NOTE

GUilt By ASSOCIATION:

TRANSNATIONAL GANGS AND
THE MERITS OF A NEW MANO DURA

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“After 9/11 we have come to look at stateless terrorists as our enemy and are developing ways to stymie their attacks and defeat them on an international scale in a new mode of conflict that does not lie in battling sovereign nations. I would advance to you the theory that we are facing the same challenges and threats by the transnational gangs that almost freely operate within our borders.”¹

“You live for your god, you live for your mother, you die for your gang.”²

INTRODUCTION

On July 17, 2003, members of Mara Salvatrucha, a gang also known as MS-13, slit seventeen year-old Brenda Paz’s throat and dumped her pregnant body on the banks of Virginia’s Shenandoah River.³ Paz was cooperating with the Federal Bureau of Investigation (F.B.I.) in its pursuit of MS-13 and was a witness to three homicides committed by the gang’s members.⁴ One gang member “green-lighted” Paz’s brutal murder from his Alexandria jail cell in order to send a message that “witnesses must die.”⁵ Unfortunately, Brenda Paz’s death is only one tragic example of the havoc that


⁴ Id.


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MS-13 and other gangs continue to wreak on Northern Virginia and other communities. Overall, MS-13 exemplifies the plague of highly organized and extremely violent street gangs that have rapidly spread throughout the United States and Latin America during the past two decades.

These transnational criminal networks engage in a broad spectrum of activities ranging from trafficking in narcotics and stolen cars to human smuggling and murder. According to the F.B.I., criminal enterprises like MS-13 pose one of the largest threats to American safety and security because they are “more violent, more organized, and more widespread than ever before.” The United States government has mounted a formidable effort, in the form of Racketeer Influenced and Corrupt Organizations (“RICO”) Act prosecutions, gang task forces, and massive deportations to combat the effects of gang violence. These legislative, investigative, and prosecutorial strategies, however, have done little to curb gang membership. MS-13 has a zero-tolerance policy towards witnesses and law enforcement officials who seek to interfere with its operations, and, consequently, governments that seek to counter the gang’s efforts must respond in kind. The United States should therefore follow the lead of Latin American countries such as El Salvador and adopt a New Mano Dura—a legislative policy of zero-tolerance towards transnational gangs—both because these criminal networks pose a threat to international and domestic security, and since existing legal strategies are insufficient to combat this growing problem.

Part I of this Note outlines the problem of transnational gangs in the United States, and traces the development of MS-13 from its roots in Los Angeles in the 1980s to its present operations throughout North America. Part II discusses current legislative strategies employed in the United States for investigating and prosecuting Mara Salvatrucha and other transnational gangs, including the gang's zero-tolerance policy. It also discusses the challenges of global organized crime in Latin America and the need for a new legislative approach.

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8. “Mano Dura” means “Firm Hand” and it refers to a series of zero-tolerance laws enacted in Latin American countries, and particularly in El Salvador, to prosecute members of gangs like MS-13. El Salvador’s Mano Dura legislation is discussed below. “New Mano Dura” refers to the set of legislative reforms proposed in this Note, which combines elements of El Salvador’s Mano Dura program with aspects of current and pending legislation in the United States to comprise a zero-tolerance policy towards transnational gangs.
RICO Act and statutory penalty enhancements for gang-related activity. This Section also compares the U.S. response to that of El Salvador and other Latin American countries. Part III evaluates pending anti-gang legislation in the U.S. House of Representatives and Senate, and advocates for the passage of legislation by Congress that would establish a New Mano Dura—a comprehensive policy of zero-tolerance towards transnational gangs implemented through criminalizing membership and adopting other provisions necessary to arm law enforcement in the fight against gangs. Finally, Part III will also address two possible constitutional challenges that may be asserted against the United States if it were to adopt a New Mano Dura.

I. Transnational Gangs in the United States and Latin America

A. An Introduction to Transnational Gangs and Mara Salvatrucha

1. Defining Transnational Gangs

Before it is possible to formulate strategies to combat transnational gangs, it is necessary to define what is meant by a “transnational gang.” The term “gang” is generally used by sociologists to refer to “a group of adolescents or young adults who frequently gather, share an identity, use common symbols, claim control over neighborhood territory, and may sometimes engage in illegal activities.” A gang may have as few as a dozen members or may have membership that numbers in the thousands. While many gangs, such as the Bloods and the Crips, are less hierarchical than traditional organized crime groups like Mafia crime families, other gangs, such as MS-13, have a sufficiently developed leadership structure and business model to fit within the definition of organized crime.

9. The author notes that the “pending legislation” referred to throughout this Note was pending before the 109th Congress at the time this Note was written, and was pending as of April 2007, but subsequently died in committee.


11. Id.


but several agreed-upon attributes can distinguish it from other types of criminal activity. The characteristics include:

1. involvement in criminal operations that cross State boundaries, often in response to goods that are illegal;
2. promotion of corruption of government officials (often exploiting economically weakened States) with the goal of influencing or neutralizing the instruments of the State;
3. possession of considerable resources;
4. hierarchical, rigid, or compartmentalized organizational structure that uses internal discipline and thereby protects the leadership, who carries out organizational, administrative and ideological functions, from detection or implication in commission of crimes;
5. laundering of proceeds and the use of legitimate “front” businesses to hide criminal activities;
6. use of violence;
7. capacity to “engage in a range of activities,” and the “professionalism of its participants”;
8. aim of the realization of large financial profits as quickly as possible;
9. operation on a sustained and long-term basis; and
10. tendency to organize international organizations together with other groups of different nationalities.\(^{14}\)

MS-13 does not yet possess all of these attributes—for instance, it does not promote the corruption of government officials within the United States—but it sufficiently falls within the definition of organized crime. The terms “gang” and “organized crime” may accordingly be used interchangeably. Finally, the transnational aspect of gangs refers to the organizations’ capacity to exploit porous borders, and the ability, for MS-13, to engage in criminal activities throughout North American and perhaps eventually, throughout the world.\(^{15}\)

2. Mara Salvatrucha (MS-13)

Although the problem of transnational organized crime encompasses a wide variety of groups from across the globe, MS-13 is one of the most visible transnational gangs currently operating in the United States, and therefore is one that deserves special attention in a discussion of legislative strategies to combat gangs. The extent of MS-13’s membership is difficult to determine "[d]ue to the lack of a national database and standard reporting criteria for the identification of gang members, the frequent use of aliases by gang

\(^{14}\) Nagle, supra note 6, at 1655-56.

\(^{15}\) Johnson & Muhlhausen, supra note 10, at 4, 6.
members, and the transient nature of gang members.” It is estimated, however, that the gang has approximately 100,000 members worldwide, with anywhere from 8,000 to 50,000 of those members operating in the United States. MS-13 is active throughout Latin America, drawing members from El Salvador, Guatemala, Honduras, Mexico, and Ecuador. To date, more than thirty-one states and the District of Columbia have reported MS-13 activity, and the gang has a significant presence in California, Northern Virginia, New York, and Texas. MS-13 is unique and “truly an international gang” because “unlike traditional U.S. street gangs, it maintains active ties with MS members and factions in El Salvador.” The following is a description of how MS-13 formed and how it operates today.

a. History

During the 1980s, more than one million people fled El Salvador as the country plunged into a bloody civil war that lasted more than twelve years. Approximately one-half of the refugees migrated to the United States, and sizable Salvadoran communities formed in the Los Angeles and Washington, D.C. metropolitan areas. Some of the immigrants had been members of La Mara, a violent Salvadoran street gang, and others had been members of paramilitary groups like the Farabundo Mari National Liberation Front (FMNL). These former FMNL guerrillas were from some of the poorest neighborhoods in El Salvador and were trained to use explosives, firearms, and combat tactics.

22. Id.
25. Id.
The La Mara and FMNL members who settled in the Rampart area of Los Angeles formed what is known today as MS-13.\textsuperscript{27} Although MS-13 initially formed for protection from other local Hispanic gangs, it quickly grew and became known for extreme levels of violence.\textsuperscript{28} In the wake of the Los Angeles riots in 1992, police attributed much of the looting and violence to local gangs, including MS-13, and the California legislature responded by implementing strict anti-gang laws.\textsuperscript{29} Around the same time, a cease fire ended the civil war in El Salvador, and the United States began deporting Salvadorans who had been convicted of crimes in the United States.\textsuperscript{30} Between 2000 and 2004, approximately 20,000 young criminals, many of whom were members of MS-13, returned to El Salvador and other Latin American countries.\textsuperscript{31}

Although gangs existed in El Salvador prior to the civil war, they were a minor phenomenon.\textsuperscript{32} The arrival of the deportees from Los Angeles in the 1990s, combined with poverty and unemployment in poor communities, the proliferation of firearms in the wake of the conflict, and societal tolerance for violence, made El Salvador a breeding ground for MS-13 and its chief rival, Calle 18.\textsuperscript{33} Although the Salvadoran government paid little attention to these groups at first, the deportees from Los Angeles, “with their outlandish gang tattoos, their Spanglish, and their antiauthoritarian attitudes, soon made themselves noticed.”\textsuperscript{34} The deportees introduced former militants who had remained in El Salvador to drug-based crime, and the rates of drug use in the country grew.\textsuperscript{35} Fueled by the poverty and lack of social prospects among many Hispanic youth, MS-13 spread from California and D.C.—where many of the gang’s members remained following the depor-
b. Current Operation

Today, MS-13 is a highly sophisticated network of localized cliques that engage in criminal activity throughout the United States and Latin America. Until recently, these cliques operated independently, but law enforcement officials report that they are uniting into more cohesive groups. There have been "reports of multiclue meetings in which gang members pay a fee to attend, coordinate their activities, exchange information regarding law enforcement actions and efforts, and issue punishment and/or sanctions for infractions of the gang’s code." While it is unclear whether there is a single leader or leadership body that oversees MS-13’s operations worldwide, the Los Angeles-based cliques are often looked to for guidance.

Los Angeles-based members occasionally travel to other cities "for the purpose of recruiting new members, establishing new cliques, and taking over existing Latino gangs, and instilling discipline through violence and intimidation." Cliques in the United States also maintain contacts with MS-13 members in El Salvador to facilitate trafficking in firearms, stolen automobiles, and narcotics. Al Valdez, an investigator with the Orange County District Attorney’s Office in California, describes MS-13’s participation in the purchase and sale of illegal arms as follows:

Mara Salvatrucha gang members maintain contact between groups in the United States and El Salvador for several specific reasons. In El Salvador, a hand grenade sells for $1.00-$2.00 U.S. currency and an M-16 rifle will sell for approximately $200.00-$220.00 U.S. dollars. This communication and alliance provides a mechanism for MS gang members to access military-style munitions and also establishes a network to traffic illegal firearms into the United States.

Although military weapons seem to be readily available to this gang, street intelligence indicates they often have difficulty obtaining handguns, which are not readily available in El Salvador. This creates a demand for small arms by MS members in

36. See Arana, supra note 29, at 101.
38. Swecker Statement, supra note 7, at 20.
39. Id.
40. Id. at 20-21.
41. Valdez, supra note 13.
the U.S. and El Salvador. This demand is so high that MS members will often take handguns as payment for drug transactions. The guns are then sent back to El Salvador, or used in the United States.\footnote{42}{Id.}

This scenario not only demonstrates the participation of transnational gangs in the arms trade, but also offers further proof that MS-13 cliques communicate with each other on a global scale.

Most MS-13 members in the United States are Salvadorans between the ages of eleven and forty, but the gang also includes members from other Central American nations as well as African Americans.\footnote{43}{Id.} Members can be identified by their tattoos, which often include the number “13” or the word “trece” (13 in Spanish),\footnote{44}{Id.} by their gang colors (blue and white),\footnote{45}{Domash, supra note 13.} and by their hand signals (an “M” formed with one’s fingers).\footnote{46}{Valdez, supra note 13.} Law enforcement agencies from twenty-eight states report that gang members engage in retail drug trafficking and launder the proceeds through legitimate businesses in their communities.\footnote{47}{Swecker Statement, supra note 7, at 21.} In addition to trafficking in narcotics and other illicit goods, the long list of the group’s criminal activities includes burglaries, home invasion robberies, extortion, assault, rape, and murder.\footnote{48}{Valdez, supra note 13, at 8.} MS-13 members have been responsible for the executions of three federal agents and the shootings of numerous others.\footnote{49}{Id.}\footnote{43}{Johnson & Muhlhausen, supra note 10, at 8.} The gang is also known for booby trapping their stash-houses in anticipation of police searches.\footnote{50}{Id.}

MS-13 poses a serious threat to the security of the United States because of the gang’s violent and dangerous criminal activities, its potential links to terrorism, and its high level of organization. These attributes set MS-13 apart from other street gangs. MS-13 also presents unique challenges for law enforcement agents, prosecutors, and legislators seeking to combat this growing problem, as these actors in the criminal justice system come to realize that existing strategies are grossly inadequate to stop the growth of MS-13 and other transnational gangs. Security threats posed by MS-13 and problems with existing legislation will be further discussed below.

\footnote{42}{Id.}
\footnote{43}{Id.}
\footnote{44}{Id.}
\footnote{45}{Domash, supra note 13.}
\footnote{46}{Valdez, supra note 13.}
\footnote{47}{Swecker Statement, supra note 7, at 21.}
\footnote{48}{Valdez, supra note 13, at 8.} In El Salvador and Honduras, at least half of all homicides are attributable to gang members. Johnson & Muhlhausen, supra note 10, at 8.
\footnote{49}{Valdez, supra note 13, at 8.}
\footnote{50}{Id.}
B. Effects of Transnational Gangs on National and International Security

Transnational gangs like MS-13 are not only dangerous because of their violent behavior and participation in illegal industries, but also because of the effect they have on domestic and international security. As opposed to other violent criminals, part of the danger these gangs pose relates to their high level of organization and ability to simultaneously benefit from and contribute to the lawlessness of Latin American societies. This instability in countries like El Salvador and Honduras, in turn, threatens the security of the United States. There are several ways in which the proliferation of transnational gangs poses both actual and potential problems for international safety and the rule of law.

Domestically, transnational organized crime compromises and weakens democratic institutions. High crime rates, combined with the inadequacy of law enforcement responses to the problem, undermine public support of legitimate governments and “erode the strength of civil society by discouraging people’s participation in community activities.” Criminal organizations also affect the political and judicial processes by bribing or threatening legislators and judges to protect the gang’s activities. Additionally, criminal activities distort the domestic economies of Latin American countries through the influx of profits generated by illegal enterprises. These funds “hinder long-term economic development since ‘easy money’ attracts disadvantaged segments of the community . . . and moves them away from legitimate jobs that help build the economy.” Finally, organized crime activities disrupt community life in the areas where gangs operate. Municipal bus drivers in San Salvador refused, for example, to traverse certain areas of the city after a deadly attack on a bus by gang members in April 2004. Also, approximately 300 families, fled the working-class Soyapando

51. See Gangs and Crime in Latin America: Hearing Before the H. Subcomm. on the W. Hemisphere, 109th Cong. 4 (2005) (statement of Representative Dan Burton, Chairman, Subcommittee on the Western Hemisphere) [hereinafter Burton Statement]; see also Levitsky, supra note 6, at 232.
52. See Burton Statement, supra note 51, at 4-5.
53. Levitsky, supra note 6, at 235.
54. Id.
56. Levitsky, supra note 6, at 232.
57. Id. at 235.
58. Id.
neighborhood in 2004 to escape the turf war between MS-13 and Calle 18.59

Internationally, gangs “play a role in weakening international security via their links and support to rebel and international terror groups.”60 In 2004, rumors began to circulate that the leader of an al-Qaeda cell met with Hispanic gangs in Mexico and Honduras to seek their help in bringing terrorists into the United States.61 These rumors were never confirmed and are now generally regarded as false.62 Even so, the prospect of cooperation between gang members and terrorists is real. According to one immigration official, if the gangs “‘can smuggle people looking for a job [into the United States],’ . . . ‘they can smuggle people interested in terror.’”63 Moreover, U.S. Immigration and Customs Enforcement, a division of the Department of Homeland Security, views “every criminal organization that can exploit the border . . . as a national security threat.”64 The concept of “narco-terrorism,” which embodies the connection between gang activity and terrorism, “exemplifies the natural connection, both in terms of proximity and common cause, between drug trade and terrorism.”65

Gang activity disrupts life in local communities, contributes to lawlessness, and undermines democracy as well as economic development, while the profits derived from gang activities, especially from gang participation in drug trafficking, fund narco-terrorist groups.66 Weak states and terrorism are two significant threats to the security of the United States.67 In the words of Representative Dan Burton of Indiana: “We must[, therefore,] fully understand this and recognize that the region’s [i.e., Latin America’s] crime problems are OUR problems as well; and that we have a responsibility to help.”68

60. Levitsky, supra note 6, at 233-36.
61. Johnson & Muhlhausen, supra note 10, at 8.
62. Id. at 26.
63. Arana, supra note 29, at 104.
65. Levitsky, supra note 6, at 236.
66. Id.
68. Id. at 4 (emphasis in original).
Transnational gangs are an international problem, but most of the means by which countries have targeted these gangs involve domestic legislation and local or national law enforcement initiatives. One notable exception is the United Nations Convention Against Transnational Organized Crime, which seeks to “eliminate differences among national legal systems that have in the past blocked mutual assistance efforts between countries, and to set standards to render domestic laws more effective for combating international organized crime.”

Cooperation among affected nations is crucial in combating transnational gangs, but “even with the recent developments of international conventions and regimes to deal with crime, the lack of a set of enforceable international legal standards and common principles for intergovernmental cooperation, allows [transnational crime networks] to operate freely, often with near impunity.”

Until international criminal law further evolves, the best criminal justice strategies will need to be based in domestic law. Accordingly, this Section will summarize the two main legislative strategies that the United States has employed to combat MS-13 and gangs in general. It will also examine the zero-tolerance policies recently implemented in Latin American countries, with a focus on the Mano Dura (“firm hand”) anti-gang polices in El Salvador.

A. U.S. Strategies

The United States currently employs several strategies on both the federal and state levels to root out MS-13 gang activity and prosecute its members. This Section will explore two federal stat-
utes used to prosecute and sentence gang members: the RICO Act and sentencing enhancements under 18 U.S.C. § 521.\textsuperscript{72}

1. The RICO Act\textsuperscript{73}

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations (RICO) Act to “seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”\textsuperscript{74} RICO essentially criminalizes the commercialization of crime by proscribing “the acquisition or operation of an enterprise whose activities affect interstate commerce through the commission of a series of designated state and federal crimes.”\textsuperscript{75} In a criminal RICO case,\textsuperscript{76} the prosecution must establish five elements to prevail: (1) the defendant committed two or more acts of specified racketeering activity;\textsuperscript{77} (2) the racketeering activity was part of a pattern; (3) the defendant was part of an enterprise; (4) the defendant’s activity had an effect on interstate commerce;\textsuperscript{78} and (5) the alleged act was prohibited.\textsuperscript{79} RICO did not create a new substantive offense; instead, it increased the civil and criminal penalties for

\textsuperscript{72} State anti-gang laws and local gang ordinances have also been promulgated to combat the rise in gang violence. For a discussion of state statutes, see generally Bart H. Rubin, \textit{Hail, Hail, The Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute}, 66 Fordham L. Rev. 2033 (1998); David R. Truman, \textit{The Jets and Sharks are Dead: State Statutory Responses To Criminal Street Gangs}, 75 Wash. U. L.Q. 683 (1995). California’s Street Terrorism Enforcement and Prevention (STEP) Act is discussed below as a potential model for a federal anti-gang statute.


\textsuperscript{76} Individuals can also bring suits under the RICO Act, but this Note will only address criminal RICO actions brought by the government. For a discussion of the differences between civil and criminal RICO actions, see generally Goodwin, \textit{supra} note 74 (explaining the differences between civil and criminal RICO claims).

\textsuperscript{77} The racketeering acts upon which a RICO violation may be predicated are set forth at § 1961(1). These predicate acts include “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in a controlled substance . . . which is chargeable under State law and punishable by a term of imprisonment for more than one year,” as well as violations of various federal statutes. 18 U.S.C. § 1961(1)(A).

\textsuperscript{78} The effects on interstate commercial only need to be minimal. Doyle, \textit{supra} note 75, at 2.

engaging in a series of state and federal crimes that comprise a pattern of racketeering activity.\textsuperscript{80}

Although RICO was originally directed at the eradication of Mafia crime families,\textsuperscript{81} the statute has two main benefits for prosecuting gang members. First, the RICO statute allows “prosecutors to cast a wide net in connecting gang members to crimes and in introducing evidence in court.”\textsuperscript{82} Second, it allows prosecutors to target the leaders of gangs, who may not have a hands-on role in the group’s violent activities.\textsuperscript{83}

The use of the statute to target gang members, however, is limited by the difficulty in proving the existence of an organizational structure, even if it is well known in the law enforcement community that such a structure exists.\textsuperscript{84} For example, RICO could not be used against the Bloods and the Crips in Los Angeles because the government was unable to establish a leadership structure or business model.\textsuperscript{85} Also, it is sometimes difficult to discern whether a particular gang member acted as “a common criminal or [as] part of an organized group” when he committed a crime.\textsuperscript{86} Finally, even if RICO could become an effective tool against gangs in the United States, it would likely be unsuccessful in Latin America.\textsuperscript{87} Overall, the most difficult elements to establish in a RICO prosecution involving a gang are (1) that the defendant is part of an enterprise, (2) that the defendant’s conduct was part of a pattern of criminal activity, and (3) that the activity had an effect on interstate commerce.\textsuperscript{88}

Despite its shortcomings, such as the difficulty in establishing that gangs possess leadership structure, prosecutors throughout the United States are using RICO to try and punish gang members.

\textsuperscript{80} Doyle, \textit{supra} note 75, at 2.
\textsuperscript{81} Klein, \textit{supra} note 12.
\textsuperscript{82} Id.
\textsuperscript{83} See id.
\textsuperscript{84} See Levitsky, \textit{supra} note 6, at 233.
\textsuperscript{85} Klein, \textit{supra} note 12.
\textsuperscript{86} See Nagle, \textit{supra} note 6, at 1657.
\textsuperscript{87} See Newman, \textit{supra} note 79, at 246-48 (discussing obstacles to the use of a RICO-like statute in Russia).
\textsuperscript{88} In the Eastern District of Virginia’s 2005 RICO prosecution of Osmín Heriberto Alfaro Fuentes, the government proffered that MS-13 constituted an enterprise within the meaning on 18 U.S.C. § 1959(b)(2) because MS-13 is a “criminal organization” and a “violent gang.” It sought to establish a pattern by discussing the wide range of criminal activities that MS-13 is involved in. Finally, it alleged a connection to interstate commerce by asserting that MS-13 members traveled throughout the United States to attend gang meetings. See Statement of Facts at 1-2, United States v. Reyes, 384 F. Supp. 2d 9261 (E.D.V.A. 2005).
The Ninth Circuit Court of Appeals, in a 1997 decision, approved using RICO against gang members, and even against juvenile gang members.\textsuperscript{89} The use of RICO to target gang members has also spread to other jurisdictions. For instance, in August of 2005, a grand jury in the District of Maryland indicted nineteen members of MS-13, but the indictment did not include charges for individual crimes, such as homicide, kidnapping, or assault.\textsuperscript{90} In September of 2005, the first MS-13 member to be prosecuted under RICO in the Eastern District of Virginia pleaded guilty to murder in aid of racketeering.\textsuperscript{91} Although RICO is not always the preferred act for prosecuting gang members because of the difficulties in proving all five elements when gangs are involved, the law’s severe penalties and its ability to target gangs as a whole, instead of the individual members, makes the statute an attractive option for ambitious prosecutors.

2. Statutory Penalty Enhancements

Another avenue for punishing gang-related crimes more severely than other criminal activity is through statutes providing enhanced penalties for crimes committed in the course of gang activity. Under federal law, such enhancements are available pursuant to 18 U.S.C. § 521.\textsuperscript{92} Section 521 provides that the sentence of an individual convicted of a federal violent or drug-related felony may be

\textsuperscript{89} United States v. Juvenile Male, 118 F.3d 1344, 1351 (9th Cir. 1997). See also Kelly McMurry, Ninth Circuit Extends RICO Law to Gang-Related Activity Involving Kids, TRIAL, Nov. 1997, at 99.


\textsuperscript{92} In United States v. Matthews, the Fifth Circuit held that § 521 did not create a separate offense and was only a sentencing enhancement. 178 F.3d 295, 302 (5th Cir. 1999). Therefore, it disagreed with the defendant’s argument that the elements of § 521 needed to be charged in the indictment and proven beyond a reasonable doubt. While it is still proper to regard this section as creating a sentencing enhancement instead of a substantive offense, the Supreme Court’s decision in Apprendi v. New Jersey now requires that the elements of a sentencing enhancement be charged in the indictment and proven to the jury beyond a reasonable doubt in certain circumstances. 530 U.S. 466 (2004). The essential holding of Apprendi is: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490. Therefore, if the § 521(c) penalty enhancement would cause the defendant’s sentence to exceed the statutory maximum for the substantive crime charged, the government must include an allegation of gang activity in the indictment (or information) and the jury must find beyond a reasonable doubt that the defendant’s crime was committed in the context of gang activity.
increased by up to ten years if the offense is committed under certain gang-related circumstances.\textsuperscript{93} These circumstances include (1) “participat[ion] in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of” narcotics or violent offenses,” and (2) “inten[t] to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang.”\textsuperscript{94}

Statutory penalty enhancements for gang-related activity may be a useful tool because some research indicates that prosecutors prefer to use traditional criminal law statutes, instead of laws or ordinances directed specifically at criminal organizations, to prosecute gang members.\textsuperscript{95} Section 521 and related statutes on the state level, however, have three main limitations.\textsuperscript{96} First, by limiting the enhancement to narcotics offenses and crimes of violence, these statutes do not address the wide range of criminal activities in which gang members participate.\textsuperscript{97} Second, these statutes only target individual gang members who commit individual crimes, instead of targeting the gang as a whole.\textsuperscript{98} Finally, sentencing enhancements are only implicated after a crime has occurred, and therefore do little to prevent gang-related criminal activity.

B. \textit{Mano Dura in El Salvador}\textsuperscript{99}

El Salvador’s response to the surge in violent gang activity has been to enact a series of aggressive anti-gang legislation tantamount to a zero-tolerance approach toward the problem.\textsuperscript{100} The

\begin{itemize}
\item \textsuperscript{93} 18 U.S.C. § 521(b)-(d) (2005).
\item \textsuperscript{94} 18 U.S.C. § 521(d)(1)-(2).
\item \textsuperscript{96} The limitations of this statute are reflected in several bills pending in the House and Senate that seek to amend § 521. Section III of this Note discusses in depth these criticisms and the pending legislation.
\item \textsuperscript{99} For a general summary of El Salvador and Mexico’s response, see Domash, \textit{supra} note 13. For a discussion of anti-gang laws in Honduras, Guatemala, and Panama, see Johnson & Muhlhausen, \textit{supra} note 10, at 11-12.
\end{itemize}
linchpin of this strategy has been the “Mano Dura”¹⁰¹ and “Super Mano Dura”¹⁰² reforms. Mano Dura was introduced by President Flores in 2003 and was superseded by President Saca’s Super Mano Dura in 2004. Based in part upon the authority in these new laws, the Salvadoran police arrested more than 19,275 individuals on gang-related charges from 2003 and 2004.¹⁰³ The Salvadoran government attributes declining murder and kidnapping rates to Mano Dura.¹⁰⁴ This Section will detail some aspects of the Mano Dura and Super Mano Dura legislation, and discuss some of the criticisms that have been levied against this controversial program.

1. Mano Dura Legislation¹⁰⁵

The aim of Mano Dura is to establish a “special regimen” for the prosecution and punishment of gang members.¹⁰⁶ It applies to all gang members over the age of twelve who commit offenses enumerated in the statute.¹⁰⁷ A gang, referred to in Spanish as a “mara” or a “pandilla,” is defined as a group that meets two or more of the following requirements:

a) They gather or meet regularly;
b) They designate unjustifiably exclusive territorial segments in relation to other Maras or Pandillas;
c) They have signs or symbols as a means of identification or recognition with the Mara or Pandilla;
d) They mark the body with tattoos or scars as a means of identification or property of the same.¹⁰⁸

Gangs are further defined as those groups that affect the peace, safety, and security of El Salvador and Salvadoran citizens.¹⁰⁹

Mano Dura creates a variety of substantive offenses. A person who joins or associates with a gang may be sentenced to a term of

¹⁰⁴. Ribando, El Salvador, supra note 18, at 5.
¹⁰⁵. This Note will refer to El Salvador’s anti-gang laws as “Mano Dura,” even though the current legislation is commonly referred to as Super Mano Dura. This Note will only discuss those anti-gang laws that remain in effect.
¹⁰⁶. See Mano Dura, supra note 102, at pmbl. and ch. I, art. 1.
¹⁰⁷. Id. ch. I, art. 2.
¹⁰⁸. Id. ch. I, art. 3.
¹⁰⁹. Id.
imprisonment of three to six years.\textsuperscript{110} A leader of a gang may be sentenced to a maximum term of imprisonment of nine years.\textsuperscript{111} An individual who incites or encourages another to join a gang may be sentenced to a term of imprisonment of three to six years.\textsuperscript{112} If a person recruits someone under the age of fourteen to join a gang, the maximum penalty increases to eight years.\textsuperscript{113} Other crimes specified in the statute include leading a fight against a rival gang,\textsuperscript{114} using intimidation or violence to demand money,\textsuperscript{115} and defacing public or private buildings with graffiti.\textsuperscript{116} A person may be charged with multiple offenses under this statute, but the total term of imprisonment may not exceed twenty years.\textsuperscript{117}

2. Expressions Against Mano Dura

Despite the apparent success of Mano Dura in reducing crime rates in El Salvador, and the unanimous approval the current legislation received when introduced in the Legislative Assembly, this anti-gang program has been widely criticized. While these criticisms are not without merit, a program like Mano Dura—if properly administered—can be a positive addition to an anti-gang program. This Section will address two of those criticisms: first, that Mano Dura violates human rights and civil liberties; and second, that Mano Dura will be unsuccessful because it is a piecemeal approach to combating gangs.

a. Human Rights and Civil Liberties

The United Nations and humanitarian groups argue that Mano Dura’s strict penalties and its application to juveniles violate international human rights standards.\textsuperscript{118} In particular, the United Nations Committee on the Rights of the Child declared El Salvador in breach of the Convention on the Rights of the Child based on the application of Mano Dura to juveniles.\textsuperscript{119} Additionally, critics

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. ch. II, art. 4.
\item \textsuperscript{112} Id. ch. II, art. 5.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. ch. II, art. 6 (punishable by a term of imprisonment of two to four years, or one to two years if the leader is not a member of a gang).
\item \textsuperscript{115} Id. ch.II, art. 8 (punishable by a term of imprisonment of two to four years).
\item \textsuperscript{116} Id. ch.II, art. 10 (punishable by a term of imprisonment of three to six years).
\item \textsuperscript{117} Id. ch.IV, art. 30.
\item \textsuperscript{118} Ribando, \textit{El Salvador}, supra note 18, at 3.
\item \textsuperscript{119} Press Release, Amnesty International, El Salvador: Unconstitutional Law Should Be Repealed and New Approaches To Public Security Considered (June 16, 2004) [herein-
assert that the law constitutes a violation of civil liberties because individuals are often arrested for simply wearing gang tattoos.\footnote{Johnson & Muhlhausen, supra note 10, at 13.}

On April 1, 2004, the Constitutional Division of the Supreme Court of Justice of El Salvador declared the first Mano Dura law to be unconstitutional because “the Act presumed that individuals would engage in criminal activity, based on personal or social circumstances and not on whether they actually committed a crime.”\footnote{Amnesty Press Release, supra note 119. For more information on the Supreme Court of Justice’s decision to declare Mano Dura unconstitutional, see Juan J. Fogelbach, \textit{Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador’s Struggle to Reclaim Social Order}, 7 \textit{San Diego Int’l L.J.} 225, 239-42 (2005).} These criticisms can be addressed in the New Mano Dura by excluding juveniles from the scope of the statutory regime and ensuring that the statute is sufficiently tailored to protect gang members’ individual liberties.\footnote{Both the treatment of juvenile offenders and the protection of individual liberties under the New Mano Dura are discussed below.}

\paragraph{b. Piecemeal Approach to Gangs}

The second major criticism of Mano Dura is that it is reactionary and shortsighted because it focuses on getting gang members off the streets, without addressing the underlying social and economic conditions fueling gang membership.\footnote{See Johnson & Muhlhausen, supra note 10, at 13.} Opponents of Mano Dura who hold this view believe that suppression of gang activity must be combined with intervention and prevention for an anti-gang program to be successful.\footnote{Arana, supra note 29, at 109.}

Additionally, laws like Mano Dura focus on the manifestations of organized crime at the street level instead of emphasizing the syndicate’s all-inclusive and menacing influence on the entirety of society. Such compartmentalization hinders the ability of the affected governments to successfully respond to the problem, because the focal point are \textit{sic} the symptoms and not the root, and the emphasis is on the individual parts and not on the whole.\footnote{Nagle, supra note 6, at 1662.}

The result is that street-level criminals are discovered and punished while potentially more dangerous activity continues unabated beyond the street.\footnote{Id.} Overall, these critics assert that a long-term “holistic” approach to gangs is needed, combining ele-
ments of prevention, intervention, and suppression, rather than a piecemeal strategy like Mano Dura.127

III. THE FUTURE OF FEDERAL ANTI-GANG LEGISLATION IN THE UNITED STATES

Although the current methods of combating transnational gangs have yielded some success in the investigation, prosecution, and punishment of gang-related crimes, Congress needs to enact anti-gang legislation that is both comprehensive in scope and zero-tolerance in approach. Federal legislation is preferable to state legislation in this arena because statutes targeting transnational gangs will inevitably address issues of national security, an area in which Congress has considerable expertise relative to state legislatures. Furthermore, as one proponent of additional federal legislation notes, “Federal law enforcement agencies and Federal law are extremely useful when it comes to long-term, multi-jurisdictional investigations and prosecutions. They have the resources and technical capabilities many local agencies do not have or need only on rare occasions.”128 Moreover, the federal government is best suited to coordinate operations among state and local jurisdictions, as well as between the United States and foreign governments.129

This Section will begin by discussing the various permutations of anti-gang legislation pending before the 109th Congress. While none of these bills are an ideal response to the problem of investigating and prosecuting transnational gangs, they contain many provisions that are necessary in any comprehensive anti-gang regime like the proposed New Mano Dura. This Section will then explain what additional elements need to be added to the pending legislation to provide law enforcement agencies and prosecutors with the tools they need to effectively target and punish gangs. In identifying these elements, El Salvador’s Mano Dura law and California’s Street Terrorism Enforcement and Prevention (STEP) Act

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127. Gangs and Crime in Latin America: Hearing Before the H. Subcomm. on the W. Hemisphere, 109th Cong. 14 (2005) (statement of Adolfo A. Franco, Assistant Administrator, Bureau for Latin America and the Caribbean, U.S. Agency for International Development). The United States already has some aspects of a “holistic” approach in place, such as job training programs, Boys and Girls Clubs, and local initiatives like Boston’s Operation Ceasefire, which combine law enforcement strategies with the efforts of community leaders and social service providers. See Johnson & Muhlhausen, supra note 10, at 13.

128. Logli Statement, supra note 1, at 22.

provide useful models for establishing a policy of zero-tolerance towards transnational gangs. Finally, in recognition that a hard-line approach to gangs is not without controversy, this Section will also address potential constitutional challenges to any proposed U.S. version of Mano Dura.

A. Pending Legislation

Three current pieces of legislation provide a starting point for crafting federal anti-gang legislation: (1) the Gang Deterrence and Community Protection Act (GDCPA), which was passed by the House and sent to the Senate in May of 2005;\(^{130}\) (2) the Gang Prevention and Effective Deterrence Act (GPEDA), introduced in the Senate in January of 2005 and the House in February of 2005;\(^{131}\) and (3) the ANTI-GANG Act, which was introduced in the Senate in June of 2005.\(^{132}\) Using these proposals as a guide, there are three elements that must be part of a comprehensive approach to transnational gangs: (a) prosecuting specific offenses committed in furtherance of gang activity, (b) establishing programs to promote intelligence sharing and cooperation between jurisdictions, and (c) including special provisions addressing juvenile offenders.

1. Prosecuting Gang-Related Crimes

Building upon the sentence enhancements provided in § 521, the comprehensive anti-gang legislation envisioned in this Note must include heightened penalties for individuals who commit crimes in furtherance of gang activity or encourage others to commit crimes in furtherance of such activity. GPEDA would amend § 521 to make the following a crime:

(1) to commit, or conspire or attempt to commit a predicate crime—

(A) in furtherance or in aid of the activities of a criminal street gang;

(B) for the purpose of gaining entrance to or maintaining or increasing position in such a gang; or

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(C) for the direct or indirect benefit of the criminal street
gang, or in association with the criminal street gang; or
(2) to employ, use, command, counsel, persuade, induce,
entice, or coerce any individual to commit, cause to commit, or
facilitate the commission of, a predicate gang crime—
(A) in furtherance or in aid of the activities of a criminal
street gang;
(B) for the purpose of gaining entrance to or maintaining or
increasing position in such a gang; or
(C) for the direct or indirect benefit or the criminal street
gang, or in association with the criminal street gang.\textsuperscript{133}

Unlike the current version of § 521, whose sentencing enhance-
ments may only be predicated upon a federal felony narcotics
offense or crime of violence, the revised version contemplated in
GPEDA sets forth a list of thirty-one possible predicate offenses.\textsuperscript{134}

\begin{enumerate}
\item[(A)] any act, threat, conspiracy, or attempted act, which is chargeable under
Federal or State law and punishable by imprisonment for more than 1 year involving—
\begin{enumerate}
\item murder;
\item manslaughter;
\item maiming;
\item assault with a dangerous weapon;
\item assault resulting in serious bodily injury;
\item gambling;
\item kidnapping;
\item robbery;
\item extortion;
\item arson;
\item obstruction of justice;
\item tampering with or retaliating against a witness, victim, or informant;
\item burglary;
\item sexual assault . . . ;
\item carjacking; or
\item manufacturing, importing, distributing, possessing with intent to dis-
tribute, or otherwise dealing in a controlled substance or listed chemicals . . . ;
\end{enumerate}
\item[(B)] any act punishable by imprisonment for more than one year under—
\begin{enumerate}
\item section 844 (relating to explosive materials);
\item section 922(g)(1) (where the underlying conviction is a violent felony
. . . );
\item subsection (a)(2), (b), (c), (g), or (h) of section 924 (relating to receipt,
possession and transfer of firearms);
\item sections 1028 and 1029 (relating to fraud and related activity in con-
nection with identification documents or access devices);
\item section 1503 (relating to obstruction of justice);
\item section 1510 (relating to obstruction of criminal investigations);
\item section 1512 (relating to tampering with a witness, victim, or inform-
ant), or section 1513 (relating to retaliations against a witness, victim, or inform-
ant);
\item section 1708 (relating to theft of stolen mail matter);
\item section 1951 (relating to interference with commerce, robbery or
extortion);
\item section 1952 (relating to racketeering);
\item section 1956 (relating to the laundering of money instruments);
\end{enumerate}
\end{enumerate}
This expansion recognizes the wide range of crimes in which gang members engage and allows violations of state law to implicate the enhanced sentence.\textsuperscript{135} These amendments, thereby, add a large measure of flexibility to § 521. Finally, the pending legislation seeks to strengthen the section by imposing mandatory minimum sentencing for engaging in gang-related crime. GDCPA sets up the following sentencing scheme:

Whoever commits, or conspires, threatens or attempts to commit, a gang crime for the purpose of furthering the activities of a criminal street gang, or gaining entrance to or maintaining or increasing position in such a gang, shall . . .

(1) if the gang crime results in the death of any person, be sentenced to death or life in prison;
(2) if the gang crime is kidnapping, aggravated sexual abuse, or maiming, be imprisoned for life or any term of years not less than 30;
(3) if the gang crime is assault resulting in serious bodily injury . . . be imprisoned for life or any term of years not less than 20; and
(4) in any other case, be imprisoned for life or for any term of years not less than 10.\textsuperscript{136}

The mandatory minima will ensure that gang crimes are punished harshly and uniformly, deter gang violence, and provide arrested gang members an incentive to cooperate in subsequent prosecutions of other gang members.\textsuperscript{137} Overall, a statute directed at severely punishing crimes committed in furtherance of gang activity is a necessary element of a comprehensive anti-gang regime.

2. Intelligence Sharing and Interagency Cooperation

In addition to legislative strategies aimed at helping prosecutors pursue gang members, an anti-gang program needs to include

\textsuperscript{136} H.R. 1279 § 101(a).
measures aimed at helping investigators root out gang crime in the first place. Because transnational gangs like MS-13 are prevalent throughout the United States and Latin America, it is necessary to establish a national, and even international, infrastructure for conducting investigations and sharing intelligence. Federal programs like the MS-13 National Gang Task Force need to be combined with funding for state and local initiatives because state and local governments are often best suited to understand the unique gang-related problems occurring within their borders.

GDCPA addresses these concerns by providing for “criminal street gang enforcement teams, consisting of Federal, State, and local law enforcement authorities, for the coordinated investigation, disruption, apprehension, and prosecution of criminal street gangs and offenders in each high-intensity interstate gang activity area.”\textsuperscript{138} Finally, the Act would authorize grants to state and local agencies to combat gang crime as well as protect witnesses and victims of crime.\textsuperscript{139} At present, there is insufficient cooperation among states and municipalities in the fight against transnational gangs, but a New Mano Dura that includes coordinated gang task forces could help promote collaboration among these entities.\textsuperscript{140}

3. Treatment of Juvenile Offenders

A third necessary element of a comprehensive anti-gang package is a set of provisions that concern the treatment of juveniles who commit gang crimes. Under El Salvador’s Mano Dura, individuals as young as twelve may be charged with violating the law’s provisions.\textsuperscript{141} The problematic nature of treating juveniles the same as adults under all circumstances is easy to appreciate, especially in the U.S. federal court system, which has no juvenile courts or juvenile detention facilities and therefore is not responsive to the needs of young offenders.\textsuperscript{142}

GDCPA gives the Attorney General of the United States the discretion to prosecute a juvenile as an adult if the juvenile commits a

\textsuperscript{138} H.R. 1279 § 201(b).

\textsuperscript{139} H.R. 1279 § 202.

\textsuperscript{140} Andrew E. Goldsmith, \textit{Criminal Gang Abatement Act}, 39 Harv. J. on Legis. 503, 513-14 (2002). According to Goldsmith, only forty-nine percent of jurisdictions, two-thirds of which are large cities, reported using a collaborative “task-force” method to fight gangs. \textit{Id.} at 514.

\textsuperscript{141} Mano Dura, \textit{supra} note 102, ch. 1, art. 2.

\textsuperscript{142} \textit{Gang Deterrence and Community Protection Act of 2005: Hearing on H.R. 1279 Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec., 109th Cong. 28-29 (2005) (statement of Robert E. Shepherd, Jr., Emeritus Professor of Law, University of Richmond School of Law)} [hereinafter Shepherd Statement].
crime of violence or other certain specified crimes after his sixteenth birthday. The Act further provides that the Attorney General’s “decision whether or not to prosecute a juvenile as an adult . . . is not subject to judicial review in any court.” GPEDA provides a list of factors to be considered when evaluating whether trying a juvenile gang member as an adult would be in the interests of justice. The factors include the nature of the offense and the extent of the juvenile’s prior delinquency record. This type of analysis is useful because it allows juveniles who have acted like adults in the commission of their crimes to be treated as adults. The Act also provides necessary flexibility since not all youthful offenders will be subject to the harshness of the adult criminal justice system. It would, therefore, be prudent for the New Mano Dura to construct a rebuttable presumption in favor of juveniles being tried in state court, and to allow district court judges to use these factors when determining if the juvenile should remain in federal court or be transferred to state court. Additionally, because of the serious implications of the decision to try a juvenile as an adult in federal court, the legislation should provide for immediate judicial review of that determination.

143. H.R. 1279 § 115(3).
144. Id. GPEDA has a similar provision. S. 155 § 301(a).
145. See S. 155 § 301(a).
146. See S. 155 § 301(a). The complete list of factors is as follows:
   (i) The age and social background of the juvenile.
   (ii) The nature of the alleged offense, including the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities.
   (iii) Whether prosecution of the juvenile as an adult would protect public safety.
   (iv) The extent and nature of the juvenile’s prior delinquency record.
   (v) The juvenile’s present intellectual development and psychological maturity.
   (vi) The nature of past treatment efforts and the juvenile’s response to such efforts.
   (vii) The availability of programs designed to treat the juvenile’s behavioral problems.

Id.

147. Shepherd Statement, supra note 142, at 28. Shepherd discusses studies “showing that youth transferred to adult court and tried as adults had higher recidivism rates, they re-offended sooner after release from adult institutions, and their repeat offenses were more serious that similar youth retained in juvenile court for the same offenses in the same or comparable jurisdictions.” Id. Shepherd further asserts that juveniles in adult correctional facilities are at greater risk for sexual and physical assault, are more likely to commit suicide, and that minority youths are more likely to be treated as adults than white youths charged with the same offense. Id.
B. *Proposed Legislation—The United States and the New Mano Dura*

MS-13 and other transnational gangs have a policy of zero-tolerance towards those who seek to interfere with their operations, and the United States must therefore adopt its own zero-tolerance policies to combat these gangs. In addition to the proposals detailed above, the comprehensive anti-gang regime must also include additional elements to demonstrate the U.S. commitment to fighting gangs and to send a message to both prospective and current gang members that their attacks on domestic and international security will not be tolerated. As the Salvadoran government did when it enacted the Mano Dura reforms, the United States should therefore create two new substantive offenses by making it a crime to actively participate in a transnational gang and criminalizing the recruitment of new gang members. The creation of these offenses, along with other provisions designed to aid their implementation, would allow prosecutors to pursue gang members before they commit other violent and dangerous crimes by making membership itself criminal. El Salvador’s Mano Dura and California’s STEP Act are useful models for this new legislation, which would constitute a New Mano Dura for the United States.

The first task in the creation of these new substantive offenses is to define their scope. California’s STEP Act defines a “criminal street gang” as follows:

> any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [elsewhere in the statute] . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

This definition is useful for gang statutes that target local gang activities, but is inadequate for inclusion in a statutory regime that seeks to target transnational gangs. Accordingly, the New Mano Dura must define transnational gangs based not only on the elements of the STEP definition, but also based on the connection of the gang to foreign commerce, because that is what sets transnational gangs like Mano Dura apart from other street gangs. This definition would ensure that the legislation only criminalizes activities associated with those gangs that pose the greatest risk to national and international security. Because MS-13 cliques in the

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United States maintain ties with groups in El Salvador and elsewhere for the purpose of accomplishing criminal transactions, a statute that defines gangs in terms of their link to foreign commerce would sufficiently encompass MS-13 and other similar transnational gangs.

With the scope of the New Mano Dura in mind, it is now possible to set forth three main provisions that should be included in any comprehensive regime that targets transnational gangs. The first is a provision that prohibits active membership in a transnational gang. As noted above, El Salvador’s Mano Dura makes it a crime to join or associate with a gang, and provides a penalty enhancement for leading a gang. STEP, on the other hand, provides that “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang,” is criminally liable.

STEP does not provide an enhancement for gang leadership, but does include other types of sentencing enhancements similar to those found in the current and proposed versions of § 521. STEP’s definition of this substantive offense is preferable to that of El Salvador’s Mano Dura because the former’s requirements of active participation and knowledge of gang activities avoids some of the vagueness and overbreadth challenges to which anti-gang statutes are susceptible. Yet, the enhancement for holding a leadership role in a gang included in Mano Dura is absent from STEP. The failure to differentiate between mere gang membership and gang leadership has the effect of treating vastly different conduct in the same way. Building on these two statutory schemes, the New Mano Dura that the United States should adopt must include a substantive offense for active participation in a transnational gang—with knowledge of that gang’s activities—and an enhanced penalty for an individual who holds a leadership role in a gang.

The second necessary provision is one that prohibits recruiting new members to join a transnational gang. Recruitment needs to be treated as a substantive offense because bringing new members into the gang actively contributes to the continuity of these organi-
zations. Additionally, recruitment is a dangerous activity because of the “jumping in” process by which new members are initiated into a gang.154 El Salvador’s Mano Dura law makes it a crime to initiate or encourage another person to join a gang, and increases the maximum penalty by two years if the recruited individual is under age fourteen.155 California’s STEP statute makes it a crime to

solicit or recruit another to actively participate in a criminal street gang . . . with the intent that the person solicited or recruited participate in a pattern of criminal street gang activity . . . or with the intent that the person solicited or recruited promote, further, or assist in any felonious conduct by members of the criminal street gang. . . .156

Again, the STEP definition of recruitment is preferable to that contained in the Mano Dura statute because it includes an intent requirement. The New Mano Dura should therefore create a substantive offense under which it would be a crime to recruit another person to become an active member in a transnational gang with the intent that the recruited individual participate in or further gang activities.

Finally, anti-gang legislation needs to include other provisions to assist prosecutors in trying cases under the new substantive offenses. Because gang membership is an element of one offense and a sentencing factor in others, the New Mano Dura needs to ensure the admissibility of evidence of the defendant’s gang membership. At present, some jurisdictions are reluctant to admit testimony about an individual’s membership in a gang because of the potentially prejudicial value of such testimony, while other jurisdictions will admit such evidence if it is relevant to an issue in the case.157 Evidence of gang membership goes directly to proving the charged offense, and therefore is no more prejudicial than other testimony that the defendant engaged in acts constituting a crime. Additionally, because transnational gangs are complex entities with which the public is generally unfamiliar,158 the New Mano Dura needs to ensure the admissibility of expert witness testimony to

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155. Mano Dura, supra note 102, ch. II, art. 5.
158. Strosnider, supra note 95, at 108.
explain the operation of gangs and their leadership structure.\textsuperscript{159} This type of testimony, which could be provided by law enforcement agents familiar with the particular gang and its operations,\textsuperscript{160} is critical in educating judges and juries hearing gang-related cases.

C. \textit{Constitutional Analysis of the New Mano Dura}

Current anti-gang statutes have been attacked on a variety of constitutional grounds and it is likely that the provisions of the New Mano Dura would be met with similar challenges. While the possibility that legislation might offend the Constitution must be taken seriously, this Section of the Note seeks to explain why two potential challenges—one based on the guarantee of substantive due process and one based on the guarantee of equal protection of the laws—will not prove fatal to the proposed statutory regime.\textsuperscript{161}

\begin{itemize}
\item[159.] Such a provision could be modeled after Alaska’s Code of Criminal procedure, which provides:
\begin{itemize}
\item In a criminal prosecution, expert testimony is admissible to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case,
\item (1) common characteristics of persons who are members of the criminal street gang or criminal street gangs;
\item (2) rivalries between specific criminal street gangs;
\item (3) common practices and operations of the criminal street gang or criminal street gangs and the members of those gangs;
\item (4) social customs and behaviors of members of the criminal street gang or criminal street gangs;
\item (5) terminology used by members of the criminal street gang or criminal street gangs;
\item (6) codes of conduct of the particular criminal street gang or criminal street gangs; and
\item (7) the types of crimes that are likely to be committed by the particular criminal street gang.
\end{itemize}
\end{itemize}
\textit{Alaska Stat.} § 12.45.037 (2005).

\begin{itemize}
\item[160.] In the realm of narcotics prosecutions, law enforcement agents are often allowed to give expert testimony on aspects of the narcotics trade, such as coded language used by drug dealers, with which a jury or judge might not be familiar. For example, one court has held that juries need the specialized knowledge of experts to understand wiretap tapes in narcotics cases because jurors “need help in deciphering the jargon of those engaged in the drug trade.” United States v. Walls, 70 F.3d 1323, 1326 (D.C. Cir. 1995). This line of reasoning also supports use of expert testimony in gang cases.
\end{itemize}

\begin{itemize}
\item[161.] The possibility that a ban on gang membership will violate the guarantee of free association embodied in the First Amendment is the most obvious grounds for challenging the New Mano Dura. Because previous authors have analyzed and rejected potential First Amendment challenges to California’s STEP law, and because the same pattern of First Amendment analysis that applies to STEP would apply to the New Mano Dura, the connection between freedom of association and the criminalization of transnational gangs is not addressed in this Note. For this First Amendment analysis, see Raffy Astvasadoorian, \textit{Note, California’s Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions}, 19 J. Juv. L. 272 (1998). Additionally, this Note will not address challenges based on overbreadth or vagueness because such challenges have also been addressed in other scholarly works. For an example of this analysis,
1. Substantive Due Process

The first possible challenge that an opponent of the New Mano Dura may assert is that the criminalization of gang activity deprives current and future gang members of their right to join a gang, and therefore that the statutes violate their right of substantive due process. This right is rooted in the Due Process Clause of the Fifth Amendment, which provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”

The Supreme Court has recognized that the Due Process Clause limits the power of the federal government to regulate human behavior with respect to certain fundamental rights, such as child-rearing, abortion, and marriage. When fundamental rights are involved, a strict scrutiny test is applied to the statute, and the law will only survive if the government can show a compelling interest in regulating the conduct and that the statute is necessary to achieve that interest. When non-fundamental rights are involved, however, a rational basis test is applied to the statute, and the law will survive as long as the government can show that it is “rationally related to [a] legitimate government interest.”

In evaluating the New Mano Dura under a substantive due process rubric, the first step is to determine whether membership in a gang is a fundamental right. The Supreme Court has employed various standards in this analysis, including whether the right is “implicit in the concept of ordered liberty,” whether the right is “deeply rooted in this Nation’s history and tradition,” and whether the nature of the right is such that it implicates intimate or personal decisions. While decisions about how to earn a living or how to spend one’s leisure time—both of which are implicated by the decision to join a gang—might be considered
fundamental under these analyses, gang membership cannot be a fundamental right because it is not innocent conduct.

This conclusion is supported by two cases, City of Chicago v. Morales171 and Doe v. City of Lafayette,172 both of which focus on the significance of “innocent” activity in the substantive due process analysis. In Morales, the Court struck down Chicago’s Gang Congregation Ordinance, which targeted the city’s street gangs, on grounds of vagueness.173 Although the case was not decided on due process grounds, Justice Stevens stated in dicta that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause.”174

In Doe the Seventh Circuit Court of Appeals held that a convicted sex offender’s substantive due process rights were not violated when the city banned him from a public park.175 The court of appeals engaged in a fundamental rights analysis and concluded that the right to enter a public park for personal enjoyment lacks historical support.176 Even assuming, arguendo, that use of public parks is a fundamental right, the court stated that the city was justified in banning Mr. Doe because of the harm that a sex offender poses to children playing in those areas.177

Taken together, these two cases support the proposition that because gang activity is not innocent, curtailment of gain membership does not offend the Due Process Clause. Those provisions of the New Mano Dura that seek to criminalize gang membership would be judged by the rational basis standard of review, and upheld because they are at least rationally related to the State’s legitimate interest in preventing crime.

2. Equal Protection

The second potential challenge to the New Mano Dura is that its focus on transnational gang activity deprives members of the target organizations of the equal protection of the laws because they are treated differently than members of ordinary street gangs, or because MS-13, which is the target of the statute, is comprised primarily of Latino individuals. The Equal Protection Clause of the
Fourteenth Amendment, which is made applicable to the federal
government through the Due Process Clause of the Fifth Amend-
ment, restricts the federal government’s ability to classify individu-
als based on certain characteristics.\textsuperscript{178} Suspect classifications, such
as race, are subject to strict scrutiny, and the government has the
burden of proving that the law is narrowly tailored to serve a com-
pelling government objective.\textsuperscript{179} Non-suspect classifications are
judged under a rational basis review; the law is presumed to be
constitutional, and the challenger bears the burden of demonstrating
that the law is irrational and arbitrary.\textsuperscript{180} Whether a classifica-
tion is suspect is determined by reference to a variety of factors,
including whether the groups is a discrete or insular minority that
has been excluded from participation in the political processes,\textsuperscript{181}
or whether the group has suffered a history of discrimination.\textsuperscript{182}

Members of transnational gangs, however, do not fit the defini-
tion of a suspect class. Consequently, the applicability of the New
Mano Dura to transnational gangs would be judged under a
rational basis review. The distinction in the New Mano Dura
between members of transnational gangs, like MS-13, and other
gangs or criminal organizations is justified based on the unique
dangers posed by the former. The law could not, therefore, be
considered to be either irrational or arbitrary. Furthermore, the
Supreme Court has stated that, in cases that warrant rational-basis
review, the government is permitted to take a step-by-step, rather
than a comprehensive, approach to a problem.\textsuperscript{183} Congress would,
therefore, be justified in implementing the New Mano Dura to
curb transnational gangs, even though such legislation would not
address the full scope of the gang problem in the United States.

Challengers of the New Mano Dura could also point to the dis-
proportionate impact the statute would have on Latinos because
MS-13 is primarily comprised of members of that ethic group. Stat-
utes that discriminate on the bases of race or ethnicity are ordina-
rily subject to strict scrutiny,\textsuperscript{184} but the Supreme Court has held that “a law, neutral on its face and serving ends otherwise within
the power of government to pursue, is not invalid under the Equal

\textsuperscript{178} Bolling v. Sharpe, 347 U.S. 497 (1954); see United States v. Carolene Prods. Co.,
304 U.S. 144, 152 n.4 (1938).
\textsuperscript{181} Carolene Prods., Co., 304 U.S. at 152 n.4 (1938).
\textsuperscript{182} See Bakke, 438 U.S. at 295.
\textsuperscript{184} Bakke, 438 U.S. at 290.
Protection Clause simply because it may affect a greater proportion of one race than of another.” 185  Unless the challengers could establish that Congress enacted the legislation with a discriminatory purpose, rational basis review would apply, and the statute would be upheld for the reasons mentioned above. The only way in which the statute would fail on equal protection grounds is if the challengers could demonstrate that the law was arbitrarily enforced by law enforcement against Latino gang members. 186

IV. CONCLUSION

The National Gang Youth Center, in its “Comprehensive Gang Model,” identified “five strategies” that need to be included in an effective anti-gang regime: “mobilization” of communities, “provision of opportunities” such as jobs and education, “social intervention” and outreach to at-risk youth, reformation of ways organizations utilize resources to combat gangs, and “suppression” of gangs through “formal and informal” means. 187  A legal policy of suppression like the New Mano Dura needs, therefore, to be part of a larger, holistic approach that addresses the underlying social and economic conditions, such as the correlation between unemployment and criminality, which contribute to the growth of gangs. 188  Because it is futile to address the effects of gangs without addressing their causes, short term law enforcement approaches such as arrests and deportations need to be combined with long term, private-sector efforts aimed at the factors that cause gangs to flourish. 189

This holistic approach to gangs needs to include a federal legislative policy of zero-tolerance towards transnational gangs because organizations like MS-13 “undermine legal authority and weaken international security.” 190  The United States needs to employ strategies that not only investigate and punish gang members after they have committed violent and dangerous crimes, but also strategies that seek to stop gang members before they have an opportunity to commit crimes. This legislative regime, which would comprise a New Mano Dura for the United States, would likely be met with

186. See Strosnider, supra note 95, at 120.
188. Goldsmith, supra note 140, at 518-19.
190. Levitsky, supra note 6, at 232.
constitutional challenges, but a well-tailored set of statutes, enforced by professional and competent law enforcement agencies, is capable of surviving constitutional scrutiny.