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Ending Guilt by Association: The STEP Forward Act's Attempt to Return the Presumption of Innocence to California Gang Prosecution

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Ending Guilt by Association: The STEP Forward Act’s Attempt to Return the Presumption of Innocence to California Gang Prosecution

Madison Sykes*

Code Sections Affected

Penal Code § 186.22 (amended) and § 1109 (added)
AB 333 (Kamlager); 2021 STAT. CH. 699

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I. INTRODUCTION

Charlie was a young, Black father who was living in a neighborhood subject to heavy policing.¹ One night, he was at a party with friends when gunshots rang out.² Authorities apprehended the actual shooter, yet police insisted Charlie was a second shooter, and a jury convicted him accordingly.³ Charlie spent almost a decade in prison for murder and gang participation because the prosecutor overwhelmed the jury with evidence of other people’s crimes.⁴ On appeal, the defense uncovered that police had blackmailed the only eyewitness, threatening him with drug charges if he did not testify against Charlie.⁵ With this witness impeached, the defense proved Charlie’s innocence.⁶

In gang-related cases, California allows prosecutors to introduce evidence of crimes committed by people other than the defendant to prove a pattern of gang activity.⁷ To establish a pattern, prosecutors commonly call police officers to testify as experts in court on many elements of gang behavior.⁸ However, this can be extremely prejudicial, because it allows prosecutors to easily fill in the blanks of their own cases.⁹ Additionally, studies indicate a jury is significantly more likely to convict a defendant upon the introduction of gang evidence, regardless of whether other evidence exists against the accused person.¹⁰

1. Emily Galvin-Almanza, *California Gang Laws Are Normalized Racism*, APPEAL (Oct. 4, 2019), <https://theappeal.org/drakeo-california-gang-laws-racism/> (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Emily Galvin-Almanza, *End Laws That Sanction Guilt by Association*, CALMATTERS (June 2, 2021), <https://calmatters.org/commentary/my-turn/2021/06/rebalancing-laws-weighted-against-people-of-color/> (on file with the *University of the Pacific Law Review*) (“By allowing . . . prosecutors to circumvent the normal rules of evidence and use crimes by friends and neighbors to infer guilt, the STEP Act effectively serves to manufacture crime on the basis of ethnicity and relationships.”).

8. See Christopher McGinnis & Sarah Eisenhart, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 111 (2010) (“In California, in order to prove that a given crime is gang-related . . . police officers are regularly called by the prosecution and qualified by the courts as gang experts.”).

9. See *id.* (“The gang expert’s testimony can shore up a number of elements that would otherwise be lacking in the underlying offense, and can also be used to support a gang enhancement.”).

10. See Mitchell L. Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*,

The American criminal justice system has an essential, foundational principle: innocent until proven guilty.¹¹ This principle is brought to life by Constitutional protections, such as due process and void-for-vagueness doctrine, which keep courts and legislatures from enforcing arbitrary, discriminatory, or overly-broad laws.¹² Cases like Charlie’s demonstrate California fails to afford people of color and people living in gang-policed neighborhoods the same presumption of innocence as white defendants.¹³ Instead, people in gang-policed neighborhoods are often convicted upon evidence of association with the people in their communities.¹⁴

In an interview, Emily Galvin-Almanza, a criminal justice reform advocate and Charlie’s attorney, described how California’s gang laws fail to acknowledge the realities of living in a gang-policed neighborhood.¹⁵ She explained the defendants from gang-policed neighborhoods often “have no control over whether [they] are present for a crime . . . by the time someone [is] facing a gang charge, they’ve already been steeping in a stew of systems that are designed to route them toward prison . . . ”¹⁶

The California Street Terror Enforcement and Protection (STEP) Act, passed in 1988, created a new substantive offense—participation in a criminal street gang.¹⁷ Additionally, STEP created sentence enhancements for felonies committed for the benefit of a gang.¹⁸ This act was the first in a wave of anti-gang legislation

62 UCLA L. REV. DISCOURSE 2, 17 (2014) (“[I]nforming a jury that the defendant is a gang member significantly increases the likelihood of a guilty verdict . . . a significant minority of jurors will vote to convict even when reasonable doubt has been clearly established.”); *see also* COMM. ON REVISION OF THE PENAL CODE, 2020 ANNUAL REPORT AND RECOMMENDATIONS 46 (2020) (“Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.”).

11. *See Presumption of Innocence*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/presumption_of_innocence (last visited May 20, 2022) (on file with the *University of the Pacific Law Review*) (“[A]ny defendant in a criminal trial is assumed to be innocent until they have been proven guilty.”).

12. *See Procedural Due Process*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/procedural_due_process (last visited Jan. 14, 2023) (on file with the *University of the Pacific Law Review*) (describing that procedural due process is necessary when the government deprives a citizen of their life, liberty, or property); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (explaining that the void-for-vagueness doctrine is intended ensure that laws are sufficiently definite so as to avoid “arbitrary and discriminatory enforcement”).

13. *See Galvin-Almanza, supra* note 1 (“Caldwell and Charlie are just two of the people who have grown up among generations of young men and women of color in California with the knowledge that the rule of law is designed not for their protection, but to be used against them.”).

14. *See Galvin-Almanza, supra* note 7 (“Under the STEP Act, guilt by association, once anathema to jury trials, is allowed.”).

15. Telephone Interview with Emily Galvin-Almanza, Senior Legal Analyst & Co-Founder, Partners for Just. (June 3, 2022) (recording and notes on file with the *University of the Pacific Law Review*).

16. *Id.*

17. McGinnis & Eisenhart, *supra* note 8, at 113; Galvin-Almanza, *supra* note 7.

18. McGinnis & Eisenhart, *supra* note 8, at 114.

across America.¹⁹ These new laws utilized suppression tactics such as “[m]ass arrests, stiff prison sentences often served with other gang members and other strategies that focus on law enforcement rather than intervention”²⁰

However, since enactment, judicial decisions and legislative action have increasingly broadened STEP’s scope, resulting in inconsistent, often discriminatory, enforcement.²¹ According to the California Department of Corrections and Rehabilitation, Black and Latinx men make up ninety-two percent of men sentenced with gang enhancements.²² In some cases, these enhancements can nearly triple a defendant’s sentence.²³ Moreover, the number of gang enhancements in state prisons increased forty percent in recent years.²⁴

Despite recognition of these discriminatory and procedural problems, the California Legislature has taken little meaningful steps toward resolution in the last forty years.²⁵ Chapter 699—the STEP Forward Act—is a long-awaited amendment to STEP, attempting to bring it back to its original scope.²⁶ The amendments’ slightly-revised requirements might provide nominally greater Constitutional protection for marginalized defendants prosecuted for alleged gang affiliation.²⁷ However, Chapter 699, by failing to protect defendants’ Constitutional rights and refusing to move from suppression toward intervention, continues STEP’s legacy of guilt by association.²⁸

19. Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 MARQ. L. REV. 979, 1001 (2014); see also H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PENN. J.L. & SOC. CHANGE 341, 348 (2015) (“Following California’s lead, all fifty states and the District of Columbia have codified some form of anti-gang measures.”).

20. *Report: Gang Suppression Doesn’t Work*, USA TODAY (July 18, 2007), https://usatoday30.usatoday.com/news/nation/2007-07-18-gang-report_N.htm (on file with the *University of the Pacific Law Review*).

21. Sara Lynn Van Hofwegen, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 681 (2009) (discussing the ways gang laws “are disproportionately applied to minority and low-income communities, unfairly prejudice juries against criminal defendants, and violate the accused’s constitutional rights to freedom of association and equal protection”).

22. *Hearing on AB 333 Before the S. Pub. Safety Comm.*, 2021 Leg., 2021–2022 Sess. 13 (Cal. 2021).

23. Van Hofwegen, *supra* note 21, at 680.

24. *Hearing on AB 333*, *supra* note 22, at 13 (“The number of people sentenced to state prison with a gang enhancement increased 40% between 2011 and 2019.”).

25. See Nelson, *supra* note 25, at 518–19 (“[E]ven with public defenders, prosecutors, and the state government acknowledging the systemic issues in evaluating gang prosecutions, little action has been taken to address the issue. Instead, gang prosecutions remain in stasis—where small, modest steps like *Valenzuela* shift the tide only a little.”).

26. See *id.* at 506 (“The California legislature took pains to indicate the STEP Act was a tool to be used cautiously by prosecutors to take down serious criminals—loose associations of neighborhood kids who tagged buildings with their initials were, by and large, supposed to be excluded from the STEP Act’s purview.”).

27. See Galvin-Almanza, *supra* note 7 (explaining that the STEP Forward Act attempts to “stop prosecutors from claiming people are gang members simply because of the community they come from, who they’re related to, what clothing they wear or who they know”).

28. See Van Hofwegen, *supra* note 21, at 693 (“Suppression strategies are considered by many to be the least effective strategy for combating gangs in a particular community.”); see also Telephone Interview with Emily Galvin-Almanza, *supra* note 15 (“[I]f we actually wanted to solve gang crime and keep communities safer,

II. LEGAL BACKGROUND

In the 1980s, increased gang activity in the State, along with media portrayal, led to an overwhelming fear of California gang violence.²⁹ Section A discusses the STEP Act—California’s original response to increased gang activity.³⁰ Section B explains ways the California legislature and judiciary have expanded STEP’s scope over time.³¹ Finally, Section C explores the State’s recent move toward reform.³²

A. *The Limited Scope of the Original STEP Act*

Section 186.22(a) of the California Penal Code establishes STEP’s substantive offense—active participation in a criminal street gang.³³ This offense requires the prosecution to prove a defendant is an “active particip[ant]” in a criminal street gang.³⁴ Defendants must also know the group engages in a “pattern of criminal gang activity” and must “willfully promote, further, or assist” the gang’s felonious conduct.³⁵ Additionally, Section 186.22(b) establishes gang-related sentence enhancements, which apply when defendants commit listed offenses “for the benefit of, at the direction of, or in association with a criminal street gang.”³⁶ The prosecution must also prove a defendant committed the underlying felony with specific intent to “promote, further, or assist in any criminal conduct by gang members.”³⁷ Prior law did allow a defendant to request bifurcation—separating gang charges from the underlying trial—but courts rarely granted such motions.³⁸

we would not think that sending someone to Pelican Bay is fixing anything. It’s not. We would be doing very different kinds of interventions that support people and protect them and enable them to succeed and give them opportunity.”).

29. See CAL. PENAL CODE § 186.21 (“California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”); see also McGinnis & Eisenhart, *supra* note 8, at 112–13 (“The Legislature found that California was in a state of crisis due to the activities of nearly 600 criminal street gangs. According to the Legislature, these activities presented ‘clear and present danger to public order and safety.’”); Jodi Lane & James W. Meeker, *Fear of Gang Crime: A Look at Three Theoretical Models*, 37 L. & SOC’Y REV. 425, 433–34 (2003).

30. *Infra* Section II.A.

31. *Infra* Section II.B.

32. *Infra* Section II.C.

33. CAL. PENAL CODE § 186.22(a).

34. McGinnis & Eisenhart, *supra* note 8, at 113–14.

35. *Id.* at 114.

36. CAL. PENAL CODE § 186.22(b).

37. McGinnis & Eisenhart, *supra* note 8, at 114.

38. See Eisen et al., *Probative or Prejudicial*, *supra* note **Error! Bookmark not defined.**, at 16 (“In order to prevent gang evidence from biasing the trier of fact, a defendant may seek to bifurcate trial Bifurcation, however, is generally denied . . .”).

B. Judicial and Legislative Expansion of Prosecutorial Power Under the STEP Act

The numerous, complex elements described above show that the legislature designed the original STEP offenses to be “very difficult to prove except in the most egregious cases.”³⁹ However, over time, California has greatly expanded STEP’s scope.⁴⁰ Subsection 1 describes the role California courts played in STEP’s expansion.⁴¹ Subsection 2 discusses the California Legislature’s contributions to the expansion of gang prosecution.⁴²

1. Expansion Through Judicial Interpretation

Various judicial interpretations of the STEP Act by the California Supreme Court have significantly broadened its scope.⁴³ *People v. Gardeley* (*Gardeley*)—STEP’s case of first impression—lowered prosecutors’ burden by allowing a defendant’s current offense as evidence of a “pattern of criminal gang activity.”⁴⁴ The *Gardeley* Court also held STEP does not require prosecutors to prove all the offenses in the pattern were “gang related.”⁴⁵ Therefore, a prosecutor could prove a “pattern of criminal gang activity” using only a defendant’s current charge and, for example, another alleged gang member’s juvenile, non-gang-related conviction.⁴⁶

People v. Castenada further lowered prosecutors’ burden by holding a STEP defendant need not be a current gang member; a defendant’s participation need only be more than “nominal or passive.”⁴⁷ *People v. Albillar* extended *Castenada*’s

39. Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 114 (2006) (quoting *Hearing on AB 2013 Before the S. Judiciary Comm.*, 1987 Leg., 1987–1988 Reg. Sess. 7 (Cal. 1988)).

40. See Erin R. Yoshino, *California’s Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 REV. L. & SOC. JUST. 117, 121 (2008) (describing the ways that California “courts have greatly expanded [the STEP Act’s] scope”).

41. *Infra* Section II.B.1.

42. *Infra* Section II.B.2.

43. See Nelson, *supra* note 25, at 506 (stating that particular California court cases “interpreted several important parts of the STEP Act in a broader manner than intended”).

44. See *People v. Gardeley*, 14 Cal. 4th 605, 624 (1996) (describing that the pattern of criminal gang activity was proved through one alleged gang member’s prior acts combined with evidence of the defendant’s act in question); see also Nelson, *supra* note 25, at 507 (describing how the *Gardeley* Court’s decision lowered prosecutor’s burden on the “pattern of criminal gang activity” element).

45. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 46 (1998).

46. See *id.* (“[I]n California a juvenile who has sustained a previous juvenile petition prior to gang involvement will be eligible for prosecution under the S.T.E.P. once it is demonstrated that he/she has committed one of the enumerated crimes, regardless of whether this individual acted alone or in the company of other gang members.”).

47. See *People v. Castenada*, 23 Cal. 4th 743, 752 (2000) (“We have pointed out that, giving the words ‘actively’ and ‘participates’ their usual and ordinary meaning, a person ‘actively participates in any criminal street gang,’ within the meaning of section 186.22(a), by ‘involvement with a criminal street gang that is more than nominal or passive.’”).

already-broad interpretation, holding the substantive offense—participation in a criminal street gang—does not require the current felony be gang-related.⁴⁸ Finally, *People v. Romero* held a gang enhancement’s intent requirement “is satisfied if appellant had the specific intent to ‘promote, further, or assist’ [the current offense].”⁴⁹

2. *Expansion Through Statutory Amendments*

In 2000, California voters passed Proposition 21—the Gang Violence and Juvenile Crime Prevention Act.⁵⁰ Proposition 21 expanded STEP’s scope through numerous Penal Code modifications, including increasing the length of gang enhancements and making gang-related murders punishable by death.⁵¹ Over time, the Legislature also increased the number of STEP-eligible offenses from seven to over thirty-three, including some non-violent offenses.⁵² Furthermore, Proposition 21 waived the requirement that prosecutors obtain the juvenile court’s permission before filing gang charges in adult court, allowing law enforcement to target juveniles more easily.⁵³

C. *Moving Toward Reform Through the Creation of the Committee on Revision of the Penal Code*

In 2020, California created the Committee on Revision of the Penal Code (“the Committee”) in an effort to simplify and rationalize its penal provisions.⁵⁴ The Committee’s first annual report proposed legislative modifications to certain provisions, including STEP gang enhancements.⁵⁵ The Committee suggested the Legislature define “criminal street gang” more specifically and require the defendant have “current and active gang involvement” for enhancement eligibility.⁵⁶ Additionally, the Committee asked the Legislature to prevent prosecutors from using a defendant’s current charges and “nonviolent property crimes” to establish a pattern of criminal gang activity.⁵⁷ Finally, the Committee requested the Legislature separate gang-related offenses from a defendant’s

48. See *People v. Albillar*, 51 Cal. 4th 47, 59 (2010) (“Having now considered the argument that the phrase ‘any felonious criminal conduct’ in section 186.22(a) refers only to gang-related felonious criminal conduct, we reject it.”).

49. *People v. Romero*, 140 Cal. App. 4th 15, 20 (2006).

50. Cal. Proposition 21 (2000).

51. LEGIS. ANALYST’S OFF., ANALYSIS OF PROPOSITION 21 (2000), <https://vigarchive.sos.ca.gov/2000/primary/propositions/21analysis.htm> (on file with the *University of the Pacific Law Review*).

52. Caldwell, *supra* note 19, at 351.

53. LEGIS. ANALYST’S OFF., *supra* note 51.

54. COMM. ON REVISION OF THE PENAL CODE, *supra* note 10, at 3.

55. See *id.* at 44 (listing six revisions to gang enhancements necessary to avoid future disproportionate application and refocus it on the coordinated, violent crimes legislators intended these enhancements to prevent).

56. *Id.*

57. *Id.*

underlying charges at trial to avoid jury prejudice due to gang evidence.⁵⁸ Overall, the Committee's recommendations aimed to decrease the overly-broad, arbitrary, and often discriminatory applications of the STEP Act, which have resulted from its expanded scope.⁵⁹

III. CHAPTER 699

Chapter 699 amends some STEP definitions that affect both the substantive offense and the enhancements.⁶⁰ For example, prior law defined a "criminal street gang" as an "ongoing organization, association, or group of three or more persons" with a common name, symbol, color, etc.⁶¹ Chapter 699 redefines a gang as an "ongoing, organized association."⁶² This definition requires proof of at least some structure in the alleged gang, attempting to limit arbitrary or discriminatory application.⁶³

Chapter 699 also creates a more specific definition for a gang's "pattern of criminal activity."⁶⁴ Contrary to prior law, Chapter 699 bars prosecutors from using a defendant's current charge to establish such a pattern.⁶⁵ Instead, establishing a pattern requires evidence of three incidents total—two previous crimes by other gang members, as well as the defendant's current charge.⁶⁶ Chapter 699 also requires prosecutors show the latest offense in the pattern occurred within three years of a defendant's charge, and that all offenses benefit the gang.⁶⁷ Chapter 699 defines "benefit" as "more than reputational," including financial gain, retaliation, or intimidation.⁶⁸

Chapter 699 also made a substantive change through the addition of Penal Code section 1109, which requires courts, upon a defendant's request, to separate gang prosecutions from underlying charges.⁶⁹ Overall, Chapter 699 increases the prosecution's burden for a pattern of gang activity, requires a higher level of organization in alleged gangs, and decreases jury prejudice through bifurcation.⁷⁰

58. COMM. ON REVISION OF THE PENAL CODE, *supra* note 10, at 44.

59. *See id.* ("Gang enhancements are applied inconsistently and disproportionately against people of color, and fail to focus on the most dangerous, violent, and coordinated criminal activities.").

60. *Hearing on AB 333*, *supra* note 22, at 2.

61. *Id.* at 5.

62. *Id.*

63. *See id.* at 12 ("Current law allows broad and unfettered discretion regarding law enforcement's terminology and definitions.").

64. *See id.* at 3–5 (comparing the prior law to the revisions and additional requirements added to this element by the bill).

65. CAL. PENAL CODE § 186.22(e)(1)–(2).

66. CAL. PENAL CODE § 186.22(e)(2).

67. CAL. PENAL CODE § 186.22(e)(1).

68. CAL. PENAL CODE § 186.22(g).

69. CAL. PENAL CODE § 1109; *Hearing on AB 333*, *supra* note 22, at 5.

70. *See Hearing on AB 333*, *supra* note 22, at 2 (summarizing the purposes of the bill).

IV. ANALYSIS

STEP critics claim the act's vague definitions and expansive expert testimony allow courts to punish defendants simply for their proximity to gang-affiliated people and communities.⁷¹ Section A explores the ways Chapter 699 attempts to increase Constitutional protections for STEP defendants, as well as the ways in which it fails.⁷² Section B discusses why the Legislature should focus resources on treating the root causes of gang membership to better prevent criminal gang activity.⁷³

A. Chapter 699's Lack of Constitutional Protections for Defendants

In 1876, the United States Supreme Court held it unconstitutional for a law to “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained.”⁷⁴ Since STEP's enactment, the act's critics have claimed it casts too large a net and have challenged it based on unconstitutional vagueness, due process, and freedom of association.⁷⁵ Subsection 1 examines the unconstitutional vagueness in Chapter 699 and the ways STEP continues to infringe on defendants' First Amendment rights.⁷⁶ Subsection 2 will explore the due process concerns within STEP prosecutions, which Chapter 699 fails to adequately address.⁷⁷

1. Freedom of Association Challenges Due to STEP's Vague Definitions

Void-for-vagueness is a legal doctrine used to prevent legislatures from enacting broad laws which arbitrarily or discriminatorily limit Constitutional freedoms.⁷⁸ STEP's vague definitions verge on violating this doctrine, and by broadly interpreting these definitions, the California judiciary set a dangerous precedent for STEP's intent requirement.⁷⁹ California courts incidentally allow

71. See Martin Baker, *supra* note 39, at 101–02 (“Opponents of [STEP] argued that the bill promoted ‘guilt by association,’ opening the door to potential unconstitutional punishment of mere gang membership.”); see also Galvin-Almanza, *supra* note 7 (explaining the ways in which STEP has allowed guilt by association for certain marginalized groups).

72. *Infra* Section IV.A.

73. *Infra* Section IV.B.

74. *United States v. Reese*, 92 U.S. 214, 221 (1875).

75. Caldwell, *supra* note 19, at 352.

76. *Infra* Section IV.A.1.

77. *Infra* Section IV.A.2.

78. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

79. See Martin Baker, *supra* note 39, at 102 (“[C]ourts 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.”).

prosecutors to establish intent based on the presumption that association with alleged gang members, plus intent for a minor offense, amounts to specific intent to promote criminal gang enterprises.⁸⁰ Public defenders and police officers have recognized these methods for identifying and prosecuting gang members as “basically guilt by association.”⁸¹ California courts have only allowed such methods by interpreting STEP’s vague definitions broadly in favor of the act.⁸² These interpretations have allowed law enforcement to arbitrarily and discriminatorily charge citizens in certain, marginalized, gang-prevalent communities under STEP, disproportionately affecting people of color.⁸³

This raises another Constitutional issue: freedom of association.⁸⁴ Established in the First Amendment of the Constitution, this doctrine bars Congress from making any law which abridges “the right of the people peaceably to assemble”.⁸⁵ These challenges to criminal gang laws have been generally unsuccessful because criminal gang activity is inherently not “peaceable.”⁸⁶ However, this oversimplifies the issue and fails to address STEP’s effect on defendants from gang-policed neighborhoods, who inevitably associate with gang members, but are not active gang members.⁸⁷

The Senate Public Safety Committee report on Chapter 699 acknowledged this issue, sharing public defenders’ concerns about prosecutors using defendants’ affiliations to argue specific intent for STEP enhancements.⁸⁸ For example, if prosecutors charged a defendant with illegal possession of a firearm, they could allege gang membership, based on a defendant’s friends or social media photos.⁸⁹ The prosecution is then allowed to call police officers to testify, as experts, about

80. See Martin Baker, *supra* note 39, at 124 (explaining the presumption in California courts “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”) (emphasis omitted).

81. Yoshino, *supra* note 40, at 129.

82. See *People v. Romero*, 140 Cal. App. 4th 15, 20 (2006) (holding that a gang enhancement’s intent requirement “is satisfied if appellant had the specific intent to ‘promote, further, or assist’ [the current offense]”); see also *People v. Castenada*, 23 Cal. 4th 743, 752 (2000) (describing the distinction between active gang membership and the more than “nominal or passive” language in the statute).

83. See Galvin-Almanza, *supra* note 7 (quoting California State Senator Sydney Kamlager, author of Chapter 699, who explained that “[w]hen we see 92% of gang enhancements are used against communities of color, we have to consider how our criminal justice system is using the tools they already have at their disposal”).

84. Van Hofwegen, *supra* note 21, at 681 (discussing the ways gang laws “violate the accuseds’ constitutional rights to freedom of association and equal protection”).

85. U.S. CONST. amend. I.

86. See Caldwell, *supra* note 19, at 352 (“[C]ourts have long acknowledged that criminal street gangs are not owed First Amendment protection, as ‘the act of associating with compatriots in crime is not a protected associational right.’”).

87. See *id.* (“[T]he legislative challenge is not so much in identifying gangs . . . but rather in determining which individuals are to be caught up in the gang dragnet.”).

88. *Hearing on AB 333*, *supra* note 22, at 12.

89. See Yoshino, *supra* note 40, at 134 (using a similar firearm enhancement hypothetical); see also *Hearing on AB 333*, *supra* note 22, at 13 (“[E]ntire neighborhoods are criminalized on the basis of ‘he was in this picture on Instagram, or he was in this rap video throwing hand signs.’”).

the crimes of other alleged gang members, who are likely unknown to a defendant.⁹⁰ Such testimony is likely to make a defendant look morally culpable, causing jurors to forget the defendant's underlying crime must specifically intend to benefit the gang.⁹¹ Consequently, the jury will likely convict a defendant for the firearm offense and a gang enhancement, thus adding four years to the sentence without proof of specific intent.⁹² Defendants' freedom of association is violated because they receive greater punishment for allegedly associating with morally culpable people, not because prosecutors proved their active gang membership.⁹³

However, proponents of Chapter 699 argue the amendment repairs this issue by redefining STEP's previously vague definition of a criminal street gang as an "organized association."⁹⁴ Requiring a level of organization could protect friend groups, sports teams, and other associations with common colors and symbols from marginalized neighborhoods, which police might otherwise label as gangs.⁹⁵ Yet, Chapter 699 still fails to redefine STEP's most vague and broadly-interpreted terms, like "active participant" and specific intent.⁹⁶ Therefore, a successful amendment must truly redefine the vague definitions that subject gang-related neighborhoods to unjustifiable cycles of enhanced punishment simply due to inevitable connections within their communities.⁹⁷ Redefining these elements to require specific evidence, beyond just the behavior of other people, could prevent guilt by association issues STEP created for defendants from marginalized communities.⁹⁸ Nevertheless, Chapter 699 fails to do this, leaving major vagueness and freedom of association concerns among defendants for whom association with gang-affiliated family or neighbors is inevitable.⁹⁹

90. See Yoshino, *supra* note 40, at 134–35 (explaining when an officer expert is called in a similar hypothetical).

91. *Id.* at 135, 143.

92. See *id.* at 119, 134, 136, 143 (explaining sentencing in a similar hypothetical).

93. See Martin Baker, *supra* note 39, at 124 (“[T]he *Romero* holding implicitly imposes a punishment for mere gang membership unrelated to the commission of the charged crime, thus encroaching upon constitutional rights.”).

94. See *Hearing on AB 333*, *supra* note 22, at 5.

95. See Fudge, *supra* note 19, at 997 (“They may have a common name, mode of dress, and have been associated with the commission of crimes, but that also describes the Green Bay Packers or the Milwaukee Police Department.”).

96. *Hearing on AB 333*, *supra* note 22, at 7–9 (restating the “active participation” and intent definitions from prior law and explaining that the intent requirement can even be proven by circumstantial evidence alone); see also Caldwell, *supra* note 19, at 353–54 (describing the United States Supreme Court’s ruling in *Aptheker v. Secretary of State*, in which the Court held the portion of an anti-communist law unconstitutional, based on the fact that it “‘renders irrelevant’ a person’s degree of participation in an organization and ‘his commitment to its purpose’”).

97. See Galvin-Almanza, *supra* note 7 (describing the ways the STEP Act has been used to “criminalize kids of color and create a separate system of justice for them and their families”).

98. See Martin Baker, *supra* note 39, at 114 (“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.”).

99. Yoshino, *supra* note 40, at 129 (describing defense attorneys’ observations that often “a person was

2. Jury Prejudice and Due Process Concerns in Gang Prosecution

Due process is a constitutional requirement put in place to ensure the government does not deny any citizen life, liberty or property, without due process of law.¹⁰⁰ In criminal cases—in which the defendant stands to lose their liberty—procedural due process requires trial by a neutral and fair jury.¹⁰¹ Subsection a discusses how bifurcation of gang-related charges under Chapter 699 begins to solve due process issues caused by jury prejudice.¹⁰² However, subsection b explains the problems with expert testimony and how Chapter 699 fails to limit this testimony, leaving STEP with unaddressed due process concerns.¹⁰³

a. Bifurcation as a Solution to Jury Prejudice and Due Process Concerns

In gang cases, prosecutors often bombard juries with crimes committed by people other than the defendant in order to establish the necessary pattern of criminal gang activity.¹⁰⁴ The process of establishing this pattern can be extremely prejudicial, because studies show juries become much more likely to convict at even the mention of gangs.¹⁰⁵ Juries are even more likely to convict based on gang evidence when other evidence is especially weak; in other words, when a jury would otherwise acquit a defendant.¹⁰⁶ Gang enhancements present a unique prejudicial challenge.¹⁰⁷ The jurors more likely to be sympathetic to defendants—such as those from marginalized communities—are also those most likely to experience gang violence effects in their neighborhoods.¹⁰⁸ Therefore, once prosecutors make gang allegations, the defendant's most favorable jurors become most condemning, because these jurors personally face the consequences of true gang members' wrongful acquittals.¹⁰⁹

assumed to be a 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”).

100. *Procedural Due Process*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/procedural_due_process (on file with the *University of the Pacific Law Review*).

101. *See id.* (describing that procedural due process includes the right to a “neutral decision-maker” or “[a]n unbiased tribunal”).

102. *Infra* Section IV.A.2.a.

103. *Infra* Section IV.A.2.b.

104. *See Hearing on AB 333, supra* note 22, at 8 (“The predicate offenses offered to establish a “pattern of criminal gang activity” (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation.”).

105. Mitchell L. Eisen et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors*, 13 J. FORENSIC PSYCH. PRACT. 1, 9 (2013) (“[M]erely mentioning that the defendant was seen hanging around known gang members on the night in question was enough to boost guilty verdicts from 43.8% to 59.2%.”).

106. Eisen et al., *supra* note **Error! Bookmark not defined.**, at 5 (describing that negative stereotypes, such as those related to gangs, are extralegal factors and “the weaker the case, the stronger the effect of extralegal factors”).

107. Yoshino, *supra* note 40, at 134–35.

108. *Id.*

109. *See id.* at 135 (explaining the effects of a gang enhancement on jurors who are most likely to live with

Chapter 699's section 1109 requires courts, upon a defendant's request, to try gang-related charges separately from the underlying crimes.¹¹⁰ This allows juries to focus on evidence for the current charge, or lack thereof, instead of other people's crimes presented to prove a pattern of gang activity.¹¹¹ Furthermore, bifurcation protects defendants' freedom of association by preventing juries from returning a guilty verdict or enhanced sentence based on defendants' proximity to gang members in their community.¹¹² Therefore, bifurcation has the potential to decrease wrongful determinations of guilt for underlying charges, which occur through jury prejudice from gang evidence.¹¹³

b. Chapter 699's Failure to Limit Expert Testimony

While bifurcation may reduce jury prejudice in underlying trials, Chapter 699 fails to limit overly expansive expert testimony in these bifurcated proceedings.¹¹⁴ In fact Chapter 699's exclusion of a defendant's current charge from the criminal pattern could increase the amount of expert testimony required in gang proceedings.¹¹⁵ This amendment seems to protect defendants by raising the prosecution's burden of proof.¹¹⁶ However, it also has the potential to increase jury prejudice because it requires presentation of a third, extraneous crime, committed by other members of the alleged gang.¹¹⁷ This is problematic because police "experts" often cannot accurately distinguish between active gang members and those "meshed in a gang social network by virtue of family and neighborhood."¹¹⁸

the consequences of gang violence).

110. CAL. PENAL CODE § 1109; *Hearing on AB 333*, *supra* note 22, at 5.

111. *See Hearing on AB 333*, *supra* note 22, at 8 (describing the California Supreme Court's acknowledgment that the offenses required to establish a pattern can be "unduly prejudicial, thus warranting bifurcation").

112. *See id.* ("[G]ang evidence . . . 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.").

113. *See Eisen et al.*, *supra* note **Error! Bookmark not defined.**, at 16 ("Greater utilization of bifurcation . . . may provide an effective remedy to eliminate the prejudicial impact of the gang evidence on jurors' decisionmaking.").

114. *See McGinnis & Eisenhart*, *supra* note 8, at 112 ("[P]olice officers lacking qualifications that go beyond police work should not be qualified as gang experts . . .").

115. *Hearing on AB 333*, *supra* note 22, at 5. *Compare Eisen et al.*, *Examining the Prejudicial Effects*, *supra* note 105, at 9 (describing that the mention of gangs can increase the likelihood of a guilty verdict by 43.8% to 59.2%), *with McGinnis & Eisenhart*, *supra* note 8, at 119 ("Gang expert testimony is also used to prove the existence of a pattern of criminal activity commonly coupled with documentary evidence such as a minute order or evidence of a gang member's prior conviction.").

116. *Hearing on AB 333*, *supra* note 22, at 7–8 (explaining both the prior law, which allowed the current offense to be one of the two required for a pattern, and the new law, which would prohibit the use of the current offense while still requiring the prosecution to establish a pattern of offenses).

117. *See CAL. PENAL CODE* § 186.22(e)(1).

118. *Hearing on AB 333*, *supra* note 22, at 10 ("Civil Rights attorney Sean Garcia-Leys testified to the Committee that police often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are 'meshed in a gang social network by virtue of family and neighborhood.'").

Furthermore, the court oftentimes qualifies officers as experts based on their experience with gangs generally, rather than with the specific gang or community in question.¹¹⁹ The officers' statuses and lack of personal relationships with defendants causes jurors to give more determinative weight to officers' opinions than they do to community members.¹²⁰

California's Committee on Revision of the Penal Code suggested the Legislature revise or limit expert testimony in gang proceedings.¹²¹ The Committee explained other states, unlike California, use expert testimony sparingly, requiring additional, direct evidence of gang involvement for a gang-related conviction.¹²² As such, Chapter 699 does not address expert testimony; thus, the Legislature missed a crucial opportunity to elevate the relevant community's self-definition above that of the police.¹²³

B. The Root Causes of Gang Membership and Chapter 699's Missed Opportunity for Intervention

To truly prevent gang membership, legislators need to move beyond suppression tactics to understand the root causes of gangs and develop intervention programs to target these causes.¹²⁴ Some of the many reasons young people join gangs include financial strain, lack of meaningful relationships, and desire for protection or status.¹²⁵ Thus, young people from marginalized or dangerous neighborhoods, broken families, and struggling school systems are more likely to end up gang members.¹²⁶

119. See McGinnis & Eisenhart, *supra* note 8, at 118 ("The assertions the expert actually makes on the stand may not reflect specific personal knowledge of the gang at issue, but law enforcement's hypotheses about the nature of gang culture . . .").

120. Telephone Interview with Emily Galvin-Almanza, *supra* note 15 ("[P]olice definition trumps the person's self-identification, trumps the gang's identification trumps the community's identification . . . in the eyes of the law it's that officer's declaration and testimony that is fairly dispositive.").

121. COMM. ON REVISION OF THE PENAL CODE, *supra* note 10, at 44 (recommending that gang enhancements "[r]equire direct evidence of current and active gang involvement and violence, and limit expert witness testimony.").

122. *Id.* at 47.

123. See McGinnis & Eisenhart, *supra* note 8, at 158 (describing the progressive Ninth Circuit opinion, *Briceno v. Scribner*, which held that "[r]ather than letting an expert's sweeping generalities go by unchallenged, the Ninth Circuit raised the bar, indicating that experts would have to base their opinions on actual evidence relevant to the case at hand rather than broad generalizations. California courts should follow . . . and require more evidence from gang experts").

124. See Nancy Ritter et al., *Changing Course: Keeping Kids Out of Gangs*, NAT'L INST. JUST. J., Mar. 2014, at 3 ("[J]oining a gang should be understood as part of a life course that begins when a child is born (or before).").

125. *Id.*

126. See *id.* at 4 ("[C]hildren are at risk for joining a gang from an early age if they are hypersensitive to threat because they regularly see shootings in the neighborhood, have fallen behind in school because they can't read, or live in neighborhoods where gangs and 'easy money' seem to go hand-in-hand."); see also Caldwell, *supra* note 19, at 344 ("[E]arly gangs provided opportunities and their own sense of belonging to a group of people whom society largely ignored.").

Further, schools in marginalized or gang-heavy neighborhoods often hire police officers.¹²⁷ These schools are more likely to punish students with criminal charges instead of detention or a trip to the principal.¹²⁸ Contact with police and criminal punishment at a young age somewhat counterintuitively causes students to disengage from school, making them more at-risk for gang membership and criminal activity.¹²⁹ In the midst of these struggles, long prison sentences do nothing but cause at-risk youth to feel more marginalized, angered, and traumatized, often counter-productively encouraging gang membership.¹³⁰ Prisons are criminogenic, often pushing young, incarcerated people, who were not previously gang-affiliated, to prison gangs for protection.¹³¹ Furthermore, many gang members return to their gangs upon release, showing long prison terms fail to prevent recidivism.¹³²

On the other hand, successful intervention programs have proven to decrease gang activity.¹³³ These programs provide former gang members and at-risk youth with education, community, employment, and other resources as alternatives to

127. See Telephone Interview with Emily Galvin-Almanza, *supra* note 15 (explaining students in gang-policed neighborhoods often have “no control over . . . whether the thing that happened to you that day at school is dealt with by your school counselor and your teacher and maybe you get detention or dealt with by a school cop who charges you with a strike felony . . .”).

128. Matt Barnum, *Do Police Keep Schools Safe? Fuel the School-To-Prison-Pipeline? Here’s What Research Says*, CHALK (July 23, 2020), <https://www.chalkbeat.org/2020/6/23/21299743/police-schools-research> (on file with the *University of the Pacific Law Review*).

129. *Id.* (describing a Texas research study that found “when middle or high schools hired more police, students were 1.7 percentage points less likely to graduate high school, compared to similar students in the same district in other years. More police also led to slightly lower college enrollment rates”); Telephone Interview with Emily Galvin-Almanza, *supra* note 15 (“[A] single contact with police negatively impacts a child’s mental health so much that [c]hildren were seen to disengage from school the very next day and exhibit symptoms of anxiety and depression.”).

130. See *Report: Gang Suppression Doesn’t Work*, *supra* note 20 (“Mass arrests, stiff prison sentences often served with other gang members and other strategies that focus on law enforcement rather than intervention actually strengthen gang ties and further marginalize angry young men, according to the Justice Policy Institute, a Washington, D.C., think tank that advocates alternatives to incarceration.”).

131. IRVING SPERGEL ET AL., U.S. DEP’T OF JUST. OFF. JUV. JUST. & DELINQ. PREVENTION, GANG SUPPRESSION AND INTERVENTION: PROBLEM AND RESPONSE 5 (1994) (“Incarceration, although generally a short-term response to a specific crime, has led to increased gang cohesion and membership recruitment in many institutions, and it may indirectly worsen the problem in the streets.”); James C. Howell, *Gang Prevention: An Overview of Research and Programs*, U.S. DOJ at 4 (December 2010), <https://www.ojp.gov/pdffiles1/ojdp/231116.pdf> (on file with the *University of the Pacific Law Review*) (reporting that some youth joined gangs for protection).

132. *Helping to Break the Recidivism Cycle*, U.S. DEP’T OF JUST. (June 20, 2018), <https://nationalgangcenter.ojp.gov/insights/44/helping-to-break-the-recidivism-cycle> (on file with the *University of the Pacific Law Review*).

133. Ritter et al., *supra* note 124, at 2 (“Fortunately, we know that many early-prevention programs are effective and provide taxpayers with significantly more benefits than costs.”).

gangs and the criminal justice system.¹³⁴ Therefore, intervention is a more efficient use of tax-payer money than increased prison time because it provides rehabilitative, long-term alternatives to gang membership.¹³⁵

Chapter 699 does not shorten prison sentences or provide intervention resources; instead, it continues to use sentence enhancements that greatly increase defendants' time in criminogenic prisons.¹³⁶ Because gangs are a symptom of underlying issues, legislators could more successfully deter gangs by giving at-risk youth and former members resources that eliminate gang participation's root causes.¹³⁷

V. CONCLUSION

Chapter 699's bifurcation requirement and small alterations to legislative language will likely afford defendants like Charlie some protection from jury prejudice and wrongful conviction.¹³⁸ However, the STEP Forward Act fails to address Constitutional concerns, leaving gang-policed neighborhoods subject to overly-broad, police-centered definitions of gang activity.¹³⁹ Additionally, Chapter 699 continues enhanced sentencing, a tactic proven ineffective, treating only symptoms of the gang problem, instead of its underlying causes.¹⁴⁰

Truly effective reform of gang-related prosecution in California must focus on limiting prejudicial expert testimony and restoring defendants' Constitutional protections.¹⁴¹ Instead of focusing on ever-increasing punishment, California legislators could better decrease gang activity by reallocating resources to intervention programs targeting problems at the core of gang membership.¹⁴²

134. See Ritter et al., *supra* note 124, at 4 (“The key is identifying at-risk youth and providing them with age-appropriate prevention strategies, such as those that improve family functioning and connections with schools, facilitate involvement with socially appropriate peers, and reduce bullying and victimization.”).

135. SPERGEL ET AL., *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 17 (“[A] successful approach had to be guided, not only by concern for safeguarding the community . . . but for providing support and supervision to present and potential gang members in a way that contributed to their personal development.”); Ritter et al., *supra* note 124, at 2.

136. See CAL. PENAL CODE § 186.22(b)(1)(A) (describing the two- to four-year enhancements that still exist under Chapter 699's enactment).

137. See Ritter et al., *supra* note 124, at 4 (“There are protective factors, however, that can help youth who are growing up in high-risk communities; these include higher levels of social-emotional competence, academic success, secure attachment and effective parenting.”).

138. *Hearing on AB 333*, *supra* note 22, at 2, 8; Galvin-Almanza, *supra* note 1.

139. Fudge, *supra* note 19, at 1025 (“When gang definitions are unduly vague, it threatens the free expression and association rights not only of gang members, but of individuals not involved in a gang in any way.”).

140. See *Report: Gang Suppression Doesn't Work*, *supra* note 20 (explaining that suppression tactics often increase gang issues and cities are losing the war on gangs because they lack intervention).

141. See Martin Baker, *supra* note 39, at 122 (describing requirements for truly constitutional gang definitions).

142. See SPERGEL ET AL., *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 17 (1994) (explaining that, while suppression tactics exist in most all cities, they are only successful “when community organization and

Therefore, Chapter 699 is only a band-aid on the deep social wound of California's gang problem, failing to truly improve the lives of defendants' and their communities.¹⁴³

opportunities provision strategies were also present and emphasized”).

143. See Telephone Interview with Emily Galvin-Almanza, *supra* note 15 (“I also don’t think [Chapter 699] deals with some of the underlying factors and realities of who gets involved in the criminal court system . . .”).

* * *