
CALIFORNIA'S CRIMINAL GANG ENHANCEMENTS:

LESSONS FROM INTERVIEWS WITH PRACTITIONERS

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I. THE HISTORY OF CALIFORNIA'S CRIMINAL GANG ENHANCEMENTS: THE STREET TERRORISM ENFORCEMENT AND PREVENTION ACT

A. CALIFORNIA GANGS

During the 1980s, California experienced an explosion of gang violence. This gang violence was highly publicized and was simultaneously condemned by local media and glorified by popular culture in movies, music and attire.¹ The problem was particularly acute in the County of Los Angeles, where gang membership was a way of life with a seemingly endless life cycle.² From 1981 to 2001, there were approximately 10,000 gang homicides³ in the state of California, approximately seventy-five percent of

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¹ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, ADDRESSING COMMUNITY GANG PROBLEMS: A PRACTICAL GUIDE 18 (1998); Beth Bjerregaard, *Antigang Legislation and Its Potential Impact*, in THE MODERN GANG READER 381, 387 (Arlen Egley Jr. et al. eds., 2006).

² See George Tita & Allan Abrahamse, *Gang Homicide in LA, 1981-2001*, AT THE LOCAL LEVEL: PERSPECTIVES ON VIOLENCE PREVENTION, Feb. 2004, at 2 (published by the California Attorney General's Office).

³ *Id.* Definitions of gang-related violence and gang homicides vary by geographic location. Los Angeles uses a broad definition such that any incident in which either the suspect or the victim is a gang member will be designated as gang-related; however, in Chicago, incidents will be designated as gang-related only where there is evidence that gang activity or membership was the motive for the incident. Cheryl L. Maxson & Malcolm W. Klein, *Defining Gang Homicide: An Updated Look at Member and Motive Approaches*, in THE MODERN GANG READER 258, 259 (Arlen Egley Jr. et al. eds., 2006).

which occurred in Los Angeles County.⁴ As law enforcement agencies attempted to quell the gang violence, they began tracking alleged gang members in a database, and in Fiscal Year 2001/2002, California recorded 180,219 active gang members.⁵

B. CALIFORNIA'S LEGISLATIVE RESPONSE TO CRIMINAL GANG VIOLENCE AND SUBSEQUENT AMENDMENTS

In 1988, the California State Legislature confronted this “state of crisis” by enacting emergency legislation entitled the Street Terrorism Enforcement and Prevention Act (“STEP Act”).⁶ The STEP Act was codified in section 186.22 of the California Penal Code.⁷ As part of its findings, the Legislature determined that nearly 600 gangs existed in California and that gang-related murders were on the rise.⁸ In 1986, Los Angeles County alone accounted for 328 such murders and that number increased eighty percent by the following year.⁹ With the “eradication of criminal [gang] activity”¹⁰ as its end goal, the STEP Act did two things: (1) Subsection (a) created a substantive crime for “active[] participat[ion] in any criminal street gang;” and (2) Subsection (b) imposed greater punishment for crimes committed “for the benefit” of a criminal street gang.¹¹

Subsection (a) creates a substantive offense and provides for the punishment of up to three years for anyone “actively participat[ing]” in a criminal street gang as either a felony or misdemeanor.¹² While this section of the STEP Act has been the subject of several constitutional chal-

⁴ Tita & Abrahamse *supra* note 2.

⁵ KIRBY L. EVERHART, CAL. GOV.'S OFFICE OF CRIMINAL JUSTICE PLANNING: EVALUATION, MONITORING AND AUDITS DIVISION, AN EVALUATION OF THE GANG VIOLENCE SUPPRESSION PROGRAM: FINAL EVALUATION REPORT 19 (Mar. 2003). It must be noted that the accuracy of gang databases has been severely criticized. See Anne-Marie O'Connor, *Massive Gang Member List Now Clouded by Rampart*, L.A. TIMES, Mar. 25, 2000, at A1; Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747 (2001) (database accuracy is hindered by lack of safeguards, oversight and transparency); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115, 120–21 (2005) (calling into question the reliability of gang databases because of documentation issues such as systematic errors resulting from administrative overload and technical failures, police misconduct and the ease with which individuals are entered into gang databases); *The Tavis Smiley Show: CalGang Database* (NPR radio broadcast Aug. 6, 2002) (with Commentator Connie Rice).

⁶ CAL. PENAL CODE § 186.21 (West 2008).

⁷ Unless otherwise noted, all references to code sections refer to the California Penal Code.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CAL. PENAL CODE § 186.22(a), (b) (West Supp. 2008).

¹² *Id.* § 186.22(a).

lenges, it is prosecuted relatively infrequently and will not be the focus of this note.

Subsection (b) (hereinafter, the “gang enhancement”) creates sentencing enhancements for felonies committed “for the benefit of, at the direction of, or in association with any criminal street gang,” by a defendant with “specific intent to promote, further, or assist in any criminal conduct by gang members.”¹³ Under the current law, an enhancement under this subsection results in an additional term of two years to life imprisonment, depending on the underlying felony, and will run consecutive to the punishment of that felony.¹⁴ This section is frequently filed in prosecutions and is the focus of this note.

Since its enactment, the STEP Act’s most significant amendments have increased the penalties under the gang enhancement. Originally, gang enhancements added an additional term of one, two, or three years to the sentence imposed for the underlying felony conviction,¹⁵ and in 1994, the low term was increased to sixteen months, instead of one year.¹⁶

In 2000, the gang enhancement terms changed drastically. The terms were increased to an additional term of two, three, or four years, instead of the previous sixteen months, two, or three years.¹⁷ Crimes that were “serious” or “violent,” as defined by the Penal Code, did not receive the regular enhancement term of two, three, or four years, but instead were enhanced by a term of five¹⁸ or ten years,¹⁹ respectively. Certain crimes enumerated in this section resulted in a life sentence.²⁰

While California was cracking down on gang-related crimes with the STEP Act, it fought general criminal activity on another front by increasing the punishment for repeat offenders. In 1994, California adopted two statutes, one by urgency statute in the Legislature and one by a public initiative called Proposition 184.²¹ This legislation, commonly known as the Three Strikes Law, classified “serious” and “violent” felonies as “strikes.”²² Under the current state of the law,²³ if a person is convicted of a felony and

¹³ *Id.* § 186.22(b).

¹⁴ *Id.* § 186.22(b)(1)(A)–(C), (b)(4).

¹⁵ CAL. PENAL CODE § 186.22(b) (West 1988).

¹⁶ CAL. PENAL CODE § 186.22(b) (West Supp. 1995).

¹⁷ CAL. PENAL CODE § 186.22(b) (West Supp. 2008).

¹⁸ *Id.* § 186.22(b)(1)(B).

¹⁹ *Id.* § 186.22(b)(1)(C).

²⁰ *Id.* § 186.22(b)(4).

²¹ 1 WITKIN CAL. CRIMINAL LAW Ch. 1 § 115 (3d ed. 2000).

²² CAL. PENAL CODE § 667(d)(1) (West Supp. 2008).

²³ Amendments to sections 667 and 1170 are currently pending in the California State Legislature.

has previously suffered a single strike, among other provisions, the sentence is doubled and must be served consecutively; the person must also serve eighty percent of the sentence (as opposed to those without a strike who may be eligible for release after having served fifty percent of their sentence).²⁴ If a person has previously suffered two strikes and is convicted of any third felony (it does not have to be “serious” or “violent”), that person is sentenced to an indeterminate life term.²⁵

Section 1192.7 enumerates the serious felonies that may be used as strikes for the purposes of the Three Strikes Law. In 1998, this section was amended to include any felony accompanied by a gang enhancement under section 186.22(b)(1).²⁶

II. THE METHODOLOGY

This note is based on the interviews of three deputy district attorneys, four deputy public defenders, and three law enforcement officers conducted between December 2007 and February 2008. Although this is a limited sample set, the interviewees represent varied backgrounds and many years of experience in the criminal justice system. All of the deputy district attorneys work for the Los Angeles County District Attorney’s Office, and one previously worked in that office’s Hardcore Gang Unit. All of the deputy public defenders work for the Los Angeles County Public Defender’s Office and have over seventy-five years experience combined; two are Grade IV senior felony attorneys and two work in felony arraignments. Two of the law enforcement officers work for the Los Angeles County Sheriff’s Department, and one works for the California State Department of Corrections.

The interviews were conducted either in person or over the telephone. I took notes throughout the interviews, and although I had prepared questions for the interviewees in advance, I encouraged them to discuss whatever they believed was important for the legal community to know about the STEP Act. All interviewees were given the option to remain anonymous; they will be referred to throughout this note as Deputy District Attorneys 1 through 3, Deputy Public Defenders 1 through 4, and Officers 1 through 3.

After generating a list of general questions that I hoped the interviewees would be willing to address, I contacted Deputy Public Defender 1,

²⁴ CAL. PENAL CODE § 667(e)(1), (c)(8), (c)(5).

²⁵ *Id.* § 667(e)(2).

²⁶ *Id.* § 1192.7(c)(28); *People v. Briceno*, 99 P.3d 1007, 1014 (Cal. 2004).

who not only agreed to be interviewed, but also arranged for me to meet with the other deputy public defenders that I interviewed. He introduced me to Deputy District Attorney 2 and provided me with the names and contact information for Deputy District Attorneys 1 and 3. Officer 1 agreed to be interviewed and referred me to Officer 2. A family friend works as a parole officer and referred me to Officer 3.

III. THE STEP ACT IN ACTION

A. APPLICATION BY THE COURTS

California courts have generally proven to be great supporters of the STEP Act. In addition to finding the STEP Act to be a valid law in spite of challenges to its constitutionality, courts have greatly expanded its scope.

1. Constitutional Challenges to the STEP Act

California courts, in the face of challenges that it is unconstitutional, have consistently held that the very language of the STEP Act's gang enhancements ensures its constitutionality.²⁷

The STEP Act has been criticized as infringing on a person's First Amendment Constitutional right to the Freedom of Association.²⁸ It has been argued that the overbroad and vague term "criminal street gang" results in the unlawful punishment of one's association with a group whose members may have committed criminal offenses.²⁹ In response, courts have instead found that "it is not the association with other individuals *alone* which section 186.22 addresses, but the association with others *for the purpose of promoting, furthering or assisting them in the commission of crime.*"³⁰ The STEP Act "regulates conduct, not speech or association, and there is no right of association to engage in criminal conduct."³¹

²⁷ See *People v. Gamez*, 286 Cal. Rptr. 894, 975–76 (Ct. App. 1991); *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 357 (Ct. App. 1991) (the STEP Act was not unconstitutionally vague because it included the California legislature's affirmation of the right of Freedom of Association and its intention not to interfere with that right, as well as limiting language regarding the proscribed criminal activity); *People v. Gardeley*, 927 P.2d 713, 724 (Cal. 1997) (The STEP Act does not violate Due Process because its "requirements . . . are sufficiently explicit to inform those who are subject to it what constitutes a criminal street gang for purposes of the act.").

²⁸ See Alexander A. Molina, Comment, *California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457, 466 (1993); *Gamez*, 286 Cal. Rptr. at 900–01.

²⁹ *Gamez*, 286 Cal. Rptr. at 901.

³⁰ *Id.* (emphasis in original).

³¹ *Id.*

It has also been argued that the STEP Act violates defendants' Fifth Amendment Due Process rights because terms such as "criminal street gang," "pattern of criminal gang activity," and "specific intent to promote, further, or assist in any criminal conduct by gang members" are unconstitutionally vague and overbroad.³² In addressing this concern, courts have looked to current case law which finds that a statute's vagueness violates due process when: (1) the statute is not reasonably clear about the conduct it proscribes; and (2) the statute does not provide reasonable guidelines to law enforcement officers, thereby lending itself to arbitrary or discriminatory enforcement.³³ In other words, where a law "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application," it is unconstitutionally vague.³⁴ Courts have consistently held that the STEP Act is sufficiently specific to ensure its constitutionality, and that requiring a showing that the defendant "commit[ted] the crime for the benefit of or in association with the gang and with the specific intent to promote, further, or assist members of the gang in any criminal conduct is sufficient to appease any concerns regarding a violation of due process based upon 'pure' association."³⁵

2. Statutory interpretation

In addition to confronting numerous constitutional issues, the STEP Act has also faced a multitude of statutory interpretation challenges. In fact, the California Supreme Court itself has described the STEP Act as a "thicket of statutory construction issues."³⁶ Provided here is a brief analysis of some of the STEP Act's statutory challenges, which also demonstrate the courts' expansive reading of the statute.

i. "Criminal Street Gang"

Gang enhancements under the STEP Act require that the alleged crime be "committed for the benefit of, at the direction of, or in association with any criminal street gang."³⁷ Penal Code section 186.22(f) defines a "criminal street gang" as "any ongoing organization, association, or group of

³² See *id.* at 900.

³³ See *id.* at 901-02.

³⁴ *Alberto R.*, 1 Cal. Rptr. 2d at 352 (citing *People v. Superior Court*, 758 P.2d 1046 (Cal. 1988)).

³⁵ *Gamez*, 286 Cal. Rptr. at 905. *But see* Bjerregaard, *supra* note 1, at 386 (Anti-gang statutes, such as California's STEP Act, are often written to allow for law enforcement discretion. While this discretion is somewhat necessary for the efficient and effective execution of their jobs, it also creates an opportunity for abuse.).

³⁶ *People v. Sengpadychith*, 27 P.3d 739, 741 (Cal. 2001).

³⁷ CAL. PENAL CODE § 186.22(b), (f) (West Supp. 2008).

three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated [therein], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*.”³⁸

a. “Primary Activities”

In determining the meaning of “primary activities,” the California Supreme Court has looked to the plain language of the STEP Act, holding that the term implied that “one or more of the statutorily enumerated crimes be one of the group’s ‘chief’ or ‘principal’ occupations.”³⁹ Therefore, the occasional commission of the enumerated offense will not constitute a “primary activity” within the meaning of the STEP Act.⁴⁰ As an example, the California Supreme Court quoted the Court of Appeal in *People v. Gamez*,⁴¹ where the defendant challenged the STEP Act on the grounds that it was so overbroad that it punished one’s association with an organization whose members have committed crimes, and argued that members of groups such as the Los Angeles Police Department or Humboldt County environmental activists would fall within its ambit.⁴² In response, the *Gamez* court cited the statute’s language, stating that the STEP Act requires that “one of the primary activities of the group or association itself be the commission of crime” in order to fall within the meaning of a “criminal street gang,” therefore, the STEP Act does not punish “association with a group of individuals who, in a separate capacity, may commit crimes.”⁴³

In *People v. Sengpadychith*,⁴⁴ the Court agreed with the Court of Appeal’s holding in *People v. Galvan* that the trier of fact may consider prior conduct to establish the “primary activities” required for a gang enhancement, as well as evidence of conduct that occurred at the time of the present charged offense.⁴⁵ The Court stated that the STEP Act’s language did not prohibit the consideration of the present offense and that evidence of both past and present conduct is relevant in determining a group’s “primary activities.”⁴⁶

³⁸ *Id.* § 186.22(f) (emphasis added).

³⁹ *Sengpadychith*, 27 P.3d at 744.

⁴⁰ *Id.* (emphasis omitted).

⁴¹ 286 Cal. Rptr. 894 (Ct. App. 1991).

⁴² *Sengpadychith*, 27 P.3d at 744–45; *Gamez*, 286 Cal. Rptr. at 901.

⁴³ *Gamez*, 286 Cal. Rptr. at 901.

⁴⁴ 27 P.3d 739 (Cal. 2001).

⁴⁵ *Id.* at 743–44.

⁴⁶ *Id.* at 744.

The Court found that the consistent and repeated offense of the crimes enumerated in the statute by gang members would be sufficient proof of a “primary activity.”⁴⁷ Additionally, expert testimony may also be sufficient proof.⁴⁸

b. “Pattern of Criminal Gang Activity”

Section 186.22(e) defines a “pattern of criminal gang activity” as the “commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [] offenses [enumerated therein] . . . committed on separate occasions, or by two or more persons”⁴⁹

The offenses used to demonstrate a gang’s pattern of criminal gang activity must occur within the specified time frame and are called “predicate acts.”⁵⁰ The *Gamez* court held that predicate acts must have been “gang related” because “[t]o allow otherwise would be to punish [a] defendant for the *unrelated* actions of people with whom he associated.”⁵¹ However, the California Supreme Court disagreed with this holding and instead held that while the predicate acts do not have to be gang-related, they do have to have been committed by gang members.⁵²

In interpreting the definition of “pattern of gang activity,” the Court has looked to the phrase “on separate occasions, or by two or more persons.”⁵³ The Court has read it as allowing the prosecution to choose between showing either that the “two or more” predicate acts were committed on “separate occasions” *or* by evidence that “two or more” predicate acts were committed “by two or more persons” on the *same* occasion.⁵⁴

However, when one person is charged with a crime and another person is charged with aiding and abetting in that crime, this is not sufficient to show a pattern of criminal gang activity.⁵⁵ This is because aider and abettor liability stems from the commission of a single crime (the perpetra-

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ CAL. PENAL CODE § 186.22(e) (West 2008).

⁵⁰ *People v. Gardeley*, 927 P.2d 713, 716 n.1 (Cal. 1996)

⁵¹ *Gamez*, 286 Cal. Rptr. at 906 (emphasis in original).

⁵² *Gardeley*, 927 P.2d at 724. *But see* *People v. Augborne*, 128 Cal. Rptr. 2d 258, 267 (Ct. App. 2002) (emphasis omitted) (“[N]one of the elements of the gang enhancement statute require the two or more persons committing the two predicate crimes be gang members at the time the offenses were committed.”).

⁵³ *People v. Loeun*, 947 P.2d 1313, 1317 (Cal. 1997).

⁵⁴ *Id.* at 1317–18.

⁵⁵ *People v. Zermeno*, 986 P.2d 196, 198–99 (Cal. 1999).

tor's), as opposed to the commission of two separate crimes on the same occasion.⁵⁶

Lastly, the pattern of gang activity can be proven through the current offense (if it is one of the enumerated offenses identified in the statute), and one other offense committed on another occasion by a fellow gang member.⁵⁷

ii. "Specific Intent to Promote, Further, or Assist in Any Criminal Conduct by Gang Members"

The gang enhancement requires that the defendant have acted with specific intent to promote, further or assist in the criminal conduct of a criminal street gang member (although the defendant does not have to be a member of that gang).⁵⁸ In *Garcia v. Carey*,⁵⁹ the Ninth Circuit held that the prosecution must present evidence as to this specific intent requirement in order to distinguish the instant crime as one furthering a criminal street gang member's criminal conduct from the mere commission of a crime.⁶⁰ In *Garcia*, the defendant identified himself to the victim as an El Monte Flores (E.M.F.) gang member.⁶¹ He and his companions then allegedly stole the victim's money and bicycle.⁶² Although the prosecution offered the testimony of an El Monte Police Detective who was familiar with E.M.F. and was able to testify about the general behavior and tendencies of its members, the prosecution did not offer any evidence as to the defendant's intent to further the criminal conduct of E.M.F.⁶³ Thus the evidence justifying the gang enhancement was constitutionally infirm, leading the Ninth Circuit to uphold the district court's grant of habeas relief to the defendant.⁶⁴

While this seems to be the correct holding, as we will later see, this requirement is often glossed over in the face of highly prejudicial gang evidence.

⁵⁶ *Id.*

⁵⁷ *Gardeley*, 927 P.2d at 723.

⁵⁸ CAL. PENAL CODE § 186.22(b)(1) (West 2008).

⁵⁹ 395 F.3d 1099 (9th Cir. 2005).

⁶⁰ *Id.* at 1104.

⁶¹ *Id.* at 1101.

⁶² *Id.*

⁶³ *Id.* at 1101–03.

⁶⁴ *Id.* at 1100.

B. HOW TO DETERMINE WHO IS A GANG MEMBER

1. Difficulties and Law Enforcement Methods in California

One of the difficulties of the STEP Act is determining what constitutes a gang and who counts as a gang member. Gangs are comprised of members of varying involvement and commitment, and as such, have been aptly described as “inherently ambiguous.”⁶⁵ Thus, creating a bright line definition of a gang or gang member is a difficult and complicated task. In his book, *Gangs in Court*, Lewis Yablonsky describes two types of gang involvement: (1) active gang roles and (2) non-active gang roles.⁶⁶ The active gang roles consist of the shot callers (the OGs or Veterans), the troops or foot soldiers (the Gs), and the interns (the Wannabes).⁶⁷ The non-active gang roles include gangster groupies (those who associate with gang members, but do not generally engage in criminal activity), residents of a gang dominated neighborhood, and former gang members.⁶⁸ Often, those assuming non-active gang roles are mistaken as active gang members.⁶⁹

Additionally, the different types of initiation and varying levels of participation in a gang create difficulties in determining who is a gang member. Many gangs require members to “jump[] in,” which generally requires the applicant to perform some act to prove his loyalty to the gang.⁷⁰ While “jumping in” may require some overt act that is violent in nature, often a mere verbal acceptance may suffice.⁷¹

Another complication is that gangs tend to be extremely territorial.⁷² They are often located in urban centers of socially and economically disadvantaged communities,⁷³ and while gangs are not exclusively a minority problem,⁷⁴ it is estimated that eighty percent of gang activity is committed

⁶⁵ Malcolm W. Klein, *What Are Street Gangs When They Get to Court?*, 31 VAL. U.L. REV. 515, 516 (1997).

⁶⁶ LEWIS YABLONSKY, *GANGS IN COURT* 10–11 (2005).

⁶⁷ *Id.*

⁶⁸ *Id.* at 11.

⁶⁹ *Id.*

⁷⁰ *Id.* at 36.

⁷¹ *Id.*

⁷² *Id.* at 36, 71; *see also* Klein, *supra* note 65, at 516 (Territoriality is a shared characteristic of many street gangs.).

⁷³ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 19; *see also* Klein, *supra* note 65, at 517 (Concentration in inner city areas with other social problems is a shared characteristic of many street gangs.).

⁷⁴ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 19.

by African-American and Hispanic gangs.⁷⁵ Often, youths living in a neighborhood under the control of a particular gang will likely be associated with that gang, and many of their acquaintances and neighbors, and even friends, will be members of the local gang.⁷⁶ People with childhood friends or acquaintances who later became gang members may cause them to be mistaken as gang members themselves.⁷⁷ They may even dress like their gang member neighbors, even if they themselves are not gang members.

In an effort to curb criminal gang violence, the Los Angeles Police Department assigned particular law enforcement officers, often called “gang cops,” to gang ridden areas.⁷⁸ In patrolling the same, concentrated area, gang cops become familiar with the players in that neighborhood.⁷⁹ They can initiate informal stops without probable cause and work directly with gang prosecutors.⁸⁰

To better identify and track gang members, California implemented the Cal/Gang database in December of 1997.⁸¹ The database is comprised of information gathered from Field Interview cards (“FI cards”).⁸² When law enforcement officers encounter a person who is either a known gang member or a suspected gang member, the officers complete an FI card.⁸³ FI cards are not only issued for arrests, but also for routine stops by neighborhood gang cops without probable cause and may include detailed information such as gang monikers or affiliations, the location of the stop, vehicles involved, schools attended, addresses, tattoos,⁸⁴ style of dress and identifications by informants or associates.⁸⁵ This information is included in the Cal/Gang database and is often accompanied by a photograph of the individual.⁸⁶ In 2000, the database contained entries on over 250,000 indi-

⁷⁵ YABLONSKY, *supra* note 66, at 71; *see also* Klein, *supra* note 65, at 516 (“[P]reponderance of racial or ethnic minority membership” is a shared characteristic of many street gangs.).

⁷⁶ *See* YABLONSKY, *supra* note 66, at 11.

⁷⁷ Jennifer Steinhauer, *Immigration and Gang Violence Propel Crusade*, N.Y. TIMES, May 15, 2008 at A20.

⁷⁸ *See* Joe Mozingo, *L.A. Fights Back; The LAPD Uses a Broader Arsenal to Take on Gangs*, L.A. TIMES, May 1, 2008 at A1.

⁷⁹ *See Id.*

⁸⁰ *See Id.*

⁸¹ EVERHART, *supra* note 5, at 18.

⁸² Wright, *supra* note 5, at 120–21.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Editorial, *Branded; Gang Injunctions Help Reduce Crime, but They Are Also Unfair to Those Mistakenly Included in Them*, L.A. TIMES, Apr. 11, 2007 at A22.

⁸⁶ O’Connor, *supra* note 5; *see also* Beres & Griffith, *supra* note 5, at 760.

viduals.⁸⁷ Nearly ninety percent of FI cards are for minority youths,⁸⁸ and in 2000, approximately two-thirds of the Los Angeles County residents in the database were Latinos, and one-third were African Americans.⁸⁹ The information from the Cal/Gang database is provided to local prosecutors⁹⁰ and is often used to support gang enhancements.⁹¹

2. According to the Interviewees

Deputy District Attorney 1 worked in the Hardcore Gang Unit with the Los Angeles County District Attorney's Office from 1996 to 1998.⁹² He explained that the process of identifying gang members was based on the reports he received from the police.⁹³ He relied on the Cal/Gang data as well as the description of the defendant's conduct as contained in the police report.⁹⁴

However, as senior felony attorneys, Deputy Public Defenders 3 and 4 recalled countless cases in which their clients denied being gang members, but were nonetheless subject to gang enhancements.⁹⁵ They observed that law enforcement officers, gang cops and prosecutors often made erroneous assumptions that led them to mislabel defendants as gang members.⁹⁶ One such example was when a person had a family nickname that was subsequently picked up and used by his friends who happened to be gang mem-

⁸⁷ O'Connor, *supra* note 5; *see supra* text accompanying note 5.

⁸⁸ YABLONSKY, *supra* note 66, at 130.

⁸⁹ O'Connor, *supra* note 5.

⁹⁰ Telephone Interview with Deputy District Attorney 1, Deputy Dist. Attorney, L.A. County Dist. Attorney's Office, in L.A., Cal. (Jan. 3, 2008).

⁹¹ Wright, *supra* note 5, at 120–21. Cal/Gang information is also used in civil gang injunctions, where named individuals are prohibited from associating with certain people, being in certain places, wearing certain types of clothing, etc. *See Branded*, *supra* note 85; Wright, *supra* note 5, at 117. Los Angeles County has a policy of forwarding the names of those who have violated gang injunctions to immigration officials, and the Los Angeles County District Attorney, Steve Cooley, considered a policy of forwarding the names of people *suspected* of violating gang injunctions to immigration officials. *See Branded*, *supra* note 85. Furthermore, Los Angeles County is currently being pressured to implement a policy in which police officers would inquire into an individual's immigration status when that person is in the Cal/Gang database. Steinhauer, *supra* note 77. Clearly, the consequences of being in the Cal/Gang database can be quite severe, although one's inclusion in it is remarkably easy. *See Branded*, *supra* note 85. The burden of being removed from Cal/Gang is on the individual. *Id.* However, with most databases of this sort, the individual is not entitled to notice of their documentation, a hearing on whether they are properly included, or an opportunity to challenge their inclusion. Wright, *supra* note 5, at 118.

⁹² Telephone Interview with Deputy District Attorney 1, *supra* note 90.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Interview with Deputy Public Defenders 3 and 4, Deputy Pub. Defenders, L.A. County Pub. Defender's Office, in L.A., Cal. (Dec. 19, 2007).

⁹⁶ *Id.*; *see also* Klein, *supra* note 65 at 521.

bers.⁹⁷ The nickname was often erroneously assumed to be a gang moniker.⁹⁸ Another example was when a person was assumed to be gang member if he or she had a family member who was a gang member, or if he or she was seen with or arrested with known gang members.⁹⁹

Deputy Public Defender 2, drawing upon his own upbringing and his experience as a deputy public defender, provided an illustration of how easily one could be mistaken for a gang member.¹⁰⁰ He grew up in the inner city where gangs were prevalent, although he himself managed to avoid gang life.¹⁰¹ In his neighborhood, everyone knew who the gang members and drug dealers were, some of whom were his friends.¹⁰² He recalled that his house was the only one with a basketball hoop and that all the neighborhood kids, including gang members, would congregate in front of his house and play basketball.¹⁰³ However, his parents had strict rules, and while the gang members were allowed to play in their yard, they were not allowed in their home.¹⁰⁴ Deputy Public Defender 2 believed that if such a scenario existed today, he would have been issued an FI card because known gang members frequented his yard. Once his name was in the Cal/Gang database, he would have received an FI card for each time he was stopped by a gang cop.¹⁰⁵ With so many FI cards, if he were ever arrested for a crime, they would likely be used against him as evidence of his gang affiliation.¹⁰⁶

Officer 1 essentially agreed with the observations of the deputy public defenders.¹⁰⁷ When asked how law enforcement officers identify a person as a gang member, Officer 1 stated the popular adage: “if it looks like a duck, quacks like a duck, and swims like a duck, it must be a duck.”¹⁰⁸ He described his method of identification as “basically guilt by association,” observing that identifying individual gang members by their appearance

⁹⁷ Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

⁹⁸ *Id.*; see also Bjerregaard, *supra* note 1, at 387 (citations omitted) (suggesting that common law enforcement practices, such as mistaking a childhood nickname for a gang moniker, “[have] the potential to wrongly identify innocent citizens as gang members and to create gangs where no gangs exist”).

⁹⁹ Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹⁰⁰ Interview with Deputy Public Defender 2, Deputy Pub. Defenders, L.A. County Pub. Defender’s Office, in L.A., Cal. (Dec. 19, 2007).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Interview with Officer 1, Deputy Sheriff, L.A. County Sheriff’s Office, in L.A., Cal. (Dec. 19, 2007).

¹⁰⁸ *Id.*

has become more difficult.¹⁰⁹ Previously, baggy clothing and tattoos used to be indicative of membership in a gang.¹¹⁰ Now, baggy clothing and tattoos have become a part of popular culture and are no longer reliable indicators of gang involvement.¹¹¹ And while certain gangs have adopted distinctive clothing, such as the bright green shirts worn by the Lime Street Gang, other gangs have chosen to wear the paraphernalia of particular sports teams, which makes distinguishing members of a gang from avid sports fans much more difficult.¹¹² Thus, because it has become more difficult to distinguish between gang members and non-gang members based on clothing and appearance, Officer 1 believes that if a person appears to be a gang member and is seen associating with known gang members, he or she will likely be identified as a gang member.¹¹³

Officer 1 was presented with a scenario about an individual who grew up in a neighborhood within the territory of a local gang.¹¹⁴ As a result, his only friends are members of the gang, and he dresses like members of that gang, but denies being a member himself.¹¹⁵ Officer 1 did not believe that such a person would not be a member of the gang, positing his own example that if he did not want to be identified as a police officer, he would not dress like a police officer and hang out where only police officers hang out.¹¹⁶

Officer 1 further extended this analogy to former gang members who claim to no longer have any affiliation with the gang.¹¹⁷ Even some deputy public defenders were dubious about whether any former gang member is ever able to effectively denounce and leave his or her gang.¹¹⁸ However, gang researcher Lewis Yablonsky defines a separate category of non-active

¹⁰⁹ *Id.*; see also Bjerregaard, *supra* note 1, at 387 (citation omitted) (finding that identifying one individual as a gang member can lead to the identification of his friends as gang members).

¹¹⁰ Interview with Officer 1, *supra* note 107; see also Bjerregaard, *supra* note 1, at 387.

¹¹¹ Interview with Officer 1, *supra* note 107; see also Bjerregaard, *supra* note 1, at 387 (citations omitted) (finding that clothing and styles previously associated only with gang culture have become a part of teen fashion; therefore, they are no longer reliable indicia of gang membership).

¹¹² Interview with Officer 1, *supra* note 107; see also Bjerregaard, *supra* note 1, at 387 (citations omitted) (Research indicates that a gang may choose to wear clothing from particular sports team because the team's colors match the gang's colors. Gangs have also adopted certain brand names for their initials. For example, the Bloods have adopted Calvin Klein attire, which allegedly stands for "Crip Killer." By adopting attire that is worn by the general public, gangs are able to avoid conspicuous gang affiliations.).

¹¹³ Interview with Officer 1, *supra* note 107.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

gang role for former gang members and has testified as an expert witness in approximately twenty-five cases in which the defendant had erroneously been identified as a gang member based on his previous involvement.¹¹⁹ He observed that former gang members are often older with families, many of whom may have completed some education and hold steady jobs.¹²⁰ Because they often maintain relationships with members of their former gang, they are often erroneously mistaken to be gang members.¹²¹

Officer 2 acknowledged the difficulty in distinguishing between gang members and non-gang members, but believed it could be done.¹²² He grew up in a gang-dominated neighborhood in East Los Angeles and had an older brother who was a gang member.¹²³ He previously worked in a California State prison, which had a large gang population, but now works as a deputy sheriff with the Los Angeles County Sheriff's Department.¹²⁴ Because of his early and continuous exposure to gangs, Officer 2 believed he would be able to tell who, among similarly dressed individuals, was not a member of the local gang by looking at their facial expressions, their body posture, and their attitude.¹²⁵ However, he believed that most law enforcement officers would not be able to make such a distinction.¹²⁶

C. CRIMES BENEFITING A GANG

Another contested aspect of gang enhancements is whether a crime, even if committed by known gang members, was committed for the benefit of a gang with the specific intent to further criminal conduct by gang members. Certain cases leave little question as to whether a gang enhancement is appropriate: if a defendant gang member shoots a rival gang member in retaliation for the shooting of one of his own, there is little dispute that he may properly be subjected to a gang enhancement.

However, many cases are not so obvious. All of the interviewed deputy public defenders believed that gang enhancements were improperly and

¹¹⁹ YABLONSKY, *supra* note 66, at 11.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Interview with Officer 2, Deputy Sheriff, L.A. County Sheriff's Office, in L.A., Cal. (Dec. 19, 2007).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

excessively filed against their clients.¹²⁷ They recalled countless real life stories of crimes that were not so clearly meant to benefit the gang.¹²⁸ In an example provided by Deputy Public Defender 1, three friends, all members of the same gang, were caught joy riding in a stolen car.¹²⁹ In another example, Deputy Public Defender 3's client happened be a gang member, who shot his abusive father during a domestic dispute.¹³⁰ In these instances, gang enhancements were filed against their clients and found to be true.¹³¹

Deputy Public Defender 3 also believed that prosecutors and law enforcement officers had incentives to file gang enhancements excessively.¹³² He suggested that one reason may be that in addition to the prosecutorial advantages that gang enhancements provide (discussed below), federal money to combat gang violence is granted to prosecutors and law enforcement in districts that have a demonstrated gang problem.¹³³ The increasing number of gang enhancement filings, mostly among minority populations, has led some to speculate that gang enhancements are being filed not only for the federal grant money, but also to leverage plea bargaining (discussed below) and because of racist sentiments.¹³⁴

Mr. Yablonsky, in his exposure to California state criminal gang prosecutions, estimated that fifty percent of the violent crimes committed by gang members were not actually gang-related, thereby rendering half of the charged gang enhancements in California courts inapplicable.¹³⁵

Deputy District Attorney 1 acknowledged that gang enhancements were being filed with greater frequency now than before and provided an explanation for this trend.¹³⁶ Originally, gang enhancements were not used very often because they added such a short term to a convict's sentence; therefore, including a gang enhancement was not ordinarily worth the trou-

¹²⁷ Interview with Deputy Public Defender 1, Deputy Pub. Defender, L.A. County Pub. Defender's Office, in L.A., Cal. (Dec. 19, 2007); Interview with Deputy Public Defender 2, *supra* note 100; Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹²⁸ Interview with Deputy Public Defender 1, *supra* note 127; Interview with Deputy Public Defender 2, *supra* note 100; Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹²⁹ Interview with Deputy Public Defender 1, *supra* note 127.

¹³⁰ Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹³¹ Interview with Deputy Public Defender 1, *supra* note 127; Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹³² Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

¹³³ *Id.*; see also Nicholas Kusnetz, *Gang Time Adds Time*, CONTRA COSTA TIMES, Dec. 23, 2007 (reporting that the Richmond City Council received \$95,000 and the Contra Costa County District Attorney's Office would receive \$287,930 in federal grants for which they were eligible because of their demonstrated gang problem).

¹³⁴ Kusnetz, *supra* note 133.

¹³⁵ YABLONSKY, *supra* note 66, at 123.

¹³⁶ Telephone Interview with Deputy District Attorney 1, *supra* note 90.

ble of proving all of its elements along with those of the underlying crime.¹³⁷ However, a gang enhancement would permit the admission of gang evidence against a defendant, and thus, it served primarily as an evidentiary function when it was used.¹³⁸ Now, an additional five years, ten years, or life sentence may be imposed; this increased “bite” has led to wider use of gang enhancements.¹³⁹

Deputy District Attorney 1 also acknowledged that many prosecutors take far too much latitude in applying gang enhancements because of its many prosecutorial advantages (discussed below).¹⁴⁰ He observed that courts often allow the gang enhancement to stand in opposition to objections raised by defense counsel.¹⁴¹ As a result, prosecutors can now get a gang enhancement on almost any crime, including possession of a firearm or possession of a firearm with priors.¹⁴² Deputy District Attorney 1 also acknowledged that there is some political pressure to file gang enhancements and push for longer sentences.¹⁴³ He recalled a case in which the defendant gang member was accused of committing several armed robberies outside of his territory with no further indication that the robberies had been committed for the benefit of his gang.¹⁴⁴ He chose not to file a gang enhancement and received some criticism from his office as a result since the growing trend had been to include a gang enhancement whenever a known gang member was involved in the alleged crime.¹⁴⁵

Deputy District Attorney 1 stated that a determination of whether to include a gang enhancement should be based on the facts of the case.¹⁴⁶ Often, when a defendant is said to have asked of his or her victim, “Where are you from?” (a question commonly used to determine one’s gang affiliation) this will be sufficient to prove that the crime was committed in furtherance of his or her gang, and therefore, justifies a gang enhancement against the defendant.¹⁴⁷

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

D. HOW A GANG ENHANCEMENT AFFECTS THE TRIAL PROCESS

When asked about gang enhancements, Deputy District Attorney 2 posited a hypothetical in which a defendant, who is a member of a local gang, is charged with possession of a rock of cocaine.¹⁴⁸ At trial, a gang expert testifies about the defendant's gang and, as part of his testimony, tells the jury about two murders committed by two fellow gang members whom the defendant did not know.¹⁴⁹ The jury convicts him for the crime and finds the gang enhancement to be true.¹⁵⁰ Deputy District Attorney 2 then asked: "This strikes you as a little unfair, right?"¹⁵¹

Gang scholar Malcolm W. Klein has found that anti-gang legislation such as the STEP Act grants many advantages to the government in the prosecution of gang-related felonies, and such "prosecutorial armament" often exceeds the tools available to the defense.¹⁵²

Deputy Public Defender 1 explained that where the crime carries a life sentence, such as murder, gang enhancements have had relatively little impact because when a defendant is facing life as a baseline, there is little else that will likely change his calculus or stratagem.¹⁵³ The impact of gang enhancements has been felt most with lesser offenses, such as possession of a firearm or the example above because of the prejudice a gang enhancement poses during trial.¹⁵⁴ To illustrate this point, Deputy Public Defender 1 provided an example.¹⁵⁵ The defendant is charged with possession of a firearm after he ran from the police with a startled expression while holding his hand to his waistband.¹⁵⁶ The police later found an unidentified gun, and did not preserve for prints.¹⁵⁷ Prior to the STEP Act, this case would have been defensible as it would have come down to an issue of the defendant's credibility versus the police officer's credibility.¹⁵⁸ Deputy Public Defender 1 explained that often jurors from low income and minority communities will be more sympathetic to the defendant, at least enough to create a reasonable doubt, because they are more likely to have been "har-

¹⁴⁸ Interview with Deputy District Attorney 2, Deputy Dist. Attorney, L.A. County Dist. Attorney's Office, in L.A., Cal. (Dec. 17, 2007).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Klein, *supra* note 65, at 515, 518.

¹⁵³ Interview with Deputy Public Defender 1, *supra* note 127.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

assed” by the police.¹⁵⁹ However, these same people are also the ones who have to live with gang violence within their families and neighborhoods.¹⁶⁰ Thus, when a gang enhancement has been filed, the group of jurors who used to be the most favorable to a defendant all of a sudden becomes the least favorable, and the gang enhancement before these jurors becomes highly prejudicial.¹⁶¹

Deputy District Attorney 1 agreed.¹⁶² Because gang violence takes place mostly in low income and minority communities, he preferred to try a gang case to jurors from these communities because they are the ones that have to live with the gang violence.¹⁶³ Asking them, “Do you want to return the defendant to the streets?” elicits a stronger response from these jurors than from white jurors who simply read about gang violence in the newspaper, but do not have to live amongst it.¹⁶⁴

Not only is the gang allegation highly prejudicial, but so is the evidence used to prove it. The predicate acts used to prove the gang’s pattern of criminal gang activity can be shown by introducing evidence of one or more of the crimes enumerated in the statute that were committed by any of the gang’s members, not necessarily by the defendant, even if the defendant did not know the perpetrators, as many gangs tend to be quite large.¹⁶⁵

In his rock cocaine possession example above, Deputy District Attorney 2 believed that the jurors tend to gloss over the fact that the prosecution bears the burden of proving that the rock was in his pocket *for his gang*, but instead find the gang enhancement to be true simply because his gang seems so bad.¹⁶⁶ After hearing about the two murders committed by the defendant’s fellow gang members (the “predicate acts”), it would be easy for jurors to associate the defendant with the violent behavior of his fellow gang members, regardless of whether he knew them or not, convict him for the crime, and find the gang enhancement to be true.¹⁶⁷

Deputy Public Defenders 3 and 4 agreed with Deputy District Attorney 2 and further observed that in testifying about the predicate acts, the

¹⁵⁹ *Id.*; see also Bjerregaard, *supra* note 1, at 384 (citation omitted) (finding “[t]here is much evidence that minorities have historically been subjected to disproportionate harassment and excessive use of force by the police”).

¹⁶⁰ Interview with Deputy Public Defender 1, *supra* note 127.

¹⁶¹ *Id.*

¹⁶² Telephone Interview with Deputy District Attorney 1, *supra* note 90.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ CAL. PENAL CODE § 186.22(j) (West 2008).

¹⁶⁶ Interview with Deputy District Attorney 2, *supra* note 148.

¹⁶⁷ *Id.*

gang expert will often choose the most heinous and violent crimes to illustrate the gang's pattern of criminal activity.¹⁶⁸

Deputy Public Defenders 3 and 4 also expressed frustration regarding expert witnesses, almost all of whom are gang cops, or former gang cops, and almost none of whom would be willing to testify on behalf of a defendant.¹⁶⁹ The predicate acts and other information used to prove the existence of a gang will be admitted by the prosecution through the testimony of a gang cop expert witness.¹⁷⁰ Malcolm W. Klein observed that he, as an academic, is often asked to testify on behalf of the defense to rebut the testimony of the prosecution's expert witness.¹⁷¹ However, academics often cannot speak to the specifics of the defendant's gang, but rather serve as generic experts testifying as to the nature of gangs, gang members and gang behavior.¹⁷² Therefore, their testimony is often excluded as irrelevant, thus enabling the prosecution to put forth evidence by an expert witness, without any testimony to refute it from the defense.¹⁷³ As a result, even if Deputy Public Defenders 3 and 4 were able to find a qualified expert witness, his or her testimony would likely be inadmissible.

The California Supreme Court took up the issue of the gang enhancements' prejudice to the defendant in *People v. Hernandez*.¹⁷⁴ To mitigate the prejudice to the defendant, the Court held that a trial court has the discretion, but is not required, to bifurcate the trial on the gang enhancement, thereby allowing the prejudicial gang evidence to be introduced only after the defendant has been convicted of the underlying crime.¹⁷⁵ The Court acknowledged that because gang evidence may be unduly prejudicial, such as the predicate acts, which do not need to be related to the crime or even the defendant, bifurcation may be warranted.¹⁷⁶ Additionally, it stated that "some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt,"¹⁷⁷ and that the trial court should consider the gang evidence's relevance to the underlying crime when deciding whether to bifurcate the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Klein, *supra* note 65, at 515.

¹⁷² *Id.*

¹⁷³ *Id.* at 519.

¹⁷⁴ *People v. Hernandez*, 94 P.3d 1080 (Cal. 2004).

¹⁷⁵ *Id.* at 1085.

¹⁷⁶ *Id.* at 1086.

¹⁷⁷ *Id.*

trial.¹⁷⁸ The Court also held that while the trial court has no duty to do so *sua sponte*, upon request from defense counsel, the jurors should be given a limiting instruction that the gang evidence is to be used only to prove the gang enhancement.¹⁷⁹

When asked how often a gang enhancement is bifurcated, Deputy Public Defender 1 replied, “About as often as the Clippers win the Championship,” which means never.¹⁸⁰ While this is perhaps a slight exaggeration, Deputy Public Defender 1 believed that gang enhancements are rarely bifurcated because of the prosecutorial advantages of a gang enhancement and because of judges’ concerns for judicial efficiency.¹⁸¹ In Deputy District Attorney 2’s example, he said the trial judge ordered bifurcation of the enhancement because of the highly prejudicial nature of the gang evidence.¹⁸² As a result, the gang enhancement and all of the evidence used to determine the gang enhancement were presented after the jury had already found the defendant guilty of the underlying crime so that such evidence would not prejudice the jury’s determination of guilt.¹⁸³ While this makes the underlying conviction more difficult for the prosecution to prove, Deputy District Attorney 2 conceded that this approach was probably fairer.¹⁸⁴

In contrast, Deputy District Attorney 1 argued that bifurcation was not always appropriate.¹⁸⁵ He discussed the different motivations a prosecutor might have for filing a gang enhancement.¹⁸⁶ One motivation may be to increase the pressure on the defendant to plead, which Deputy District Attorney 1 believed was an improper purpose.¹⁸⁷ Therefore, bifurcation was not the answer; the gang enhancement simply should not be filed.¹⁸⁸ Another reason was to use the defendant’s gang membership as evidence of his motive to commit the crime.¹⁸⁹ While the motive evidence should be admissible even without the gang enhancement, the gang enhancement also imposes greater punishment for crimes committed in furtherance of the

¹⁷⁸ *Id.* 1086–87.

¹⁷⁹ *Id.* at 1087.

¹⁸⁰ Telephone Interview with Deputy Public Defender 1, Deputy Pub. Defender, L.A. County Pub. Defender’s Office, in L.A., Cal. (Feb. 28, 2008).

¹⁸¹ *Id.*

¹⁸² Interview with Deputy District Attorney 2, *supra* note 148.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Telephone Interview with Deputy District Attorney 1, *supra* note 90.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

gang.¹⁹⁰ Deputy District Attorney 1 believed that crimes falling properly within the ambit of the STEP Act should receive more time.¹⁹¹ He argued that because gang members have sworn to commit crime, they are subject to a higher standard in which their actions should be punished accordingly.¹⁹² And while he acknowledged that gang enhancements are often filed excessively, he believed that if a gang enhancement is properly filed (i.e. there is evidence that the crime was committed for the benefit of the defendant's gang), it should not be bifurcated and evidence of the defendant's gang and his own gang involvement should be admissible during the prosecution's case-in-chief.¹⁹³

E. HOW A GANG ALLEGATION AFFECTS PLEA BARGAINING

Deputy Public Defender 1 works in felony arraignments, which is generally a defendant's first contact with the court.¹⁹⁴ There, the defendant has the opportunity to enter a plea. During their initial interview, Deputy Public Defender 1 informs his client of the charges against him, the contents of the police report, and any plea bargain offers made by the prosecution.¹⁹⁵ He then advises his client of his choices for his course of action, including whether or not he should accept the prosecution's offer or plead not guilty and take his case to trial.¹⁹⁶ Gang enhancements have caused a drastic change in the advice that an attorney gives a client because they impose significantly higher sentences and the mere allegation is so highly prejudicial.¹⁹⁷

Deputy Public Defender 1 provided the following illustration.¹⁹⁸ In California, some crimes (commonly called "wobblers") can be charged as either misdemeanors or felonies.¹⁹⁹ For example, one wobbler, possession of a firearm, used to be routinely filed as a misdemeanor with a maximum sentence of one year.²⁰⁰ Then, as gang violence escalated, it was routinely filed as a felony, carrying a mid-term sentence of three years state prison.²⁰¹ The prosecution's offer was ordinarily 180 days actual, but Dep-

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Interview with Deputy Public Defender 1, *supra* note 127.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

uty Public Defender 1 would often advise his clients not to take it.²⁰² This is because a defendant charged with a felony possession of a firearm could try to negotiate the charge down to a misdemeanor, or could plead not guilty, set his case for preliminary hearing, and ask the judge at the preliminary hearing to reduce the charge to a misdemeanor.²⁰³ But with the STEP Act, gang enhancements were commonly filed on possession of firearm charges, and because gang enhancements may only be used on felonies, the crime was charged as a felony, not a misdemeanor, and could not be negotiated down to a misdemeanor.²⁰⁴ Now, the gang enhancement adds three years, and turns a felony into a strike, under California's Three Strikes Law.²⁰⁵ As a result, Deputy Public Defender 1 would likely now advise a client charged with possession of a firearm with a gang enhancement, to accept the prosecution's offer.²⁰⁶

Additionally, any hint of gang activity or involvement in the police report may lead Deputy Public Defender 1 to advise his client to accept the prosecution's offer, even if no gang enhancement has been filed or if the case otherwise appears beatable.²⁰⁷ This is because testimony at the preliminary hearing may reveal the gang activity or involvement, at which time the prosecution can add the gang enhancement.²⁰⁸ The mere possibility of having a gang enhancement added at the preliminary hearing may cause Deputy Public Defender 1 to advise his client to take the prosecution's offer because: (1) the addition of the gang enhancement increases the client's sentencing exposure significantly; (2) the prejudicial nature of the gang enhancement will often lead to the client's conviction based on his alleged gang membership without proper consideration of the facts; and (3) the client is left only with the defense that he was a minor gang member, or only an associate, which is hardly a reliable defense on which to stake one's liberty.²⁰⁹ This is significant because gang enhancements increase the risks such that many innocent people simply cannot gamble on fighting their cases.²¹⁰ Deputy Public Defender 1 believed that the Los Angeles County District Attorney's Office policy for possession of a firearm is sixteen months without the gang enhancement, or less time with the gang en-

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*; CAL. PENAL CODE § 1192.7(c)(28) (West 2008).

²⁰⁶ Interview with Deputy Public Defender 1, *supra* note 127.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Telephone Interview with Deputy Public Defender 1, *supra* note 180.

hancement (and a strike).²¹¹ In such a case, Deputy Public Defenders 3 and 4 will often encourage their clients to plead to a felony on a wobbler or to an otherwise defensible case just to get rid of the gang enhancement and the strike.²¹²

Deputy District Attorney 1 confirmed this notion that gang enhancements have had a significant impact on plea bargaining.²¹³ He observed that defendants often know that the mere allegation of gang involvement will be prejudicial, and that it will allow otherwise excludable evidence about his gang to be admitted.²¹⁴ Because gang enhancements can add such a significant amount of time to one's sentence, defendants will often accept the certainty of the prosecutor's plea bargain rather than gamble with not only conviction and sentencing for the underlying crime, but also the possibility of adding an additional five years, ten years, or life sentence to his term.²¹⁵ For this reason, Deputy District Attorney 1 believed that many prosecutors file unsupported gang enhancements, even though it is against office policy to file charges and enhancements that will inevitably drop off.²¹⁶

F. EFFECTIVENESS OF GANG ENHANCEMENTS

The STEP Act's legislative findings, as codified in section 186.21, state that its purpose was to curb criminal gang activity. Whether the STEP Act actually achieves that goal has been hotly contested. Although the STEP Act has been in effect since 1987, it has only come into regular use since the penalties were increased in the 1990s.

Based on his previous work in a California State prison, where a large portion of the population consists of gang members, Officer 2 believed gang enhancements did not reduce criminal gang activity, because even though many gang leaders are housed in state prisons where security is greater, they are still able to run their gangs from the inside.²¹⁷

Officer 3 has previously worked in California State prisons, and now currently works in parole.²¹⁸ He did not believe that the STEP Act curbs

²¹¹ *Id.*

²¹² Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

²¹³ Telephone Interview with Deputy District Attorney 1, *supra* note 90.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Interview with Officer 2, *supra* note 122.

²¹⁸ Telephone Interview with Officer 3, Gang Coordinator, Cal. Dept. of Corr. and Rehab., in Cal. (Jan. 8, 2008).

criminal gang activity because it does not have any deterrent effect.²¹⁹ Officer 3 believed that joining a gang is a commitment of one's life, and gang members are willing to pay such a price.²²⁰ Thus, he observed that additional jail time for gang-related crimes does not alter the loyalty of gang members.²²¹

Deputy Public Defender 1 agreed.²²² He observed that most gang members come from communities and families that have been ravished by gang violence.²²³ And yet they are still willing to kill a rival gang member knowing that they may ultimately pay with their own lives.²²⁴ Thus, when a person has already pledged his or her life to a gang, additional jail time does not affect the person's decisions on whether or not to commit crimes for the gang.²²⁵

Deputy District Attorney 1 conceded that the STEP Act has not had its desired deterring effect on the current generation, and that this generation is lost.²²⁶ However, he believed that the benefits of the STEP Act will be felt in later generations.²²⁷ Deputy District Attorney 1 believed that the current generation, after spending much of their lives behind bars for gang-related offenses, will encourage their children to avoid gang life, thereby stemming gang violence in the future.²²⁸

Deputy Public Defender 3 observed that his gang clients are often between the ages of eighteen and twenty-five.²²⁹ While many people become less active in gangs as they get older, Deputy Public Defender 3 believed the STEP Act simply prolongs a person's gang involvement by increasing the amount of time spent in jail, where the commitment and involvement remain strong and the only way of life.²³⁰ He also observed that a person with a minor first offense will often get a light sentence.²³¹ The second offense will lead to a slightly increased sentence, and so on.²³² But if a person receives a gang enhancement for his or her first offense, the next of-

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Interview with Deputy Public Defender 1, *supra* note 127.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Telephone Interview with Deputy District Attorney 1, *supra* note 90.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Interview with Deputy Public Defenders 3 and 4, *supra* note 95.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

fense will result in an even longer sentence, creating a snowball effect and a life of incarceration.²³³

Deputy Public Defender 2 admitted that the STEP Act was a good idea, but regretted that it was misguided in its practical application.²³⁴ He believed that gang enhancements merely increase the amount of time a person spends in jail, where he receives no education or vocational training, apart from training in criminal activity.²³⁵ Inmates acquire no social skills, and gang affiliations are often strengthened and reaffirmed on the inside.²³⁶ And while a person serving a three-year sentence may be able to succeed on the outside upon his release, a person who instead serves a thirteen-year sentence hardly stands a chance to rejoin society in a productive manner.²³⁷ In his research, Lewis Yablonsky observed that many Hispanic youths in prison spend their time learning how to optimize their lives on the inside, and have little or no expectation for life on the outside.²³⁸ Additionally, the stigma of a gang enhancement conviction makes returning to society after release extremely difficult, the effect of which will likely have long term consequences for families and communities.²³⁹

In a 2007 Discovery Channel program entitled “Breaking Point,” Ted Koppel explores overcrowding at California’s Solano State Prison.²⁴⁰ He confirmed some of Deputy Public Defender 2’s observations, finding that only ten percent of Solano’s inmates received any job training or rehabilitation.²⁴¹ He further observed that inmates are in many ways worse off after they leave the prison than when they came in, and that the recidivism rate is seventy percent in California, the highest in the nation.²⁴² He described California prisons as a “system in which people are being warehoused” and while much of this state of affairs is attributed to the Three Strikes Law,²⁴³ the STEP Act’s increasingly longer prison terms, imposition of strikes, and mandatory life sentences for certain crimes, has no doubt made its own contribution.

²³³ *Id.*

²³⁴ Interview with Deputy Public Defender 2, *supra* note 100.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ YABLONSKY, *supra* note 66, at 98.

²³⁹ Kusnetz, *supra* note 133.

²⁴⁰ Koppel on Discovery: *Breaking Point* (Discovery Channel broadcast Oct. 7, 2007).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

Deputy Public Defender 2 acknowledged society's general fear of criminal activity and violence and understood that lawmakers have an obligation to respond to such fears.²⁴⁴ However, he believed that because lawmakers were removed from the actual criminal justice system and created regulations for which they could garner popular support, the result was a "tough on crime" stance that exacerbated the problem rather than solved it.²⁴⁵

IV. INTERVIEW SUMMARY

The interviews of the deputy district attorneys, deputy public defenders and law enforcement officers reflected opinions of the STEP Act that varied in many ways. However, on many points, they were, surprisingly, in substantial agreement.

A. HOW TO DETERMINE WHO IS A GANG MEMBER

Deputy District Attorney 1 determined who was and was not a gang member based on the information included in the police report. However, the deputy public defenders believe law enforcement officers often mistakenly identify people as gang members, after making erroneous assumptions from a variety of factors, such as the arrestee's associations, attire and nicknames. While Officer 2 believed that those intimately familiar with gangs would be able to tell the difference between gang members and non-gang members, Officer 1 acknowledged that differentiating based on a person's clothing or tattoos has become increasingly difficult, and therefore, gang members are often identified based on their associations.

B. WHICH CRIMES WERE COMMITTED FOR THE BENEFIT OF A GANG

Although gang enhancements require the prosecution to prove that the defendant committed the felony for the benefit of a gang with the *specific intent* to further criminal conduct by gang members, the deputy public defenders believed that prosecutors are filing them excessively, even when this element is not well supported by evidence. Deputy District Attorney 1 agreed that many prosecutors file gang enhancements in violation of their office policy that prohibits filing enhancements that they know will drop off.

²⁴⁴ Interview with Deputy Public Defender 2, *supra* note 100.

²⁴⁵ *Id.*

C. HOW A GANG ENHANCEMENT AFFECTS THE TRIAL PROCESS

The deputy public defenders believe that gang enhancements drastically change the dynamics of a trial. They believe that the mere presence of a gang enhancement is highly prejudicial, and turns the group of jurors that otherwise would have been the most receptive to the defendant's case into skeptical and unforgiving adversaries. Additionally, the evidence used to prove the elements of a gang enhancement is extremely prejudicial. To prove a gang's predicate acts, the prosecution's expert witness will often testify about a gang's most heinous and violent crimes. Often the defendant will not be able to find a suitable expert witness in rebuttal, or his expert witness's testimony will not be admitted for lack of relevance.

Deputy Public Defender 1 and Deputy District Attorney 2 believed that bifurcating the gang enhancement would reduce the prejudice to the defendant. Although Deputy District Attorney 1 acknowledged that prosecutors may have improper motives in filing a gang enhancement, he believed that if a gang enhancement was properly filed, it should not be bifurcated. This is because gang members have sworn to commit crimes, and their crimes that properly fall within the ambit of the STEP Act should receive a longer sentence.

E. HOW A GANG ALLEGATION AFFECTS PLEA BARGAINING

Deputy Public Defender 1 said that a gang enhancement, or the mere possibility of a gang enhancement being added, often causes him to advise his clients to accept the prosecution's offer. This is because the gang enhancement increases a defendant's sentencing exposure and his chances of being convicted before a jury; he simply cannot afford the risk of fighting his case. Deputy District Attorney 1 acknowledged the influence of gang enhancements on the plea bargaining process, and believed that some prosecutors may use unsupported gang enhancements because of the increased pressure they put on defendants to accept their offer.

F. EFFECTIVENESS OF GANG ENHANCEMENTS

Most of the interviewees were skeptical about whether the STEP Act was achieving its purpose of curbing criminal gang activity. Officer 2 believed that putting gang members away for longer did not curb criminal gang activity because they could still participate in their gangs from the inside. Officer 3 and Deputy Public Defender 1 believed that the STEP Act did not have any deterrent effect because gang members have already

sworn their lives to their gangs; increased sentences do not deter criminal gang activity for those prepared to pay with their lives. Although Deputy District Attorney 1 conceded that the STEP Act had no effect on the current generation, he believed that it would reduce gang activity in the future, as those serving increased sentences for gang-related crimes begin to tell their children that gang life does not pay.

Deputy Public Defender 3 believed that most gang members are young, and that they eventually grow out of the gang lifestyle. However, gang enhancements simply prolong the gang lifestyle by housing people in jails where their gang affiliations only become stronger.

Deputy Public Defender 2 admitted that the STEP Act was a good idea, but was ineffective in practice. Gang enhancements simply increase the amount of time one spends in jail, where there is no opportunity to acquire proper social, educational or vocational skills.

V. SUGGESTIONS FOR REFORM

These interviews, from various perspectives within the criminal justice system, illuminate some of the problems posed by the STEP Act. In addition, they serve to inform the discussion about how to improve this statute from a very real and practical standpoint. One thing these interviews have made clear is that even if one accepts the effectiveness of increased sentences imposed by gang enhancements under the STEP Act, California's Penal Code must be amended to ensure that they are not misused.

A. ELIMINATING AMBIGUOUS LANGUAGE

The STEP Act should be revised to clarify some of the ambiguities that appear in its language.²⁴⁶ In so doing, prosecutors would be given less discretion to file gang enhancements that lack merit, and courts would have better guidelines for ensuring fairness once they have been filed.

1. Primary Activity

The STEP Act should be revised to explicitly state that the "primary activity" of an alleged criminal street gang may only be proved through evidence of past conduct, not evidence of conduct committed during the current offense. The defendant in *People v. Gamez* argued that the STEP Act's definition of a criminal street gang is so overbroad that the Los Ange-

²⁴⁶ See Bjerregaard, *supra* note 1, at 388–89.

les Police Department (“LAPD”) or the Humboldt County environmental activists (whose members may have committed one or more of the enumerated crimes) would qualify as criminal street gangs.²⁴⁷ The California Court of Appeal rejected this idea saying that one of the group’s “primary activities” must be the commission of one of the enumerated crimes, and neither the LAPD nor the Humboldt County environmental activists had as a *primary activity* the commission of an enumerated crime.²⁴⁸ In determining a group’s “primary activity” within the meaning of the STEP Act, the California Supreme Court has held that the trier of fact may consider both prior conduct and conduct that occurred at the time of the current offense.²⁴⁹ However, in employing such a definition, one could easily imagine a scenario in which the LAPD would meet this criterion for a criminal street gang: LAPD Officer 1 has been convicted of assault with a deadly weapon. LAPD Officer 2 is currently charged with assault with a deadly weapon (enumerated offense 186.22(e)(1)). During his trial, LAPD Officer 1’s prior conviction and evidence of LAPD Officer 2’s conduct for the current offense can be used to prove that assault with a deadly weapon was one of the LAPD’s “primary activities.” Once this has been established, the LAPD falls neatly within the contours of the current criminal street gang definition:

[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [therein], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.²⁵⁰

2. Predicate Acts

Further defining which crimes may constitute predicate acts will help reduce the prejudice of the gang enhancements. For example, the Penal Code might be properly modified to exclude as a predicate act the commission of the instant crime and disallow the use of crimes committed on the same occasion, but by different persons. As it stands right now, if Codefendants 1 and 2 are being charged with battery of a third person, evidence of Codefendant 1’s participation and evidence of Codefendant 2’s partici-

²⁴⁷ People v. Gamez, 286 Cal. Rptr. 894, 901 (Ct. App. 1991).

²⁴⁸ *Id.*

²⁴⁹ People v. Sengpadychith, 27 P.3d 739, 744 (Cal. 2001).

²⁵⁰ CAL. PENAL CODE § 186.22(f) (West 2008). Courts have interpreted “pattern of gang activity” in much the same way as “primary activity,” in that evidence of the current offense may be used to establish said pattern. *E.g.*, *Sengpadychith*, 109 Cal. Rptr. 2d at 744.

pation will, in the current language of the STEP Act, establish a “pattern of criminal activity,” while in reality their actions are an isolated incident and hardly a “pattern.” The Penal Code should also be modified to incorporate the Court of Appeal’s holding in *People v. Gamez* (which was subsequently overruled by the California Supreme Court in *People v. Gardley*) that predicate acts must be gang-related in order to avoid punishing a defendant for the “*unrelated* actions of people with whom he associated.”²⁵¹

Gang enhancements should also be modified to apply only to proven gang members. As the statute reads, “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members,” receives an enhanced sentence, regardless of whether he is a gang member or not.²⁵² Thus, a non-gang member defendant with the specific intent to assist his gang member friend in stealing a car for an evening joyride would properly be included within the ambit of the STEP Act’s gang enhancement, subjecting himself to a greatly increased sentence. The statute might more appropriately impose gang enhancements upon “any *member of a criminal street gang* who is convicted of a felony committed for the benefit of, at the direction or, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”

B. A BIFURCATION CLAUSE

In addition to addressing the ambiguities in the STEP Act’s language to limit its reach to those truly deserving of a gang enhancement, the STEP Act must ensure a fair process for those properly within its ambit. As a result, the Penal Code should require bifurcation in those cases in which the gang evidence is not necessary to prove the elements of the underlying crime. Although Deputy District Attorney 1’s belief that gang evidence should be admitted without bifurcation when the gang enhancement is properly charged makes sense in theory, gang enhancements are actually being charged for other, improper purposes, such as to pressure the defendant to plead guilty. Additionally, such a policy would do nothing to ensure that a defendant is convicted based on evidence of the underlying crime, as opposed to the mere prejudice of the gang evidence. Therefore, the use of bifurcation whenever possible is necessary to safeguard defendants against the prejudicial nature of the gang enhancements.

²⁵¹ *Gamez*, 286 Cal. Rptr. at 906 (emphasis in original).

²⁵² CAL. PENAL CODE § 186.22(b) (West 2008).

In those instances in which gang evidence is necessary to prove the underlying crime, such as evidence of motive, evidentiary rules should be enacted such that only the evidence necessary to prove the crime is admissible at trial. The gang evidence needed to prove the remaining elements of the gang enhancement should be withheld for a bifurcated proceeding after the defendant has been convicted of the underlying crime. While the prejudice of gang activity is still present at the trial, bifurcating the more prejudicial evidence required to prove the gang enhancements would mitigate the amount of prejudice to the defendant. For example, withholding testimony as to a gang's predicate acts, during which the most gruesome crimes are often chosen to demonstrate a gang's pattern of gang activity, would mitigate the risk of conviction based on guilt by association. Similarly, the Penal Code should require that a well-drafted jury instruction be given when bifurcation of the gang enhancement is not possible.

C. EXPERT WITNESSES

Another revision that will help ensure that defendants are not unduly prejudiced by gang enhancements is to change the evidentiary rules regarding the admissibility of defense expert witnesses. Such rules might expand the scope of material on which a defense expert is able to testify. In addition to testifying about the nature of gangs, gang members, and gang behavior, Malcolm W. Klein stated that defense expert witnesses might also testify about the criminological relevance or validity of the gang enhancement, as well as data on patterns of gang activity to contextualize the alleged offense.²⁵³ While this does not assist defense counsel in finding an expert witness when they are so hard to come by, allowing him to put forth an expert witness to rebut the prosecution's at the very least ensures that the courts and laws meant to protect people's rights do not further hinder a person in his own defense.

D. INTERVENTION

It has become clear that we cannot "arrest our way out of this problem."²⁵⁴ Ultimately, the issue of gang violence may not be a matter for the courts or the Penal Code, but may be dealt with more effectively by addressing problems within the communities plagued by gangs. Statutes such as the STEP Act have been described as suppression legislation (as op-

²⁵³ Klein, *supra* note 65, at 519.

²⁵⁴ Adam Schiff & Rocky Delgadillo, *Broad Fix Needed for Gang Woes*, DAILY NEWS OF L.A., Dec. 17, 2007, at A15.

posed to prevention or intervention), and are arguably only temporary solutions to an ongoing, persistent problem.²⁵⁵ Rather, gang violence is rooted in the contributing factors of gang membership such as: the social disorganization and failures of families, schools, and employment; poverty; racism; fragmented policy approaches by criminal justice and social services agencies; and the presence of gangs in the community.²⁵⁶

Thus, Deputy Public Defender 2 suggested that a more effective way to curb criminal gang activity would be to address the problems in low-income and minority communities, where gang violence is most prevalent, such as the role of parents.²⁵⁷ Both Deputy Public Defender 2 and Officer 2 grew up in the inner city, and they both attributed their ability to avoid gang life to their parents.²⁵⁸ Their parents imposed strict rules and high expectations for their children, and there were severe consequences when rules were broken or expectations were unmet.²⁵⁹ Often, youths who join gangs generally do not have positive role models.²⁶⁰ Furthermore, the role models that are present are often gang members themselves, involved in drugs, or are in and out of prison.²⁶¹

While the criminal justice system is not in the position to provide parents for all at-risk youths, there are other means of curbing criminal gang activity that do not include costly incarceration for increasingly longer, unproductive sentences.

Creating more community outreach and after school programs would give at-risk youths not only a safe place to be, but would expose them to proper social interactions and more positive role models. Many gang members talk about their devotion to their gang as an outgrowth of their need for family and community lacking in their homes and neighborhoods; thus, community programs would provide that sense of community and belonging for youths that otherwise feel marginalized. By dealing with the issues that give rise to gang participation and providing youths with options besides just gang life, we might not only reduce the amount of gang violence, but also encourage and stimulate communities.²⁶²

²⁵⁵ Bjerregaard, *supra* note 1, at 390.

²⁵⁶ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 111.

²⁵⁷ Interview with Deputy Public Defender 2, *supra* note 100.

²⁵⁸ *Id.*; Interview with Officer 2, *supra* note 122.

²⁵⁹ Interview with Deputy Public Defender 2, *supra* note 100; Interview with Officer 2, *supra* note 122.

²⁶⁰ YABLONSKY, *supra* note 66, at 40.

²⁶¹ *Id.*

²⁶² See Schiff & Delgadillo, *supra* note 254 (“We cannot devote more resources toward the arrest and prosecution of gang members without addressing the factors that led our youth toward criminal

Mr. Koppel observed that “Americans don’t seem to want rehabilitation, or at least don’t seem to be prepared to pay the price that rehabilitation costs.”²⁶³ However, ending the cycle of gang violence must necessarily consist, in part, of breaking the cycle through rehabilitative efforts; therefore, more resources should be devoted to education and vocational training within our state prisons. Some may argue that to do so would reward inmates for their bad behavior. However, given the choice, we can safely assume that inmates would forego the educational services on the “inside” for their freedom on the “outside.” Thus, rather than viewing such resources as a free meal ticket, as a reason to commit crime in order to get back to the luxuries of penitentiary life, they might more aptly be characterized as necessary tools to equip an inmate for their safe return to society.

Many children from gang-ridden neighborhoods fall through the cracks of the educational system, and without basic educational skills, these individuals have little chance to seek, obtain or retain employment, and often resort to a life of crime. Prisons can help correct this failure of society. Prison life offers inmates ample time; they should also provide inmates with the opportunity to use that time productively and learn those skills needed to rejoin society. Basics such as reading, writing and mathematics should be a priority, although vocational training is also necessary. With these skills, choosing a future life without crime will at least be an option for these inmates.

For most of those convicted with gang enhancements, life on the “outside” was an uphill battle to begin with. When they are released from prison, they are not only returning to that harsh reality, but now bear the stigma of a gang enhancement, which makes obtaining employment and moving forward even more difficult.²⁶⁴ Therefore, using their time in prison for productive, constructive skills development will help prepare them for their return to society, thereby reducing the chance that they will relapse into future criminal activity.

VI. CONCLUSION

This note is not meant to suggest that gang members should receive preferential treatment or that they should not be punished for the crimes they have committed. On the contrary, they should be pursued and prose-

street gangs. We must also develop the opportunities for education and employment to lead our youth away from a life of crime.”).

²⁶³ Koppel on *Discovery: Breaking Point*, *supra* note 240.

²⁶⁴ Kusnetz, *supra* note 133.

cuted with the full force of the law, but within the constitutional limits of that law. To do otherwise not only produces adverse and unintended consequences for the convicted individuals, but it also undermines the integrity of our entire criminal justice system.

There is no dispute that gang violence is a problem of devastating proportions, yet it remains largely immune to the laws designed to combat it. The draconian measures of the STEP Act have proven to be ineffective and ill-equipped, and instead, have stripped defendants of their ability to protect their rights.

The laws of a society can be amazing and powerful tools and yet they are, for so many reasons, unsuited to appropriately handle much of criminal law, and the STEP Act is a prime example: it cannot distinguish gang members from non-gang members or criminal gang activity from mere criminal activity, but instead treats all these groups as equals. For the youth who simply got caught with the wrong people at the wrong place and time, the additional sentence imposed by the STEP Act can be devastating and could very well be the tipping point between resigning oneself to a life of crime, or rehabilitating oneself for a productive life on the outside.

Mr. Koppel, after experiencing our prison system observed:

There is something about what we profess in this country, which is all about freedom, and the way that we process our criminals which is out of sync to me; it always has been out of sync to me. I recognize that criminals have to be punished. I also recognize that the goal is that since most of these people are going to get out of prison at some point, that when they get out, they get out as productive citizens. I think it is self evident to me that that system is not working very well.²⁶⁵

It is odd to think about this intersection of freedom and criminal sanction in our country. Our criminal justice system may properly be understood as a function of the idea that because freedom is our most valued right, taking it away must be the ultimate punishment, and therefore, the threat of losing it must be the ultimate deterrent. For those who never go to jail because they are unwilling to pay the price with their freedom (the deterred) and for those who will never get out of jail because they are serving life sentences (the ultimately punished), this premise makes sense. But for those in between, those navigating between life on the inside and life on the outside, using one's freedom as a deterrent to crime would be most effective if the severity of the punishment was correlated with the severity of the crime. The STEP Act, with its increasingly longer sentences, distorts this

²⁶⁵ Koppel on Discovery: *Breaking Point*, *supra* note 240.

system and changes the incentives for individuals to engage in good behavior versus criminal behavior. Some may argue that the STEP Act changes the incentives in a good way, for if a relatively minor crime would result in a life sentence, a person may believe the crime is not worth the punishment and decide against committing it to avoid an excessive sentence. However, it may also have the opposite effect because if the person is going to receive a life sentence anyway, what is there to stop him from intimidating or harming the witnesses that will send him away for life? Or from committing other, more dangerous crimes which would not result in anything more than what he is already facing?