NOTES

JAIL, JAIL, THE GANG'S ALL HERE: SENATE CRIME BILL SECTION 521, THE CRIMINAL STREET GANG PROVISION

Urban street gangs continue to plague major cities.[1] Although they are not new to this country, over the past two decades the general public has increasingly viewed gangs as a significant threat to the peace.[2] Officials in California estimate that from 1980 to 1989, the number of gang members in Los Angeles County increased from 30,000 to 70,000, and the number of gang-related murders doubled from 279 to 570 per year.[3] Gangs are also said to have expanded geographically, spreading from large cities into smaller cities and suburbs.[4] Some commentators suggest the reported increases are a result of changes in record-keeping, and others note that not every area has reported increased activity.[5] Virtually every state in the country, however, now experiences some level of gang violence in its largest cities.[6] Police have employed a variety of methods to combat gangs, but have struggled in attempting to quell the problem.[7]

In reaction, Congress has expressed predictable concern. Assessing the impact of street gang violence, U.S. Senator Arlen Specter (R-Pa.) said in 1990:

> Not since the 1920's has such widespread violence plagued our city streets. This lawlessness revolves around the illegal

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[1] 137 CONG. REC. S8333 (daily ed. June 20, 1991) (statement of Sen. Specter); N. Denise Burke, *Restricting Gang Clothing in the Public Schools*, Apr. 1993, *available in* WESTLAW, 80 WELR 513, at *1.

[2] Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 740–41 (1990).

[3] *Id.*

[4] Burke, *supra* note 1, at *1; Tom Zucco, *Teen Gangs—A Growing Problem in Tampa Bay*, ST. PETERSBURG TIMES, July 14, 1993, at 1D.

[5] Burrell, *supra* note 2, at 741 n.8.

[6] *Id.* at 740; Burke, *supra* note 1, at *1.

[7] Burrell, *supra* note 2, at 741–45.

> drug trade, and increasingly involves our nation's young people . . . . [U]nless we take immediate and vigorous action, we run the risk of fostering a permanent underclass living outside the common values of our society.[8]

In 1994 Congress passed the Omnibus Crime Bill, later signed into law by President Clinton. Among the provisions is 18 U.S.C.A. § 521.[9] Section 521 lengthens the sentences of any street gang member who

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[8] 137 CONG. REC. S8333 (daily ed. June 20, 1991) (statement of Sen. Specter).

[9] 18 U.S.C.A § 521 (West Supp. 1995) provides:

(a) Definitions.—

"conviction" includes a finding, under State or Federal law, that a person has committed an act of juvenile delinquency involving a violent or controlled substances felony.

"criminal street gang" means an ongoing group, club, organization, or association of 5 or more persons—

(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);

(B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and

(C) the activities of which affect interstate or foreign commerce.

(b) Penalty.—The sentence of a person convicted of an offense described in subsection (c) shall be increased by up to 10 years if the offense is committed under the circumstances described in subsection (d).

(c) Offenses.—The offenses described in this section are—

(1) a Federal felony involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years;

(2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another; and

(3) a conspiracy to commit an offense described in paragraph (1) or (2).

(d) Circumstances.—The circumstances described in this section are that the offense described in subsection (c) was committed by a person who—

(1) participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses described in subsection (c);

(2) intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang; and

(3) has been convicted within the past 5 years for

(A) an offense described in subsection (c);

(B) a State offense—

(i) involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years' imprisonment; or

(ii) that is a felony crime of violence that has as an element the use or attempted use of physical force against the person of another;

(C) any Federal or State felony offense that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense; or

(D) a conspiracy to commit an offense described in subparagraph (A), (B), or (C).

is both convicted of committing certain enumerated felonies and who has a prior conviction for one of the enumerated crimes in the preceding five years.[10]

In order to enhance a felon's sentence, the Government must demonstrate two key facts.[11] First, the Government must establish that the individual participated in the gang with the knowledge that its members engage in felonious activity.[12] Second, the Government must show that one of the primary purposes of the gang is to commit felonious crimes.[13] These two requirements were added in conference committee to the bill, S. 1607, § 603 ("section 603"), that was originally passed by the Senate.[14] Section 603 in essence required only that the individual have been convicted of certain felonies in the past five years and that he commit the prosecuted crime "as a member" of a criminal street gang.[15] The narrowing of section 603 came on the heels of criticism that this original section, by casting too wide a net, penalized benign association.[16]

Section 521, the current section, very likely survives constitutional scrutiny. The only association that it criminalizes is association with the specific intent to engage in further criminal activity.[17] California courts have upheld a very similar state statute.[18] Section 603, however, would have been a stronger club in the hands of federal prosecutors because it contained fewer required elements.[19] Congress, though, opted for a narrower provision, perhaps concerned about the viability of its approach in light of constitutional protection of freedom of association.[20]

The United States Supreme Court has recognized two distinct forms of freedom of association: expressive and intimate.[21] The Su-

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[15] *Id.*

[16] Paul Craig Roberts, *So You Say You're Not a Gang Member? Read on*, BUS. WK., Feb. 21, 1994, at 22 (describing similar congressional proposal).

[17] 18 U.S.C.A. § 521(d)(2).

[18] *In re* Alberto R., 1 Cal. Rptr. 2d 348, 357 (Cal. Ct. App. 1991); People v. Gamez, 286 Cal. Rptr. 894, 902 (Cal. Ct. App. 1991).

[19] *See* S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[20] *See* 18 U.S.C.A. § 521.

[21] Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984). For a discussion of *Roberts* and the freedoms of intimate and expressive association, see Lois M. McKenna, *Freedom of Association or Gender Discrimination?* New York State Club Association v. City of New York, 38 AM. U. L. REV. 1061 (1989); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990/91).

preme Court read freedom of expressive association into the First Amendment to enable citizens to exercise effectively their right to free speech.[22] The Court considers expressive association a penumbral right under the broad protection of speech, rather than an absolute right.[23] Thus, when an individual joins an organization engaged in illegal activity, his association with that organization receives partial First Amendment protection.[24] Membership in that organization could be grounds for criminal liability, but only if the individual intends to further the organization's illegal goals.[25]

Traditionally, the Supreme Court has recognized what it now labels as freedom of intimate association either in the Due Process Clause of the Fourteenth Amendment, or as a penumbral right under the Bill of Rights.[26] The Court has generally limited this right to the context of family relations, striking down legislation that unduly interferes with those relations.[27] For example, the Supreme Court invalidated a statute requiring children to attend public schools,[28] an ordinance preventing grandparents from living with their families in certain residential housing,[29] and a statute requiring individuals owing child support to seek the approval of the state before remarrying.[30]

In 1983, the Supreme Court suggested that the freedom of intimate association may extend to non-familial organizations.[31] Since then, however, the Court has considered but declined to provide this protection to a number of private organizations.[32] The Court has found the organizations it has analyzed too impersonal to receive protection as intimate family organizations.[33]

This Note offers a framework for analyzing the constitutionality of section 603. Part I briefly examines the dynamics of street gangs and

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[22] Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) (summarizing the Court's development of the freedom of association as a peripheral right under the First Amendment earlier in the century).

[23] *Id.* The right is penumbral in that it exists to facilitate protection of another constitutional right as opposed to being an independently protected right under the Constitution. *Id.*

[24] *See* Healy v. James, 408 U.S. 169, 194 (1970).

[25] *Id.* at 186.

[26] *See* Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (collecting cases); *Griswold*, 381 U.S. at 482–83.

[27] *See, e.g.*, *Moore*, 431 U.S. at 499; Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding families have right to educate their children privately).

[28] *Pierce*, 268 U.S. at 534–35.

[29] *Moore*, 431 U.S. at 506.

[30] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[31] Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

[32] *See, e.g.*, New York State Club Ass'n v. New York City, 487 U.S. 1, 12 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

[33] *See, e.g.*, *New York State Club Ass'n*, 487 U.S. at 12; *Rotary*, 481 U.S. at 546.

the reasons why individuals join them.[34] Part II explains how section 603 attempted to curb gang violence, and distinguishes section 603 from the current section 521.[35] Part III outlines the development of the freedoms of intimate and expressive association.[36]

In Part IV, this Note argues that section 603's implied criminal intent requirement likely rendered it constitutional under traditional freedom of expressive association analysis.[37] Given the close, family-like relationships within street gangs, section 603 would also have merited scrutiny under the freedom of intimate association.[38] This Note argues that the Supreme Court would have upheld section 603 under this line of cases as well.[39]

The viability of section 603 is of more than academic interest. The strong likelihood that section 603 ultimately would have survived scrutiny calls into question the merits of the additional requirements in section 521, the current law. This Note concludes that although section 521's express intent requirement was a sensible addition, its primary purpose requirement places an unnecessary burden upon the prosecution.[40]

I. THE ATTRACTION OF STREET GANGS

Experts on street gangs argue that gangs attract youth primarily for social reasons.[41] These experts discount the desire for protection as a motive for joining gangs.[42] Although some gang members come from strong families, for many the gang serves as a surrogate family.[43] Street gangs often satisfy "the need for belonging" and provide desperately-sought status for young men and boys.[44] Police who work with gangs support this assessment.[45] They note that the search for identity can be seen in the numerous identifying features of gangs: their clothes,

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[34] *See infra* notes 41–53 and accompanying text.

[35] *See infra* notes 54–61 and accompanying text.

[36] *See infra* notes 62–193 and accompanying text.

[37] *See infra* notes 194–211 and accompanying text.

[38] *See infra* notes 212–41 and accompanying text.

[39] *See infra* notes 212–41 and accompanying text.

[40] *See infra* notes 242–46 and accompanying text.

[41] Zucco, *supra* note 4, at 1D.

[42] *Id.* (quoting George Knox, professor and director of the Gang Crime Research Center at Chicago State University).

[43] *Id.*

[44] *Id.*

[45] V. Dion Hayes and Joseph Kirby, *Family Ties Often Are No Match for the Bonds of a Gang*, CHI. TRIB., Mar. 30, 1992, at 1. "You can't ignore the fact that kids need to belong to something or someone. They are looking for a link with something. . . . In many ways, street gangs emphasize the same values as any other youth group—fidelity, friendship and discipline. And gangs fulfill a teenager's innate desire for acceptance . . . ." *Id.* (quoting a police officer).

their colors, and their hand signals.[46] Finally, the California Attorney General's Youth Gang Task Force confirms that for a majority of gang members, the gang functions as an extension of the family and provides companionship that would otherwise be missing.[47]

Significantly, gangs possess many of the dynamics that the Supreme Court has suggested would allow a private organization to claim protection under the freedom of intimate association.[48] Street gangs are often very difficult to join.[49] Many gangs require their members to participate in certain rituals, albeit rituals that often require the individual to withstand considerable pain.[50] For example, some gangs require a potential member to remain standing for a period of time as gang members strike the individual.[51] An important part of being a gang member also involves emphasizing the gang's separateness through reinforcing the coherence of the organization.[52] Although street gangs often achieve this goal through intimidating non-members, pride in being a member arguably motivates such activity more than a desire to threaten others.[53]

II. The Congressional Response

Section 603 would have sought, and section 521 seeks, to punish gang membership by adding ten years to the sentence of any gang member convicted of another crime.[54] Under both sections, the additional penalty only applies to individuals acting as gang members when committing the other crime.[55] Section 603 defined "criminal street gang" as any group, club, organization, or association of five or more people who, within the past five years, engaged in a continuing series of offenses including federal felonies involving violence or controlled substances, or any state offense involving controlled substances or violence punishable by more than one year in prison.[56] Under the provision, an individual could have been sentenced to an additional ten years if he: (1) committed or conspired to commit a federal felony involving controlled substances or violence; (2) was a member of or

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[46] *Id.*

[47] Burrell, *supra* note 2, at 750–51.

[48] Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

[49] *See* Burke, *supra* note 1, at *6.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 18 U.S.C.A. § 521; S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[55] 18 U.S.C.A. § 521; S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[56] S. 1607, 103d Cong., 1st Sess. § 603 (1993).

acted on behalf of a criminal street gang; and (3) had been convicted within the past five years under either a federal or state statute involving drugs or violence or a federal statute involving theft or destruction of property.[57]

Section 521 incorporates the above elements and adds two additional requirements.[58] First, it limits the definition of criminal street gangs to gangs that have as one of their "primary purposes" committing, or conspiring to commit, federal felonies involving violence or controlled substances.[59] Second, it adds an individual intent requirement.[60] For the section to apply, the individual must participate in the gang with the knowledge that its members engage in or have engaged in a continuing series of the offenses described above.[61]

III. Freedom of Association

Freedom of association is a penumbral right under the First Amendment and an independent substantive right found either in the Due Process Clause of the Fourteenth Amendment, or as a penumbral right under the Bill of Rights.[62] It protects two independent types of association.[63] First, the First Amendment protects expressive association; because group association strengthens advocacy of beliefs, the freedom of association to advance beliefs is inseparable from freedom of speech.[64] The right to expressive association protects the acts of associating that advance beliefs pertaining to political, economic, religious, or cultural matters.[65]

Second, the Fourteenth Amendment and the Bill of Rights protect intimate association.[66] Traditionally, the Supreme Court has recognized that this freedom of intimate association protects relationships fundamental to family life.[67] The Court applies strict scrutiny to state regulations interfering with family relationships, requiring such regulations to be narrowly tailored to serve a substantial state interest.[68] Thus far, the Court has limited the freedom of intimate association to the crea-

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[57] S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[58] 18 U.S.C.A. § 521.

[59] 18 U.S.C.A. § 521(a)(A).

[60] 18 U.S.C.A. § 521(d)(1).

[61] *Id.*

[62] Griswold v. State of Connecticut, 381 U.S. 479, 482–83, 486 (1965); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[63] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

[64] *Patterson*, 357 U.S. at 480.

[65] *Id.*

[66] *Roberts*, 468 U.S. at 618–19.

[67] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

[68] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386, 388 (1978).

tion and sustenance of the family, although recently the Court considered extending it to non-familial organizations, most notably service organizations.[69]

A. *Freedom of Intimate Association*

In the 1920s, the United States Supreme Court pronounced that the Fourteenth Amendment protects certain basic familial rights.[70] For example, in 1925, in *Pierce v. Society of Sisters*, the Court recognized in the Due Process Clause of the Fourteenth Amendment the right of families to privately educate their children.[71] The Court invalidated a statute that required children to attend public schools, reasoning that parents have a liberty right to nurture their children as they choose.[72] The Court concluded that the state had no legitimate interest in standardized education of children.[73]

In 1965, in *Griswold v. State of Connecticut*, the Supreme Court cited *Pierce* in finding a right to privacy implied by the penumbras of the first ten amendments.[74] The Court ruled that laws prohibiting the use of contraceptives violated married couples' right to privacy.[75] The Court reasoned that the law had a "destructive impact" upon married couples that was too sweeping to survive constitutional scrutiny.[76]

Then, in a series of cases in the 1970s, the Supreme Court again explored the limits of family-based rights.[77] The first such case, although specifically grounded in the First Amendment freedom of religion, approvingly referred to *Pierce*.[78] In *Wisconsin v. Yoder*, the Court read *Pierce* as establishing a charter for parental rights in raising their children,[79] and, in so doing, invalidated the conviction of Amish parents who refused to send their children to school after the eighth grade.[80] Noting that the Amish parents had presented sufficient evidence that vocational education at home was in their children's best interest, the Court concluded that the state statute was not sufficiently

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[69] *See Roberts*, 468 U.S. at 618–20.

[70] *Pierce*, 268 U.S. at 534–35; Meyer v. Nebraska, 262 U.S. 390, 399–40 (1923).

[71] 268 U.S. at 534–35.

[72] *Id.*

[73] *See id.*

[74] 381 U.S. 481, 482–84 (1965).

[75] *Id.* at 485–86.

[76] *Id.* at 485.

[77] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 506 (1977); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Stanley v. Illinois, 405 U.S. 645, 653 (1972).

[78] *Yoder*, 406 U.S. at 233.

[79] *Id.*

[80] *Id.* at 207, 234.

narrowly tailored to overcome the family's First Amendment freedom of religion rights.[81]

This period witnessed more than an affirmation of *Pierce*. In two other cases, the Supreme Court extended what was later to be called freedom of intimate association beyond the traditional, nuclear family.[82] In 1972, in *Stanley v. Illinois*, the Supreme Court extended family-based protection to parents of illegitimate children.[83] The Court struck down a statute that, upon the death of a child's mother, automatically declared the child a ward of the state if the father was not married to the mother.[84] The Court reasoned that the due process rights of the father mandated at least an individual evaluation of his fitness to raise his children.[85] Applying strict scrutiny, the Court held that the administrative convenience of a presumptive determination did not constitute a state interest sufficient to justify the infringement of the father's due process rights.[86]

Then, in 1977, in *Moore v. East Cleveland*, the Supreme Court extended the freedom of intimate association to relatives more distant than biological parents.[87] Reasoning that the protection of the family is rooted in a desire to protect the ability of one generation to pass on "our most cherished values, moral and cultural" to the next generation, the Court, in a plurality opinion, concluded that grandparents, uncles, aunts, and cousins are important to that process of inculcation.[88] The Court thus struck down an ordinance that limited occupancy of dwelling units to members of the immediate family.[89] In so doing, the Court concluded that the ordinance's distinction between types of family members was arbitrary and purposeless and violated the due process rights of extended family members.[90]

That same year, the Court also signalled its willingness to extend the freedom of intimate association beyond blood relationships.[91] In *Smith v. Organization of Foster Families*, the Court considered procedures that gave the State of New York the complete authority to remove

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[81] *Id.* at 234.

[82] Moore v. East Cleveland, 431 U.S. 494, 499 (1977); Stanley v. Illinois, 405 U.S. 645, 653 (1972).

[83] 405 U.S. at 646, 652, 658.

[84] *Id.* at 658.

[85] *Id.*

[86] *See id.* at 652, 657–58.

[87] 431 U.S. 494, 503–04 (1977).

[88] *Id.* at 495, 503–05.

[89] *Id.* at 506.

[90] *See id.* at 500.

[91] *See* Smith v. Organization of Foster Families, 431 U.S. 816, 844–45 (1977) (dictum).

children from foster homes in order to return them to their natural parents.[92] Like in *Moore*, the Court reasoned that the importance of the familial relationship derives from intimate daily association and from promotion of a way of life, as well as from a blood relationship.[93] *Smith* found the first two factors equally prevalent in a relationship with adoptive parents as in a relationship with natural parents.[94] The Court ruled, however, that the procedure at issue did not violate the foster parents' due process rights, largely because the children were removed so that they could be returned to their natural parents.[95] Thus, although the Court did not precisely identify the level of protection afforded to adoptive and foster parents, it clearly indicated that those relationships should receive some level of constitutional protection.[96]

Finally, in 1978, in *Zablocki v. Redhail*, the Supreme Court invalidated a Wisconsin statute requiring individuals who owed child support to obtain state approval before remarrying.[97] The Court ruled that because marriage is a fundamental right, the Wisconsin statute had to be narrowly tailored to the State's interest of encouraging child support payments.[98] The Court struck down the statute because it was not narrowly tailored.[99] The Court reasoned that preventing single fathers from getting married before seeking state approval was an under-inclusive means of assuring child support because the statute did not prevent other financial commitments.[100] The Court also concluded that the statute was over-inclusive in that it prevented fathers from improving their financial condition by marrying a woman who could bring another income to the family.[101]

Thus, entering the 1980s, the Supreme Court had extended the family-based rights to many variations of the traditional family structure, including relations between spouses and relations between children and their natural or foster parents.[102] In 1983, in *Roberts v. United States Jaycees*, the Supreme Court expressly brought this line of cases under the general rubric of freedom of association.[103] At the same time,

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[92] *Id.* at 849, 855–56.
[93] *Id.* at 844.
[94] *Id.*
[95] *Id.* at 848–49.
[96] *See Smith*, 431 U.S. at 844–46.
[97] 434 U.S. 374, 388 (1978).
[98] *Id.* at 390.
[99] *Id.*
[100] *Id.* at 389–90.
[101] *Id.* at 390.
[102] *See, e.g.*, *Zablocki*, 434 U.S. at 390; Moore v. East Cleveland, 431 U.S. 494, 506 (1977).
[103] 468 U.S. 609, 617–18 (1984).

the Court signalled its willingness to extend the right to non-familial associations.[104] In *Roberts*, the Supreme Court held that the freedom of intimate association did not exempt United States Jaycees from a state prohibition of discrimination against women.[105] The Jaycees contended that the statute was unconstitutional because the freedom of association afforded them the right to exclude women and associate only with men.[106] The Court concluded, however, that the freedom of intimate association is limited to more intimate relationships than those present in large service clubs such as the Jaycees.[107]

In examining the Jaycees' claim, the Court laid out a framework for analyzing the freedom of intimate association.[108] The Court noted that all the previously protected forms of intimate association involved family relationships: marriage, raising and educating children, and cohabitation with relatives.[109] The Court indicated that the right was not limited to family settings, but stated that any protected non-family relationship would have to be relatively small, highly selective at the inception of the association and throughout its duration, and exclusive of others in fundamental areas of the relationship.[110] The Court did not draw a clear line separating the intimate relationships that are protected from the less personal ones that are not.[111] The Court simply noted that the Jaycees were clearly too impersonal.[112]

In four subsequent cases, the Court, although not always consistent in describing the source of the freedom, declined to further extend freedom of intimate association to non-familial organizations.[113] Three years after *Roberts*, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that Rotary Clubs are not immune from sexual discrimination laws.[114] The *Rotary* Court suggested that the freedom of intimate association emanates from an "element of liberty protected by the Bill of Rights," rather than the Fourteenth

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[104] *Id.*

[105] *Id.* at 628–29.

[106] *See id.* at 628.

[107] *Id.* at 620–21.

[108] *Roberts*, 468 U.S. at 619–20.

[109] *Id.* at 619.

[110] *Id.* at 620.

[111] *Id.*

[112] *Id.* at 620–21.

[113] *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989); New York State Club Association v. New York City, 487 U.S. 1, 4, 12 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

[114] 481 U.S. at 546.

Amendment.[115] In the same paragraph the Court suggested that these family-based rights are protected by the First Amendment.[116]

The Court then applied the factors outlined in *Roberts* and reasoned that Rotary Clubs are too unselective to merit protection.[117] The Court emphasized that although the size of the various clubs ranged from fewer than twenty to more than 900 members, all of the clubs were encouraged to continually recruit new members and maintain an inclusive atmosphere.[118] The Court also noted that the clubs conducted many of their activities in the presence of strangers including, for example, reporters.[119] The Court concluded that those attributes were inconsistent with the kind of personal relationships traditionally protected by the freedom of intimate association.[120]

Also in 1987, in *New York State Club Association v. New York City*, the Court again upheld a state statute prohibiting discrimination of any kind by private associations.[121] The Association, representing numerous organizations in the state, argued that the statute was facially invalid.[122] Noting that some of those organizations had as many as four hundred members, the Court reasoned that, at a minimum, those larger clubs were, like the Jaycees and Rotary Clubs, too large to qualify for the protection afforded to families.[123] The Court also noted that the organizations in the Association tended to be commercial in nature, providing the opportunity for members and non-members to conduct business.[124] Based on these two factors, the Court concluded that at least some of the organizations covered by the statute would not be protected by the right of intimate association and thus held the statute facially valid.[125]

Recently, the Court has twice declined to extend the right of association beyond traditional notions of family life.[126] In 1989, in *City of Dallas v. Stanglin*, the Supreme Court upheld a city ordinance that restricted admittance to certain dance halls to those between the ages

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[115] *Id.* at 545.

[116] *Id.*

[117] *Id.* at 546–47.

[118] *Id.* at 547.

[119] *Rotary*, 481 U.S. at 547.

[120] *Id.* at 546–47.

[121] 487 U.S. 1, 4, 12 (1988).

[122] *Id.* at 11.

[123] *Id.* at 12.

[124] *Id.*

[125] *Id.*

[126] *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989).

of fourteen and eighteen.[127] Consistent with the *Roberts* line of cases, although analyzed as a First Amendment expressive claim, the Court noted that admission was not at all selective and that most attendees were strangers.[128] Rejecting the analysis of the Texas Court of Appeals, the Court emphasized that there is no generalized right of social association that encompasses "chance encounters."[129] The Court concluded that opportunities for adults and minors to dance with one another does not involve the kind of association, either intimate or expressive, "protected by the First Amendment."[130] In concurrence, Justice Stevens maintained that the enjoyment of the company of friends implicates substantive due process rights and not First Amendment freedom of association rights.[131] But he agreed with the majority that the statute was constitutional because the State, which argued the ordinance protected teenagers from crime, drugs, and alcohol, justified the "modest" burden on teenagers' liberty rights.[132]

Similarly, in 1990, in *FW/PBS, Inc. v. City of Dallas*, the Supreme Court upheld a city provision that deemed motels which rented rooms for fewer than ten hours to be sexually-oriented businesses and thus subject to regulation by the city.[133] Motel owners argued that the regulation infringed upon the associational rights of their patrons.[134] The owners contended that their patrons had exactly the kind of highly personal relationships that the freedom of intimate association protects.[135] The Court was not persuaded, concluding that the "personal bonds" that can be formed in fewer than ten hours in a motel room are not the kind of bonds that the *Roberts* Court described as having "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[136]

Thus, although the Supreme Court in *Roberts* opened the door for an extension of intimate association to private organizations, *Stanglin* and *FW/PBS* demonstrate the Court is not anxious to step through that door.[137] The Court requires organizations seeking protection to be

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[127] 490 U.S. at 24.

[128] *Id.* at 24–25.

[129] *Id.* at 25.

[130] *Id.* The Court also upheld the statute under an minimum rationality, equal protection analysis. *Id.* at 26–28.

[131] *Id.* at 28–29.

[132] *Stanglin*, 490 U.S. at 28.

[133] 493 U.S. 215, 237 (1990).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *See, e.g., id.*; *Stanglin*, 490 U.S. at 24.

small and selective.[138] No organization thus far has been able to meet that test.[139] When the government has criminalized membership in an organization, those groups that have successfully sought protection have turned to the right to expressive association.[140]

B. *Penalizing Membership and Expressive Freedom of Association*

The question as to whether the government can make membership in an association illegal first arose in the context of Communist Party membership.[141] Shortly after the revolution in Russia, the Communist Party began to make inroads in the United States.[142] By 1919, an estimated 40,000 Americans had joined the Communist Party.[143] The nation widely perceived this to be a threat, and federal and state governments quickly passed legislation prohibiting advocacy and organization toward the violent overthrow of the government.[144] Initially, the Supreme Court gave great deference to legislative determinations that the Communist Party posed a threat to the nation.[145] But subsequently, the Court required the government to prove an individual's awareness of the organization's illegal purposes, and his intent to further those illegal aims, before penalizing his membership.[146]

Initially, in 1927, in *Whitney v. California*, the Supreme Court upheld the California Criminal Syndicalism Act.[147] The Act outlawed "syndicalism," defined as associating for the purposes of accomplishing any desired end by illegal means.[148] Many states enacted similar statutes in response to the perceived growing threat of Communism.[149] The Court reasoned that the statute reflected the legislature's decision that the offense constituted a significant danger to the public peace and security of the state.[150] Noting that such legislative determinations merited great deference, the Court concluded that the Act was not an unreasonable or arbitrary exercise of the State's police powers and thus was

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[138] Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

[139] *See, e.g., id.*

[140] *See, e.g.*, Whitney v. California, 274 U.S. 357, 371 (1927).

[141] *See, e.g., id.*

[142] Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 3 (1991).

[143] *Id.*

[144] *See id.* at 4.

[145] Whitney v. California, 274 U.S. 357, 371 (1927).

[146] Healy v. James, 408 U.S. 169, 186 (1972).

[147] 274 U.S. at 372.

[148] *Id.* at 371–72.

[149] Rohr, *supra* note 142, at 4.

[150] *Whitney*, 274 U.S. at 371.

a valid infringement on any First Amendment rights of speech or association.[151]

Concerns about the spread of communism continued into the late 1940s.[152] In 1950, in *Dennis v. United States*, the Court confronted the constitutionality of the Smith Act.[153] The Smith Act prohibited advocating the overthrow of the Federal Government by violence or destruction, or organizing any group working to overthrow the government by violence or destruction.[154] In tracing the still-recent development of First Amendment law, the Court concluded that restriction of First Amendment rights requires a showing of clear and present danger that a crime will occur.[155] The Court held, however, that the clear and present danger test does not require the government to wait until the anticipated harm has occurred.[156] Rather, the Court held that the very act of conspiring to overthrow the government during a period of international unrest created enough danger to allow the government to justify the infringement on First Amendment rights.[157] Relying on the general threat of communism, the Court upheld the defendants' convictions under the Smith Act.[158]

Subsequent to *Dennis*, the Court developed a succinct test for addressing the penalization of membership in a particular association.[159] In 1960, in *Noto v. United States*, the Supreme Court overturned a conviction under the Smith Act.[160] The Court held that evidence of the Communist Party's illegal activities alone was not sufficient to criminalize the defendant's membership in the party.[161] The Court stressed the need for the government to establish an individual's intent to commit illegal acts.[162]

However, in a companion decision to *Noto*, *Scales v. United States*, the Court upheld the Smith Act against a facial challenge.[163] Although reasoning that a blanket prohibition of associating with organizations

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[151] *Id.* at 371–72.

[152] Rohr, *supra* note 142, at 18.

[153] 341 U.S. 494, 495–96 (1951).

[154] *Id.* at 496.

[155] *Id.* at 505.

[156] *Id.* at 510.

[157] *Id.* at 510–11.

[158] *Dennis*, 341 U.S. at 511.

[159] *See* Healy v. James, 408 U.S. 169, 186 (1972); Noto v. United States, 367 U.S. 290, 298 (1961).

[160] 367 U.S. at 300.

[161] *Id.* at 291.

[162] *Id.* at 299.

[163] 367 U.S. 203, 229–30 (1961).

with both legal and illegal intentions would risk impairing legitimate association or expression,[164] the *Scales* Court held that the Smith Act only reached active members who had the intent of advancing the organization's unlawful concerns.[165] The Court thus constructively read the requirement of individualized intent into the statute.[166]

Subsequent to *Scales*, the Supreme Court continued to require the government to demonstrate individualized intent.[167] In 1966, in *Elfbrandt v. Russell*, the Court invalidated an Arizona statute that required teachers to disavow membership in any organization advocating violent overthrow.[168] The Court again emphasized that membership itself in an organization that engages in unlawful activities poses no threat to society.[169] The Court reasoned that laws punishing membership without an individualized showing of illegal intentions effectively presume individual intent and thereby infringe upon the freedom of association.[170] The Court struck down the Arizona statute because it punished membership in any organization advocating the violent overthrow of the government, regardless of whether the individual defendant had the requisite criminal intent.[171]

Similarly, in 1970, in *Healy v. James*, the Court held that without establishing that certain students intended to violate campus rules and regulations, Central Connecticut State College's refusal to recognize their organization violated the First Amendment.[172] The students had sought to establish a local chapter of Students for a Democratic Society, a national association of college students known for interrupting classes and for more violent protest techniques.[173] The Court emphasized the absence of any indication that the students contemplated violent action and thus the State failed to demonstrate individualized intent to further the association's illegal goals.[174]

In 1982, in *NAACP v. Clairborne Hardware*, the Supreme Court reaffirmed *Healy* in holding that membership in a local chapter of the NAACP is not a sufficient basis for imposing civil liability for the organization's actions.[175] Private merchants sued members of the NAACP,

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[164] *Id.* at 229.
[165] *Id.*
[166] *See id.*
[167] *See* Healy v. James, 408 U.S. 169, 193 (1972); Elfbrandt v. Russell, 384 U.S. 11, 16 (1966).
[168] 384 U.S. at 16.
[169] *Id.* at 17.
[170] *Id.* at 17–19.
[171] *Id.* at 19.
[172] 408 U.S. 169, 193–94 (1972).
[173] *See id.* at 170, 172.
[174] *Id.*
[175] 458 U.S. 886, 932 (1982).

which had organized the boycott of local stores.[176] The Court reaffirmed the analysis in *Healy* and applied it to the civil context: mere membership, without some showing of criminal intent, does not provide the basis for criminal or civil liability.[177] Without that showing, the government cannot impose a duty to disassociate from an organization.[178]

As discussed above, when assessing whether a statute is facially invalid for failure to expressly require individualized intent, the Court is generally willing to read that requirement into the statute.[179] In *Scales,* the Court held that the membership clause in the Smith Act effectively required active membership and intent to further illegal aims.[180] But in *United States v. Robel,* the Court declined to read a criminal intent requirement into a statute that contained no restriction on either the quality or degree of membership in communist parties that the statute criminalized.[181] Thus, a statute that indiscriminately penalizes membership in an association without regard to the quality and degree of membership will be found facially invalid.[182]

Finally, in 1992, in *Dawson v. Delaware,* the Supreme Court for the first time addressed the freedom of expressive association in the context of a gang, specifically a white, racist, prison gang.[183] In *Dawson,* the Court held that the admission of evidence of the defendant's gang membership constituted reversible error.[184] The defendant was convicted of murdering a woman in her home after escaping from a Delaware correctional facility.[185] During sentencing, the prosecution and defense stipulated that Dawson was a member of the Aryan Brotherhood.[186] The defense agreed to the stipulation to avoid testimony on the subject, but maintained that even the stipulation violated Dawson's First Amendment rights.[187]

The Supreme Court reversed Dawson's conviction on the grounds that the introduction of evidence of his associational beliefs had no bearing on the issue before the jury.[188] Critical to the decision was the

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[176] *Id.* at 889.
[177] *Id.* at 932.
[178] *Id.* at 925 n.69.
[179] *See* Scales v. United States, 367 U.S. 203, 229 (1961).
[180] *Id.* at 205, 229–30.
[181] 389 U.S. 258, 262 (1967).
[182] *See id.* at 262.
[183] 112 S. Ct. 1093, 1099 (1992).
[184] *Id.*
[185] *Id.* at 1095.
[186] *Id.* at 1096.
[187] *Id.*
[188] *Dawson,* 112 S. Ct. at 1099.

finding that the defendant's membership in the Aryan Brotherhood was protected by the First Amendment.[189] The Court based that finding on the freedom of expressive association as opposed to the freedom of intimate association developed in the *Roberts* line of cases.[190]

In sum, under the *Healy* freedom of expressive association cases, statutes cannot penalize mere membership in an organization with illegal activity.[191] Convictions under such statutes will survive only so long as the member was aware of the organization's illegal activity and intended to further that activity.[192] The intent requirement need not be express, but the Court has not been willing to read it into statutes lacking any restriction on either the degree or quality of criminalized membership.[193]

IV. Analysis of the Constitutionality of Section 603

Because section 603 should be read to require a street gang member to have individualized intent to further the gang's criminal interests, the section would likely survive the *Healy* test for freedom of expressive association.[194] Similarly, although street gangs may present a compelling case for protection under the Court's freedom of intimate association test as currently structured, section 603 would likely survive the *Roberts* test as well.[195] Thus, justification for the narrowing of section 603 into the current section 521 must rest more in policy considerations than in constitutional jurisprudence.

A. *The* Healy *Test*

Under the right to expressive association, *Dawson* signifies that associations as distasteful as Aryan prison gangs are entitled to protection of the freedom of expressive association under the First Amendment.[196] In applying First Amendment standard analysis to section 603, the Court would look to the *Healy* test because the section punished membership in groups engaged in illegal activities.[197] Under the *Healy*

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[189] *Id.* at 1096–97.

[190] *See id.*

[191] *See* Healy v. James, 408 U.S. 169, 193–94 (1972).

[192] *See id.*

[193] *See Robel*, 389 U.S. at 262.

[194] *See Dawson*, 112 S. Ct. at 1096–97. See *supra* notes 172–74 and accompanying text for a discussion of *Healy*.

[195] Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

[196] *See Dawson*, 112 S. Ct. at 1096–97; *Roberts*, 468 U.S. at 618. In *Lanzetta v. New Jersey*, the Supreme Court invalidated a similar 1930s statute directed at gangsters as void for vagueness. 306 U.S. 451, 458 (1939). The Court did not analyze the statute under the First Amendment. *See id.*

[197] *See* Healy v. James, 408 U.S. 169, 186 (1972).

standard, criminalization of membership in street gangs passes muster under the First Amendment only if a member knowingly affiliates himself with an organization with illegal goals, and specifically intends to further those goals.[198] Recall that the Court will read the latter requirement into a statute lacking it, if the statute in some way restricts the quality of membership that is punishable.[199] But if a statute fails to distinguish between different levels of membership, then the Court will not constructively read individualized intent into the statute.[200]

Section 603 would likely have survived under *Healy* because it expressly required intent. Section 603 was not triggered until a criminal street gang member was convicted of committing a drug or violent felony as a member of the gang or on behalf of the gang.[201] The phrase "as a member" indicates that simply being a gang member and committing crimes would not trigger the section; one had to commit the crime in the capacity of one's membership in the gang.[202] To read the section otherwise would render the phrase "as a member" meaningless.[203] Section 603 thus only applied to gangs that committed crimes as part of their regular activity and to those members who committed crimes for the gang.[204]

Accordingly, the section would have survived the test laid out in *Healy*.[205] When an individual commits a crime in the capacity of his membership in a criminal street gang, it would be difficult to argue that he has not knowingly affiliated with an organization possessing illegal aims. Further, because the individual has been convicted of committing a crime in his capacity as a gang member, it would be equally difficult to argue that he did not intend to further the illegal goals of the organization.

Moreover, even if the Court would have been unwilling to read "as a member" as satisfying the intent requirement laid out in *Healy*, the Court could have constructively read that requirement into the section.[206] The Court will constructively find an intent requirement if a provision restricts the quality of membership that is criminalized.[207] Section 603 met this standard because it only applied to members of

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[198] *See id.*

[199] *See* United States v. Robel, 389 U.S. 258, 262 (1967).

[200] *See id.*

[201] S. 1607, 103d Cong., 1st Sess. § 603 (1993).

[202] *See id.*

[203] *See id.*

[204] *See id.*

[205] See *supra* notes 172–74 and accompanying text for a discussion of *Healy*.

[206] *See* United States v. Robel, 389 U.S. 258, 262 (1967).

[207] *Id.*

the gang who committed crimes in their capacity as gang members. That requirement placed a significant limitation on the degree of membership that is punishable. Casual members of the gang who only attended social functions would not have been subject to criminal liability under section 603.[208] Only those individuals whose membership rises to the level of committing crimes as members of criminal street gangs would have been liable.[209] This limitation is comparable to the kind of distinction based on quality of membership present in *Scales* but lacking in *Robel*.[210] Hence, challenges to section 603 would likely have had to focus on the freedom of intimate association under the *Roberts* line of cases.[211]

B. *The* Roberts *Test*

The Supreme Court has suggested that the Fourteenth Amendment or the Bill of Rights might protect non-familial organizations whose characteristics are akin to family units.[212] Membership in such protected organizations would be a fundamental right.[213] When a regulation significantly impairs such a right, the regulation must serve a substantial interest that cannot be served by less invasive means.[214] Courts invalidate regulations that are not so narrowly tailored.[215]

Since *Roberts*, the Court has not extended intimate association protection to a non-familial organization. Instead, the Court has found organizations too unselective and dissimilar to the traditional family structure.[216] Nevertheless, the Court has repeatedly applied the test, suggesting a willingness to extend the protection afforded to families to a sufficiently "family-like" organization.[217]

Although these decisions indicate the Court is reluctant to extend intimate association status to non-family associations, street gangs arguably offer a compelling case.[218] Street gangs are selective, often relatively small, and exclude others from fundamental areas of the association.[219]

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[208] S. 1607, § 603.

[209] *See id.*

[210] *See Robel*, 389 U.S. at 262; Scales v. United States, 367 U.S. 203, 229 (1961).

[211] *See* Roberts v. United States Jaycees, 468 U.S. 609, 617–19 (1984).

[212] *Id.* at 620.

[213] *Id.*

[214] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[215] *Id.*

[216] *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990).

[217] *See, e.g., id.*

[218] *See id.*

[219] *See supra* notes 41–53 and accompanying text.

These are all factors that the Court found missing in previous claims for family-based protection.[220] In fact, experts on street gang dynamics maintain that gangs serve as surrogate families for gang members whose natural families have failed them.[221]

The difficulty of becoming a member demonstrates the selective and exclusive nature of street gangs.[222] The fact that gang members must survive difficult and painful initiation rituals distinguishes gangs from service clubs, which, the Court has emphasized, are easy to join.[223] For example, unlike in *Rotary*, where the Court stressed that the clubs were strongly encouraged to develop their membership lists, most gangs are very exclusive in admitting members.[224]

Moreover, street gang members make it a point to distinguish themselves from non-members by wearing distinctive clothing.[225] The value of gang membership is in part measured by constantly reminding those external to the gang that they are not members.[226] Again, this dynamic sharply distinguishes street gangs from service clubs, which, the Court has stressed, are designed to encourage contact with as many members of the local business community as possible.[227] Gang members pride themselves on their separation from non-gang members.[228]

Thus, street gangs more closely resemble family structures than any organization that the Court has thus far evaluated under the *Roberts* test. Observers of gang dynamics suggest that street gang members provide the same kind of support for one another as family members provide.[229] Although gang members are typically not blood relatives, the Court has indicated that the absence of blood relationships does not deny an intimate association protection from government interference.[230] In *FW/PBS, Inc. v. City of Dallas*, the Court refused to extend protection to motel guests, noting that whatever bonds were created in fewer than ten hours in a motel were not the traditional family bonds that freedom of intimate association protects.[231] Unlike

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[220] *See Roberts*, 468 U.S. at 619; Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

[221] Burrell, *supra* note 2, at 750–51.

[222] *See* Burke, *supra* note 1, at *6.

[223] *See Roberts*, 468 U.S. at 619; Burke, *supra* note 1, at *6.

[224] See *supra* notes 114–120 and accompanying text for a discussion of *Rotary*. See *supra* notes 49–51 and accompanying text for membership rituals.

[225] Burke, *supra* note 1, at *6.

[226] *See id.*

[227] *See Rotary*, 481 U.S. at 546.

[228] Burke, *supra* note 1, at *6.

[229] Burrell, *supra* note 2, at 750–51.

[230] *See* Smith v. Organization of Foster Families, 431 U.S. 816, 844–45 (1977).

[231] *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990).

the motel guests in *FW/PBS*, gang members clearly share strong relationships.[232] Although certainly much gang activity could not be characterized as traditional family activity, gangs arguably serve as surrogate families for members.[233]

But the Court would more likely emphasize the traditional family values aspect of the *Roberts* test and deny protection to street gangs. Although it has applied the analysis in *Roberts* to non-family organizations, as noted previously, the Court has demonstrated its reluctance to expand the doctrine in the manner suggested in *Roberts*.[234] This reluctance is often couched in value-laden language. In *Smith v. Organization of Foster Families*, the Court stressed that the protection of family relationships stems from the importance of families in nurturing children.[235] In *FW/PBS*, the Court stressed that the right to intimate association protects the cultivation of shared national ideals and beliefs.[236]

In *Roberts*, in which the freedom of intimate association was first recognized as a coherent doctrine, the Court did not stress the importance of the moral qualities of the organization.[237] Although it began its analysis by noting that intimate association cases have focused on relationships critical to national traditions and culture, its initial articulation of the important factors did not include a value component.[238] Only in a subsequent paragraph did it add "purpose" to the list of relevant factors.[239] In analyzing the Jaycees' claim, the Court focused exclusively on issues of size and selectivity, objective factors that obviated the need for the Court to make a subjective assessment of the value of the Jaycees.[240]

Section 603 might have invited the Court to go so far as limiting the doctrine of intimate association to natural and adoptive families and finally close the door that *Roberts* cracked open for non-family organizations. But short of that, it would likely have led the Court to emphasize the criminal activities of street gangs and thereby distin-

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[232] *See id.*

[233] *See* Burrell, *supra* note 2, at 750–51.

[234] *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987). In *City of Dallas v. Stanglin*, the Court even noted that the freedom of association in a non-family context is primarily a First Amendment, expressive right, suggesting a movement away from *Roberts*. 490 U.S. 19, 24 (1989).

[235] *See* 431 U.S. 816, 844–45 (1977).

[236] *See* 493 U.S. at 237.

[237] *See Roberts*, 468 U.S. at 618–21.

[238] *Id.* at 620.

[239] *Id.*

[240] *Id.* at 620–621.

guish them from the hypothetical organization that not only is selective and exclusive but also develops the "personal bonds [that] have played a critical role in the culture and traditions of the Nation's ideals and beliefs by cultivating and transmitting shared ideals and beliefs."[241] Although the *Roberts* Court may have been wary of centering the test around a value-based assessment of an organization's worth, street gangs, like hourly motel guests, allow the Court to quickly dismiss any claim for family-based protection. Thus it is unlikely the Court would have utilized the doctrine to provide refuge to gangs that engage in a continuous series of felonious activity.

V. SECTION 521 REVISITED

Because section 603 would very likely have survived scrutiny, the question turns to the value of section 521's additional requirements. As noted above, the requirement that individuals intend to further the gang's felonious activities or enhance their position in the gang makes explicit what the Supreme Court likely would have read into section 603. To that extent, it makes the statute clearer and does not effectively alter its application.

However, the new statute's requirement that the prosecution establish that the gang had a primary purpose of committing felonious criminal offenses is a different matter. Given the intent requirement, it is very unlikely this latter requirement would have been necessary under the expressive association line of cases. The intent to further the organization's criminal goals renders the association unprotected under *Healy v. James*.[242]

Moreover, it is equally unlikely that limiting application of the statute to gangs whose primary purpose is to commit felonies was required by *Roberts*. Section 603 already limited application to gangs whose members had committed a series of felonious crimes over the previous five years and to members of such gangs who committed further crimes "as members of the gang."[243] Section 521 retains this latter requirement.[244] Furthermore, the additional intent requirement further limits application in that association with the gang can only be punished when the individual is aware of the gang's criminal activity and has the requisite intent to further the gang's felonious goals. This is not the kind of association that has played a "critical role" in the

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[241] *See id.* at 618–19.

[242] *See* 408 U.S. 169, 186 (1972).

[243] *See* S. 1607, § 603.

[244] 18 U.S.C.A. § 521(d)(2) (West Supp. 1995).

formation of the national culture and ideals, at least not the kind of ideals upon which this Court would look favorably.[245]

Thus the primary purpose requirement in section 521 appears to be unnecessary from a constitutional perspective. Any public policy justification is equally tenuous. In addition to the primary purpose requirement, the statute, in another section, limits application to gangs that engage in a continuing series of felonious activities.[246]

This is significant in two ways. First, the statute never defines "primary purpose." Unless the phrase is interpreted to have no meaning, the additional requirement must mean more than a continuing series of felonious activity, which is a separate requirement. Otherwise, the primary purpose requirement, which was added in conference committee and thus after the continuing series requirement, would be redundant. It is unlikely courts will read the primary purpose requirement in a manner that renders it moot.

Thus prosecutors presumably will have to establish that a gang's primary purpose is committing felonies by showing something in addition to a continual series of felonies. That burden will be complicated by the fact that a gang is not a person, but rather an association of individuals. Establishing the purpose of an organization—apart from the individual defendant whose criminal intent must be separately established—may involve the same problems associated with discerning legislative intent. The primary purpose requirement has the potential for complicating enforcement of the statute.

Second, it is difficult to identify a strong policy argument for requiring prosecutors to find evidence of a criminal street gang's raison d'être. Association with the intent to further the illegal goals of gangs that routinely engage in serious criminal activity should be penalized, regardless of any other legal purposes of the gang. Section 603 did that. The primary purpose requirement places an unnecessary burden on the prosecution.

VI. Conclusion

Section 603 penalized membership in street gangs. Under traditional First Amendment freedom of expressive association analysis, section 603 would have passed muster because it was limited to members who were aware of the gang's illegal activities and actively participated in those illegal activities. And although it can be argued that

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[245] *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 215, 237.

[246] 18 U.S.C.A. § 521(d)(1).

street gangs are very similar to families, section 603 would not have run afoul of the freedom of intimate association because street gangs do not promote traditional family values.

Section 521 is identical to section 603 with the exception of the additional intent and primary purpose requirements. The intent requirement clarified section 603 and reflected Congress's awareness of the expressive association line of cases. The statute specifically requires the individual to have the intent to further the gang's felonious activities or maintain or increase his position in the gang.[247] In this regard, section 521 merely makes express what the Court would have read into section 603. Adding the intent language was sound drafting.

But the primary purpose requirement is an unnecessary addition that sets up one more hoop through which the prosecution must jump. The requirement is not compelled by the Constitution and, from a policy perspective, is unwise in that it only protects organizations that engage in a continuing series of felonious activities but have some other overriding purpose. Despite the "get tough on crime" rhetoric, at least in this section of the Crime Bill, Congress blinked.

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[247] 18 U.S.C.A. § 521(d)(1)–(2).