

**Testimony on behalf of the
American Civil Liberties Union Of the National Capital Area**

By

Carl Takei
Staff Attorney

Before the

Committee on Public Safety and the Judiciary

of the

Council of the District of Columbia

on

Sections 101, 103, 201, 208, and 217 of Bill 17-951, the
"Omnibus Anti-Crime Amendment Act of 2008"

December 5, 2008

.....

Introduction

Four of the sections of the Omnibus Crime Bill that are the subject of today's roundtable are seriously defective, and should flatly be rejected. For both reasons of law and public policy, the sections on gangs (§§ 103 and 217) are at the top of our list for disapproval. But in saying that, we do not suggest that § 201 (public access to MPD documents) and § 208 (prescription of mandatory minimum sentences) are more worthy of approval. They are not. As for § 101 (discharge of a firearm), it should not be adopted in its present form.

Section 103: Anti-Gang Injunctions

Section 103 of the omnibus bill sets up a system of civil anti-gang injunctions that may be the most egregious example of prosecutorial overreaching ever presented to this Council. Section 103 is a misconceived, poorly drafted, rushed measure that raises serious constitutional concerns, creates unintended consequences that will harm local communities and that may impede other anti-gang initiatives, and is based on a model that has had very limited effectiveness in reducing crime elsewhere. The ACLU urges that the Council reject this counterproductive, ineffective, and unfair provision, and replace it with a more narrowly targeted criminal offense.

Anti-Gang Injunctions Improperly Use Civil Proceedings to Selectively Impose Criminal Prohibitions on Individuals Who May Never Have Committed Any Crimes

An anti-gang injunction is criminal legislation in civil litigation clothing. Unlike a typical criminal statute, which applies equally to all citizens and is enacted through democratic processes, anti-gang injunctions give prosecutors the power to single out particular groups of alleged gang members, design a special body of prohibitions that apply only to those individuals, and use a civil suit to give those prohibitions the force of criminal law.

The injunction may prohibit a wide range of ordinary, lawful activities—for example, it may prohibit the targeted individuals from associating with each other in public, carrying objects such as cell phones or paint, being in the mere presence of others who possess drugs or guns, wearing red or blue clothing, or any other limitations that a prosecutor may seek to impose.

Because these injunctions will be obtained through civil court proceedings, defendants generally will not have counsel because they cannot afford to pay for lawyers. Once the injunction is imposed, however, the same defendants can be fined or imprisoned for contempt of court if they violate the terms of the injunction. The government can thereby imprison people for engaging in “gang activities” even though they have never been found guilty of breaking any criminal law.

By treating gang involvement as a matter of civil law, the bill’s proponents seek to punish alleged gang members for that alleged association without affording them the constitutional rights that are guaranteed to persons accused of committing crimes, including their Sixth Amendment rights to a jury trial, to be represented by counsel, and to confront the witnesses against them, and the Fifth Amendment right not to be convicted and punished unless the state proves their guilt beyond a reasonable doubt.

A Cold War analogy helps illustrate the perniciousness of this procedural trick: Suppose that J. Edgar Hoover suspects that Joe the Labor Organizer is a Communist, but lacks enough evidence to convict him of violating any criminal statutes. Under existing law, the matter would end there. But what if Hoover had the benefit of § 103? In that situation, Hoover could treat the Communist Party as a “criminal street gang”¹ and seek a permanent injunction barring all Communists from publicly associating with one another within city limits. Although Hoover’s evidence is too thin to support a criminal conviction, a judge could easily find that Joe is more likely to be a Communist than not, which would be sufficient to issue the injunction against Joe. Thus, the next time that Joe

¹ As discussed below, the Communist Party could easily fit within the broad definition of “criminal street gang” set forth in § 103(b)(2).

conducts a union meeting in the presence of other suspected Communists, Hoover can arrest Joe and charge him with violating the injunction. The use of the injunctive mechanism allows Hoover, in other words, to criminalize Joe's everyday activities rather than rely on existing criminal statutes.

In this way, anti-gang civil injunctions exploit the lesser protections of civil law to make an end-run around democratic processes and the procedural protections of the Constitution and the criminal law. In particular, the low burden of proof for prosecutors to designate groups as gangs and people as gang members, combined with severe constraints on the targeted individuals' ability to contest the basis for the injunction, make the procedural protections dangerously inadequate for a proceeding that amounts to the on-the-fly creation of new criminal offenses.²

Moreover, the language of § 103 imposes no limits on how onerous or punitive the conditions of an injunction may be. For example, an injunction could impose a 5 p.m. to 11 a.m. curfew on the targeted individuals and require them to wear orange jumpsuits at all times—based simply on a determination, supported by only a preponderance of the evidence and reached without benefit of counsel or a jury trial, that those individuals are members of a “gang” or “crew.”

The procedural protections are even more inadequate for individuals who are added to the injunction list after the injunction is in effect. First, under § 103(i)(4), such individuals can be added at the sole discretion of the Attorney General, *without a court proceeding of any kind*. And once added, such individuals have no right to challenge the terms of the injunction before or after being charged with violating it. Such later-added individuals must accept the injunction as imposed on the earlier-served individuals, even if the injunction is extremely onerous and those prior individuals failed to challenge its terms. By denying the later-added individuals any meaningful opportunity to challenge the injunction's provisions or its application to them, this procedure violates their right to due process.

Section 103's Injunctions Target an Overly Broad Range of Activities

Section 103's proposed injunctions will not simply prohibit harmful acts; they also will limit the targeted individuals' freedom of association and freedom of movement in ways that will make it difficult for them to go about their everyday, lawful lives. All injunctions issued under § 103 will prohibit the individuals targeted by the injunction from publicly associating with or congregating with any

² See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1370-71 (1991) (arguing that when applying constitutional provisions not expressly tied to a criminal or civil context, courts should ask what values underlie those protections and whether those values are implicated in a particular proceeding, even if it is formally “civil” in nature).

other targeted individual within the injunction area.³ And the size of the injunction area, like the range of prohibited activities, is not limited in any way. It could be “the District of Columbia.” At a minimum, it is likely to be the neighborhood where a targeted individual lives.

Prohibiting gang members from associating with others for non-criminal purposes in their own neighborhoods is likely to create unintended consequences, and will likely impede other, potentially more effective methods of deterring gang-related crime. In neighborhoods where family members may independently be associated with gangs, these injunctions can also interfere with important family relationships. Some examples of socially beneficial conduct that would likely be prohibited under the terms of a § 103 injunction:

- Two gang members walk or take the bus together to attend church, a drug rehab program, etc.;
- Two gang members attend an anti-gang outreach program that takes place inside a publicly owned community center or a privately-run center open to the public;
- Two brothers, both of whom are gang members, attend a family reunion in a public park or in the publicly-visible yard of a family home;
- A man, who was once an active gang member but is trying to quit the gang, has a teenaged son who recently joined the same gang. In an effort to dissuade his son from making the same mistakes as he did, the father has a conversation with his son while sitting on the front stoop of their rowhouse.

Additionally, at the request of a prosecutor, a § 103 injunction could impose an unlimited range of other conditions—including curfews on those individuals and prohibitions against entering any private property without the written consent of the owner—that would seriously interfere with that individual’s work, family, and social life. For example, § 103(i)(2)(B)(v) authorizes an injunction prohibiting a targeted individual from “[b]eing present on any private property within a defined geographic area without the written consent of the owner.” A person subject to such an injunction could be sent to jail for entering a Safeway to buy bread or entering a CVS to buy a chocolate bar, because he doesn’t have the *written consent* of Safeway, Inc., or the CVS Caremark Corp. to enter their premises.⁴ And, to repeat, these prohibitions can be imposed on individuals *who have never been before any court*.

Section 103’s Injunctions Target an Overly Broad Range of Associations

Section 103 authorizes the issuance of anti-gang injunctions against all members of a “crew” or a “criminal street gang.” The bill defines a “crew” as any

³ Bill 17-951, § 103(i)(2)(A)(ii).

⁴ Prosecutors may say they would not use these provisions in such a manner. But the Council should know by now that “trust us” is not a substitute for careful legal drafting, especially when the liberties of citizens are at stake.

group of three or more persons, at least some of whose members⁵ engage in “gang activity,” where gang activity is defined as two instances of either (1) multiple members violating a criminal law together (excepting civil disobedience), or (2) at least one member violating a criminal law for the benefit of the group or its members. Thus, a crew may, at minimum, consist of three people, at least some of whom have violated or participated in the violation of at least two crimes (including nonviolent misdemeanors). A “criminal street gang” is a narrower category encompassed within the definition of a “crew” and is treated the same as a crew for purposes of an injunction.⁶

These definitions are extraordinarily broad. For example, if Adrian and Peter are members of an informal soccer club, and they engage in two collective acts of illegally playing soccer in the street,⁷ then their soccer club would qualify as a “crew” under § 103. If members of the soccer club have a common identifying sign or symbol—say, a club T-shirt—then the club would also qualify as a “criminal street gang.”

The breadth of § 103’s “gang” and “crew” definitions (only two non-violent misdemeanors) give the police discretion to use injunctions to break up not only violent groups, but also groups of people who presumably should not be within the scope of anti-gang measures, such as:

- A group of homeless men who have, on various occasions during the winter months, lit illegal bonfires to keep each other warm;
- A group of protesters who have, on at least two occasions, no matter how distant in time (for example, once during the invasion of Afghanistan and once during the invasion of Iraq), held demonstrations at which they engaged in illegal acts that did not constitute civil disobedience (which is not defined in the statute, so there is no way to know what it is);
- Former members of radical groups who, decades earlier, engaged in illegal acts, but have long been law-abiding;
- A group of former prostitutes who, years ago, engaged in various illegal acts together, but have since reformed;

⁵ The language of the bill leaves it unclear whether it is sufficient that *some* members engage in “gang activity” or whether it is necessary for *all* of the members to do so. See Bill 17-951, § 103(b)(2) (“‘Crew’ means a formal or informal group of three or more persons whose members individually or in any combination engage in gang activity.”). If it were necessary for all members to have engaged in “gang activity,” however, then a gang could escape the reach of an injunction merely by allowing a “designated driver” who engages in no criminal activity to join its ranks. This would appear to defeat the purpose of § 103. Accordingly, we construe the provision to mean that only some members need to engage in “gang activity” for the group to be treated as a gang or crew.

⁶ Bill 17-951’s definition of “criminal street gang” is the same as its definition of crew, but adds two additional requirements: first, that the gang be an “ongoing” group; and second, that the group have “a common name, identifying sign, symbol or colors or an identifiable leadership.”

⁷ See D.C. Code § 22-1308 (prohibiting the playing of football or other ball games in D.C. streets, under penalty of a \$5 fine).

- Family members who own a small business and who have twice committed criminal violations of the tax laws for the benefit of the business;
- A group of graffiti artists who have illegally “tagged” walls together; or
- A college fraternity that has hosted two loud and overly boisterous parties.

In plain English, the bill’s definitions give prosecutors the ability to hale into court virtually any group of people as an alleged crew or criminal street gang.

Gang Injunctions Will Disparately Target African American and Hispanic Young men

Even if § 103 were rewritten to target only associations whose primary activities are criminal, it would still suffer from the difficult problem—common to all gang-specific laws—of determining who is a member of the gang and who is not. This is not an easy task; gang members, after all, do not carry membership cards in their wallets. Meanwhile, gang-affiliated colors, clothing, and signs have thoroughly integrated themselves into urban youth culture—particularly African American urban youth culture. Thus, any attempt to identify gang members based on these kinds of indicators, as § 103 does,⁸ is likely to ensnare large numbers of innocent people, a disproportionate number of whom will be African American young men.

The racially disparate nature of these classifications is harmful enough when they are used as sentence enhancements for existing crimes. But when such classifications become the predicate for imposing specialized restrictions on whom an alleged “gang member” may speak with, where he may walk, and what objects he may carry in his pockets,⁹ then the profiling problem becomes even more grave. Indeed, in other jurisdictions with anti-gang injunctions, innocent members of minority communities have experienced increased racial profiling and police harassment after the imposition of the injunctions.¹⁰ Additionally, § 103 states that an injunction may be applied to an individual even in the absence of proof that he or she personally participated in the gang activity that supports the injunction’s issuance, which makes such harassment even more likely to

⁸ See Bill 17-951, § 103(b)(2) (defining “criminal street gang”). See also, e.g., CHARLES M. KATZ & VINCENT J. WEBB, *POLICING GANGS IN AMERICA* 206-13 (2006) (describing how police gang units use clothing, tattoos, hairstyles, and other visual indicators to classify individuals as gang members).

⁹ For example, an injunction may prohibit an alleged “gang member” from carrying such common items as cell phones, pagers, and permanent markers.

¹⁰ See, e.g., *Opposition to Plaintiff’s Ex Parte Application for Order to Show Cause, People v. Norteño*, Case No. CGC-07-464492 (Cal. Super. Ct. June 21, 2007) (describing racial profiling incidents and increased police harassment of Latino resident in the wake of a preliminary anti-gang injunction); Hudson Sangree & Lakiesha McGee, *Gang order targets nine: Yolo renews its fight against the Broderick Boys*, SACTO. BEE, Dec. 31, 2007, at B1 (describing complaints of community members that anti-gang injunction led to police harassment of local residents, including racial profiling of drivers and police photographic surveillance of family picnics).

occur. We are all aware of the well-known “crime” of Driving While Black; this proposal goes a long way towards making it a crime simply to live as a young Black male in Washington, D.C.

Section 103 Eliminates the Procedural Protections that Exist in the Los Angeles Civil Injunction Model

In public comments, Attorney General Peter Nickles has characterized § 103’s anti-gang injunction provisions as being a “best practice” drawn from the policies of Los Angeles and other cities.¹¹ In fact, however, the anti-gang injunction provisions in this bill infringe more severely on freedom of association, and provide far fewer procedural protections, than the Los Angeles model. These modifications make § 103’s injunction provisions both worse in policy terms and more vulnerable to constitutional challenges. The following chart highlights those differences, which include broader definitions of “gang” and gang membership, lower burdens of proof, weaker notice provisions, and higher barriers to removing from the injunction list inactive gang members and people who never were gang members in the first place:

	Los Angeles Guidelines	Bill 17-951, § 103
Definition of “gang”	Criminal or nuisance activity must be one of the gang’s primary activities, and its members must have engaged in a recent pattern of criminal or nuisance activity. ¹²	The bad acts of the “gang” or “crew” need not be recent, part of a pattern, or one of the group’s primary activities.
Individuals who may be targeted by the injunction	A gang member whose participation in the enjoined gang during the past five years has been “more than nominal, passive, inactive, or purely technical.” The injunction may not target those who merely “associate or affiliate” with the gang. ¹³	(1) Any gang member (without reference to constitutional standards of active membership); or (2) any person “who associates with others to engage in gang activity;” or (3) any person “who owns or is responsible for maintaining a place that is used for engaging in gang activity.”

¹¹ David Nakamura, *D.C. Crime-Fighting Plan Expands Anti-Gang Tools*, WASH. POST, Oct. 4, 2008, at B1.

¹² L.A. CITY ATTORNEY’S OFFICE, GANG INJUNCTION GUIDELINES 2-3 (April 2007) (hereinafter “L.A. GANG INJUNCTION GUIDELINES”). See also *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1258 (Cal. App. 2001) (stating that this definition is drawn from California’s STEP Act, which defines a “pattern” of gang activity to be one in which the various acts occurred within a three-year period).

¹³ L.A. GANG INJUNCTION GUIDELINES, *supra* note 12, at 9. This definition is drawn from *Scales v. United States*, 367 U.S. 203, 227 (1961) (defining an active member of the Communist Party as

Proof required to classify a person as a gang member	Beyond a reasonable doubt. ¹⁴	Preponderance of the evidence.
Proof required to establish other relevant facts	Clear and convincing evidence. ¹⁵	Preponderance of the evidence.
Notice required for injunction to be effective as against a particular individual	No person may be prosecuted for violating the injunction unless s/he has been personally served with the injunction. ¹⁶	Substituted service may be made upon three gang members on behalf of the entire group; the language of the bill does not specify whether or not an injunction is effective against unserved individuals.
Periodic review of injunction list	The list of individuals targeted by the injunction is reviewed at least every three years to remove those who are no longer members of the gang. ¹⁷	No provisions for periodic review.
Voluntary removal from injunction list	A targeted individual may petition the City Attorney to be removed from the list if s/he no longer is or never was a gang member. ¹⁸	A targeted individual may petition the Attorney General to be removed from the list if s/he is a former gang member who “disaffiliate[d]” from the gang.

The weaker notice provisions of § 103 are particularly worrisome. Under § 103, the Attorney General may serve as few as three individuals on behalf of the entire gang. In the context of a loosely organized street gang, however, such substituted service violates the right to due process because it is not reasonably

one who “actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities”).

¹⁴ L.A. GANG INJUNCTION GUIDELINES, *supra* note 12, at 8.

¹⁵ *Id.* at 3. See also *Englebrecht*, 88 Cal. App. 4th at 1256 (holding that due process demands that gang injunctions be supported by clear and convincing evidence, not just a preponderance of the evidence). “The interests involve more than a mere dispute over property or money. The need for a standard of proof allowing a greater confidence in the decision reached arises not because the personal activities enjoined are sublime or grand but rather because they are commonplace, and ordinary. While it may be lawful to restrict such activity, it is also extraordinary. The government, in any guise, should not undertake such restrictions without good reason and without firmly establishing the facts making such restrictions necessary.” *Id.*

¹⁶ L.A. GANG INJUNCTION GUIDELINES, *supra* note 12, at 8.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 16-17.

calculated to provide notice to all members of the gang, yet all will be bound by the resulting injunction.¹⁹

The Proposed Witness Protection Provision Violates a Defendant's Right to Due Process

Section 103(g) adds two “witness protection” provisions that would make it extremely difficult for an alleged gang member served with a civil lawsuit to challenge the prosecutor’s evidence:

- If the affidavits supporting the injunction would reveal, directly or indirectly, “the information the witness or witnesses provided” or the identity of any witness, then the court can seal or redact the affidavits. Even the defendant’s lawyer (in the unlikely event that he has one) has no right to examine the sealed evidence.
- If the Attorney General establishes probable cause to believe that any member of the gang has committed a crime of violence or firearm violation, or if “any other reason” exists to justify preventing the direct or indirect disclosure of a witness’s identity, then the court has no discretion and must seal any documents containing that evidence. To unseal the information, the targeted individual’s attorney must establish by clear and convincing evidence that the disclosure would not put the witness at risk.

Together, these provisions erect extremely high barriers to any defendant attempting to probe the basis for the requested injunction. Like *ex parte* hearings²⁰ and secret evidence rules²¹ that have been held to violate due process in other contexts, § 103(g) offends against due process by denying a defendant the opportunity to meaningfully challenge the evidence used against him. As Justice Frankfurter observed in a case involving the federal government’s *ex parte* compilation of anti-Communist blacklists, “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”²² This truth applies equally in the context of anti-gang injunctions.

¹⁹ See *People v. The Broderick Boys*, 149 Cal. App. 4th 1506, 1527 (Cal. Ct. App. 2007) (rejecting as “speculation” the idea that the one gang member served would pass along word of a court injunction and noting that “indeed, a gang member is less likely to be responsible about such matters than a corporate employee.”).

²⁰ See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52-59 (1993) (holding that in an action for civil forfeiture of a home, *ex parte* seizure of the home violates due process).

²¹ See *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069-70 (9th Cir. 1995) (holding that the use of secret evidence in administrative hearings to deport permanent resident aliens violates due process).

²² *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

Anti-Gang Injunctions Are an Ill-Conceived Measure That Has Little or No Impact on Violent Crime

As the Justice Policy Institute observed in a recent report, policymakers should consider three key “questions that will determine the success or failure of a gang control strategy: What are its objectives? Whom will it target? And what effect will the initiative have on the targets in order to achieve the objectives?”²³ The anti-gang civil injunction subchapter of § 103 fails this test because its targets and likely effects are poorly tailored to its stated objectives.²⁴

According to the text of the bill, anti-gang civil injunctions seek to deter harmful territorial activity by youth “gangs” and “crews.”²⁵ However, § 103’s authority for anti-gang civil injunctions would allow the imposition of broad, intrusive restrictions on a much larger set of individuals and behaviors. The breadth of these restrictions is particularly worrisome because, as described above, they infringe upon the civil liberties of individuals who may not even be engaged in the harmful activities that § 103 supposedly targets. Additionally, while the civil liberties harms are real, the evidence that injunctions reduce gang violence is at best equivocal.

Injunctions Have, at Most, a Limited Short-Term Impact on Crime Rates

Over the past decade, several studies have evaluated the impact of civil anti-gang injunctions. In 1997, the ACLU of Southern California examined crime rates before and after the April 1993 imposition of an anti-gang injunction in the Blythe Street neighborhood of Los Angeles.²⁶ In 1998, Jeffrey Grogger, a public policy professor at the University of Chicago, studied the effects of fourteen injunctions imposed in Los Angeles County between 1993 and the end of 1998.²⁷ In 2004, the Los Angeles County Civil Grand Jury’s Gang Injunction Committee conducted a management audit of gang injunctions in the City of L.A. and L.A.

²³ JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INSTITUTE, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 67 (July 2007), available online at http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

²⁴ Such lack of clarity is, unfortunately, all too common in hastily-conceived and hastily-approved anti-gang measures. See *id.* at 68 (“Few initiatives have proved capable of orienting their activities around realistic, measurable public safety objectives. And most are unable to articulate a viable theory of how gang control activities will have the intended effect on their targets.”).

²⁵ As stated in the Findings and Declaration of Necessity, the purpose of Bill 17-951’s anti-gang civil injunction subchapter is to create a mechanism to stop gangs and gang members from engaging in activities that “injure[] the health, safety, and security of the District’s citizens, frighten[] or intimidate[] them, obstruct[] the free use of both private and public property, and interfere[] with the comfortable enjoyment of the lives and property of the District’s citizens.”

²⁶ See generally ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (May 1997) (hereinafter “ACLU BLYTHE STREET STUDY”), available online at <http://www.streetgangs.com/injunctions/topics/blythereport.pdf>.

²⁷ See generally Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J. L. & ECON. 69 (2002).

County that analyzed the impact of those injunctions on crime rates.²⁸ And throughout the late 1990s and early 2000s, Maxson et al. conducted a series of studies examining the impact of civil anti-gang injunctions on community perceptions and law enforcement perceptions of gang activity and neighborhood quality.²⁹

None of these studies found that the injunctions led to significant, long-term reductions in violent crime. Instead, they found that the gang injunctions had either a moderate, short-term impact on crime rates or no discernible impact at all.³⁰ Meanwhile, the community perception studies by Maxson et al. found that although the injunctions had some positive short-term effects, they did not affect intermediate or long-term indicators—there was “little evidence that immediate effects on residents translated into larger improvements in neighborhood quality.”³¹ Additionally, none of the studies found that gang injunctions were an effective strategy in the absence of increased police patrols or other significant commitments of additional law enforcement resources to the affected neighborhoods.³² Grogger noted that gang injunctions are notably less effective at reducing crime than other place-based enforcement efforts, such as increased patrols in crime “hot spots.”³³

Finally, another major concern with gang injunctions is the “displacement effect”—the likelihood that rather than diminishing crime they will merely displace it from the area covered by the injunction into neighboring areas. Studies have found evidence suggesting that the injunctions caused such displacement effects.³⁴ Inevitably, prosecutors will seek to leapfrog such effects by enlarging the geographical scope of the injunctions. Soon enough, persons deemed to be gang members will be prohibited from living normal lives almost anywhere they might go in their own city.

²⁸ See 2003-2004 LOS ANGELES COUNTY CIVIL GRAND JURY, FINAL REPORT 169-391 (June 2004) (hereinafter “GRAND JURY REPORT”).

²⁹ See generally CHERYL L. MAXSON, KAREN HENNIGAN, DAVID SLOANE & KATHY A. KOLNICK, CAN CIVIL GANG INJUNCTIONS CHANGE COMMUNITIES? A COMMUNITY ASSESSMENT OF THE IMPACT OF CIVIL GANG INJUNCTIONS, DOC. NO. 208345, NIJ GRANT NO. 98-IJ-CX-0038 (April 2004).

³⁰ See ACLU BLYTHE STREET STUDY, *supra* note 26, at 7-9 (finding that crime continued to rise in injunction area even after imposition of injunction); GRAND JURY REPORT, *supra* note 28, at 213 (finding statistically significant decrease in crime only in the first year of injunctions); Grogger, *supra* note 27, at 85 (finding statistically significant decrease in assaults, conflicting results on robberies, and no statistically significant decrease in murders or rapes, in the first year of injunctions). The reduction in crimes were only moderate in size—for example, Grogger concluded that the injunctions probably led to the commission of between 1.5 and 3.0 fewer crimes per quarter during the first year, and that most of this decline stemmed from reductions in assault rather than more serious violent crimes. Grogger, *supra* note 27, at 89.

³¹ MAXSON ET AL. (2004), *supra* note 29, at 44.

³² See, e.g., GRAND JURY REPORT, *supra*, at 224 (“By themselves, CGIs [civil gang injunctions] can have only limited impact on gang behavior.”).

³³ Grogger, *supra* note 29, at 87.

³⁴ MAXSON ET AL. (2004), *supra* note 29, at 45-46; ACLU BLYTHE STREET STUDY, *supra* note 26, at 39.

Anti-Gang Injunctions are Counterproductive in the Long Term

Section 103 calls for permanent injunctions against the targeted individuals. According to data from national surveys and surveys of particular metropolitan areas, the typical gang member is active for a year or less.³⁵ And when individuals leave gangs, they often experience difficulties building the social capital that they need to integrate themselves into mainstream society. Injunctions that continue to apply to targeted individuals even after their gang activity has ceased actually discourage members from leaving gangs because they increase the difficulties associated with leaving the gang.³⁶ Thus, the scheme contemplated by § 103 might well impede rather than aid efforts to convince young gang members to leave their gangs to lead more productive lives.

Additionally, § 103's blanket prohibitions against gang members associating with one another would likely impede efforts by police, social workers, and religious leaders to directly communicate specific messages to particular gangs. This is unwise because one of the best-known models for balanced gang enforcement—Boston's Operation Ceasefire—requires such contacts to work properly. In Operation Ceasefire, direct communication with gang members was “a key element in the logic of the overall strategy” of lever-pulling, because it allowed police to communicate two related messages to the gangs in the city: first, to make all of the city's gangs “aware that new rules existed regarding violence and to understand what they were and how to avoid coming to the Working Group's attention,” and second, to send messages to the most problematic gangs to make them “understand that violence had drawn the official attention, and only a cessation of violence would lead to its easing.”³⁷

The ACLU Recommends a Targeted Criminal Statute to Deal with the Problem

The ACLU believes that the stated objective of § 103's anti-gang provisions (that is, to deter and punish acts of intimidation by gang members that leave community members feeling besieged by gang activity) is best served by a straightforward criminal statute that targets these specific bad acts. For example, the Council could enact a provision along these lines:

(a) Definition. “Public space” means a street, alley, sidewalk, bridge, path or other vehicular or pedestrian right-of-way,

³⁵ GREENE & PRANIS, *supra* note 23, at 46.

³⁶ *See id.* (“Gang control policies that fix the gang label on youth . . . deter youth from leaving the gang by ensuring that they will be treated as pariahs no matter what they do.”). Astonishingly, Bill 17-951 does not even contain any provision by which a person subject to a gang injunction can demonstrate to the court that he is no longer a member of a gang. Under § 103(m), only the Attorney General can seek such relief, and he is under no legal obligation to do so.

³⁷ DAVID M. KENNEDY, ANTHONY A. BRAGA & ANNE M. PIEHL, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE, NIJ RESEARCH REPORT, NCJ 188741, at 30 (Sept. 2001), *available online at* <http://www.ncjrs.gov/pdffiles1/nij/188741.pdf>.

a park, a public building, a private building that is open to the public, common areas of public housing, or the exterior of any public or private building, including but not limited to yards, stairs, stoops, and porches.

(b) It shall be unlawful for three or more persons, acting in concert, to engage in public conduct that is not constitutionally protected, and that intentionally or recklessly hinders another person from lawfully using or enjoying a public space in a manner that causes such person to suffer a reasonable fear of bodily harm.

Anti-gang civil injunctions seek to deter gang-related intimidation and harassment of local residents by prohibiting gang members from associating with one another. As discussed above, that type of indirect solution is counterproductive, ineffective, and unfair. Instead, to the extent the Council believes that gang-related intimidation and harassment is insufficiently addressed by current law, it can directly prohibit the intimidation and harassment activities. Creating a special offense for threatening acts done in concert addresses the concern that group acts of intimidation can be more harmful than individual acts of intimidation.

The language provided above targets individuals who actually engage in the prohibited behavior, not those who simply wear the same color clothing. Unlike a system of anti-gang injunctions, the same prohibitions would apply to everyone. Additionally, the language of the prohibition is narrowly targeted at behavior that is objectively threatening, not at unthreatening (and constitutionally protected) acts of association.³⁸ This avoids § 103's misplaced focus on association and instead punishes threatening acts, leaving all D.C. residents free to associate for beneficial or non-harmful purposes.

The ACLU is not recommending new criminal laws. But the language above shows how easy it is to draft a criminal law that directly addresses the stated problem, rather than enacting a law that will give prosecutors the power to send hundreds, perhaps thousands, of D.C. residents to prison for wearing the wrong clothes and being friends with the wrong people.

Section 217: Definition of "Gang"

Separately, § 217 of the Omnibus Bill amends the definition of a gang to include any group that "[w]ithout a legal right to do so, excludes or attempts to exclude any person or persons from a specific geographic area by violence, physical force, threats, coercion, or intimidation." The ACLU opposes this new

³⁸ See *Chicago v. Morales*, 527 U.S. 41 (1999) (holding that criminal statute that prohibited gang members from remaining in any public place without an apparent purpose violated the Due Process Clause of the Fourteenth Amendment).

provision because it is a classic guilt-by-association measure that punishes the entire group for the illegal acts of some of its members.

For example, under the language of § 217, if a labor union or other advocacy organization were to organize a boycott of certain businesses, and some members enforced that boycott through threats, coercion, or intimidation, then the organization would be considered a “criminal street gang” under the D.C. Code. The U.S. Supreme Court has held, however, that “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.”³⁹ In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the NAACP organized a boycott of racially discriminatory businesses in a Mississippi town, but some NAACP members—acting without the approval of NAACP officers—used illegal methods to enforce the boycott. The business owners sued the NAACP and its officers to recover for the lost business and other harms they suffered as a result of the boycott. The Court held that although a few NAACP members did act illegally, holding the entire organization liable for the illegal acts of those few would violate the NAACP’s First Amendment rights to freedom of expression and freedom of association.⁴⁰ The same principle applies to § 217. The mere fact that some members of an organization unlawfully exclude or attempt to exclude persons from some geographic area does not justify treating an otherwise legitimate organization, and all of its law-abiding members, as a “criminal street gang,” with all of the substantive restrictions (including criminal penalties for attempting to recruit new members⁴¹) and stigmatic harms that follow from this label.

Section 101: Unlawful Discharge of a Firearm

As written, this section would allow the government to charge a person with the crime of firing a weapon without a permit in addition to another offense in which the weapon was fired. The ACLU objects to piling on multiple punishments based on the same conduct.

To prevent that result, a new subsection should be added to § 101 to read:

Except that no person shall be convicted under this section who is also convicted of any other offense arising out of the same conduct.

Section 201: MPD’s General Complaint Files

This section would deny public access to MPD’s General Complaint Files where the complainant is a victim of:

- a “crime of violence”

³⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

⁴⁰ *Id.* at 921-23.

⁴¹ D.C. Code. § 22-951(a)(1).

- a threat of kidnapping or personal injury
- stalking
- an assault or threat in a “menacing manner”

The purpose of this proposal presumably is to protect a victim from retaliation by an aggressor for filing a complaint with the police. But examined more closely, the proposal makes little sense.

Is it likely that an aggressor would go to a police station to obtain a complaint and thereby expose his identity if he intended to retaliate against the complainant? Would a would-be aggressor not be deterred by knowing that a complaint has been lodged against him and that the police were involved in the matter? In short, this bill is unlikely to protect a complainant.

But what is clear is that in cases where the victim of a crime is not known to an accused, the ability of his defense counsel to investigate the charges will be seriously impeded. The attorney who goes to trial without having checked out the complainant’s story is not meeting her professional obligations.

In addition to undercutting an accused’s right to defend himself, this provision would also undercut the ability of the news media to investigate and report crimes. There is no good reason to further limit the public’s right to access government documents. The Council should reject § 201.

Section 208: Weapons Offenses

This section would perpetuate and extend the prescription of mandatory minimum sentencing for certain crimes. An extensive body of literature demonstrates that mandatory minimum sentences are bad public policy.

For example, the American Bar Association, in a July 3, 2007, letter to the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives, stated:⁴²

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) state clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that “[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized,” and “[t]he sentence imposed in each case

⁴² Letter from Karen J. Mathis, President, American Bar Association, to Hon. Bobby Scott and Hon. Randy Forbes, House Subcommittee on Crime, Terrorism, and Homeland Security (July 3, 2007), available online at http://www.abanet.org/poladv/letters/crimlaw/2007jul03_minimumsenth_1.pdf (hereinafter “ABA letter”).

should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account." . . .

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics."

A Rand Corporation study similarly found:⁴³

"Three strikes and truth-in-sentencing laws [prescribing mandatory minimum sentences] have had little significant impact on crime and arrest rates. According to the Uniform Crime Reports, states with neither a three strikes nor a truth-in-sentencing law had the lowest rates of index crimes, whereas index crime rates were highest in states with both types of get-tough laws."

In addition, mandatory minimum sentencing effectively transfers the authority for sentencing from neutral judges to adversarial prosecutors. With the authority to charge a defendant with a crime carrying a severe mandatory minimum sentence, prosecutors are able to induce defendants – even innocent persons – to plead guilty to a lesser offense.

As a Rand study concluded: "Mandatory minimums have not actually reduced sentencing discretion. Control has merely been transferred from judges to prosecutors."⁴⁴

And here is what the American Bar Association said on this point:⁴⁵

In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging

⁴³ Susan Turner, RAND Corporation Criminal Justice Program, Justice Research & Statistics Association, *Impact of Truth-in-Sentencing and Three Strikes Legislation on Crime*, CRIME AND JUSTICE ATLAS 2000, at 10 (US Dep't. of Justice, June 2000).

⁴⁴ JONATHAN P. CAULKINS, ET AL., RAND MONOGRAPH REPORT, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? at 24 (1997).

⁴⁵ See ABA letter, *supra* note 42.

decisions they make, rather than judges imposing a sentence, taking into account all relevant factors regarding an offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case.

At an appropriate time, the Council should revisit the mandatory minimum sentences currently in the criminal code. But for now, the Council should not compound the wrong by adding new mandatory minimum sentences.

Thank you for your consideration of our views.