Testimony on behalf of the

American Civil Liberties Union Of the National Capital Area

By

Stephen M. Block
Legislative Counsel

Before the

Committee on Public Safety and the Judiciary

of the

Council of the District of Columbia

on

Bill 18-138, the
"Omnibus Anti-Crime Amendment Act of 2009"

Bill 18-151, the
"Public Safety and Justice Amendments Act of 2009"

Bill 18-152, the
"Hot Spot No Loitering Zone Act of 2009"

March 18, 2009

Summary of Recommendations[1]

The Anti-Gang Injunction Provisions of Bills 18-138 & 18-151

The ACLU of the National Capital Area urges the Council to:

- Reject these provisions.

Bill 18-138, the "Omnibus Anti-Crime Amendment Act of 2009"

The ACLU of the National Capital Area urges the Council to:

- Reject section 201 that limits public access to police complaints.
- Reject sections 204, 206, 208, and 218 that prescribe mandatory minimum sentences.

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[1] The absence of comment on a particular section should not be construed as ACLU approval.

- Reject section 210's novel definition of "daylight."
- Reject section 212 that expands the use of pre-trial detention.
- Reject section 219 requiring gun offenders to register.

Bill 18-151, the "Public Safety and Justice Amendment Act of 2009"

The ACLU of the National Capital Area urges the Council to:

- Adopt section 104 to protect campaign material.
- Adopt section 106 to revise the disorderly conduct statutes.
- Reject sections 107 and 110 that prescribe mandatory minimum sentences.
- Adopt section 112 to repeal the vagrancy statute.
- Adopt section 113 to add homelessness as a protected class under the Bias-Related Crimes statute with the addition of an evidentiary provision protecting First Amendment rights.

Bill 18-152, the "Hot Spot No Loitering Zone Act of 2009"

The ACLU of the National Capital Area urges the Council to:

- Reject this bill.

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The Anti-Gang Injunction Provisions of Bills 18-138 & 18-151

Section 102 of Bill 18-138 and section 101 of Bill 18-151 both propose systems of anti-gang injunctions. Except where indicated, our testimony discusses the two bills together. For the most part, our testimony applies equally to both bills, because they suffer from the same basic infirmities.

We oppose the anti-gang injunction provisions of both bills because they raise serious constitutional concerns, create unintended consequences that will harm local communities and impede other anti-gang initiatives, and are based on a model that has had very limited effectiveness in reducing crime elsewhere.

The proposed anti-gang injunctions raise serious due process questions

By treating gang involvement as a matter of civil law,[2] the bill's proponents seek to punish alleged gang members for that alleged association without

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[2] Civil proceedings traditionally operate with looser burdens of proof and different procedural rules than criminal proceedings because, as a general rule, they adjudicate the rights and responsibilities of private parties to one another. This distinguishes them from criminal

affording them the constitutional rights that are guaranteed to persons accused of committing crimes, including their Sixth Amendment rights to a jury trial, to be represented by counsel, and to confront the witnesses against them, and the Fifth Amendment right not to be convicted and punished unless the state proves their guilt beyond a reasonable doubt. Because these injunctions will be obtained through civil court proceedings, defendants generally will not have counsel because they cannot afford to pay for lawyers. Once the injunction is imposed, however, the same defendants can be fined or imprisoned if they violate the terms of the injunction.

An anti-gang injunction may prohibit a wide range of ordinary, lawful activities—for example, it may prohibit the targeted individuals from associating with each other in public, carrying objects such as cell phones or paint, being in the mere presence of others who possess drugs or guns, wearing red or blue clothing, or any other limitations that a prosecutor may seek to impose. In this respect, the terms of anti-gang injunctions are akin to the conditions of probation imposed as part of a criminal sentence. For example, probation terms often involve prohibitions against associating with certain individuals or remaining in certain areas. But there is a key difference: Probation is imposed as part of the sentence for a criminal conviction, whereas anti-gang injunctions are imposed as part of a freestanding civil proceeding. This leads to three major distinctions, as outlined in the chart below:

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proceedings, which involve higher burdens of proof and stronger procedural protections designed to minimize the risk of wrongly convicting the innocent, because such proceedings adjudicate whether a defendant is guilty or innocent of a crime against the public good. *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

	Probation	**Anti-Gang Injunction**
Access to legal counsel	Defendant is entitled to free representation by a court-appointed attorney.	Targeted individual has no right to a court-appointed attorney.
Prior culpable conduct of the person whose activities are restricted	Probation is imposed only after the defendant has pled guilty or been found guilty beyond a reasonable doubt by a jury of his peers, of committing a particular crime.	An individual may be made subject to an anti-gang injunction without any evidence that the particular individual has participated in the gang's harmful activities.
Process available to challenge the restrictions	Probation is imposed only after the defendant has had an opportunity to make arguments in favor of a lesser sentence.	An individual may be made subject to an anti-gang injunction without an opportunity to make arguments in favor of lesser restrictions on his liberty.[3]

In effect, then, anti-gang injunctions allow a sentence of *permanent* probation to be imposed *without the defendant's ever being convicted of a crime or having access to the procedural safeguards of the criminal justice system*. This raises serious due process concerns.

Anti-gang injunctions could also be analogized to pre-trial detention, in that they impose restrictions on the defendant's liberty before the defendant has been found guilty of any crime, on the theory that the restriction will prevent the defendant from posing a danger to the community. Under this analogy, anti-gang injunctions raise serious due process questions. As the Supreme Court observed in *United States v. Salerno*, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[4] Anti-gang injunctions last far longer than pre-trial detention and may be imposed in a broader range of circumstances than pre-trial detention. Moreover, they differ procedurally in that a criminal defendant is entitled to counsel for bail purposes; an injunction defendant has no right to counsel. Together, these differences

[3] Although those initially named in the injunction will have an opportunity to challenge the terms of the injunction before it goes into effect, neither Bill 18-138 nor Bill 18-151 gives later-added individuals such an opportunity.
[4] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

raise due process concerns in the injunction context that do not exist in the bail context.

Injunctions that prohibit innocent acts of association impede efforts to convince young people to disaffiliate from gangs

Section 102(h)(2)(A) of Bill 18-138 and section 101(i)(4)(A) of Bill 18-151 both state that the injunction "shall enjoin . . . the criminal street gang members from associating or congregating with one or more other criminal street gang members in public space within a defined geographic area." In other words, both bills mandate blanket restrictions against association, regardless of whether that association is for innocent or criminal purposes. This kind of sweeping restriction will slice through people's family lives, political activities and expression, cultural activities, and religious practices and celebrations. And it will inevitably interfere with efforts to reach out to members of the gang and to convince them to disaffiliate.

The case of Antonio Buitrago, a resident of San Francisco who was targeted by an anti-gang injunction in 2007 but lucky enough to receive legal representation challenging the terms of the injunction, illustrates the nature of these harms. The son of a Nicaraguan immigrant and a Peruvian-American, Buitrago lived within the Mission neighborhood of San Francisco that was targeted by the injunction—the same neighborhood as his parents, three sisters, cousins, and over two dozen extended family members. During the week, Buitrago was responsible for picking up his 17-year old sister, his aunt, and his grandmother from various work- and family-related activities. He volunteered regularly at the Precita Community Center, overseeing activities such as basketball games and video games with "at risk" youth. Additionally, Buitrago worked the night shift at a towing company, from 10 pm to 8 am, responding to dispatch requests to tow cars around the city. He had no criminal history.[5] Buitrago was placed on the injunction list because he writes "gangsta rap" music

[5] Decl. of Antonio "Tone" Buitrago, Ex. A to Mem. Of Points and Authorities in Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Re: Preliminary Gang Injunction, *People v. Norteño*, Case No. CGC 07-464492 (Sept. 5, 2007).

lyrics and was occasionally observed associating with members of the targeted gang.[6]

The preliminary injunction that Buitrago challenged sought to prohibit its targets from associating with other injunction targets in public, with narrow exemptions for school attendance and church attendance.[7] These proposed terms were, in fact, less restrictive than those that would be mandated by both Bill 18-138 and Bill 18-151. Nevertheless, the proposed restrictions would not only have prohibited Buitrago from ever visiting his cousin, Antonio Garcia (who was also named on the injunction list), but would also have made it difficult or impossible for Buitrago to continue volunteering at the Precita Community Center (for fear that the "at risk" youth he mentored might also be on the injunction list), to effectively perform his towing job within the injunction (for fear that the driver or owner of a towed car might also be on the injunction list), or to attend the Dia de los Muertos parade or other large communal gatherings (for fear that he might encounter another person on the injunction list).

Ultimately, the presiding judge found that the city had failed to prove that Buitrago was a gang member, and chose to issue the injunction without including Buitrago on the list—a result, it bears noting, that was vigorously opposed by the City Attorney and that came about only because attorneys volunteered to represent Buitrago *pro bono*.[8] Buitrago's predicament illustrates how the restrictions that gang injunctions impose on innocent association have the effect of making it *more* difficult, not less difficult, for people like Buitrago to build and

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[6] *See* Ari Burack, "San Francisco Judge Grants Civil Injunction Against 30 Alleged Norteno Gang Members," *San Francisco Sentinel* (Oct. 15, 2007), online at http://www.sanfranciscosentinel.com/?p=6042.

[7] The text of the preliminary injunction, approved by the San Francisco Superior Court on October 12, 2007, prohibited its targets from, in relevant part:

> Standing, sitting, walking, driving, gathering or appearing anywhere in public view or any place accessible to the public, with any known member of [the gang], but not including: (1) when all individuals are inside a school attending class or on school business; or (2) when all individuals are inside a church engaging in a religious service; provided, however, that such individuals are in full compliance with all other terms of the injunction, and no association occurs during travel to and from any of those locations.

[8] *See People v. Norteño*, Case No. CGC 07-464492 (Oct. 12, 2007) (order granting preliminary injunction).

maintain law-abiding lives by volunteering for the community, taking regular jobs, and participating in family and community celebrations.

This destabilizing effect is particularly dangerous for at-risk individuals who associate with gang members but could be convinced, through outreach work by community organizations, to disaffiliate and pursue legitimate job opportunities. Indeed, in connection with Buitrago's case, a range of community organizations in San Francisco complained that the proposed injunction would actually interfere with their anti-gang outreach work by chilling at-risk youth from participating in their activities. Among these were: the Community Response Network, a community organization that coordinates crisis response, case management, and street-level outreach services to at-risk youth in the Mission District;[9] the Central American Resource Center, a community organization that operates a gang tattoo removal program and provides other support services for at-risk youth;[10] and Mission Neighborhood Centers, which operates community centers within the Mission community that offer programming and services for high-risk youth.[11] Many of the programs for these organizations involve organizing group activities, providing transportation services, and leading educational programs for gang members that ran afoul of the injunction's proposed restrictions on association.

The gang injunctions proposed by Bill 18-138 and Bill 18-151 would, in all likelihood, have a similar impact on the outreach work done by community organizations in the District. For example, the Good Ground Good Life (GGGL) Hollywood Hoopfest basketball tournaments for inner-city youth and Rock the Block musical events both involve groups of at-risk youths congregating together in public spaces. If two or more attendees are injunction targets, they could be

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[9] Decl. of Socorro Gamboa, Ex. F to Mem. Of Points and Authorities in Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Re: Preliminary Gang Injunction, *People v. Norteño*, Case No. CGC 07-464492 (Sept. 5, 2007).

[10] Decl. of Henry Morales, Ex. G to Mem. Of Points and Authorities in Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Re: Preliminary Gang Injunction, *People v. Norteño*, Case No. CGC 07-464492 (Sept. 5, 2007).

[11] Decl. of Santiago Ruiz, Ex. H to Mem. Of Points and Authorities in Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Re: Preliminary Gang Injunction, *People v. Norteño*, Case No. CGC 07-464492 (Sept. 5, 2007).

arrested for attending these outreach events. Similarly, the employment readiness training programs run by Neighbors' Consejo, in which current or former gang members learn job skills together, might also run afoul of an injunction's prohibition against association. And perhaps more alarmingly, the mediation programs run by Helping Inner City Kids Succeed (HICKS), which bring together members of multiple gangs to defuse tensions and resolve conflicts, could also run afoul of the same prohibitions by making use of the very associations that the injunction prohibits.

The executive branch will likely argue that the injunctions will not interfere with community organizations because MPD officers will exercise their discretion not to enforce the injunction against community outreach work. This response is unsatisfactory for two reasons. First, it is hardly clear that the police department will make consistent, accurate judgments about what constitutes association for community outreach purposes and what constitutes association for other purposes. Second, no matter what MPD officers do to avoid accidentally arresting individuals for participating in a community outreach program, the mere existence of the injunction will have a chilling effect on such participation. From the perspective of a gang member, if he understands the injunction to prohibit him equally from spontaneously choosing to hang out on a street corner and from attending a scheduled activity organized by a community organization, and if he wishes to minimize his risk of being arrested, then the rational choice would be to avoid the scheduled activity and instead choose some form of unscheduled, unsupervised activity that is less likely to be attended by police officers. (Indeed, he might even suspect the scheduled activity to be a law enforcement trap.)

Additionally, at the request of a prosecutor, a gang injunction could impose an unlimited range of other conditions that would seriously interfere with that individual's work, family, and social life. For example, both bills authorize an injunction prohibiting a targeted individual from "[b]eing present on any private property within a defined geographic area without the written consent of the owner." A person subject to such an injunction could be sent to jail for entering a Safeway to buy bread or entering a CVS to buy a chocolate bar, because he

didn't have the *written consent* of Safeway, Inc., or the CVS Caremark Corp. to enter their premises.[12] Even worse, a person subject to such an injunction could be sent to jail for walking in the hallways or other common areas of any apartment complex or housing project, *even if he lives elsewhere in that building*.[13] Such restrictions will only make it more difficult for a targeted individual to go about his everyday life, maintain a stable job, and maintain his family relationships.

It is hard to overemphasize the importance of such community ties in preventing gang violence. As Vincent Schiraldi, Director of the Department of Youth Rehabilitation Services, stated before the Committee on Human Services:

> The [DYRS] Individualized Development Plan focuses on supporting and enabling a transition to productive adulthood, such as connections with education, training, and employment, caring adults and mentors, positive peers, community service, and leadership development opportunities . . . . It's about creating a bond between our youth and our communities because research and personal experience shows that the more young people are civically engaged, the more they will succeed and the less likely they are to commit delinquent acts. That is, the more time they spend doing good, the less time they'll spend doing bad.[14]

To the extent that anti-gang injunctions interfere with this kind of broader civic engagement and community participation, they promote rather than prevent gang violence. The Council should think hard before going down this dangerous road.

<u>The lack of access to legal counsel undermines the proposed procedural protections</u>

As a general rule, PDS will not be able to represent an individual in challenging an anti-gang injunction until that individual is charged with violating it.

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[12] The risk that such an injunction would issue is not a remote or purely hypothetical possibility. In San Francisco, for example, a recent gang injunction prohibited the targeted individuals from "Being present on any private property, including San Francisco Housing Authority property, except (1) with the prior, written consent of the owner or the owner's agent, or person in lawful possession of the property, or (2) in the physical presence of the owner or owner's agent, or person in lawful possession of the property." *People v. Chopper City*, Case No. 464-493, at 4 (Dec. 18, 2007) (judgment granting permanent injunction).

[13] Prosecutors may say they would not use these provisions in such a manner. But "trust us" is not a substitute for careful legal drafting, especially when the liberties of citizens are at stake.

[14] Testimony of Vincent Schiraldi, Dep't of Youth Rehabilitation Services, at Public Roundtable on Youth Violence, D.C. Council Committee on Human Services, at 8-9 (Feb. 10, 2009).

This means that if anyone seeks to argue for changes to the terms of the injunction or avoid being subject to the injunction in the first instance, he or she must either retain private legal counsel or proceed without counsel. The individuals likely to be targeted by such an injunction—young minorities with low incomes and little education—will generally be unable to retain private counsel.

Absent the assistance of an attorney, these young people will not be able to avail themselves of the bills' procedural protections. As the U.S. Supreme Court stated in overturning the infamous 1931 Alabama trial of the Scottsboro Boys:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[15]

This lesson applies pointedly to gang injunction proceedings. Neither Bill 18-138 nor Bill 18-151 provides for a right to an attorney to defend against being designated a gang member and being burdened with onerous restrictions on legitimate activities.

<u>Insufficient judicial oversight for adding new defendants to the injunction list violates due process rights</u>

Section 101(i)(6) of Bill 18-151 allows the Mayor, in his sole discretion, to add new individuals to an injunction after the injunction is in effect, *without a court proceeding of any kind*. And once added to the list, such individuals have no right to challenge the terms of the injunction either before or after being

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[15] *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (holding that the Due Process Clause of the Fourteenth Amendment required that the Scottsboro Boys receive the assistance of appointed legal counsel in their criminal trial).

charged with violating it. Such later-added individuals must accept the injunction as imposed on the earlier-served individuals, even if the injunction is extremely onerous and those prior individuals failed to challenge its terms. This procedure violates the later-added individuals' right to due process by denying them any meaningful opportunity to challenge the injunction's application to them, as well as denying them any opportunity to challenge the injunction's provisions.[16]

Although § 102(h)(5) of Bill 18-138 requires judicial review of the decision to add a new individual to an existing injunction, it falls short by failing to give the later-added individuals an opportunity to challenge the terms of the injunction.

Periodic review of lists of alleged gang members is essential

Automatic review of the injunction list to remove persons who are no longer actively involved in the gang is essential to reduce the risk that individuals who are no longer affiliated with the gang will continue to be subject to the injunction's restrictions. Bill 18-151, § 101(n) has such a provision; Bill 18-138 does not.

Studies show that injunctions have, at most, a limited short-term impact on crime rates

In 1997, the ACLU of Southern California examined crime rates before and after the April 1993 imposition of an anti-gang injunction in the Blythe Street neighborhood of Los Angeles.[17] In 1998, Jeffrey Grogger, a public policy professor at the University of Chicago, studied the effects of fourteen injunctions imposed in Los Angeles County between 1993 and the end of 1998.[18] In 2004, the Los Angeles County Civil Grand Jury's Gang Injunction Committee conducted a management audit of gang injunctions in the City of L.A. and L.A.

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[16] This is an attempt to bind new individuals to an existing judgment, without giving them an opportunity to litigate independently. An analogy illustrates the audacity of this provision: imagine that a landlord files suit to evict five of his tenants, all of whom are members of the tenants' association, and he obtains a judgment in his favor. If the landlord had the same powers to add new defendants as the Mayor seeks, then the landlord could then proceed to evict *every* member of the tenants' association without giving them individual opportunities to contest the eviction.

[17] *See generally* ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (May 1997) (hereinafter "ACLU BLYTHE STREET STUDY"), *available online at* http://www.streetgangs.com/injunctions/topics/blythereport.pdf.

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

County that analyzed the impact of those injunctions on crime rates.[19] And throughout the late 1990s and early 2000s, Maxson et al. conducted a series of studies examining the impact of civil anti-gang injunctions on community perceptions and law enforcement perceptions of gang activity and neighborhood quality.[20]

None of these studies found that the injunctions led to significant, long-term reductions in violent crime. Instead, they found that the gang injunctions had either a moderate, short-term impact on crime rates or no discernible impact at all.[21] Meanwhile, the community perception studies by Maxson et al. found that although the injunctions had some positive short-term effects, they did not affect intermediate or long-term indicators—there was "little evidence that immediate effects on residents translated into larger improvements in neighborhood quality."[22] Additionally, none of the studies found that gang injunctions were an effective strategy in the absence of increased police patrols or other significant commitments of additional law enforcement resources to the affected neighborhoods.[23] Grogger noted that gang injunctions are notably less effective at reducing crime than other place-based enforcement efforts, such as increased patrols in crime "hot spots."[24]

Another major concern with gang injunctions is the "displacement effect"—the likelihood that rather than diminishing crime they will merely displace it from

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[19] *See* 2003-2004 LOS ANGELES COUNTY CIVIL GRAND JURY, FINAL REPORT 169-391 (June 2004) (hereinafter "GRAND JURY REPORT").

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

[21] *See* ACLU BLYTHE STREET STUDY, *supra* note 17, at 7-9 (finding that crime continued to rise in injunction area even after imposition of injunction); GRAND JURY REPORT, *supra* note 19, at 213 (finding statistically significant decrease in crime only in the first year of injunctions); Grogger, *supra* note 18, at 85 (finding statistically significant decrease in assaults, conflicting results on robberies, and no statistically significant decrease in murders or rapes, in the first year of injunctions). The reduction in crimes were only moderate in size—for example, Grogger concluded that the injunctions probably led to the commission of between 1.5 and 3.0 fewer crimes per quarter during the first year, and that most of this decline stemmed from reductions in assault rather than more serious violent crimes. Grogger, *supra* note 18, at 89.

[22] MAXSON ET AL. (2004), *supra* note 20, at 44.

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

[24] Grogger, *supra* note 20, at 87.

the area covered by the injunction into neighboring areas. Studies have found evidence suggesting that the injunctions caused such displacement effects.[25] Inevitably, prosecutors will seek to leapfrog such effects by enlarging the geographical scope of the injunctions. Soon enough, persons deemed to be gang members will be prohibited from living normal lives almost anywhere they might go in their own city.

Anti-gang injunctions are counterproductive in the long term

Both bills call for permanent injunctions against the targeted individuals. According to data from national surveys and surveys of particular metropolitan areas, the typical gang member is active for a year or less.[26] And when individuals leave gangs, they often experience difficulties building the social capital that they need to integrate themselves into mainstream society. Injunctions that apply to targeted individuals even after their gang activity has ceased actually discourage members from leaving gangs because they increase the difficulties associated with leaving the gang.[27] Thus, the scheme contemplated by these bills is likely to impede rather than aid efforts to convince young gang members to leave their gangs to lead more productive lives.

Additionally, prohibiting gang members from associating and communicating with one another is likely to impede efforts by police, social workers, and religious leaders to directly communicate specific messages to gangs through contacts with selected members or leaders. One of the best-known models for balanced gang enforcement—Boston's Operation Ceasefire—requires such contacts to succeed. In Operation Ceasefire, direct communication with gangs was "a key element in the logic of the overall strategy" of lever-pulling, because it allowed police to communicate two related messages to the gangs in the city: first, to make all of the city's gangs "aware that new rules

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[25] MAXSON ET AL. (2004), *supra* note 20, at 45-46; ACLU BLYTHE STREET STUDY, *supra* note 17, at 39.

[26] JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INSTITUTE, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 46 (July 2007), *available online at* http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

[27] *See id.* ("Gang control policies that fix the gang label on youth . . . deter youth from leaving the gang by ensuring that they will be treated as pariahs no matter what they do.").

existed regarding violence and to understand what they were and how to avoid coming to the Working Group's attention," and second, to send messages to the most problematic gangs to make them "understand that violence had drawn the official attention, and only a cessation of violence would lead to its easing."[28]

<u>The witness protection measures in both bills violate the right to due process</u>

The "witness protection" provisions of these bills go well beyond existing law[29] in erecting barriers to access information an alleged gang member needs to defend himself. Currently, D.C. Code § 42-3105, dealing with drug- and prostitution-related nuisances, reads:

> If proof of the existence of the drug or prostitution-related nuisance depends, in whole or in part, upon affidavits of witnesses who are not law enforcement officers, the court in its discretion may issue orders to protect those witnesses, including, but not limited to, placing the complaint and supporting affidavits under seal.

Section 102(f)(2) of Bill 18-138 begins in a similar fashion (giving the court discretion to issue protective orders sealing affidavits for the purpose of protecting witnesses), but includes the following additional provisions:

- In addition to sealing or redacting affidavits because they would reveal the witness's identity, the court may seal or redact affidavits because they would reveal "the information the witness or witnesses provided."
- The sealing procedure extends well beyond the initial complaint and supporting affidavits. The court may issue further orders prohibiting the disclosure of "other information that, directly or indirectly, may identify a witness responding to interrogatories or depositions or testifying at trial" to "respondents or any other person." If this evidence is sealed, moreover, the statute indicates that even the defendant's lawyer (if he has one) will be unable to examine the sealed evidence.[30]

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

[29] Cf. § D.C. Code § 42-3105.

[30] All that the respondent's attorney may request is an "in camera, ex parte hearing, under seal" for the sole purpose of "verify[ing] that the witness or witnesses live in the neighborhood that is affected by the gang activity."

- If the Attorney General establishes probable cause to believe that any member of the gang — no matter how long ago or how far away — has committed a crime of violence or firearm violation, or if "any other reason" exists to justify preventing the direct or indirect disclosure of a witness's identity, then the court has no discretion and must seal any documents containing that evidence. To unseal the information, the targeted individual's attorney must establish by clear and convincing evidence that the disclosure would not put the witness at risk.

Together, these provisions authorize what can only be described as Star Chamber-style proceedings, with secret evidence and anonymous accusers. Such proceedings differ starkly from current DC law, and would violate the defendant's right to due process by denying him a meaningful opportunity to challenge the evidence against him.

The analogous section of Bill 18-151, § 101(g), eliminates the noxious requirement that the defendant bears the burden of showing that the release of witness information will not put the witness at risk, but otherwise largely tracks the language of Bill 18-138. It therefore raises many of the same issues as Bill 18-138.

The ACLU endorses a targeted criminal statute to deal with the problem

The objective of the anti-gang provisions (to deter and punish acts of intimidation by gang members that leave community members feeling besieged by gang activity) is best served by a straightforward criminal statute that targets these specific bad acts. In fact, the new disorderly conduct statute proposed in § 106 of Bill 18-151 serves this purpose well. By prohibiting intimidation and harassment activities directly, § 106 of Bill 18-151 avoids the gang injunction's misplaced focus on association and instead punishes the threatening acts that gave rise to the proposed gang legislation in the first place. The revised disorderly conduct statute will accomplish the same purposes as a system of anti-gang injunctions without raising its serious constitutional and practical problems. The ACLU urges the Council to embrace this alternative.

The Other Provisions of Bill 18-138

Sections 204, 206, 208 & 218: More Mandates for Minimum Sentences

These sections would perpetuate and extend the prescription of mandatory minimum sentencing for certain crimes. This is bad public policy.

The bill assumes that the courts are not competent to decide appropriate levels of sentences. Before extending mandatory minimum sentencing, the Council should examine this assumption.

The critical question is whether mandatory minimum sentencing – a one-size-fits-all approach – is an effective deterrent. Do mandated minimums reduce recidivism? Should factors such as the defendant's prior criminal record, age, and employability be taken into account in assessing a defendant's likelihood to reoffend?

There is an extensive body of literature that the Council should consult before adding mandates for minimum sentencing. For example, the American Bar Association, in a July 3, 2007 letter to the House of Representatives' Subcommittee on Crime, Terrorism and Homeland Security, stated:[31]

> The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) state clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account." . . .
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> Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has

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[31] Available at http://www.abanet.org/poladv/letters/crimlaw/2007jul03_minimumsenth_l.pdf.

> increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics."

A Rand Corporation study similarly found:[32]

> Though it is still too early to make a final judgment, RAND found that three strikes and truth-in-sentencing laws [prescribing mandatory minimum sentences] have had little significant impact on crime and arrest rates. According to the Uniform Crime Reports, states with neither a three strikes nor a truth-in-sentencing law had the lowest rates of index crimes, whereas index crime rates were highest in states with both types of get-tough laws.

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

As a Rand study concluded: "Mandatory minimums have not actually reduced sentencing discretion. Control has merely been transferred from judges to prosecutors."[33]

And here is what the American Bar Association said on this point:[34]

> In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make, rather than judges imposing a sentence, taking into account all relevant factors regarding an offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case.

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[32] Turner, Susan, RAND Corporation Criminal Justice Program, Justice Research & Statistics Association, "Impact of Truth-in-Sentencing and Three Strikes Legislation on Crime" Crime and Justice Atlas 2000 (Washington, DC: US Dept. of Justice, June 2000), p. 10.

[33] Caulkins, J., et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* (Santa Monica, CA: RAND Corporation, 1997), p. 24.

[34] *See* note 1, *supra.*

At an appropriate time, the Council should revisit the mandatory minimum sentences currently in the criminal code. There is an alternative to Bill 18-138's mandates for minimum sentences: preserving the courts' discretion to suspend all or part of a prescribed minimum sentence. This approach allows the Council to enact legislation that reflects the community's condemnation of particular criminal conduct such as driving while intoxicated, but also ensures that judges will still be able to structure a sentence that is appropriate for the individual defendant. Suspending part or all of a sentence and placing a defendant on probation would allow a judge to reimpose the original sentence for violation of the terms of probation. But for now, the Council should not compound the wrong by adding new mandatory minimum sentences.

Section 210: A Novel Definition of "Daylight"

Justice Thurgood Marshall observed: "there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night."[35] Recognizing and respecting that truth, District of Columbia law requires that search warrants must normally be executed during daylight hours.[36] The statute does not define "daylight," and there is no need to do so, as it has an easily understood ordinary meaning.[37] Bill 18-138 seeks to twist that plain meaning beyond recognition by absurdly defining "daylight" as the "hours between 6:00 a.m. and 11 p.m." Those of us who live at the latitude of Washington, DC will be surprised to learn that we have "daylight" at 10:45 p.m., or at 6:15 a.m. during the winter.

The D.C. Code recognizes that there may be special circumstances for serving search warrants at night and spells those out:[38]

> The application may also contain a request that the search warrant be made executable at any hour of the day or night upon the ground that there is probable cause to believe that (1) it cannot be executed during the

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[35] *Gooding v. United States,* 416 U.S. 430, 462 (1974) (Marshall J., dissenting).
[36] D.C. Code § 23-523.
[37] *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) (undefined words generally "will be interpreted as taking their ordinary, contemporary, common meaning"); *accord Barbour v. Dep't of Employment Services*, 499 A.2d 122, 125 (D.C. 1985).
[38] D.C. Code § 23-522 (c).

> hours of daylight, (2) the property sought is likely to be removed or destroyed if not seized forthwith, or (3) the property sought is not likely to be found except at certain times or in certain circumstances. Any request made pursuant to this subsection must be accompanied and supported by allegations of fact supporting such request.

That provision provides all the flexibility the police need for serving warrants at night. The police are required to obtain judicial authorization to conduct a search, and if there's good reason to execute the warrant at night, the police can justify that departure from the usual practice of executing warrants during daylight when they apply for the warrant. The goal of Bill 18-138 is to allow the police to decide for themselves whether to invade someone's home in the dark, at 6 a.m. or 11 p.m., free from judicial supervision. It is difficult to understand why anyone who sleeps in the District would see such a change as desirable.

Section 212: Misuse of Pre-trial Detention

This proposed revision of D.C. Code § 23-1322(c) would make it much easier for a judge to detain someone prior to trial by reducing the standard of proof for a finding that the accused committed an offense for which pre-trial detention is authorized. Such a finding gives rise to "a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community."[39] Currently, the judge must find that there is a "substantial probability" that the accused committed the offense. The Bill would reduce that standard to the significantly less demanding standard of "probable cause."

The Court of Appeals for the District of Columbia contrasted the two standards:

> A "substantial probability" is a degree of proof meaningfully higher than probable cause, intended in the pretrial detention statute to be "equivalent to the standard required to secure a civil injunction-likelihood of success on the merits." *United States v. Edwards*, 430 A.2d 1321, 1339 (D.C.1981) (en banc) (internal quotation marks and citations omitted).[40]

[39] D.C. Code § 23-1322(c).
[40] *Blackson v. United States*, 897 A.2d 187, n. 16 (D.C. 2006).

The less demanding standard of "probable cause" required for an arrest is merely a "reasonable suspicion to suspect that a person has committed or is committing a crime."[41] The proposed change in the standard of proof would provide a premise for pretrial detention no different than the standard for the arrest that led to the pre-trial detention hearing. This must be rejected, because, as the District of Columbia Court of Appeals stated:

> Adherence to the statutory requirements [of D.C. Code § 23-1322(c)] is imperative, for "liberty is the norm" to which pretrial detention is intended to be a "carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). . . .
>
> Pretrial detention is not to be employed as a device to punish a defendant before guilt has been determined, nor to express outrage at a defendant's evident wrongdoing. The sole purpose of pretrial detention is to ensure public safety and the defendant's future appearance in court when the government proves that conditions of release cannot be counted upon to achieve those goals.[42]

In sum, "preventive detention implicates basic constitutional liberties,"[43] and the Council must reject this attempt to subvert them.

Section 219: Additional Punishment for Gun Offenders

On its face, the only conceivable reason for this proposal to create a registry for gun offenders is to punish them further after they have served their sentences. It will be argued that the registry will enable the Metropolitan Police Department better to monitor the activities of these persons. But, on closer scrutiny, this does not hold up.

The form and extent of post-release supervision is specified in the conditions for parole or probation. The Court Services and Offender Supervision Agency (CSOSA) will have all the personal information needed to track ex-offenders.

The gun registry is a trap for persons convicted of gun offenses outside the District.[44] How are they to be informed of the requirement to register?

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[41] *Black's Law Dictionary*, Seventh Edition.
[42] *Blackson*, 897 A.2d at 194-195.
[43] *Pope v. United States*, 739 A.2d 819, 825 (D.C. 1999).

The sanctions for failing to comply with the registration requirements are draconian: up to a fine of $1,000 and/or six months imprisonment for each day of violation. Failure to register for a week would subject a violator to three and a half years behind bars. This proposal would simply give a prosecutor license to threaten ex-offenders with long prison terms.

The imposition of this additional requirement is antithetical to the objective of reintegrating ex-offenders into society. It is simply a form of harassment or worse. Requirements for post conviction/release supervision should be determined on an individual basis by the courts with the assistance of CSOSA. The proposed Gun Offender Registry makes no sense and should be rejected.[45]

The Other Provisions of Bill 18-151

Section 104: Protection of Campaign Material

This section would protect campaign materials from unlawful removal or defacement. Free elections depend upon voters being able to evaluate competing messages, but this can easily be defeated by persons who tear down or deface their competitors' material. Making this misconduct a misdemeanor offense is an appropriate response.[46]

Section 106: Disorderly Conduct

In its report on "Disorderly Conduct Arrests Made by Metropolitan Police Officers," November 19, 2003, the Citizen Complain Review Board found that the disorderly conduct statutes were subject to abuse by arresting officers. The Board recommended:

> The Mayor, the Council, and MPD should review the criminal law chapter covering breaches of the public peace, with a focus on the disorderly conduct provision, as well as the rules governing collateral forfeiture, to determine if the chapter and rules are adequate to meet the needs of the public. Based on their own review, as well as MPD's review of disorderly conduct complaints, the Mayor and Council should consider

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[44] Section 801(6) defines "gun offender" as "a person who committed a gun offense in the District or another jurisdiction and, within the registration period established pursuant to section 803, remains in or enters the District to live, work or attend school."
[45] If this proposal is not rejected by the Council it may well be vetoed or repealed by Congress.
[46] New subsection (c)(1) should specify the period for the unlawful conduct. The first sentence should read: "Any person who, during the period beginning 30 days before and ending four days after any election . . ." There is an error in revised subsection (c)(2). It should read ". . . the court shall consider the frequency, nature and extent of the proscribed conduct."

> whether the code and rules need to be revised, updated, or changed. In addition, the Mayor and Council should consider specific reforms, such as whether disorderly conduct and other offenses should be decriminalized, and whether the collateral forfeiture process should be modified to mirror the response process for a parking violation, which allows 15 days for the recipient of a ticket to decide how he or she wants to respond to the charged offense.

The disorderly conduct statutes, D.C. Official Code §§ 22-1307 and 22-1321, are unconstitutional in part and antiquated. They should be corrected and consolidated so as to be more understandable to both the police and the public.

Section 106 preserves the traditional elements of disorderly conduct. To illustrate: Under subsection (b)(1), a person riding a bicycle at a high rate of speed on a crowded public sidewalk obliging pedestrians to jump out of the way to avoid being hit would commit disorderly conduct. Under subsection (b)(2), a person blocking the flow of traffic in a street while soliciting money and refusing to move when so instructed by a police officer would commit disorderly conduct. Under subsection (b)(3), a person playing a trumpet very loudly on the Metro to the discomfort of the other passengers would commit disorderly conduct.

Section 22-1307[47] is based on an 1892 statute last modified in 1953. On its face, it contains provisions that are constitutionally suspect. *See for example*

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[47] § 22-1307. Unlawful assembly; profane and indecent language.
It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than 90 days, or both for each and every such offense.

In re W., 383 A.2d 646 (D.C. 1978) (juvenile's adjudication as a delinquent for using profanity against a police officer reversed).

Section 22-1321[48] is based on a 1953 statute last modified in 1994. It is riddled with vague language that is constitutionally suspect, for example: "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

The proposed revision of the disorderly conduct statutes should be adopted. It restricts the concept of disorderly conduct to conduct that may constitutionally be sanctioned while at the same time affording the police all the latitude they were entitled to employ under the existing law.

<u>Sections 107 and 110: More Mandates for Minimum Sentences</u>

For the reasons stated above[49] in opposition to the provisions for mandatory minimum sentences in Bill 18-138, the ACLU urges the Council to reject sections 107 and 110 of Bill 18-151.

<u>Section 112: Repeal of the Vagrancy Statute</u>

The statute on vagrancy continues to appear in the D.C. Code[50] even though it has effectively been held to be unconstitutional. *Ricks v. District of*

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[48] § 22-1321. Disorderly conduct.

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such person or by placing a hand in the proximity of such person's pocketbook, or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than $250 or imprisoned not more than 90 days, or both.

[49] Page 23.

[50] § 22-3502. "Vagrants" defined.

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his or her own confession or by his or her having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself or herself when found loitering around in any park, highway,

Columbia, 414 F.2d 1097 (D.C. Cir. 1968). It will continue to be on the books until the Council formally repeals it. While the Court of Appeals in *Ricks* found unconstitutional only the sections of the statute that were challenged in that case, it made clear that the rest of the statute was likewise infirm:[51]

> It may be appropriate to add a final word on the scope and nature of our ruling. Our opinion has been cast in relatively narrow doctrinal terms and passes on only those particular statutory sections involved in the information against appellant. . . .
>
> We are also aware that our ruling, as a matter of stare decisis, undercuts the validity of other sections of both the general vagrancy statute and narcotic vagrancy legislation. Our silence as to the validity of these sections does not indicate any reservation about extending our holding to cover them in appropriate cases. We do not rule on those sections now because their validity was not argued nor is decision on them necessary for resolution of the case before us. We add this word, fully aware that it is dictum, to avoid constriction of the scope of the ruling by all concerned, including those in the legislative and executive branches.

The Court's invitation to the Council to repeal the vagrancy statute could not be clearer. We urge the adoption of section 112.[52]

Section 113: Bias- Related Crimes and Homelessness

The proposal to make homelessness a protected class under the

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public building, or other public place, store, shop, or reservation, or at any public gathering or assembly;

(2) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source;

(3) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire;

(4) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license;

(5) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage, gasoline station, parking lot, or in the open air, and not giving a good account of himself or herself;

(6) Repealed;

(7) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself or herself; and

(8) All persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not.

[51] *Ricks*, 414 F.2d at 1110.

[52] There is a typographical error in the citation of the section of the D.C. Code to be repealed. It should read: "§ 22-3501 *et. seq.*"

District's bias-related crimes statute[53] calls attention to the absence of a provision in that law protecting First Amendment expression. Protecting free speech and civil rights are not inconsistent. Vigilant protection of free speech rights historically has opened the doors to effective advocacy for expanded civil rights protections. The District's bias-related crimes statute punishes only the conduct of intentionally selecting another person for violence because of that person's "actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, physical disability, matriculation, or political affiliation."[54] In *Shepherd v. United States*, the Court of Appeals for the District of Columbia made it clear that the statute punishes discrimination (an act), not bigotry (a belief).[55]

To make that distinction an explicit part of the District's bias-related crimes statute, and to ensure that it is not misapplied to punish First Amendment protected expression, we strongly recommend the addition of a new section as follows:

> Evidence of expression or association of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing the impeachment of a witness.

This provision will reduce or eliminate the possibility that a criminal conviction could be obtained on the basis of evidence of speech that had no role in the alleged violent act proscribed by the statute.

The problem today is that there is an increasing focus on "combating hate," fighting "hate groups," and identifying alleged perpetrators by their

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[53] D.C. Code § 22-3701 et Seq.
[54] D.C. Code § 22-3701.
[55] *Shepherd v. United States*, 905 A.2d 260, 262-63 (D.C. 2006). Upholding a conviction for a bias-related assault, the court stated: "The trial court implicitly applied the statute as requiring a clear nexus between the bias identified in the statute and the assault, finding it 'very clear that it was the bias that was the source of the assault' beyond 'the slightest doubt.' Thus, it was appellant's assaultive conduct motivated by bias, not his homophobic prejudice as such, that was subject to criminal sanction. . . . The trial court's finding of a nexus was amply supported by evidence-to which appellant generally admitted at trial-that appellant accompanied his assaults on the two women with a verbal stream of homophobic insults."

membership in such groups--even in the absence of any link between membership in the group and the violent act. The proposed evidentiary provision removes the danger that the District's bias-related crimes statute could be construed to allow the admission of speech-related evidence that is unrelated to the chain of events leading to a violent act as a proper basis for proving the intentional selection element of the offense. The provision will stop the temptation for prosecutors to focus on proving the selection element by showing "guilt by association" with groups whose bigoted views we may all find repugnant, but which may have had no role in committing the violent act.

The evidentiary provision is not overly expansive. It will bar only evidence that has no specific relationship to the underlying violent offense. It will have no effect on the admissibility of evidence of speech that bears a specific relationship to the underlying crime--or evidence used to impeach a witness. Thus, the proposal will not bar all expressions or associations of the accused. It is a prophylactic provision that is precisely tailored to protect against the chilling of constitutionally protected free speech.

With the addition of the recommended evidentiary provision, the ACLU supports § 113, making homelessness a protected class under the District's bias-related crimes statute.

Bill 18-152, the "Hot Spot No Loitering Zone Act of 2009"

Bill 18-152 and the Anti-Loitering/Drug Free Zone Act of 1996, Which it Supplements, Embody Bad Public Policy

The rationale for drug free zones and anti-loitering statutes is that by ordering persons suspected of criminal activity to disperse, police officers will disrupt their activity and thereby drive down the crime rate. This argument is of similar vintage to the rationale for deploying surveillance cameras -- it is presumed that by erecting cameras in areas frequented by drug dealers, they will simply abandon their dealing. The belief that surveillance cameras reduce crime is false. Study after study has shown that at best cameras displace crime and do not reduce the overall crime rate. *See*, for example, the August 2002 British

Home Office Research Study 252: “Crime prevention effects of closed circuit television: a systematic review,” pp. 7-8 for a discussion of the displacement effect.

Moreover, drug-free zones disparately and unfairly impact minority groups. Consider the experience of:

- Texas, New Jersey, Massachusetts, Connecticut, Illinois, Utah, and Washington: The title of the Justice Policy Institute’s Report of March 2006 summarizes the research: *Disparity by Design: How drug-free zones laws impact racial disparity – and fail to protect youth.*[56]

- New Jersey: “New Jersey's drug-free school zone law wastes money, damages young lives, has racially discriminatory outcomes and hasn't reduced crime. Among those who want it changed are the governor, the attorney general, many of the state's judges, the prosecutors of all 21 counties and the mayor of Newark, where its impact has been especially harmful.” *The* [New Jersey] *Times*, May 12, 2008.[57]

- Portland, Oregon: In announcing that the Drug and Prostitution Free Zone policies were cancelled, Mayor Tom Potter explained: “both laws have not been effective in eliminating the drug addiction that drives these crimes. Additionally, new data indicates a disparity in how the Drug Free Zone law has been enforced.” The decision to let these two laws die was based on a report by consultant John Campbell: *An Analysis of Data Relating to The City of Portland’s Drug Free Zone Ordinance*, September 2007, Conducted for: The City of Portland, Office of Mayor Tom Potter.[58] Campbell found discrimination against African-Americans in the enforcement of drug free zones as compared to Caucasians and Hispanics.[59]

Before the Council considers authorizing the expansion of exclusion zones proposed in Bill 18-152, members should be certain that drug free zones have both reduced drug crimes in the District and not disparately impacted minority communities. We urge you not to assume that drug-free zones are an appropriate law enforcement tool when serious research demonstrates that they are not.

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[56] Available at: http://www.drugpolicy.org/docUploads/SchoolZonesReport06.pdf.
[57] Available at: http://www.nj.com/news/times/index.ssf?/base/columns-0/1210565114271070.xml&coll=5.
[58] Available at: http://blogtown.portlandmercury.com/files/2007/09/CDRI_DFZ%20Report%20Sept%202007.pdf.
[59] Campbell Report, p. 4.

The Anti-Loitering/Drug Free Zone Act of 1996 is Unconstitutional

Before councilmembers consider expanding exclusion zones as proposed in Bill 18-152, they should satisfy themselves that the Anti-Loitering/Drug Free Zone Act of 1996, which it would supplement, is itself constitutional. It is not.

The courts have not ruled on the constitutionality of this District statute in the light of the Supreme Court's decision in *Chicago v. Morales* in 1999.[60] There the Court considered a Chicago anti-gang ordinance that gave police officers authority to order persons reasonably believed to be gang members to disperse if they "remain[ed] in any one place with no apparent purpose."[61] The Court began with the principle that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.[62] It found the ordinance to be a violation of the Due Process Clause of the Constitution on grounds of vagueness for two independent reasons:

> First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.[63]

As to the first reason, failure to enable the public to know what conduct is prohibited, the Court found that the operative provision in the ordinance, "to remain in any one place with no apparent purpose," did not provide adequate notice. The Court explained:

> It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?[64]

This is precisely the infirmity of the Anti-Loitering/Drug Free Zone Act of 1996.[65] The statute authorizes a police officer to conclude that a person is

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[60] 527 U.S. 41 (1999).
[61] *Morales,* 527 U.S. at 47, note 2.
[62] *Ibid.* at 53.
[63] *Ibid.* at 56.
[64] *Ibid.* at 56-57.
[65] There are other somewhat more debatable constitutional problems in the Anti-Loitering/Drug Free Zone Act of 1996, but the vagueness problems identified here are clear.

"congregating in a drug free zone" if "such person has no other apparent lawful reason for congregating in the drug free zone such as waiting for a bus or being near one's own residence."[66] This is virtually the same language held to be unconstitutional in *Morales*. It provides no guidance to answer the hypothetical questions posed by the Court.

The Court found that the Chicago ordinance's failure to afford adequate notice to the public was compounded by its lack of specificity concerning the order to disperse:

> . . . how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?[67]

The absence of answers to these questions is also conspicuous in the District's drug free zone statute.

As to the second reason for the Court's finding unconstitutional vagueness, the failure to "establish minimal guidelines to govern law enforcement,"[68] the Court found that the "no apparent purpose" language of the ordinance was "inherently subjective." It authorized an officer to order someone to disperse if he saw "no apparent purpose" to the person's presence:

> Presumably an officer would have discretion to treat some purposes-perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening-as too frivolous to be apparent if he suspected a different ulterior motive.[69]

Again, the language in the Anti-Loitering/Drug Free Zone Act of 1996, "such person has no other apparent lawful reason for congregating in the drug free zone such as waiting for a bus or being near one's own residence,"[70] is

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[66] D.C. Code § 48-1004(b)(6). While the statute requires the officer to consider "the totality of the circumstances" in determining whether the person is congregating in the drug free zone to commit a narcotics crime, it provides seven factors that may be considered. These varying factors must be read in the alternative to make any sense, with the result that an officer is entitled to rely on her "sixth sense" in concluding that a person has no "other apparent lawful reason for congregating in the drug free zone."
[67] *Morales*, 527 U.S. at 59.
[68] *Ibid.* at 60, citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).
[69] *Ibid.* at 62.
[70] D.C. Code § 48-1004(b)(6).

virtually the same as that held to be unconstitutional in *Morales*. It does not "establish minimal guidelines to govern law enforcement."[71]

Bill 18-152, the "Hot Spot No Loitering Zone Act of 2009" is Unconstitutional

The vagueness sins of the parent statute, the Anti-Loitering/Drug Free Zone Act of 1996, are visited on its progeny, Bill 18-152. Indeed, this year's version[72] is even more deficient.

Bill 18-152 allows a police officer to order two people to leave a designated "hot spot no loitering zone" simply because they are "loitering" there.[73] "Loitering" is not defined, but presumably encompasses what in today's vernacular is called "hanging out." The police officer who orders the loiterers to disperse does not have to believe that the loiterers intend to break the law. But innocent loitering is precisely what the Supreme Court in *Morales* said was protected by the Due Process Clause of the Fourteenth Amendment.[74]

The bill seeks to avoid such problems by directing the Mayor to "promulgate rules to prevent the enforcement of this act against persons who are engaged in assembly protected by the Constitution of the United States or the District of Columbia."[75] But why does anyone believe that the Mayor can thread this constitutional needle? He can't, because the foundational statute, the Anti-Loitering/Drug Free Zone Act of 1996 is unconstitutional. Acting responsibly, the Council cannot simply kick this can down the road in the direction of the Mayor.

Bill 18-152 should be rejected without further consideration.

Thank you for considering our views.

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[71] *Morales,* 527 U.S. at 60, citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).
[72] For comparison, *see* Bill 17-111, the "Hot Spot No Loitering Zone Amendment Act of 2007."
[73] Bill 18-152 § 3.
[74] *Morales,* 527 U.S. at 53.
[75] Bill 18-152 § 4.