. Serv. Prop. 21 § 2 (West) (outlining the rationale for adding California’s gang death penalty qualifier, including the statistic that juvenile arrests for violent crime went up 54% in a ten-year period).

<sup>216</sup> UNIFORM CRIME REPORTS 2002, *supra* note 32.

<sup>217</sup> *Id.*

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

Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas.<sup>219</sup> Above average rates were found in the urbanized states of New Jersey, New York and Pennsylvania, and in the urbanized areas of the Pacific Rim states of Alaska, California, Oregon, and Washington.<sup>220</sup>

Another study reported by the Department of Justice analyzed statistics for major urban cities and drew together several private and public databases to determine the increase or decrease in gang-related homicides between 1991 and 1996.<sup>221</sup> This study concluded that “gang homicides decreased among the cities in the survey by nearly 15 percent” during this time period—dropping from 1,748 to 1,492.<sup>222</sup> They went on, however, to urge continued concern.

This 15-percent drop provides little comfort when two other findings are considered. First, just one city—Los Angeles—accounts for 29.7 percent of the 256-homicide decrease nationwide from 1991 to 1996. Second, the number of cities with decreases in gang homicides during this period is counterbalanced by a similar number of cities with increases . . . . Thus, gang homicides remained a serious problem in most U.S. cities during the first part of the decade . . . .<sup>223</sup>

These two studies offer a comparison of cities’ statistics and nationwide statistics. They tend to establish that, in California, gang-related homicides have been increasing at a steady rate since the early 1990s. All of this was before the gang death penalty qualifier was enacted by California voters in March, 2000. This data suggests that the new death qualifier has had no impact on the problem. Indeed, it may further be suggested that the need for California’s twenty-second death qualifier was not based on empirical data about gang-related homicides, but was, rather, the product of the fears of voters.<sup>224</sup> The nationwide statistics reveal similar trends. The charts below show the increased number of gang killings—even while the total number of murders dropped slightly.<sup>225</sup>

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<sup>219</sup> FOX & ZAWITZ (DOJ), *supra* note 24, at REGIONAL TRENDS, available at <http://www.ojp.usdoj.gov/bjs/homicide/region.htm> (last visited July 15, 2004).

<sup>220</sup> *Id.*

<sup>221</sup> CURRY (DOJ), *supra* note 138 (internal citations omitted).

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

<sup>223</sup> *Id.*

<sup>224</sup> For example, the introductory language for California Proposition 21 that put the gang-related qualifier in the penal code stated: “Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities.” 2000 Cal. Legis. Serv. Prop. 21 § 2(b) (West).

<sup>225</sup> The charts are taken directly from publications available Department of Justice websites. See *supra* notes 24 and 32 (citing to these publications). The first (labeled “Murder Circumstances, 1998-2002”) is available at <http://www.fbi.gov/ucr/02cius.htm> (last visited July 15, 2004) and is labeled table 2.14 on the website. The second (labeled “Homicide by circumstance, 1976-2000”) and the third (labeled “Homicide Victims by Circumstance”) are available at



<i>Murder Circumstances, 1998-2002</i>					
<i>Circumstances</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>	<i>2001<sup>226</sup></i>	<i>2002</i>
Total	14,209	13,011	13,230	14,061	14,054
<i>Felony type total:</i>	<i>2,510</i>	<i>2,215</i>	<i>2,229</i>	<i>2,364</i>	<i>2,314</i>
Rape	62	47	58	61	43
Robbery	1,243	1,057	1,077	1,080	1,092
Burglary	92	81	76	80	96
Larceny-theft	17	14	23	17	15
Motor vehicle theft	15	12	25	22	16
Arson	83	66	81	71	59
Prostitution and commercialized vice	15	8	6	5	8
Other sex offenses	20	19	10	7	8
Narcotic drug laws	682	581	589	575	657
Gambling	12	17	12	3	5
Other - not specified	269	313	272	443	315
Suspected felony type	104	65	60	72	67
<i>Other than felony type total:</i>	<i>7,203</i>	<i>6,880</i>	<i>6,871</i>	<i>7,073</i>	<i>7,097</i>
Romantic triangle	187	137	122	118	130
Child killed by babysitter	23	34	30	37	38
Brawl due to influence of alcohol	211	203	188	152	153
Brawl due to influence of narcotics	117	127	99	118	84
Argument over money or property	241	213	206	198	203
Other arguments	4,115	3,471	3,589	3,618	3,527
Gangland killings	73	122	65	76	73
Juvenile gang killings	625	580	653	862	911
Institutional killings	15	13	10	8	12
Sniper attack	16	5	8	7	11
Other - not specified	1,580	1,975	1,901	1,879	1,955
<i>Unknown</i>	<i>4,392</i>	<i>3,851</i>	<i>4,070</i>	<i>4,552</i>	<i>4,576</i>

<http://www.usdoj.gov/bjs/homicide/circumst.htm> (last visited July 15, 2004) and <http://www.ojp.usdoj.gov/bjs/homicide/tables/circumsttab.htm> (last visited July 15, 2004), respectively.

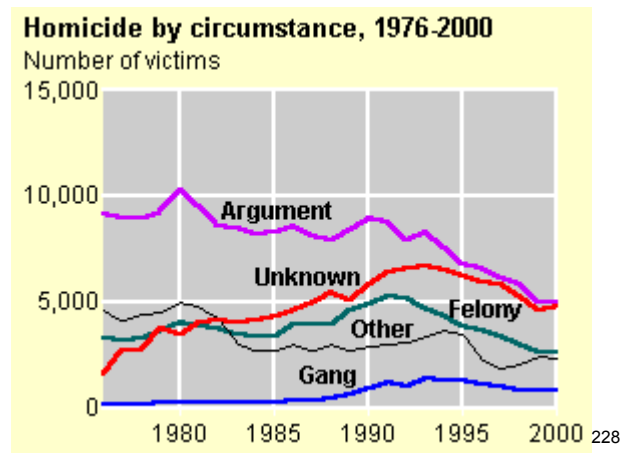
<sup>226</sup> The murder and non-negligent homicides that occurred as a result of the events of September 11, 2001, are not included. UNIFORM CRIME REPORTS 2002, *supra* note 32, at 27; *see also supra* note 225.

*Homicide Victims by Circumstance*<sup>227</sup>

	<i>Felony</i>	<i>Argument</i>	<i>Gang</i>	<i>Other</i>	<i>Unknown</i>
1976	3,327	9,106	129	4,630	1,588
1977	3,189	8,929	180	4,112	2,709
1978	3,262	8,950	194	4,447	2,706
1979	3,623	9,237	264	4,534	3,803
1980	4,070	10,299	221	4,963	3,486
1981	3,882	9,519	280	4,835	4,005
1982	3,721	8,612	238	4,322	4,116
1983	3,478	8,470	260	3,058	4,045
1984	3,382	8,211	223	2,708	4,166
1985	3,389	8,285	288	2,689	4,330
1986	3,992	8,602	357	3,015	4,644
1987	3,935	8,087	395	2,678	5,005
1988	3,932	7,872	428	3,010	5,437
1989	4,593	8,433	678	2,709	5,086
1990	4,867	8,988	905	2,867	5,812
1991	5,283	8,806	1,192	3,027	6,393
1992	5,143	7,950	994	3,110	6,563
1993	4,721	8,309	1,362	3,403	6,735
1994	4,303	7,529	1,340	3,622	6,536
1995	3,810	6,756	1,338	3,450	6,256
1996	3,688	6,621	1,091	2,330	5,919
1997	3,413	6,103	999	1,888	5,807
1998	2,998	5,845	834	2,048	5,245
1999	2,642	4,993	837	2,455	4,594
2000	2,614	4,966	842	2,321	4,774

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<sup>227</sup> FOX & ZAWITZ (DOJ), *supra* note 24, at Homicide Circumstances, available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/circumstab.htm> (last visited July 15, 2004); see also *supra* note 225.



Nationally, gang-related homicides have decreased in overall numbers by 2002, but remained approximately at the same percentage of all homicides.<sup>229</sup> While in 1976 gang-related homicides were only 1.4% of all homicides, by 1993 they rose to 16.8%. This rate remains nearly constant through the end of the 1990s. In 2000, 16.9% of all homicides in the United States were gang-related.<sup>230</sup> This one in six number has steadily increased in the last two years.<sup>231</sup>

#### B. *Is One In Six Narrow Enough?*

In *Furman*, the high number of African-Americans being executed, relative to their proportion of the population, drew the Supreme Court's attention to the problem of arbitrary imposition of the death penalty. Of the 3,859 executions in the United States in the four decades preceding the *Furman* decision, 1,721 of those executed were white and 2,066 were black. This happened despite the fact that the African-Americans comprised only 10-11% of the population. The statistics were significant enough to raise the question as to whether the death penalty was being imposed in some manner other than an identifiable, objective, or rational one.

<sup>228</sup> FOX & ZAWITZ (DOJ), *supra* note 24, at Homicide Circumstances, available at <http://www.usdoj.gov/bjs/homicide/circumst.htm> (last visited July 15, 2004); *see also supra* note 225.

<sup>229</sup> *See* FOX & ZAWITZ (DOJ), *supra* note 24, at Homicide Circumstances, available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/circumstab.htm> (last visited July 15, 2004).

<sup>230</sup> *See id.*

<sup>231</sup> UNIFORM CRIME REPORTS 2002, *supra* note 32, at 27. The preliminary report for the first six months of 2003 indicates similar trends. *See* UNIFORM CRIME REPORTS 2003 (preliminary), *supra* note 213.

The statistics considered in *Furman* were generated over a decade and involved actual executions. This article's analysis of gang-related murder involves a relatively short time span and, as yet, few executions. As a result, the concerns raised here will lack the staggering disproportionality of *Furman* and are not necessarily race based.<sup>232</sup> Although, given the high percentage of African-American and Hispanic membership in gangs, a race claim would not be entirely without merit.<sup>233</sup> Nonetheless, the lessons of *Furman* still pertain and if the *potential* for arbitrariness exists, that potentiality must be exposed and extinguished.

It is the discretion within seemingly neutral laws that is the jagged reef lurking just outside the placid waters of the safe harbor. By creating a law that has the potential to capitally file in one in six murders because those murders are "gang-related," have the legislatures of California, Missouri, Indiana, and Florida sufficiently narrowed the class of individuals that may be designated for execution from the broader class of murderers?

The primary *Furman* concern was that the existing death penalty laws left too much discretion in the hands of prosecutors. The statutes were not specific enough to narrow the potential for abuse in the charging process. And while we do not have four decades of history to establish arbitrariness in fact, the goal here is to identify the potential for arbitrariness and, if it exists to raise the hue and cry to hopefully prevent decades of executions outside the mandates of constitutions of the United States and the affected states.

If, indeed, one in six murders is "gang-related," prosecutors in the four gang qualifying states have been handed expansive authority to seek the death penalty. Is that number, standing alone, sufficient to run afoul of *Furman*? Without considering any other circumstances of the crime—such as number of victims or other felonies in conjunction with the gang involvement—prosecutors begin the filing process with the power to capitally charge. Does such a state of affairs comport with that narrowing requirement so that only the few most deserving of death shall be executed? Does this state of affairs open the death charging process to abuse by prosecutors?

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<sup>232</sup> Since these gang-related death qualifiers are slightly over a decade old, there are few cases where a defendant has been convicted under any of them. California implemented its gang-related death qualifier in March, 2000. Indiana added its gang related qualifier in 1991. Florida added their statute in 1996, and Missouri added theirs in 1993. *See supra* note 15.

<sup>233</sup> "Offenders who were young black males have increased dramatically from the mid 1980's to the early 1990's but have declined recently." FOX (DOJ), *supra* note 24, *available at* <http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm> (last visited July 15, 2004).

## V. "GANG-RELATED" MURDER: IS THERE A VAGUENESS PROBLEM?

The potential abuse of the gang-related qualifier lies not just in the high number of potentially eligible murders, but also in the definition. What is a "gang-related" murder? For that matter, what is a gang? Indeed, a significant problem in relying on law enforcement numbers is that even in the same jurisdiction, different agencies may define "gang-related" differently. Can a gang be comprised of two people, three people, or is it just any group that commits crimes? Do gangs need to have some identifying name, mark, color, or purpose? Is a gang simply any association of persons for an unlawful purpose? Such a broad definition would include any conspiracy,<sup>234</sup> as well as outlaw motorcycle gangs, the traditional American hate groups such as the Ku Klux Klan and the Neo-Nazis, and an assortment of militia groups, to name just a few.<sup>235</sup> Even some fraternities and sororities might fit this definition when they engage in certain "college pranks."<sup>236</sup> Yet, from an examination of the states that have criminalized gangs and their activities, inclusion of conspirators and members of hate groups has not been contemplated.<sup>237</sup> Rather, the intent of these state-by-state efforts have been directed at "street gangs" such as the Bloods, the Crips,<sup>238</sup> the Mexican Mafia<sup>239</sup> and so on. In California, the proponents of the gang-related death qualifier made their case by focusing on criminal street gangs as their 2000 initiative went before the public:

Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized in recent years. Some gangs, like the Los Angeles-based 18th Street Gang and the Mexican Mafia, are properly analyzed as organized crime groups, rather than mere street gangs. The problem of youth and gang violence will, without active intervention, increase, because the juvenile population is projected to grow substantially by the next decade.<sup>240</sup>

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<sup>234</sup> See generally, Esbensen, *supra* note 214, at 105.

<sup>235</sup> *Id.* at 108.

<sup>236</sup> *Id.* at 108 (internal citation and quotation marks omitted).

<sup>237</sup> These factors are drawn from an examination of various state statutes. See *supra* note 81 (listing the relevant statute sections).

<sup>238</sup> See Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: or Why the 'War on Drugs' was a 'War on Blacks'*, 6 J. GENDER, RACE & JUST. 381 (2002).

<sup>239</sup> See Yvette M. Mastin, *RICO Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 27 WM. MITCHELL L. REV. 2295 (2001).

<sup>240</sup> Proposition 21 § 2(b) and (d). 2000 Cal. Legis. Serv. Prop. 21 (West). This position was set forth in the voter pamphlet supporting passage of the initiative.

It is the “street gangs” who, in the estimation of lawmakers and the voting public, constitute the greater public threat.<sup>241</sup> In 1997, Attorney General Janet Reno, testifying at a Congressional Joint Hearing, stated: “We know that there are serious and violent juveniles on the street right now, and tough action must be taken against these offenders to protect public safety.”<sup>242</sup> As California’s Proposition 21 maintained, “[g]ang-related crimes pose a unique threat to the public because of gang members’ organization and solidarity.”<sup>243</sup> Indeed, the focus is clear. It is the street gangs who engage in drive-by shootings that put innocents at risk.<sup>244</sup> It is street gangs that terrorize neighborhoods and even whole cities.<sup>245</sup> It is street gangs who use murder as a readily available option in the operation of their nefarious activities.<sup>246</sup>

But are the phrases “criminal street gang” and “gang-related” constitutionally vague? The arguments surrounding vagueness are deeply seeded in constitutional jurisprudence.<sup>247</sup> In the criminal law context, a law may be invalidated in either of two ways: “First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize, and even encourage, arbitrary and discriminatory enforcement.”<sup>248</sup> The test requires that the statutory language used must define unambiguously each element of criminal conduct and not leave the door open to discretionary interpretation by prosecutors or to judicially arbitrary interpretation.<sup>249</sup>

As it relates to gangs, “void-for-vagueness” challenges typically raise questions of First Amendment right to free-association and Fourteenth Amendment due process concerns. A person may not be punished merely for his or her associations.<sup>250</sup> The First Amendment prevents any state from criminalizing the conduct or association with any group, absent an affirma-

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<sup>241</sup> See *infra* text accompanying notes 242-43.

<sup>242</sup> Administration’s Anti-Gang and Youth Violence Initiative: Hearing Before the Subcomm. On Crime of the House Comm. On the Judiciary and the Subcomm. On Early Childhood, Youth, and Families of the House Comm. On Educ. & Workforce, 105th Congress, 1<sup>st</sup> Sess. 21 (1998) (testimony of Attorney General Janet Reno).

<sup>243</sup> 2000 Cal. Legis. Serv. Prop. 21 § 2(h) (West).

<sup>244</sup> *Id.* § 2(b) (West).

<sup>245</sup> *Id.* § 2(k) (West).

<sup>246</sup> THRASHER, *supra* note 75, at 18.

<sup>247</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding that a New Jersey Statute which criminalizes gang activity but does so in vague, indefinite, and uncertain terms is void because it offends the due process clause of the Fourteenth Amendment.).

<sup>248</sup> *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (internal citation omitted).

<sup>249</sup> De Vries, Elizabeth N., *Guilt by Association: Proposition 21’s Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F. L. REV. 191 (2002).

<sup>250</sup> U.S. CONST. amend. I.

tive act by the charged individual.<sup>251</sup> In *Smith v. Goguen*, the United States Supreme Court held that due process requires the literal scope of the statute to be constructed with a “greater degree of specificity than in other contexts” when First Amendment rights are at stake.<sup>252</sup> The *Smith* Court recognized “settled principles of [the vagueness] doctrine . . . incorporates [the] notions of fair notice or warning.”<sup>253</sup> Logically, the reasoning by the Court makes perfect sense. Whenever a fundamental constitutional right, such as freedom of association, is restricted, the Supreme Court will apply strict scrutiny in evaluating the constitutionality of the law.<sup>254</sup> Strict scrutiny review takes into consideration the breadth of the law being reviewed.<sup>255</sup> Statutes or regulations which are overbroad will fail under this level of review.<sup>256</sup> Given the vagueness concerns raised by the gang-related murder qualifier, it may well be stricken as unconstitutional.

In the context of these significant Constitutional requirements, defining “gang-related” remains elusive and contradictory. A striking example is illustrated by the evolution of California’s “gang-affiliation” crimes. In attempting to define a “criminal street gang,” the California 1988 Street Terrorism Enforcement and Prevention Act (“STEP Act”) set forth that one element of a “criminal street gang” involved “active participation” in the gang.<sup>257</sup> The California Court of Appeal, in *People v. Green*,<sup>258</sup> defined “active participation” with a two-part test: a defendant must have a relationship with a criminal street gang which is (1) more than nominal, passive, inactive, or purely technical, and (2) the person must devote all, or a substantial part of his time and efforts to the criminal street gang.<sup>259</sup> A dec-

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<sup>251</sup> *Scales v. United States*, 367 U.S. 203, at 224-25 (1961).

<sup>252</sup> 415 U.S. 566, 573 (1974).

<sup>253</sup> *Id.* at 572.

<sup>254</sup> *See NAACP v. Alabama*, 357 U.S. 449, 461 (1958).

<sup>255</sup> *See* Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 541-42 (1985); *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259 (1979); J. W. Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974).

<sup>256</sup> *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71-74 (1981).

<sup>257</sup> CAL. PENAL CODE ANN. § 186.22 (West 1999).

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

(e) As used in this chapter, “pattern of criminal gang activity” means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.

<sup>258</sup> 278 Cal. Rptr. 140 (Ct. App. 1991).

<sup>259</sup> *Id.* at 146.

ade later, the California Supreme Court expanded “active participation,” requiring only participation that is more than passive or nominal.<sup>260</sup>

In March, 2000, Californians passed Proposition 21 despite two previous legislative rejections that such a law would over-incarcerate young men in violation of due process concerns and vagueness requirements.<sup>261</sup> Proposition 21 incorporated the loosened standard,<sup>262</sup> affording prosecutors greater latitude to charge gang conspiracy based upon a reduced burden of defendant activity within the gang. If critics of the Proposition are correct—that courts' interpretation will be critical to determine whether a defendant may be charged with gang affiliation or conspiracy—this could give rise to a new wave of vagueness and *Furman* challenges.<sup>263</sup>

As an example, let us return to our earlier discussion of *West Side Story*. Could the entirety of the Sharks gang be susceptible to a “gang conspiracy” charge based upon (1) active participation in the gang and (2) Chino’s act of shooting Tony? Indeed, should Maria be found to intentionally contribute to or benefit from the Sharks’ criminal activity, *regardless of her involvement or knowledge of Chino’s action*, she could be potentially charged under Proposition 21.<sup>264</sup>

An example of due-process concerns recently arose when the Utah Supreme Court faced a challenge to a statute providing for enhanced penalties when gang activity was involved. In *State v. Lopes*, the defendant appealed his first-degree murder conviction and the accompanying gang-enhanced sentence.<sup>265</sup> The Utah Supreme Court found that, by passing the gang enhancement provision, the legislature created unwittingly a new element requiring a separate factual finding by the jury.<sup>266</sup> The court reasoned that treating the enhancement as a mere sentencing guideline requiring less than “guilt beyond a reasonable doubt” constituted an abridgement of due process.<sup>267</sup> While the Utah court did not address the vagueness issue, it recognized the problematic nature of intertwining factual and legal conclusions in gang related offenses.<sup>268</sup>

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<sup>260</sup> See, e.g., *People v. Castenada*, 3 P.3d 278, 282 (Cal. 2000).

<sup>261</sup> De Vries, *supra* note 249, at 197-98.

<sup>262</sup> *Castenada*, 3 P.3d at 282.

<sup>263</sup> Analysis for the California Assembly Committee on Public Safety. AB 963 - As Amended: April 10, 2003, at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_0951-1000/ab\\_963\\_cfa\\_20030428\\_135350\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0951-1000/ab_963_cfa_20030428_135350_asm_comm.html) (last visited July 15, 2004).

<sup>264</sup> De Vries, *supra* note 249, at 209.

<sup>265</sup> *State v. Lopes*, 980 P.2d 191, 192 (Utah 1999).

<sup>266</sup> *Id.* at 195, 197.

<sup>267</sup> *Id.* at 195.

<sup>268</sup> *Id.* at 194 (citing Utah Code §§ 76-3-203(1) & 203.1).



So how are we to identify, define and, thus, criminalize street gangs? Any such attempts must necessarily contend with problems of vagueness<sup>269</sup> and First Amendment concerns restricting the right to freely associate.<sup>270</sup> The majority of states who have criminalized street gangs define them as a group of three or more persons, identified by some common name, sign or symbol, that engage in a course or pattern of criminal activity.<sup>271</sup> Working within such generalized parameters would seem to exclude most criminal conspiracies as they typically are not identified by some common name or sign but perhaps would still include organizations such as the Ku Klux Klan and the Neo-Nazis. It may be argued that such hate groups, though laboring under a common name, are not always engaged in a pattern of criminal conduct.<sup>272</sup> After all, it is possible to simply meet and exchange views without planning or even contemplating criminal activity. The same, however, could be said for criminal street gangs.<sup>273</sup> Indeed there are many roles gangs, even criminal street gangs, play in the lives of their members.<sup>274</sup> Gangs have traditionally been, and continue to be, social organizations that provide emotional and financial support for individuals, and sometimes for their families.<sup>275</sup>

Sociological researchers have found it difficult to define gang membership. As early as 1927, research was done on a five-factor definition including the fact that the group was of “a spontaneous and unplanned origin.”<sup>276</sup> Such a broad definition is useless in defining criminal behavior. Even the more specific five factors of this early research (membership, type of leaders, mode of organization, activities, and community status)<sup>277</sup> are broad enough to cover a wide variety of youth groups from sports leagues to religious youth gatherings. That study formulated a definition of the gang:

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<sup>269</sup> See *Lanzetta*, 306 U.S. at 458.

<sup>270</sup> See *NAACP*, 357 U.S. 449 (expressing Supreme Court's general views regarding Federal Constitution's First Amendment right of association as applied to elections and other political activities).

<sup>271</sup> See *supra* note 81 (listing the relevant statute sections).

<sup>272</sup> For example, it would not be illegal in California for a hate group to gather privately to denounce others without taking any overt action to attack those same people they condemn. CAL. PENAL CODE § 186.186.22(e)-(f) (West 2003). An example would be the White Camelia Knights of the Klu Klux Klan faction, who describe their purpose as defense of the white race, Christianity, and the United States. See White Camelia Knights, *White Power*, at <http://www.wckkkk.com/index2.html> (last visited July 15, 2004).

<sup>273</sup> By definition, a criminal street gang that simply meets to discuss their view is engaging in a criminal activity. See, e.g., CAL. PENAL CODE § 186.186.22(e)-(f) (West 2003).

<sup>274</sup> See Esbensen, *supra* note 214, at 109.

<sup>275</sup> See *id.* at 110.

<sup>276</sup> THRASHER, *supra* note 75, at 50.

<sup>277</sup> *Id.* at 45.

[The gang is an interstitial group originally formed spontaneously, and then] integrated through conflict. It is characterized by the following types of behavior: meeting face to face, milling, movement through space as a unit, conflict, and planning. The result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory.<sup>278</sup>

This definition, with the exception of the conflict element, would apply not only to gangs but would also fit the activities of many groups of teenagers seen at shopping malls. The conflict element that separates gangs from the gatherings of several thirteen-year olds at the local mall.<sup>279</sup> And although a sociologist may be able to distinguish a gang on the basis of this definition, is it specific enough to impose criminal sanctions?

From such broad origins have emerged definitions that fall into two general categories: linguistic and activity.<sup>280</sup> The linguistic group attempts to articulate the factors that define a gang by viewing them in a traditional and intuitive way.<sup>281</sup> Factors may include a gang name, gang colors, common descriptive phrases, and recounting of corporate memories of past events or history.<sup>282</sup> In other words, if it looks like a gang and they talk like gang members, it must be a gang. While some of these factors may be observed by an outsider, others require either subjective accountings of members or infiltration by undercover operatives. Such an approach tends to be superficial—names and colors—and thus fails to identify the criminal concerns that bring street gangs under such close scrutiny by law enforcement. For surely it is not the façade, but what might be beneath the façade, that is of concern. Some may argue that once we identify a particular group as a gang, then the business of ascertaining the gang's true nature will follow. However, just as it is difficult to even identify gang members, it is even more difficult to identify their coordinated activities.

The “activity” definition, not surprisingly, focuses on behaviors that distinguish members of a gang and members of a youth group.<sup>283</sup> Such behavior may include engaging in delinquent behavior, planning conflicts (e.g., with another gang), or defending a given geographical area, sometimes with force.<sup>284</sup> And while the objective, observable behavior may

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<sup>278</sup> *Id.* at 57.

<sup>279</sup> Teenagers often plan and meet at certain times and places developing the group characteristics that Thrasher describes. *See id.* at 45-57.

<sup>280</sup> *See* Esbensen, *supra* note 214, at 108-10.

<sup>281</sup> For example, New Jersey carefully defines a criminal street gang with linguistic factors. N.J. STAT. ANN. § 2C:44-3h (West 1995).

<sup>282</sup> *See* ALASKA STAT. § 11.81.900(b)(12) (Michie Supp. 2003); FLA. STAT. ANN. § 874.03(1) (West 2000); MISS. CODE ANN. § 97-44-3 (1999).

<sup>283</sup> *See, e.g.*, ALA. CODE § 13A-6-26 (Michie Supp. 2003); TENN. CODE ANN. § 40-35-121 (2003).

<sup>284</sup> *See* ARK. CODE ANN. § 5-74-202 (Michie 1997); COLO. REV. STAT. ANN. § 18-23-101 (West 2004); GA. CODE ANN. § 16-15-3 (2003); OKLA. STAT. ANN. tit. 21 § 856 (West 2002).

make for easier empirical study, it may not always be clear when the observable violence is gang related. For instance, would it be criminal street gang violence when one gang member kills another from personal jealousy rather than for gang-related reasons? Would Chino, in *West Side Story*, be engaged in gang activity when he kills Tony out of jealousy or because Tony killed his gang leader?<sup>285</sup>

Despite various efforts expended in investigating the essence of gangs, no single sociological definition has emerged. Indeed, the authors of one survey article even questioned the wisdom of attempting to define gangs: “Given the lack of consensus about what constitutes gang membership, is it viable to implement policies that subject individuals to criminal justice processing due to their alleged gang status?”<sup>286</sup>

Apparently undaunted by problems of ascertaining workable and realistic definitions of gangs and their violence, lawmakers in the states that have qualified gang-associated murder as a capital offense have formulated their criteria for making those determinations. California’s attempts in this regard are fairly typical. California law defines a criminal street gang as a group of three or more who commit at least one enumerated felony, who have a common name or symbol, and who “engage in a pattern of criminal activity.”<sup>287</sup> It is the latter part of the definition—“a pattern of criminal activity”—that begins to hone the designation. Yet even this parameter is vague and amorphous. Is a course of conduct or a pattern of activity specific enough? Is “criminal activity” readily ascertainable? As already suggested, the seemingly subjective nature of such generalized terms raises very real constitutional concerns.<sup>288</sup> Nonetheless, the legislatures of the four states that have made gang-related murder a capital offense have set forth with some degree of specificity the criteria for ascertaining “a pattern of criminal activity.” In California, for instance, a “pattern of criminal gang activity” may be established by attempts, conspiracies, solicitations, or

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<sup>285</sup> WEST SIDE STORY (MGM 1961).

<sup>286</sup> Esbensen, *supra* note 214, at 112.

<sup>287</sup> CAL. PENAL CODE § 186.22(e) (West 1999).

<sup>288</sup> See CAL. PENAL CODE ANN. § 186.22 (West 1999).

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

(e) As used in this chapter, “pattern of criminal gang activity” means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. While it still poses an interesting academic discussion, due process and vagueness challenges have failed.

See also *Castenada*, 3 P.3d at 282; *Helton v. State*, 624 N.E.2d 499 (Ind. Ct. App. 1993).

convictions of two or more enumerated felonies.<sup>289</sup> The California Supreme Court has held that the two offenses may be committed on the same occasion.<sup>290</sup>

Florida's gang-related death enhancer has some of the same characteristics as California law.<sup>291</sup> Both states require an on-going group of at least three persons engaged in criminal acts as one of its primary activities.<sup>292</sup> Florida, however, only requires two persons to engage in the pattern of criminal street gang activity to constitute a "criminal street gang."<sup>293</sup> Rather than defining the pattern as commission of certain specified felonies, Florida requires any two felonies, or three misdemeanors, or one felony and two misdemeanors within a three-year period.<sup>294</sup>

Missouri, the third state with a gang activity death qualifier,<sup>295</sup> defines a "criminal street gang" as three or more persons with crime as one of its primary activities, with an identifying symbol and with a pattern of criminal gang activity.<sup>296</sup> The law in Missouri does, however, differ in defining the pattern of criminal gang activity. As with the two other states, two offenses from the laundry list must have been committed, but with the Missouri statute, there is a specific timeframe for the offenses. The second offense must have been committed within three years of the first offense. Additionally, the offenses must be committed on separate occasions.<sup>297</sup>

The fourth state with a gang activity death qualifier is Indiana. Indiana's statutes define 'criminal gang activity' as "a person who knowingly or intentionally actively participates in a criminal gang."<sup>298</sup> Unlike the other three states, there is no narrowing definition of criminal gang or what may constitute active participation. This is the broadest of the four death qualifiers.

The California Legislature is considering broadening further their definition of gang activity. There have been bills introduced before the California Assembly that would change the way a "pattern of criminal behavior" may be proved.<sup>299</sup> The proposed revision would allow a "duly

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289 CAL. PENAL CODE § 186.22(e) (West 1999).

290 *People v. Loeun*, 947 P.2d 1313, 1317-18 (1997).

291 FLA. STAT. ANN. § 921.141(5)(n) (West 2001).

292 FLA. STAT. ANN. § 874.03(1) (West 2000); CAL. PENAL CODE § 186.22 (e)-(f) (West 2004).

293 FLA. STAT. ANN. § 874.03(1) (West 2000).

294 *Id.* at § 874.03(3).

295 MO. REV. STAT. § 565.032 2(17) (West 1999).

296 *Id.* at § 578.421(1).

297 *Id.* at § 578.421(2).

298 IND. CODE ANN. § 35-45-9-1 (West 1998).

299 *See* 2004 Cal. Assembly Bill. 963.

qualified street gang expert” to testify whether or not a pattern exists.<sup>300</sup> One of the bill's authors explained his action:

Duly qualified experts are permitted to testify 'in matters sufficiently beyond common experience'; however, the courts have not allowed gang experts to establish the pattern of criminal gang activity. This bill specifically allows prosecutors to establish a pattern of criminal gang activity using the testimony of a gang expert. It is important that burdensome impediments to the proper adjudication of violent criminals be corrected and this bill does just this.<sup>301</sup>

California legislative analysis, however, took a contrary position:

By providing that a street gang expert may testify as to whether a pattern of criminal gang activity exists, this bill arguably permits proof of an essential fact (commission of a predicate offense) to be based entirely upon the opinion of a police officer. Since expert testimony may be based on evidence that is ordinarily inadmissible, such as hearsay, this bill would permit proof of the commission of an enumerated offense based on an expert's conversations with gang members, other officers, or information obtained from other law enforcement agencies. Such nonspecific hearsay and arrest information has been held to be insufficient to establish commission of a predicate offense.<sup>302</sup>

In past California cases, these “gang experts” have largely been current law enforcement officers.<sup>303</sup> In Texas, “gang experts” are also mostly police officers assigned to control gang activity.<sup>304</sup> Its Rules of Evidence 702 provides generally for expert testimony to assist the trier of fact.<sup>305</sup> Usage of this rule has resulted in police officers testifying to a wide range of factors in gang-related cases.<sup>306</sup>

The very complexity of the efforts of these four states to clearly define their “gang-related” qualifiers is a testament to the difficulty of the task. If any law that restricts the ability to freely associate must be held to the strictest scrutiny, do these laws provide that necessary notice as to what is being criminalized without succumbing to the over-breadth concerns of the First Amendment?

Has the law put potential offenders on notice by defining “active participation” as a relationship that is more than “nominal” or “passive”? Has

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<sup>300</sup> 2003 Cal. Assembly Bill 963.

<sup>301</sup> Comm. Rep. 2003 Cal. Assembly Bill 963 (April 29, 2003), at 2.

<sup>302</sup> *Id.* at 5-6.

<sup>303</sup> *See, e.g.*, *People v. Duran*, 97 Cal. App. 4th 1448, 145 (2002).

<sup>304</sup> Placido G. Gomez, *It Is Not So Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY'S L.J. 581, 596-98 (2003) [hereinafter Gomez, *It Is Not So Simply Because an Expert Says It Is So*].

<sup>305</sup> Tex. R. Evid. 702.

<sup>306</sup> Gomez, *It Is Not So Simply Because an Expert Says It Is So*, *supra* note 304, at 599-605.

an eighteen year old who lives in the same neighborhood as “active members” and who plays basketball with them, and occasionally parties with them, developed a relationship? Where is the line—when has the relationship moved from passive or nominal to something more? Can such a transition be qualified? Is it a telling indictment that police officers must testify as “experts” in ascertaining “participation”?

The Federal Rules of Evidence provide the *Daubert* standard must be met before expert testimony can be permitted.<sup>307</sup> The Chief Justice’s concurrence/dissent in that case coined the descriptive term of “gatekeeper” to describe the test’s function as it relates to the admissibility of expert testimony.<sup>308</sup> The *Daubert* test focuses on the methodology by which the expert reaches a conclusion and becomes problematic when applied to nonscientific experts.<sup>309</sup> Gang experts fall clearly within that realm and their “methodology” for obtaining data and accuracy of their conclusions would fail under this evidentiary standard.<sup>310</sup> Proving a defendant is involved in a criminal street gang has largely depended on police expert testimony. Yet, that testimony fails to meet the *Daubert* test.

#### VI. DOES THE PREEXISTING GANG ASSOCIATION ARBITRARILY EXPOSE GANG MURDERERS TO THE DEATH PENALTY?

There remains a third concern in capitally punishing “gang-related” murder. Unlike any of the other death penalty qualifiers, “gang related” murder singles out association with a specific, finite group.<sup>311</sup> The “gang-related” murder qualifier is unique in that the accused must be linked initially to a gang and then linked to a murder “for or on behalf of” the gang.<sup>312</sup> None of the other qualifiers in any of the death penalty states designate for capital treatment any preexisting association at the time of the murder. The other death qualifiers focus either on the circumstances of the specific murder<sup>313</sup>—lying-in-wait, felony murder, murder for financial

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<sup>307</sup> FED. R. EVID. 702; *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 597 (1993).

<sup>308</sup> *Daubert*, 509 U.S. at 597 (Rehnquist, C.J. & Stevens, J., concurring in part and dissenting in part).

<sup>309</sup> *Daubert*, 509 U.S. at 595.

<sup>310</sup> Lisa M. Agrimonti, Note, *The Limitations of Daubert and its Misapplication to Quasi-scientific Experts, a Two-year Case Review of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), 35 WASHBURN L.J. 134, 144-47 (1995) (calling application of *Daubert* to purely nonscientific experts “absurd” at best).

<sup>311</sup> CAL. PENAL CODE § 190.2(a) (West Supp. 2004); FLA. STAT. ANN. § 921.141(5) (West 2001); IND. CODE ANN. § 35-50-2-9(b) (Michie Supp. 2003); MO. REV. STAT. § 565.032(2) (West 1999).

<sup>312</sup> See, e.g., CAL. PENAL CODE § 190.2(a)(22) (West Supp. 2004).

<sup>313</sup> *Id.* at § 190.2(a)(1), (15), & (17).

gain—or the status of the victim<sup>314</sup>—a peace officer, a witness, a judge, or a juror. In designating gang-related murder a capital offense, the states of Indiana, Florida, Missouri, and California have broken new ground in death penalty legislation. For the first time in the history of this country, association or membership in a particular type of organization has been made a predicate event for capital treatment.

Perhaps more significant than this preexisting condition is the concern that the group designated is so generally deplored that there may well exist a predisposition to seek the death penalty, thus exacerbating the already serious concern of prosecutorial discretion in the filing process for death penalty cases. Every “gang-related” murder suspect may be subjected to a predisposition by prosecutors to capitally file, simply out of a loathing and societal fear of gangs themselves. Of course, such a predisposition is difficult to quantify. However, by virtue of singling out criminal street gangs, society has expressed a predisposition. Instead of reserving capital punishment for the worst of the worst, those murderers who have been worked through the filtering process, it may be that with criminal street gang murderers that process works in reverse and the default position is to capitally charge.

Does such a pre-qualifying association alter fundamentally the constitutional legitimacy of the “gang-related” death qualifier? Does membership in a particular kind or type of organization that has been designated as so outside the accepted limits of lawful society render it constitutionally suspect? There is a long, storied and constitutionally guaranteed tradition in the United States of protecting the right of persons to associate with whom they please.<sup>315</sup> It is every citizen’s right to join the Ku Klux Klan, Michigan Militia, or Hell’s Angels.<sup>316</sup> Membership in and association with such organizations, while generally deplored, is constitutionally protected.<sup>317</sup> And, while associating with the Crips or the Mexican Mafia is not unlawful, murdering for or on behalf of the Crips or the Mexican Mafia is a death qualifier.<sup>318</sup> Yet, in startling contrast, a Klansman beating a man to death with a bat will not be a death eligible under the gang-related murder qualifier because this act was not associated with a “criminal street gang.”<sup>319</sup>

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<sup>314</sup> *Id.* at § 190.2(a) (7)-(13).

<sup>315</sup> *Scales v. United States*, 367 U.S. 203, 224-30 (1961) (membership in the Communist party can only be punished if there was knowledge of, and intent to contribute to, illicit activity by the member.).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *See supra* note 1.

<sup>319</sup> This crime may qualify as a hate crime. In many jurisdictions this would render the convicted death eligible. Many jurisdictions have language similar to California’s Penal Code: “The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.” CAL. PENAL CODE § 190.2(a)(16) (West Supp. 2004).

Defenders of the “gang-related” qualifier will maintain that singling out “gang-related” murder for capital treatment is not violative of the right to associate. The mere fact of association has not been criminalized; rather it is the coupling of a particular association with murder that is singled out. And, indeed, it would be a difficult argument to maintain that the constitutionally protected right to associate with criminal street gangs has been impeded by designating “gang-related” murder as a capital event.

*Furman* singled out African-American men.<sup>320</sup> Unlike the “gang-related” qualifier which specifically targeted a designated group, *Furman* focused on whether Georgia and Texas general laws—murder and rape as death qualifiers—and applied them “sparingly, selectively, and spottily to unpopular groups.”<sup>321</sup> In *Furman*, the Court found that those seemingly general or neutral laws placed excessive discretion in the hands of prosecutors to decide who was to be capital charged.

The fear in designating gang-related murder as a death qualifier cuts to one of the fundamental concerns of *Furman*—that any death scheme must narrow sufficiently the type and manner of crime befitting capital punishment.<sup>322</sup> Those filters must be applied in a non-arbitrary manner.<sup>323</sup>

Such filters were found wanting in *Furman*, in that a particular group—African-American men—was singled out for capital treatment in numbers vastly disproportionate to all other groups.<sup>324</sup> Can the same be said for the “gang-related” death qualifier? There are, of course, striking distinctions. *Furman* singled out a group by virtue of that group’s race, whereas the “gang-related” qualifier singles out murderers who associate with a particular group. Additionally, the affected group in *Furman* was singled out under the guise of general or neutral laws whereas the gang-related qualifier is group specific. However, what most concerned the Court in *Furman* was not that a group was singled out by otherwise neutral laws or by specific designation; but whether the criminal law, as applied, lacked the requisite filters to determine in a non-arbitrary fashion who was to be capital charged.<sup>325</sup> The *Furman* decision requires safeguards against arbitrary and capricious filing decisions by state prosecutors. The arbitrary nature of the state’s imposition of capital treatments in *Furman* was not readily ap-

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<sup>320</sup> See *supra* Part II.

<sup>321</sup> *Furman v. Georgia*, 408 U.S.238 (1971) (per curiam).

<sup>322</sup> Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections Within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 346 (2000).

<sup>323</sup> *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

<sup>324</sup> See *supra* Part II.

<sup>325</sup> *Furman*, 508 U.S. at 309-10.



parent and was only recognized after analyzing hundreds of prosecutions over a number of years.<sup>326</sup>

Will gang-related murderers be sifted and filtered through the charging process so that only those select few most deserving of death will be so charged? Or will prosecutors begin their analysis favoring death charges simply by virtue of gang membership? The answer to these questions are problematic in that we are on virgin turf—as suggested previously, this is the first death qualifier that singles out membership or association in a particular type of organization as a predicate condition. The fact of membership may well skew the dynamic. Indeed it may turn the analysis on its head. Since the precondition is an association or membership in an organization found repellant to most and frightening and threatening to all, it is not guaranteed that state prosecutors can rise above public sentiment in making critical filing decisions. Instead of beginning with what would seem a presumption against death charges—a logical deduction given the *Furman*'s filtering requirement—gang membership may well begin with a presumption favoring death charges. If such a presumption could be found to exist, the mere fact of association would place gang members in a particularly vulnerable position—a position contrary to *Furman*.

#### CONCLUSION

We began this article asking whether “gang-related” murder was the kind of signature event justifying the selective meting out of a publicly sanctioned execution. We believe this inquiry is justified for a number of reasons, not the least of which is that gang violence and gang murder are real and present dangers.<sup>327</sup> As documented by the various studies, gang murder accounts for a significant percentage of all murders.<sup>328</sup> Legitimate, constitutional efforts striking at gang murder are not only justified, but are necessary. This inquiry is also justified given the distinctive nature of the gang-related qualifier, with its predicate precondition and its fixation on such an undesirable and repugnant association. Furthermore, this discussion is necessary because other states, perhaps reacting to the experiences in California, Missouri, Florida and Indiana, may be considering similar legislation. Finally, this inquiry is justified because it concerns the death penalty and thus leaves little room for error.

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<sup>326</sup> *Furman*, 508 U.S. at 250-51 (Douglas, J., concurring).

<sup>327</sup> 2000 Cal. Legis. Serv. Prop. 21 §2(b) (West).

<sup>328</sup> UNIFORM CRIME REPORTS 2002, *supra* note 32 at 27. The preliminary report for the first six months of 2003 indicates similar trends. UNIFORM CRIME REPORTS 2003 (preliminary), *supra* note 213.

As suggested throughout this exercise, in establishing yet another death qualifier, Missouri, Florida, Indiana, and California have embarked on a constitutionally tenuous trek. It is certain that in the near future the United States Supreme Court will be called upon to resolve a challenge brought by a murderer condemned to die because he fit within the “gang-related” death qualifier.

The Court, with *Furman* as its talisman, will in all likelihood confront the concerns raised here and determine if the gang-related death qualifier cedes too much discretion to state prosecutors because of the high percentage of “gang-related” murders compared to all murders. The Court will also confront the vagueness issue—is “gang-related” specific enough to instill confidence that the notice requirements demanded by the due process clause have been met? And finally, the Court must address whether the preexisting association of gang membership may predispose prosecutors to favor death charges in violation of the narrowing mandate of *Furman*.