

Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act

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*We gangs of L.A. will never die – just multiply . . .
People don't even understand
They don't even know what they're dealing with
You wanna get rid of the gangs it's gonna take a lotta work¹*

In 1987, while former-Crip-turned-rapper Ice-T was extolling the invincibility of the newly emerging gangster culture, politicians and lawyers just a few miles down the road from his South Central Los Angeles neighborhood were drafting legislation designed to eradicate street gangs in California. In September 1988, that legislation – Assembly Bill 2103 – was enacted as an urgency measure entitled the Street Terrorism Enforcement and Prevention Act,² or “STEP Act” (“Act”).

The STEP Act created the new crime of “active participation in a criminal street gang” and imposed lengthier sentences for existing crimes found to be gang related under the terms of the Act.³ Proponents claimed that the Act would be applied in accordance with established federal constitutional precedent and would not punish individuals for mere gang membership or association; instead it would punish only those who actively furthered the goals of gangs engaging in serious criminal activity.⁴ Opponents of AB 2103 argued that the bill promoted “guilt by association,” opening the door to potential

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1. ICE-T, *Colors*, on *COLORS* (ORIGINAL MOTION PICTURE SOUNDTRACK) (Warner Bros. Records 1987).

2. CAL. PENAL CODE §§ 186.20-186.33 (West 2006).

3. *Id.*

4. See, e.g., *Criminal Street Gang Bill Passes Committee*, EAGLE ROCK SENTINEL, June 27, 1987, at A1 (“[STEP Act co-drafter and Los Angeles District Attorney Ira Reiner] said the law would make ‘participation in such a gang a crime’ provided that ‘the proveable purpose of the gang is to commit serious and violent crime and that it can be shown that a gang member knew that was the gang’s purpose’ when he joined.”).

unconstitutional punishment of mere gang membership.⁵ State Senator Bill Lockyer, in particular, predicted that the Act was so unconstitutionally overbroad that it would be “laughed out of court.”⁶

Not only has the Act not yet been laughed out of court, but the original intent of its drafters has been betrayed by a succession of amendments and appellate opinions which have significantly broadened the scope and enhanced the severity of the Act’s provisions. Furthermore, recent appellate decisions, using inconsistent and often illogical reasoning, have pushed the Act dangerously close to unconstitutionally punishing mere membership.

The confusion among the appellate courts appears to be the product of their attempts to make sense of a clumsily drafted act bearing little textual resemblance to the judicial precedent that its proponents cited in support of its constitutionality at the time of its passage. The California Supreme Court’s frustration with the Act became apparent in 2000 when it described the Act, in *People v. Sengpadychith*,⁷ as presenting a “thicket of statutory construction issues.”⁸ A flurry of divergent and illogical appellate opinions in the years since *Sengpadychith* has shown that the courts have wandered so far into the thicket that they seem to have lost sight of the legislature’s intent to implement the STEP Act judiciously and within the bounds of constitutional precedent.

The purpose of this Article is to avert continued arbitrary and unconstitutional application of the STEP Act by (1) identifying and examining the flaws inherent in the text of the Act; (2) looking at the ways in which the appellate courts have struggled to interpret the provisions of the Act (oftentimes unwittingly exacerbating the Act’s potential for unconstitutional application); and (3) suggesting how the Act might be applied uniformly and constitutionally.

Part I of this Article briefly describes the two criminal provisions of the STEP Act and the punitive effects of those provisions.

Part II establishes that, although the Act does not punish gang membership *per se*, it relies on collateral proof of gang membership. Because the term “gang member” is legislatively undefined and has been subject to varying judicial interpretations, the Act is unconstitutionally vague.

5. See, e.g., Press Release, Assemb. Gwen Moore, Legislature Sends Anti-Gang Bill to Governor (Sept. 2, 1988) (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*); Letter from Marjorie C. Swartz & Daphne L. Macklin, Legislative Advocates, ACLU California Legislative Office, to Assemb. Gwen Moore, California State Assembly (April 21, 1987) (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

6. *Criminal Street Gang Bill Passes Committee*, *supra* note 4 (“The senator [Bill Lockyer] also said the law won’t work. . . . [This law] will be laughed out of court,” he said.”). During Mr. Lockyer’s term as the California Attorney General, his office unhesitatingly defended the constitutionality of the STEP Act in the appellate courts on numerous occasions. See, e.g., *People v. Castenada*, 3 P.3d 278, 279 (Cal. 2000).

7. 27 P.3d 739 (Cal. 2001).

8. *Id.* at 741.

Part III contends that the Act's definition of "active participation" in a criminal street gang is constitutionally deficient because it does not require that the gang have a criminal purpose or that the participant have both knowledge of that purpose and the intent to further it. Without these elements – mandated by established constitutional precedent – the Act improperly punishes mere membership in a street gang.

Part IV addresses the difficulties courts have recently had interpreting the gang enhancement provision of the STEP Act and argues that courts have largely misunderstood the nature of gang-related crime. The courts have manifested their misunderstanding by allowing for the imposition of additional punishment on criminals for gang association unrelated to the underlying criminal conduct. By applying the enhancement to *any* criminal conduct by gang members, the courts have effectively interpreted the enhancement provision of the Act to punish mere gang membership, in violation of the Constitution and contrary to the intent of the legislature.

This Article concludes by suggesting that the STEP Act could be salvaged by legislative amendment or judicial reinterpretation to make punishment dependent on an individual's contribution to a collective criminal gang purpose. Such an interpretation would comply with the United States Constitution, follow the intent of the Act's drafters, and encourage fair and effective implementation of the Act.

1. THE CRIMINAL PROVISIONS OF THE ACT: ACTIVE PARTICIPATION AND THE GANG ENHANCEMENT

The California Street Terrorism Enforcement and Prevention Act⁹ became effective immediately upon its enactment in September 1988 as emergency legislation¹⁰ and was made permanent in 1997.¹¹ The Act contained two key provisions: The first created a new crime of "active participation in a criminal street gang,"¹² and the second established enhanced penalties for crimes found to be gang related.¹³ The fundamental difference between the two is that the active participation provision punishes participation in criminal activity from within a criminal street gang while the enhancement provision punishes

9. CAL. PENAL CODE §§ 186.20-186.33 (West 2006).

10. *In re Nathaniel C.*, 279 Cal. Rptr. 236, 240 n.3 (Cal. Ct. App. 1991); *see also* CAL. SENATE COMM. ON JUDICIARY, BILL ANALYSIS: AB 2013, Record No. 29069, 1987-88 Reg. Sess., at 7 (1988) ("The reason for the urgency [was] to provide the tools necessary for law enforcement to stem the tide of illegal gang warfare without infringing upon the constitutional rights of any individual, at the earliest possible time.") (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

11. Act of August 26, 1996, ch. 873, § 2, 1996 Cal. Stat. 4753, 4756; Act of August 30, 1996, ch. 982, § 2, 1996 Cal. Stat. 5809, 5811; *see also* *People v. Loeun*, 947 P.2d 1313, 1319 (Cal. 1997).

12. § 186.22(a).

13. § 186.22(b).

facilitation of criminal street gang activity from within or without the gang itself.

A. Active Participation

The crime of “active participation” is codified at section 186.22(a) of the California Penal Code. Sometimes referred to as the “substantive offense”¹⁴ (to distinguish it from its companion, the “gang enhancement”¹⁵), the crime of active participation in a criminal street gang is committed by “[a]ny person who actively participates in any criminal street gang,¹⁶ with knowledge that its members engage in or have engaged in a pattern of criminal activity,¹⁷ and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.”¹⁸ Active participation in a criminal street gang is an offense that can be punished either as a misdemeanor or as a felony.¹⁹

B. The Gang Enhancement

Far more effective a weapon in the legislative effort to eradicate gang-related crime than the substantive offense of active participation is the penalty enhancement for gang-related offenses, codified within the Step Act at section 186.22(b) of the California Penal Code.²⁰ The enhancement (unlike the substantive offense) depends upon proof of an underlying gang-related felony, but it does not require proof of participation in a gang – only commission of a felony to benefit a gang.²¹ Under the enhancement statute, a defendant “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,” becomes subject

14. See, e.g., *People v. Ngoun*, 105 Cal. Rptr. 2d 837, 839 (Cal. Ct. App. 2001) (“Subdivision (a) created a substantive offense”); *People v. Herrera*, 83 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 1999) (describing section 186.22(a) as “a substantive offense whose gravamen is the *participation in the gang itself*”).

15. See, e.g., *People v. Morales*, 5 Cal. Rptr. 3d 615, 621 (Cal. Ct. App. 2003) (referring to section 186.22(b)(1) as the “gang enhancement”).

16. “Criminal street gang” is defined explicitly but inadequately at section 186.22(f). See discussion *infra* Part II.

17. The definition of “pattern of criminal activity” is codified at section 186.22(f). See discussion *infra* Part III.

18. § 186.22(a).

19. See *id.* (Active participation “shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”); CAL. PENAL CODE § 17 (West 2006) (“A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”). Offenses punishable as either a felony or a misdemeanor are commonly referred to as “wobblers.” See, e.g., *People v. Wilkinson*, 94 P.3d 551, 555 (Cal. 2004) (defining a “wobbler” as an offense “punishable as either a felony or a misdemeanor”).

20. § 186.22(b).

21. See *id.*

to an additional consecutive sentence of at least three years, depending on the nature of the underlying felony.²²

As originally enacted, the enhanced sentencing scheme reflected the drafters' intent to limit the enhancement to a period not to exceed the base term for the underlying felony: The enhancement was at most two years for any felony with a maximum sentence of up to three years, and the enhancement was at most three years for all other felonies.²³ The original legislative intent to never more than double the base term has been subverted by subsequent amendments, such that the enhancement now could have a much more significant impact on a case. Felonies categorized as "serious"²⁴ are now subject to an additional five year enhancement if proven to be gang related under the STEP Act,²⁵ even though many of those felonies otherwise have a maximum sentence of three years or less.²⁶ Felonies categorized as "violent"²⁷ are subject to an additional ten years,²⁸ almost tripling the maximum sentence for many of those felonies.²⁹ And some felonies, such as witness intimidation³⁰ – which would normally carry a maximum penalty of three years³¹ – are even subject to a penalty of life imprisonment when found to be gang related.³²

Furthermore, "any felony offense which would also constitute a felony violation of section 186.22" counts as a strike within the meaning of California's habitual offender "Three Strikes" law.³³ This language has been judicially interpreted to include both the gang enhancement and the active

22. *Id.*

23. CAL. ASSEMBLY COMM. ON PUBLIC SAFETY, AB 2013, 1987-88 Reg. Sess., at 1 (1987) (from legislative history file for AB 2013, marked "Date of Hearing: July 13, 1987") (on file with the *Berkeley Journal of Criminal Law*); CONCURRENCE IN SENATE AMENDMENTS, AB 2013, 1987-88 Reg. Sess., at 1 (1988) (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

24. Within the meaning of section 1192.7(c) of the California Penal Code.

25. § 186.22(b).

26. See CAL. PENAL CODE § 18 (West 2006) ("Except in cases where a different punishment is prescribed . . . , every offense declared to be a felony . . . is punishable by imprisonment . . . for 16 months, or two or three years . . ."). For example, criminal threats and attempted first-degree burglary are normally punishable by a maximum of three years in state prison. See CAL. PENAL CODE § 422 (West 2006) (specifying no specific term of imprisonment, therefore subject to a maximum three-year term pursuant to section 18); CAL. PENAL CODE § 461 (West 2006) (specifying a maximum term of six years for a completed first-degree burglary); CAL. PENAL CODE § 664(a) (West 2006) (setting the punishment for attempted felonies at "one-half the term of imprisonment prescribed upon a conviction of the offense attempted").

27. Within the meaning of section 667.5(c) of the California Penal Code.

28. § 186.22(b).

29. For example, robbery (in violation of section 211 of the California Penal Code) is normally punishable by three, four, or six years in state prison. See CAL. PENAL CODE § 213(a)(2) (West 2006).

30. In violation of section 136.1 of the California Penal Code.

31. § 18.

32. § 186.22(b)(4)(C).

33. CAL. PENAL CODE § 1192.7(c)(28) (West 2006).

participation felony.³⁴ Thus, a defendant convicted of a felony with a gang enhancement under section 186.22(b), and active participation under section 186.22(a), even when charged in the same complaint, would be subject to a sentence of twenty-five years to life if convicted of any subsequent felony.

II. THE STEP ACT'S UNCONSTITUTIONAL VAGUENESS

Although the STEP Act does not directly punish gang “membership” or conduct by “gang members,” the criminal conduct of a potential STEP Act violator is statutorily defined by explicit reference to the existence or conduct of “gang members.”³⁵ This section contends that as long as the term “gang members” eludes a uniform definition, the Act will remain unconstitutionally vague by failing to provide adequate notice of exactly which type of conduct is proscribed by its terms. The legislature or the appellate courts, therefore, need to create a uniform and practical definition, instead of leaving trial courts, practitioners, and potential offenders to choose from among the diverse definitions adopted by law enforcement and lay people throughout the state.

Understanding what is prohibited by the STEP Act requires understanding the definition of the term “gang members.” To be guilty of active participation in a criminal street gang in violation of section 186.22(a), a defendant must have “knowledge that [the gang’s] *members* engage in or have engaged in a pattern of criminal gang activity” and must “willfully promote[], further[], or assist[] in . . . felonious . . . conduct by *members* of that gang.”³⁶ To be subject to a penalty enhancement under section 186.22(b), a defendant must commit a felony with “the specific intent to promote, further, or assist in any criminal conduct by *gang members*.”³⁷

Despite the frequent references to “gang members” throughout the Act, the term is not defined anywhere in the Penal Code, nor has the term been adequately defined by any appellate court. As long as courts continue to define conduct proscribed under the STEP Act in relation to gang membership – a term subject to as many interpretations as there are experts willing to volunteer a definition – the entire Act is unconstitutionally vague. A statute’s vagueness may violate the Due Process Clause for either of two independent reasons: First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; and second, it may authorize and even encourage arbitrary and discriminatory enforcement.³⁸ However, the California Supreme Court has stated that facial vagueness of the kind inherent in the STEP Act does not render a statute unconstitutional if “any reasonable and

34. *People v. Briceno*, 99 P.3d 1007, 1010 (Cal. 2004).

35. § 186.22(a).

36. *Id.* (emphasis added).

37. § 186.22(b)(1) (emphasis added).

38. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

practical construction can be given to its language”³⁹ or if its validity can be preserved by “giv[ing] specific content to terms that might otherwise be unconstitutionally vague.”⁴⁰ Thus, in lieu of statutory amendment, an appellate court could effectively insert its own definition into the Act.⁴¹

Several decades prior to the emergence of modern street gangs, a criminal defendant successfully challenged a legislature’s undefined use of the term “gang member” as unconstitutionally vague in *Lanzetta v. New Jersey*.⁴² In *Lanzetta*, the United States Supreme Court invalidated a 1934 New Jersey anti-vagrancy law punishing “any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other state.”⁴³ The Court held that the statute violated due process because its terms were “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”⁴⁴ One of the unconstitutionally vague terms in the statute was the term “known to be a member.”⁴⁵ The Supreme Court found two fatal problems with this term: The first was whether the word “known” required actual membership or whether reputed membership was sufficient;⁴⁶ and second, the statute failed to indicate “what constitutes membership or how one may join” a gang.⁴⁷

The STEP Act’s abundant use of the undefined term “gang member” was attacked for vagueness in the 1991 case of *People v. Green*.⁴⁸ Notwithstanding the fatal constitutional problems that the United States Supreme Court had found with the same undefined term over half a century earlier in *Lanzetta*,⁴⁹ the California Court of Appeals held that the STEP Act’s use of the term was not unconstitutionally vague.⁵⁰ First, the court declared that “member” and “membership” were “terms of ordinary meaning, and require[d] no further

39. Walker v. Superior Court, 763 P.2d 852, 873 (Cal. 1988).

40. Associated Homebuilders etc., Inc. v. City of Livermore, 557 P.2d 473, 482 (Cal. 1976).

41. There appears to be no precise rule as to exactly when a court may (or should) apply statute-saving judicial gloss. See, e.g., *People v. Heitzman*, 886 P.2d 1229, 1231 (Cal. 1994) (rendering constitutional facially overbroad portion of elder abuse statute punishing failure to act by adding into the statute an element of a preexisting duty to prevent crime against elder by third party); *Bonwell v. Justice Court*, 307 P.2d 716, 716-17 (Cal. Ct. App. 1957) (expressly refusing to “rewrite” overbroad statute punishing mere presence in a place where drugs are being taken by adding a knowledge element).

42. 306 U.S. 451 (1939).

43. *Id.* at 452.

44. *Id.* at 453, 457-458 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

45. *Id.* at 452.

46. *Id.* at 458.

47. *Id.*

48. 278 Cal. Rptr. 140 (Cal. Ct. App. 1991), *overruled on other grounds by* *People v. Castenada*, 3 P.3d 278 (Cal. 2000).

49. See *Lanzetta*, 306 U.S. at 458.

50. *Green*, 278 Cal. Rptr. at 145.

definition.”⁵¹ The court further found that the term “member” had been judicially defined by the United States Supreme Court in *Galvan v. Press*⁵² as a person “bear[ing] a relationship to an organization that is not accidental, artificial or unconsciously in appearance only.”⁵³ However, the issue in *Galvan* was not how nominal membership should be defined, but rather *how much knowledge* of an organization’s criminal activities a member must have before that person may become subject to deportation.⁵⁴

The *Green* court also explicitly distinguished *Lanzetta*, reasoning that, unlike the New Jersey anti-vagrancy law, the STEP Act did not use the term “known,” and therefore the STEP Act’s references to “gang members” referred to *actual* gang members.⁵⁵ The fact that the STEP Act, like the New Jersey statute in *Lanzetta*, failed to indicate how one might join a gang had, according to the *Green* court, been resolved by cases such as *Scales v. United States*.⁵⁶ However, in *Scales* (as in *Galvan*), the Supreme Court was concerned solely with the issue of what kind of conduct *beyond* mere nominal membership could be punished constitutionally.⁵⁷ It had no need first to consider the problem of defining nominal membership in an informal organization. In contrast, the Supreme Court in *Lanzetta* focused on the problems inherent in defining membership in a street gang⁵⁸ – a unique type of organization that, unlike the Communist Party, does not create its own bright-line definition of membership by collecting a membership fee or issuing membership cards.⁵⁹ Thus, the *Green* court’s comparison of *Lanzetta* with *Scales* and *Galvan* is inapt.

In *People v. Englebrecht*,⁶⁰ the California Court of Appeal faced a similar challenge to that raised in *Lanzetta* and *Green* in the context of a civil injunction preventing Posole street gang members from engaging in various

51. *Id.* (citing *In re David De La O.*, 28 Cal. Rptr. 489, 505 (1963)).

52. 347 U.S. 522 (1954).

53. *Green*, 278 Cal. Rptr. at 145 (citing *Galvan*, 347 U.S. at 528).

54. *See Galvan*, 347 U.S. at 528. The *Galvan* Court held that, under the Internal Security Act of 1950, the requisite level of knowledge was low: An alien could be deported for belonging to the Communist party merely if the alien was “aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.” *See id.* There was no need to show that the alien knew of the party’s advocacy of the violent overthrow of the United States government. *See id.* at 528-29.

55. *Green*, 278 Cal. Rptr. at 146.

56. *Id.* (citing *Scales v. United States*, 367 U.S. 203 (1961)); *see also infra* text accompanying notes 78-83.

57. *See Scales*, 367 U.S. at 222-30; *Galvan*, 347 U.S. at 528.

58. *See Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939).

59. In *Lanzetta*, the Supreme Court noted that “the statute fails to indicate . . . how one may join a ‘gang.’” *Id.* The precise mode of acquiring nominal “membership” in a modern street gang appears to be just as hard to discern as it was in New Jersey in the 1930s. *See* CALIFORNIA ATTORNEY GENERAL’S OFFICE CRIME AND VIOLENCE PREVENTION CENTER, GANGS: A COMMUNITY RESPONSE 28 (June 2003) (describing how gang members are “jumped in” to a gang by submitting to a gang beating; other methods of acquiring membership include “sponsorship” by an existing member, or completion of a criminal “assignment”).

60. 106 Cal. Rptr. 2d 738 (Cal. Ct. App. 2001).

activities, including gathering in a particular area that the court found to be the gang's "territory," using hand signals or wearing clothes known to relate to membership in that gang, and engaging in various criminal activities known to be associated with the gang.⁶¹ The *Englebrecht* court rejected the defendant's argument that "gang member" should be considered synonymous with "active participant" as defined in *Green*, and, therefore, that it should include the requirement that the defendant is one who "devotes all, or a substantial part of his time and efforts to the gang."⁶² The *Englebrecht* court noted that the California Supreme Court had recently overruled *Green* on this point in *People v. Castenada*,⁶³ holding that *Scales* required that membership need only be "more than nominal, passive, inactive or purely technical" to be punishable under the United States Constitution.⁶⁴ The court also rejected the prosecution's argument that it should adopt the California Gang Task Force's definition,⁶⁵ which includes in its criteria confirmed association with known gang members.⁶⁶ Instead, the *Englebrecht* court ultimately held that a "gang member" subject to the terms of a gang injunction must be an "active gang member,"⁶⁷ i.e., one who "participates in or acts in concert with" a gang,⁶⁸ and this "participation must be more than nominal, passive, inactive or purely technical."⁶⁹ The *Englebrecht* definition of "gang member" is therefore merely a diluted version of the (criminal) "active participant" under section 186.22(a). The only difference is that, in defining "gang," instead of requiring that the gang members engage in a pattern of criminal conduct and that the gang's primary activities consist of criminal conduct,⁷⁰ the court required that the gang members engage in the nuisance activity and that the gang's primary activities consist of the nuisance activity.⁷¹ However, the *Englebrecht* court – like the Supreme Court in *Scales*⁷² and *Galvan*⁷³ – was concerned with defining the

61. *Id.* at 742 (enjoining "members" of the Posole street gang from engaging in certain collective activities amounting to a public nuisance).

62. *Id.* at 756.

63. 3 P.3d 278 (Cal. 2000).

64. *Id.* at 281-85 (cited in *Englebrecht*, 106 Cal. Rptr. 2d at 754-55).

65. One of many diverse law enforcement definitions. See *infra* notes 74-75 and accompanying text.

66. *Englebrecht*, 106 Cal. Rptr. 2d at 756. At the time of the *Englebrecht* case, the California Department of Justice Gang Task Force classified as an active gang member anyone meeting two or more of the following criteria: "(1) Subject admits being a member of the gang (2) Subject has tattoos, clothing, etc., that are only associated with certain gangs (3) Subject has been arrested while participating with a known gang (4) Information that places the subject with a gang has been obtained by a reliable informant (5) Close association with known gang members has been confirmed." *Id.* at 753.

67. *Id.* (emphasis added).

68. *Id.* at 756.

69. *Id.*

70. See CAL. PENAL CODE § 186.22(f) (West 2006).

71. See *Englebrecht*, 106 Cal. Rptr. 2d at 756.

72. See *Scales v. United States*, 367 U.S. 203, 222-30 (1961).

73. See *Galvan v. Press*, 347 U.S. 522, 528 (1954).

degree of membership, beyond merely nominal or passive membership, that could constitutionally subject a defendant to governmental sanction. Thus, instead of defining the (non-criminal) *status* of the nominal “gang members” referred to throughout the STEP Act, the *Englebrecht* court defined the type of *conduct* that would render “active gang members” subject to a civil gang injunction.

Neither *Green* nor *Englebrecht* provides an adequate solution to the problem that gang membership is statutorily undefined yet material to the application of the STEP Act. In *Green*, the court failed to recognize that, although “member” might be a term of ordinary meaning requiring no further definition, at least when applied to membership in conventional organizations such as the Communist party, the term “*gang member*” remains just as vulnerable to diverse definitions today as it did sixty-seven years ago in *Lanzetta*. In *Englebrecht*, the court simply provided a watered-down definition of active participation, leaving nominal membership undefined.

The lack of a consistent and workable definition of “gang member” not only fails to provide adequate notice to potential offenders and uniform guidance to juries, but it also encourages arbitrary enforcement of gang laws by police agencies throughout California, many of whom disagree as to what constitutes “gang membership” for purposes of monitoring gang activity at the street level. For example, in Stanislaus County, the Sheriff’s Department identifies a gang member as anyone meeting two or more of the following eight criteria:

1. Admit to being a gang member.
2. Have been arrested on suspicion of offenses consistent with usual gang activity.
3. Have been identified as a gang member by an informant.
4. Have been seen affiliating with documented gang members.
5. Have been seen displaying gang symbols and-or hand signs.
6. Have been seen wearing gang dress or having gang paraphernalia.
7. Have gang tattoos.
8. . . . [B]eing seen frequenting gang areas.⁷⁴

74. Julissa McKinnon, *Police Explain Gang Criteria*, MODESTO BEE, Mar. 4, 2005, at A1 (numbering added). The criteria are for the Stanislaus County Sheriff’s Department specifically; the last criterion is not used by the Modesto Police Department, and the Ceres Police Department “do[es] not consider frequenting a gang area as a sole criterion; instead, it must be coupled with sporting gang dress, tattoos, jewelry or monikers.” *Id.*

However, in San Diego, police “document” as a gang member anyone meeting three or more of the following nine criteria upon one contact with police, or one or more criteria upon three separate contacts:

1. Subject has admitted to being a gang member.
2. Subject has been arrested alone or with known gang members for offenses consistent with usual gang activity.
3. Subject has been identified as a gang member by a reliable informant/source.
4. Subject has been identified as a gang member by an untested informant.
5. Subject has been seen affiliating with documented gang members.
6. Subject has been seen displaying symbols and/or hand signs.
7. Subject has been seen frequenting gang areas.
8. Subject has been seen wearing gang dress.
9. Subject is known to have gang tattoos.⁷⁵

Thus, before a person can know whether a police officer may arrest him for impermissibly facilitating the criminal conduct of “gang members” under the STEP Act, he must first be aware of the location of those whose conduct he facilitates *and* the applicable local law enforcement definition. For example, a person who has the misfortune to have been contacted by police on three separate occasions while visiting his grandmother in a “gang area” would be a gang member in San Diego, but not in Stanislaus County. On the other hand, a person who, during his only contact with police, admits to being a gang member and is wearing gang “colors,” would be a gang member in Stanislaus County but not in San Diego. The disparity of definition not only affects gang enforcement at the street level, but also fosters arbitrary application of the STEP Act in the state’s courts; those same peace officers applying different definitions on the streets testify as experts in court as to the relationship between a defendant’s conduct and that of “gang members,” thus making the outcome of STEP Act cases throughout the state inconsistent.

The lack of a definition of “gang member” does not necessarily spell the end of the STEP Act. California courts could give a “reasonable and practical” judicial construction to this term,⁷⁶ or the California legislature could amend this language to comply with the U.S. Supreme Court’s concerns in *Lanzetta*. These solutions are available because the problem here, unlike the problems

75. COMMISSION ON GANG PREVENTION AND INTERVENTION, CITY OF SAN DIEGO POLICE DEPARTMENT, FREQUENTLY ASKED QUESTIONS REGARDING GANG DOCUMENTATION 2 (2006), <http://www.sandiego.gov/police/pdf/gangfaq.pdf> (numbering added) (punctuation modified).

76. See, e.g., *Williams v. Garcetti*, 853 P.2d 507, 509 (Cal. 1993) (“A statute . . . cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.”) (quoting *Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1988)).

inherent in punishing membership (whether by the Smith Act or by section 186.22(a) of the STEP Act), is simply one of notice. A workable definition does not have to define punishable conduct. It only must identify those people comprising a gang.⁷⁷ As long as there is a single, clear statewide definition, potential offenders and law enforcement will have sufficient notice for the STEP Act to avoid constitutional vagueness. However, until a constitutionally adequate definition of “gang member” is expressly created – whether statutorily or judicially – the entire Act remains invalid as unconstitutionally vague.

III. THE STEP ACT’S UNCONSTITUTIONAL PUNISHMENT OF MERE MEMBERSHIP

This section argues that courts have allowed the STEP Act to punish mere membership in organizations that have members who are criminals. Interpreting the statute in this way violates the constitutional requirement that only participatory conduct rising to the level of knowing furtherance of a collective criminal organizational goal may be subject to criminal sanctions.

In *Scales v. United States*,⁷⁸ the Supreme Court upheld the conviction of a defendant accused of violating the “membership clause” of the Smith Act by actively participating in American Communist Party activities.⁷⁹ The Supreme Court held that the Constitution permits punishment of membership in or association with an organization when the defendant’s involvement in the organization is more than nominal, passive, or theoretical; when the organization has a criminal purpose or goal which is known to the defendant; and when the defendant intends to further the criminal purpose of the organization.⁸⁰

The STEP Act punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.”⁸¹ Prior to the enactment of the STEP Act, proponents of AB 2013 claimed,⁸² and the California Supreme Court has since held,⁸³ that the substantive offense of

77. Therefore the definition need not be as elaborate as a law enforcement definition or any variant of the statutory “active participant.” For the purpose of adequate and uniform notice, it would be sufficient to define gang member in the simplest terms as a person who demonstrates, through, for example, actions, words, and dress, support for or allegiance to a criminal street gang.

78. 367 U.S. 203 (1961).

79. *Id.* at 203.

80. *See id.* at 208, 228.

81. CAL. PENAL CODE § 186.22(a) (West 2006).

82. *See* Memorandum from John Lovell, Special Counsel, Sacramento Legislative Office, Los Angeles District Attorney, to Assemb. Gwen Moore, Assemb. B. 2013 – A Reply Memorandum 2 (June 8, 1987) (“AB 2013, in fact, goes beyond the active *membership* test in *Scales*, by requiring active *participation*, rather than membership.”) (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

83. *People v. Castenada*, 3 P.3d 278, 283 (Cal. 2000).

active participation does not unconstitutionally inhibit freedom of association because the statute's language requires even more than the minimum requirements set forth in *Scales*. However, the Act – unlike *Scales* – does not require proof of the gang's criminal purpose and the individual's knowledge of that purpose. Nor have the appellate courts engrafted such a requirement onto the Act; rather, they have focused on the element of “more than nominal or passive involvement” and on the criminal conduct of individual gang members. Because California courts continue to ignore critical constitutional requirements from *Scales* that are not expressly contained within the text of the Act, the STEP Act, in practice, unconstitutionally punishes mere membership in a street gang.

A. The Criminal Street Gang: Predicate Acts and Primary Activities

To prove a defendant guilty of active participation in a criminal street gang in violation of section 186.22(a), prosecutors must first prove that there is indeed a criminal street gang in which it is possible to actively participate.⁸⁴ A criminal street gang is defined by the Act as “any ongoing organization, association, or group of three or more persons, whether formal or informal” with a “common identifying sign or symbol,” that has as “one of its primary activities” the commission of one or more of the crimes enumerated in subsection (e), and whose members “individually or collectively engage in or have engaged in a pattern of criminal activity.”⁸⁵ The Act defines “pattern of criminal 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 [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.⁸⁶

Therefore, to be “criminal” under the STEP Act, a street gang must have the commission of one or more enumerated offenses as one of its primary activities. In addition, its members must have committed two or more of the enumerated offenses within a three year period. The minimum two offenses forming the “pattern of criminal activity” are commonly referred to as the “predicate acts,” because the existence of a criminal street gang is predicated upon proof that such acts were committed by members of the gang.⁸⁷

84. See, e.g., *In re Lincoln J.*, 272 Cal. Rptr. 852, 854 (Cal. Ct. App. 1990).

85. § 186.22(f).

86. *Id.*

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

1. *A “Pattern of Criminal Activity”: The Evolution of the Predicate Acts Requirement*

This section argues that California’s legislature and courts have broadened the “predicate acts” requirement so far that this requirement no longer reflects the drafters’ intent to meet the constitutional requirements of *Scales* by limiting the application of the Act to those persons who commit crimes with prior knowledge of the commission of two or more serious felonies by members of their gang.

The Act requires that a defendant charged with active participation under section 186.22(a) must know that the gang’s members have committed two or more of certain enumerated predicate offenses.⁸⁸ The offenses must have been committed within three years of each other and “on separate occasions, or by two or more persons.”⁸⁹

In keeping with the original legislative intent to make STEP Act prosecutions “very difficult to prove except in the most egregious cases,”⁹⁰ the statutorily enumerated offenses were initially limited to the following seven serious felonies: assault with a deadly weapon or by means of force likely to produce great bodily injury; robbery; homicide or manslaughter; sale, manufacture, and possession for sale of narcotics; shooting at an inhabited dwelling or occupied vehicle; arson; and witness and victim intimidation.⁹¹ Although the text of the Act appears to require knowledge of the predicate acts only with respect to the substantive active participation offense, the following excerpt from a report from the Senate Committee on Judiciary seems to indicate (by reference to “more severe[.]” punishment of gang crimes) that the enhancement also was intended to require proof that a defendant had knowledge of the commission of at least two prior predicate offenses by members of his gang:

[The sponsors of AB 2013] considered [the initial seven enumerated offenses] to be extremely serious crimes; in addition, they claim that these crimes are crimes which are typical of street gangs. Once a prosecutor established that any member of a gang had committed at least two of these crimes, the threshold for a pattern of criminal activity would be met. Any crime committed by a member *in addition*

88. § 186.22(a) (stating that the charge applies to “[a]ny person who actively participates in any criminal street gang *with knowledge* that its members engage in or have engaged in a pattern of criminal activity”) (emphasis added).

89. § 186.22(e).

90. CAL. SENATE COMM. ON JUDICIARY, *supra* note 10, at 4.

91. *Id.*; CAL. ASSEMBLY COMM. ON PUBLIC SAFETY, *supra* note 23, at 2; *see also* Memorandum from R. Bruce Coplen, Deputy City Attorney, City of Los Angeles, to James K. Hahn, City Attorney, City of Los Angeles, and Ira Reiner, District Attorney, County of Los Angeles, Re: First Amendment Issues: S.B. 1555, Assemb. B. 2013, at 1 (May 21, 1987) (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

to this threshold would be punished more severely [under the provisions of the STEP Act].⁹²

The legislative intent to require notice of the gang's pattern of *serious* criminal activity was reiterated in a brief submitted in support of AB 2013:

[A]n individual is not liable under this statute if he joins or maintains membership in a street gang, knowing that the gang engages in graffiti writing or automobile burglaries. . . . It is therefore patently clear that the paramount element for successful prosecution under this statute is the individual member's knowledge of the gang's pattern of enumerated and specified serious crimes of violence and narcotics trafficking offenses.⁹³

Despite the apparent original legislative intent to restrict the Act's reach to street gangs whose members had committed at least two "extremely serious" offenses, the legislature (and the electorate, through Proposition 21 in 2000) has since expanded the list of enumerated crimes from seven offenses to thirty.⁹⁴ The list now includes many relatively minor offenses, including vandalism and automobile burglary.⁹⁵

Moreover, in stark contrast to the clearly stated legislative intent to put potential STEP Act violators on notice of liability by targeting conduct that occurs *after* their gang's members commit two predicate acts, the California Supreme Court has held that the second predicate act may be charged contemporaneously with a count of active participation in a criminal street gang.⁹⁶ Also, the California Supreme Court has ruled that *both* of the minimum

92. CAL. SENATE COMM. ON JUDICIARY, *supra* note 10, at 5 (emphasis added).

93. CRIMINAL STREET GANG LEGISLATION: A SUPPORT BRIEF (from legislative history file for AB 2013) (on file with the *Berkeley Journal of Criminal Law*).

94. § 186.22(e).

95. *Id.* The complete list of offenses enumerated in the Act currently reads as follows:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury . . . (2) Robbery . . . (3) Unlawful homicide or manslaughter . . . (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances . . . (5) Shooting at an inhabited dwelling or occupied motor vehicle . . . (6) Discharging . . . a firearm from a motor vehicle . . . (7) Arson . . . (8) The intimidation of witnesses and victims . . . (9) Grand theft . . . (10) Grand theft of any firearm, vehicle, trailer, or vessel . . . (11) Burglary . . . (12) Rape . . . (13) Looting . . . (14) Money laundering . . . (15) Kidnapping . . . (16) Mayhem . . . (17) Aggravated mayhem . . . (18) Torture . . . (19) Felony extortion . . . (20) Felony vandalism . . . (21) Carjacking . . . (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072 (23) Possession of a pistol, revolver, or other [concealed firearm] . . . (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422 (25) Theft and unlawful taking or driving of a vehicle, as defined in section 10851 of the Vehicle Code (26) Felony theft of an access card or account information, as defined in Section 484e (27) Counterfeiting, designing, using, attempting to use an access card, as defined in Section 484f (28) Felony fraudulent use of an access card or account information, as defined in Section 484g (29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5 (30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7.

Id.

96. *People v. Gardeley*, 927 P.2d 713, 725 (Cal. 1996).

two predicate acts may occur and be charged contemporaneously, as long as they are two distinct offenses committed by two gang members (even if committed simultaneously as part of the same criminal transaction),⁹⁷ thus eliminating entirely any element of notice of prior predicate offenses.

The drafters' intent to make the elements of the Act "very difficult to prove"⁹⁸ has been subverted even further by appellate courts ruling that the predicate offenses need not be gang related⁹⁹ and that the perpetrators of the offenses need not even be gang members at the time of the predicate acts' commission.¹⁰⁰

2. *The Primary Activities of the Gang*

For a street gang to be "criminal" to the degree that active participation in such a gang may be punished under the STEP Act, the gang must have as one of its "primary activities" the commission of one or more of the thirty acts enumerated in section 186.22(e).¹⁰¹ The STEP Act does not, however, explicitly require that a "criminal street gang" have its own criminal purpose¹⁰² – an element necessary under *Scales* for any law punishing association with a subversive group.¹⁰³ Moreover, California courts have not corrected this facial defect by interpreting the "primary activities" requirement as a criminal purpose requirement. Instead, the courts interpreting the "primary activities" element of the STEP Act have focused on the quantity of crimes committed by gang members. In sum, they have failed to recognize that individual criminal activities of the gang's members do not, in and of themselves, demonstrate a collective criminal purpose of the gang itself.

In *People v. Sengpadychith*,¹⁰⁴ the California Supreme Court ventured into the "thicket of statutory construction issues presented by the [STEP Act]" in a reluctant and largely futile attempt to clarify the issue of "primary activities."¹⁰⁵ The Court held that "primary" meant "chief" or "principal," and that the element of primary activities must be proven by "evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute."¹⁰⁶ The *Sengpadychith* court also stated that expert testimony alone might form sufficient proof of primary activities, citing *People v.*

97. *People v. Loeun*, 947 P.2d 1313, 1318 (Cal. 1997).

98. CAL. SENATE COMM. ON JUDICIARY, *supra* note 10, at 4.

99. *Gardeley*, 927 P.2d at 724-725; *People v. Augborne*, 128 Cal. Rptr. 2d 258, 264 (Cal. Ct. App. 2002).

100. *Augborne*, 128 Cal. Rptr. 2d at 264.

101. CAL. PENAL CODE § 186.22(f) (West 2006).

102. *See id.*

103. *See Scales v. United States*, 367 U.S. 203, 228 (1961).

104. 27 P.3d 739 (Cal. 2001).

105. *Sengpadychith*, 27 P.3d at 741.

106. *Id.* at 744 (citing WEBSTER'S INTERNATIONAL DICTIONARY 1963 (2d ed. 1942), for the definition of "primary") (emphasis in original).

Gardeley.¹⁰⁷ In *Gardeley* a police gang expert testified that the gang was primarily engaged in the sale of narcotics and witness intimidation, both felonies enumerated in the STEP Act.¹⁰⁸ The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on “his personal investigation of hundreds of crimes committed by gang members,” together with “information from colleagues in his own police department and in other law enforcement agencies.”¹⁰⁹

What the California Supreme Court failed to recognize is that consistent and repeated criminal activity by members of an organization might often have little to do with the organization’s criminality.¹¹⁰ By basing its opinion simply on *quantity* of criminal activity rather than the nature of that activity, the Court left open the possibility that legitimate organizations with criminal members, but no collective criminal activity or goal, would fall within the statutory definition of a criminal street gang.

Prior to *Sengpadychith*, the defendant in *People v. Gamez*¹¹¹ had attacked this potential for overbreadth¹¹² by arguing that the statutory definition of criminal street gang could encompass such organizations as the Los Angeles Police Department (“LAPD”), whose members also commit crimes in the enumerated list.¹¹³ The Court of Appeal, unlike the Supreme Court in *Sengpadychith*, recognized that the offenses constituting “primary activities” must be committed by members of the organization acting as agents of that organization.¹¹⁴ The court reasoned that, although members of the LAPD may have committed the requisite number of predicate offenses,¹¹⁵ the commission of those offenses was not a “primary activity” of the department because the crimes were committed by LAPD officers acting in a separate capacity, albeit

107. *Id.* (citing *People v. Gardeley*, 927 P.2d 713, 722 (Cal. 1996)).

108. *Gardeley*, 927 P.2d at 722.

109. *Id.*

110. See Finn-Aage Esbensen, *Preventing Adolescent Gang Involvement*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice, Washington, D.C.), Sept. 2000, at 5-6, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/182210.pdf>. Esbensen noted that research suggested that “while the gang environment facilitates delinquency, gang members are already delinquent prior to joining the gang.” *Id.* Esbensen also noted, however, that “rates of delinquent activity increase dramatically during the period of gang membership.” *Id.* at 6.

111. 286 Cal. Rptr. 894 (Cal. Ct. App. 1991), *overruled on other grounds by* *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).

112. A statute is unconstitutionally overbroad when it prohibits a substantial amount of constitutionally protected activity (such as free association within lawful groups) when judged in relation to the statute’s plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973).

113. *Gamez*, 286 Cal. Rptr. at 901.

114. *Id.*

115. The *Gamez* opinion somewhat portentously predated the Los Angeles Police Department “Rampart Scandal,” wherein LAPD anti-gang CRASH Unit officers were convicted of several serious felonies, including bank robbery and theft of seized cocaine. Frontline’s Rampart Scandal Timeline, <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> (last visited Nov. 31, 2006).

while on duty.¹¹⁶

The California Supreme Court ignored this qualitative assessment in *Sengpadychith*, incorrectly citing *Gamez* for the proposition that organizations such as the LAPD are not criminal street gangs because enumerated offenses are committed by members only on an occasional basis.¹¹⁷ The Supreme Court focused on the *quantity* of crimes committed by individual members of a gang irrespective of any connection between those crimes and the gang itself.¹¹⁸ To pass constitutional muster under *Scales*, as implicitly acknowledged by the *Gamez* court,¹¹⁹ the STEP Act must require that a “criminal street gang” has its own criminal purpose¹²⁰ – an element conspicuously absent from the expansive definition of a criminal street gang in the text of the Act,¹²¹ and an element overlooked by the California Supreme Court in interpreting the Act.

Such a collective “gang purpose” *might* be demonstrated by evidence of the gang’s members consistently and repeatedly committing enumerated crimes (as required under *Sengpadychith*¹²²), but only as long as it could also be shown that the perpetrators of those crimes were furthering the criminal purpose of the *gang* by acting as agents of the gang in committing those crimes. Simply presenting evidence of numerous heinous crimes committed by members of a gang proves only that criminals belong to gangs,¹²³ not that gangs are criminal enterprises in their own right.

B. Active Participation: More Than Nominal or Passive Involvement

1. The Unconstitutionality of the Active Participation Charge as Interpreted by California Courts

Despite frequent references to the “illegal purpose” language of *Scales* by the proponents of AB 2013 prior to the STEP Act’s enactment,¹²⁴ the language

116. *Gamez*, 286 Cal. Rptr. at 901.

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

118. *See id.*

119. *See Gamez*, 286 Cal. Rptr. at 901.

120. *See Scales v. United States*, 367 U.S. 203, 228 (1961).

121. *See* CAL. PENAL CODE § 186.22(f) (West 2006).

122. *Sengpadychith*, 27 P.3d at 744.

123. The courts and the legislature should not take for granted the proposition that gang members commit crimes at a significantly higher rate than non-gang members. At least one researcher has found that instead of a life filled with crime, gang life is “a very dull life. For the most part, gang members do very little – sleep, get up late, hang around, brag a lot, eat again, drink, hang around some more.” M.W. KLEIN, *THE AMERICAN STREET GANG* 11 (1995). On the other hand, STEP Act co-drafter (then Los Angeles City Attorney and later mayor of Los Angeles) James K. Hahn offered the following opinion: “I have a real hard time with folks who somehow try to say that just because folks are in a gang you shouldn’t assume they are involved with crime. Hello? They are in a gang. They are part of a group dedicated to breaking the law.” Megan Garvey & Richard Winton, *Tracking of Gang-Related Crime Falls Short*, LOS ANGELES TIMES, Jan. 24, 2003, Main News, at 1.

124. *See, e.g.,* CAL. SENATE COMM. ON JUDICIARY, *supra* note 10, at 4.

in section 186.22(b) as enacted (referring only to knowledge of *individual* criminal conduct by gang members),¹²⁵ has led courts to disregard the *Scales* requirement of knowledge of the gang's illegal purpose.¹²⁶

In *People v. Castenada*,¹²⁷ the California Supreme Court agreed with the sponsors of AB 2013 that the STEP Act requires even more than the Supreme Court required in *Scales* in order to punish association with a subversive organization:

[T]he high court in *Scales* held that the Smith Act satisfied the due process requirement of personal guilt by requiring proof of a defendant's active membership in a subversive organization with knowledge of and an intent to further its goals. Here, section 186.22(a) [the substantive offense of "active participation"] limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members.¹²⁸

The California Supreme Court was indeed correct in stating that aiding and abetting a felony by members of the gang was more than what was required under *Scales* to prove active membership rising to the level of constitutionally punishable participation. However, the court was mistaken if it assumed that simply having knowledge of the gang's "pattern of criminal gang activity" (as defined by the STEP Act) was constitutionally equivalent to having knowledge of the gang's illegal *purposes* (as required under *Scales*), or further, that aiding and abetting a separate felony offense by gang members, as required under the statute, would be constitutionally sufficient on its own to prove specific intent to further those illegal purposes. Now, California courts require only that the defendant have knowledge of two crimes (which need not even be gang related¹²⁹) committed by individuals who may not even be gang members at the time the crimes are committed.¹³⁰

Further, in *People v. Ngoun*¹³¹ and *People v. Lamas*,¹³² lower courts held that the element of willful promotion, furtherance, or assistance in any felonious criminal conduct by gang members may be met not solely by "aiding and abetting a separate felony offense" – as the California Supreme Court

125. § 186.22(b).

126. See *Scales v. United States*, 367 U.S. 203, 228 (1961).

127. 3 P.3d 278 (Cal. 2000).

128. *Id.* at 283 (citations omitted).

129. *People v. Gardeley*, 927 P.2d 713, 723 (Cal. 1996); *People v. Augborne*, 128 Cal. Rptr. 2d 258, 264 (Cal. Ct. App. 2002).

130. *Augborne*, 128 Cal. Rptr. 2d at 264; *People v. Ngoun*, 105 Cal. Rptr. 2d 837, 839 (Cal. Ct. App. 2001).

131. 105 Cal. Rptr. 2d 837 (Cal. Ct. App. 2001).

132. 46 Cal. Rptr. 3d 94 (Cal. Ct. App. 2006), *depublished by grant of review*, 146 P.3d 1251 (Cal. 2006).

stated unambiguously five times in *Castenada*¹³³ – but alternatively by the direct perpetration of a gang-related offense by a single gang member.¹³⁴ Moreover, these courts have held that the *Scales* requirement of “more than nominal or passive involvement” is automatically met by the commission of one gang-related offense (either as an aider and abettor or as a direct perpetrator).¹³⁵

The logic of these lower court opinions is articulated as follows: “[A]n active gang member who directly perpetrates a gang-related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids or abets.”¹³⁶ What this rationale overlooks is the concept articulated in *Scales* that membership can become criminal only when it amounts to interaction or collaboration with other members involved in the collective pursuit of the organization’s criminal goals, in a manner akin to a traditional criminal conspiracy.¹³⁷ In *Scales*, the Supreme Court recognized this similarity between active participation in a criminal organization and membership in a conspiracy, stating that “there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court.”¹³⁸ California courts, however, have failed to make this connection, remaining focused on *past* conduct by individual gang members, rather than evaluating a defendant’s collaborative efforts to further *future* collective gang crime.

2. *The Current State of the Active Participation Charge as Contrasted with Constitutional Requirements*

In sum, the active participation statute – in its current state of judicial interpretation – requires that the following be proven:

1. The defendant has knowledge of two felony offenses (which may or may not be gang related) committed by individuals who need not be gang members at the time (one of which may be an offense alleged against the defendant in the same complaint as the count of active participation).¹³⁹

133. *Castenada*, 3 P.3d at 283-85.

134. *Ngoun*, 105 Cal. Rptr. 2d at 839; *Lamas*, 46 Cal. Rptr. 3d at 96-97. *Lamas* was granted review by the California Supreme Court on November 1, 2006, and has therefore been depublished. See *People v. Lamas*, 146 P.3d 1251, 1251 (Cal. 2006). Upon review, the Supreme Court will likely be forced to expand upon its opinion in *Castenada*, hopefully clarifying whether an active participant in a criminal street gang must *aid and abet* a crime committed by *other* gang members, and whether that crime must be *gang related*.

135. *Lamas*, 46 Cal. Rptr. 3d at 97; *Ngoun*, 105 Cal. Rptr. 2d at 839-40.

136. *Lamas*, 46 Cal. Rptr. 3d at 96-97 (citing *Ngoun*, 105 Cal. Rptr. 2d at 839-840).

137. See *Scales v. United States*, 367 U.S. 203, 225-28 (1961).

138. *Id.* at 226 n.18.

139. *People v. Augborne*, 128 Cal. Rptr. 2d 258, 264 (Cal. Ct. App. 2002).

2. The defendant's involvement with the gang is more than nominal or passive¹⁴⁰ (although this element is subsumed within the following element, according to *Lamas*¹⁴¹).
3. The defendant aids and abets a separate felony offense committed by gang members (*Castenada*¹⁴²) or directly perpetrates a gang-related offense alone or with others (*Ngoun*¹⁴³ and *Lamas*¹⁴⁴).

In contrast, the United States Constitution requires (according to *Scales*) that the following be proven:

1. The defendant has knowledge of the organization's illegal purposes and intends to further those illegal purposes.¹⁴⁵
2. The defendant's involvement with the organization is more than nominal or passive.¹⁴⁶

The inclusion in the STEP Act of the additional, constitutionally unnecessary element of commission of a "separate" gang-related offense does not cure the glaring omission of the constitutionally required elements of knowledge of the gang's illegal purposes and specific intent to further those purposes. On its face, the statute does not conform to *Scales*. The "primary activities" and "pattern of criminal gang activity" elements of the active participation statute fall far short of requiring knowledge of, and intent to further, the criminal *purposes* of the gang (as opposed to knowing of and assisting in criminal endeavors by individuals who just happen to be gang members). In fact, while courts have defined "primary activities" as a more extensive course of criminal conduct¹⁴⁷ than the "pattern of criminal conduct" (two or more offenses within three years¹⁴⁸), the Act does not require that a defendant charged with active participation have any knowledge of the primary activities – only knowledge of the so-called "pattern."¹⁴⁹

Therefore, to comport with the statutory *and* constitutional requirements (under *Scales*), a person should be found guilty of violating section 186.22(a) only when he or she has knowledge of a pattern of criminal gang activity, has committed a gang-related crime (as a direct perpetrator *or* aider and abettor),

140. *People v. Castenada*, 3 P.3d 278, 284-85 (Cal. 2000).

141. *Lamas*, 46 Cal. Rptr.3d at 96.

142. *Castenada*, 3 P.3d at 283.

143. *People v. Ngoun*, 105 Cal. Rptr. 2d 837, 839-40 (Cal. Ct. App. 2001).

144. *Lamas*, 46 Cal. Rptr.3d at 97.

145. *See Scales v. United States*, 367 U.S. 203, 228 (1961).

146. *See id.* at 208, 228.

147. *People v. Sengpadychith*, 27 P.3d 739, 744 (Cal. 2001) ("Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.")

148. CAL. PENAL CODE § 186.22(f) (West 2006).

149. *See* § 186.22(a) (applying to "[a]ny person who actively participates in any criminal street gang *with knowledge that its members engage in or have engaged in a pattern of criminal gang activity*, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang") (emphasis added).

and has the specific intent to further the criminal purposes of the gang.

Until courts begin to look beyond the statute's plain language and pay closer heed to both the requirements of *Scales* and the California legislature's intent – by requiring evidence of a defendant's active involvement in the furtherance of a collective criminal enterprise – the STEP Act's active participation provision will remain unconstitutional in its application.

IV. THE GANG ENHANCEMENT: DEFINING AND MISUNDERSTANDING GANG-RELATED CRIME

The most effective and widely employed provision of the STEP Act is the “gang enhancement,” found at section 186.22(b). The gang enhancement imposes varying additional penalties for crimes found to be gang related.¹⁵⁰ According to the language of the Act, a crime is gang related (and subject to an enhanced penalty) if it is committed “for the benefit of, at the direction of, or in association with a criminal street gang,” and “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”¹⁵¹ This section argues that recent judicial interpretations of the STEP Act's penalty enhancement provision serve to punish mere gang membership by defining as “gang related” – and thus subject to additional punishment – any crime committed by a gang member. By punishing what amounts to mere membership, the California courts' interpretation of the gang enhancement provision raises similar constitutional issues to those raised by the substantive offense.¹⁵² While California courts' definitions of gang-related crime are mostly overbroad, the Ninth Circuit's recent definition, requiring that the defendant's conduct facilitate specific subsequent gang crime, is too narrow. A constitutionally sufficient definition of gang-related crime subject to the gang enhancement, therefore, would both require evidence that the defendant's relationship with the gang contributed to the commission of the crime *and* evidence that the crime was committed with the intent to advance the collective criminal purposes of the gang.

150. § 186.22(b).

151. *Id.*; see also *Garcia v. Carey*, 395 F.3d 1099, 1103 n.5 (9th Cir. 2005) (“It is important to keep these two requirements of the gang enhancement separate. For example, *People v. Olguin* . . . dealt with a challenge to the sufficiency of the evidence to meet the first requirement – that the crime of conviction be ‘for the benefit of, at the direction of, or in association with’ a criminal street gang – not the second requirement of specific intent to further other criminal activity of the gang.”) (citations omitted). For an example of how easy it is to neglect the requirement of specific intent, see a recently published gang prosecution “handbook” that omits the second prong of the enhancement entirely, informing prosecutors that they “need only prove that the crime – whatever it was – was committed for the benefit of, in association with, *or* at the direction of a criminal street gang.” ALAN JACKSON, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 21 (Am. Prosecutors Research Inst., Special Topics Series, 2004), available at http://www.ndaa.org/pdf/gang_cases.pdf. Jackson also asserts incorrectly that “the STEP Act's (b) enhancement applies to *any* felony and *any* misdemeanor.” *Id.*

152. See discussion *supra* Part III.

Courts have generally construed the requirement that a crime be gang related liberally, sustaining gang enhancements in a variety of circumstances, ranging from selling drugs in a “gang neighborhood”¹⁵³ to assaulting a police officer in order to free a fellow gang member from custody.¹⁵⁴ Recently, however, some courts have begun to require a narrower, more specific nexus between the charged offense and secondary, facilitated gang crime. For example, in *People v. Martinez*,¹⁵⁵ the First District Court of Appeal held that an automobile burglary did not qualify as gang related simply because the burglary was committed by a gang member.¹⁵⁶ Similarly, the Ninth Circuit held in *Garcia v. Carey*¹⁵⁷ that evidence that the defendant’s gang was “turf-oriented” was insufficient to support an inference that the defendant robbed his victim “with the specific intent to facilitate other criminal conduct by the gang,” even though the defendant committed the robbery with other gang members and proudly announced his gang affiliation to the victim and others during the robbery.¹⁵⁸ The most significant implication of the *Garcia* case is the Ninth Circuit’s reading of gang-related crime as crime committed with the intent to facilitate “other criminal conduct by [the gang].”¹⁵⁹ However, by requiring a nexus to specific secondary (or “other”) gang crime, the Ninth Circuit failed to recognize that there may indeed be crimes committed by gang members that are in and of themselves gang related within the spirit of the STEP Act without regard to their direct impact on secondary gang activity.

Just prior to the *Garcia* decision, the Fourth District Court of Appeals held in *People v. Morales*¹⁶⁰ that two or more gang members jointly committing a robbery was sufficient to meet both prongs of the enhancement: The crime was committed by the defendant “in association with” other known gang members, and the defendant specifically intended to assist the contemporaneous criminal conduct of his gang member cohorts.¹⁶¹ In a similar vein to the capacity (or “agency”) theory hinted at in *Gamez* with regard to primary activities being gang related, the *Morales* court acknowledged that there *could* be situations where “several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.”¹⁶² However, the

153. *People v. Ferraez*, 5 Cal. Rptr. 3d 640, 645-46 (Cal. Ct. App. 2003) (holding that the evidence was sufficient to prove that the drug sales were intended to enhance the gang’s criminal reputation).

154. *In re Ramon T.*, 66 Cal. Rptr. 2d 816, 820 (Cal. Ct. App. 1997).

155. 10 Cal. Rptr. 3d 751 (Cal. Ct. App. 2004).

156. *Id.* at 756.

157. 395 F.3d 1099 (9th Cir. 2005).

158. *Garcia*, 395 F.3d at 1103.

159. *Id.* (emphasis added).

160. 5 Cal. Rptr. 3d 615 (Cal. Ct. App. 2003).

161. *Id.* at 632-633.

162. *Id.* at 632. While the *Morales* court did not use the word “agent” in its opinion, it alluded to concepts of agency with its use of the term “frolic.” See *id.*; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 503 (5th ed. 1984) (describing a “frolic”

Morales court went on to say that in the case at bar “there was no evidence” of such a “frolic and detour,” thus implying that *any* crime committed by multiple gang member defendants is *presumed* to be gang related, *unless* the defendant can prove that the gang members were not acting as agents of the gang when committing the charged offense.¹⁶³

In a case similarly involving multiple gang members and a single offense, *People v. Romero*,¹⁶⁴ the Second District Court of Appeal held that an assault was gang related because one co-defendant had the specific intent to “promote, further, or assist” his gang member co-defendant, with whom he committed the assault.¹⁶⁵ The *Romero* court cited *Morales* in support of this holding, but failed to acknowledge the *Morales* court’s common-sense observation that not all actions of gang members are necessarily performed in their capacity as gang members, i.e., with the specific intent to further the criminal purpose of the gang.¹⁶⁶ Therefore, by defining as gang related any crime committed by a gang member in association with other gang members, the *Romero* holding implicitly imposes a punishment for mere gang membership unrelated to the commission of the charged crime, thus encroaching upon constitutional rights.¹⁶⁷ Furthermore, the *Romero* court expressly repudiated the Ninth Circuit’s requirement that the charged conduct be intended to facilitate *other* criminal gang activity, stating that as the issue is one of state law, the Ninth Circuit’s decision is not binding.¹⁶⁸

Shortly after *Romero*, the Third District Court of Appeals in *People v. Hill*¹⁶⁹ also expressly rejected the Ninth Circuit’s insistence upon a nexus to *other* criminal gang activity.¹⁷⁰ In *Hill*, the defendant acted alone, invoking his gang’s name while threatening a woman during an incident following a car accident.¹⁷¹ The defendant was convicted of committing a criminal threat, in violation of section 422 of the California Penal Code, with a sustained gang

as the acts of a “servant who is not at all on his master’s business, but is ‘going on a frolic of his own’”); RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (1958) (describing a “servant” as a “species of agent”); *see also* O’Connor v. McDonald’s Restaurants, 269 Cal. Rptr. 101, 103 (Cal. Ct. App. 1990) (citing Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 463 (1923)).

163. *See Morales*, 5 Cal. Rptr. 3d at 632. The *Morales* court did not address any potential constitutional issues arising from the apparent shifting of the burden of proof to the defendant on the element of gang-relatedness. *See id.*; *see also* *People v. Roder*, 658 P.2d 1302, 1305-07 (Cal. 1983) (holding that former section 496 of the California Penal Code (receiving stolen property) unconstitutionally required the defendant to rebut a presumption of knowledge of the stolen character of the property).

164. 43 Cal. Rptr. 3d 862 (Cal. Ct. App. 2006).

165. *Id.* at 866.

166. *See id.* at 865-66.

167. *See Scales v. United States*, 367 U.S. 203, 224-30 (1961).

168. *Romero*, 43 Cal. Rptr. 3d at 865.

169. 47 Cal. Rptr. 3d 875 (Cal. Ct. App. 2006).

170. *Id.* at 876-77.

171. *Id.* at 876.

enhancement under section 186.22(b).¹⁷² On appeal, the defendant did not challenge the opinion of the prosecution's gang expert that the threat benefited the gang by making it known "that the gang could not be 'disrespected' without consequences."¹⁷³ Instead, the defendant attacked the sufficiency of the evidence offered in support of the second, distinct element of the enhancement: "the specific intent to promote, further, or assist in any criminal conduct by gang members."¹⁷⁴ Disagreeing with the Ninth Circuit's holding that the charged crime must be specifically intended to facilitate "other" gang crime,¹⁷⁵ the *Hill* court found that "[t]here is no requirement in [the gang enhancement charge] that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits,"¹⁷⁶ and that the "defendant's own criminal threat qualified as the gang-related criminal activity."¹⁷⁷ Despite the fact that the defendant's invocation of his gang's name was likely intended to facilitate the successful completion of the charged crime, the court appeared to base its holding solely on the fact that the charged crime was committed by a gang member.¹⁷⁸ The court reasoned that it was sufficient that the criminal threat was intended to facilitate "'any criminal conduct by gang members' [i.e., the charged criminal threat committed by the single gang member defendant], rather than *other* criminal conduct [i.e., some crime or crimes other than the charged offense],"¹⁷⁹ and that "[n]o further evidence on [the specific intent] element was necessary."¹⁸⁰ In other words, the defendant had facilitated criminal activity by a gang member simply by committing a crime as a gang member.¹⁸¹

In a case decided before *Hill* and after *Romero*, *In re Frank S.*,¹⁸² the Fifth District interpreted the STEP Act in a way that fell somewhere between those two cases. In *Frank S.*, a lone gang member had been found guilty of possession of a concealed knife, which is a felony offense.¹⁸³ The court held (citing *Martinez*¹⁸⁴) that the defendant's gang membership in itself was insufficient to support a gang enhancement without any "evidence that the [defendant] had a gang-related purpose," as might be shown by "evidence that

172. *Id.*

173. *Id.* at 876-77.

174. *Id.* (quoting CAL. PENAL CODE § 186.22(b)(1) (West 2006)).

175. *Garcia v. Carey*, 395 F.3d 1099, 1103 (9th Cir. 2005).

176. *Hill*, 47 Cal. Rptr. 3d at 877.

177. *Id.*

178. *See id.*

179. *Id.* (quoting *People v. Romero*, 43 Cal. Rptr. 3d 862, 865 (Cal. Ct. App. 2006)).

180. *Id.* (emphasis added).

181. *See id.*; but cf. *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997) (holding gang membership alone "cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting"), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998).

182. 46 Cal. Rptr. 3d 839 (Cal. Ct. App. 2006).

183. *Id.* at 840-41.

184. *Id.* at 844 (citing *People v. Martinez*, 10 Cal. Rptr. 3d 751, 756 (Cal. Ct. App. 2004)).

the [defendant] was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense.”¹⁸⁵ This reasoning implies that, although a defendant cannot contemporaneously facilitate his own offense without any connection between the crime and the gang beyond the defendant’s own membership (as in *Hill*¹⁸⁶), he *could* perhaps facilitate the contemporaneous criminal conduct of gang member cohorts (as in *Romero*¹⁸⁷ and *Morales*¹⁸⁸).

The disagreement among the appellate courts mirrors the long-standing difference in opinion among law enforcement agencies nationwide as to what should be considered a “gang-related” crime. The Los Angeles Police Department and County Sheriff’s Department classify as “gang related” any offense involving a gang-affiliated offender or victim.¹⁸⁹ The Chicago Police Department, on the other hand, takes a “motive-based” approach, classifying as “gang related” any crime related to gang *function*.¹⁹⁰ Not only does the significant difference of opinion among law enforcement agencies frustrate attempts to accurately evaluate gang crime nationally, but the application of the Los Angeles definition tends to greatly exaggerate the true threat of gang crime. For example, the preamble to the STEP Act claims that in 1986 there were 328 “gang-related” murders in Los Angeles County.¹⁹¹ Without knowing how many of these “gang-related” murders were in any way related to gang function (as opposed to gang members killing or being killed for the same reasons as non-gang members), the figure is essentially meaningless.¹⁹²

The recent trend among California appellate courts in deciding which crimes are subject to the gang enhancement provision appears to be headed toward using a standard similar to the Los Angeles law enforcement’s

185. *Id.* at 844.

186. *See* *People v. Hill*, 47 Cal. Rptr. 3d 875, 877 (Cal. Ct. App. 2006).

187. *See* *People v. Romero*, 43 Cal. Rptr. 3d 862, 866 (Cal. Ct. App. 2006).

188. *See* *People v. Morales*, 5 Cal. Rptr. 3d 615, 632-33 (Cal. Ct. App. 2003).

189. G. DAVID CURRY, RICHARD A. BALL & ROBERT J. FOX, GANG CRIME AND LAW ENFORCEMENT RECORDKEEPING (Nat’l Inst. of Justice, Research in Brief No. NCJ 148345, 1994), available at <http://www.ncjrs.gov/txtfiles/gcrime.txt>.

190. *See* Carolyn Rebecca Block & Richard L. Block, *Overview of the Chicago Homicide Project*, in QUESTIONS AND ANSWERS IN LETHAL AND NON-LETHAL VIOLENCE: PROCEEDINGS OF THE FIRST ANNUAL WORKSHOP OF THE HOMICIDE RESEARCH WORKING GROUP 109 (Carolyn Rebecca Block & Richard L. Block eds., Nat’l Inst. Of Justice, Research Report No. NCJ 142058, 1992), available at <http://www.icpsr.umich.edu/HRWG/PDF/hrwg92.pdf> (“The Chicago Police Department’s definition of an offense as ‘street gang-related’ is based upon the motive of the offender. The preponderance of evidence must indicate that incident grew out of a street gang function. Gang membership of either party is not enough, by itself, to determine gang-relatedness, unless other elements of the case establish a relationship.”).

191. CAL. PENAL CODE § 186.21 (West 2006).

192. *See* Cheryl L. Maxson & Malcolm W. Klein, *Street Gang Violence: Twice as Great or Half as Great?*, in GANGS IN AMERICA 71, 90 (C. Ronald Huff ed., 1990) (Analysis of data showed that a motive-based definition of gang homicide yields half as many gang homicides as does the member-based definition used by LAPD.).

definition of gang-related crime.¹⁹³ However, gang-related crime cannot constitutionally be defined solely by whether the defendant or those he assists are “gang members” – a term undefined by statute or case law and vulnerable to a variety of different meanings. Instead, gang-related crime should be defined (similarly to the Chicago law enforcement definition) by whether the defendant is acting in the capacity of an *agent* of the gang. Such criminal conduct would exclude that defined by the holdings of *Romero*¹⁹⁴ and *Hill*,¹⁹⁵ because of the potential for unconstitutionally imposing an additional punishment solely for gang membership. At the same time, it would include crimes beyond those defined by *Garcia* so as to permit punishment of gang-motivated crime that does not necessarily directly facilitate secondary gang crime. For example, the successful completion of many assaultive crimes is facilitated by the invocation of a gang’s name – something which, because of the gang’s intimidating reputation, commonly induces submission and deters reporting. In those instances, the defendant acts overtly as an agent of the gang for the specific purpose of facilitating completion of *that* crime alone, with the merely incidental effect of facilitating *other* gang crime by subduing the surrounding community. Despite failing to meet the requirement of *Garcia* – i.e., that the defendant must have the intent to facilitate specific *other* gang crime¹⁹⁶ – such crimes are nonetheless gang related within the spirit of the STEP Act, and should be subject to a penalty enhancement.

One can only hope that when the California Supreme Court finally addresses the conflicting interpretations of the STEP Act’s gang enhancement in the lower courts, it will secure some uniformity and consistency in the application of the enhancement and craft a definition that passes constitutional muster. The court must simply recognize what should be obvious to any unbiased observer: Just as not all crimes committed by white supremacists are hate crimes, not all crimes committed by gang members are gang-related crimes. Until that day, trial courts have the luxury of crafting their own definitions, using the best parts of a variety of definitions from the state’s appellate courts and the Ninth Circuit. The Fifth District’s recent holding in *Frank S.* that a defendant’s gang affiliation alone does not make a crime gang related would seem a good place to start,¹⁹⁷ followed by the Fourth District’s astute observation in *Morales* that to be gang related, a crime must be

193. See, e.g., *People v. Hill*, 47 Cal. Rptr. 3d 875, 877 (Cal. Ct. App. 2006) (holding defendant’s gang membership alone is sufficient to render an offense gang related within the meaning of the STEP Act). Of course, California courts (unlike law enforcement) have not gone so far as to classify as gang related under the STEP Act any crime involving a *victim* who is a gang member.

194. See *People v. Romero*, 43 Cal. Rptr. 3d 862, 866 (Cal. Ct. App. 2006).

195. See *Hill*, 47 Cal. Rptr. 3d at 877.

196. *Garcia v. Carey*, 395 F.3d 1099, 1103 (9th Cir. 2005).

197. See *In re Frank S.*, 46 Cal. Rptr. 3d 839, 844 (Cal. Ct. App. 2006).

committed by someone acting as an *agent* of a criminal street gang.¹⁹⁸

V. CONCLUSION

Ice-T's prediction was accurate: The gangs of L.A. have not died, they have multiplied. Since the recording of *Colors* and the enactment of the STEP Act, the number of gangs in Los Angeles has doubled.¹⁹⁹ It is going to take a lot of work to, as the preamble to the STEP Act puts it, "eradicat[e]" the criminal activity of gangs in California.²⁰⁰ Unfortunately, as the twentieth anniversary of the STEP Act approaches, appellate courts remain mired in a thicket of statutory construction issues. The only way out is through the adoption of clear and uniform standards based on solid precedent and a thoughtful appreciation of what kind of criminal conduct in fact is committed for the benefit of the gang. To paraphrase Ice-T, people need to know what they're dealing with. If the STEP Act is to be an effective part of that effort, courts, prosecutors, and law enforcement officials need to abandon the view that gang crime is simply any crime committed by gang members. Instead, courts should respect the legislative intent and established constitutional precedent behind the STEP Act by treating criminal street gangs as collective criminal enterprises, and by punishing under the Act only those individuals who commit crimes while acting in the capacity of agents for those gangs.

198. See *supra* note 162 and accompanying text.

199. In 1987, there were nearly five hundred street gangs in the Los Angeles area. *Criminal Street Gang Bill Passes Committee*, *supra* note 4. In 2004, there were an estimated one thousand separate street gangs in Los Angeles County. Dianne Feinstein, *Congress Must Address Upsurge in Gangs*, DAILY NEWS OF LOS ANGELES, Mar. 10, 2004, Editorial, at N17.

200. See CAL. PENAL CODE § 186.21 (West 2006) ("It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.").