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Crips and Nuns: Defining Gang-Related Crime in California Under the Street Terrorism Enforcement and Prevention Act

Martin Baker*

I. INTRODUCTION

A Crip and a nun walk into a bar. The Crip tells the bartender to lie down on the ground, while the nun empties the cash register. Which one is guilty of a gang-related crime under California's Street Terrorism Enforcement and Prevention Act (STEP Act)?¹

Well, it all depends where the bar is located. In Sacramento, which is located within California's Third Appellate District, both parties would be subject to a gang-related penalty enhancement. In Bakersfield, which is in California's Fifth Appellate District, neither would be additionally punished. In Santa Ana or in Los Angeles—located in the Fourth and Second Appellate Districts, respectively—possibly neither would be additionally punished; but if it were one of the two, strangely enough, it would be *the nun*.

The preceding examples show that, despite the huge legislative effort spent on its drafting, the gang enhancement statute² has produced a disparate and conflicting array of interpretations among California's intermediate appellate courts. The purpose of this Article is to resolve the ambiguities inherent in the statute by looking at analogous areas of law (specifically, *respondeat superior* and "hate-crime" enhancements) and to propose a new interpretation of the enhancement statute that is constitutional, reflects the intent of the legislature, and can be uniformly and practically applied throughout the state.

Part II of this Article critically examines and compares recent appellate rulings in gang enhancement cases throughout four of California's six appellate districts. Part III looks at analogous situations in the areas of agency law and California's hate-crime legislation. The Article concludes by proposing an interpretation of the statute drawn from conceptual parallels to the theories of liability discussed in Part III.

* Associate attorney at Perry & Associates, Modesto, California. J.D., Chapman University School of Law, 2003. I would like to thank my colleagues at Perry & Associates for their encouragement and support, and to express my admiration for everyone working on the streets, in the courts, and in the classroom to keep our children safe from the threat of gang violence; especially my dear friend, Gertrude.

1. CAL. PENAL CODE §§ 186.20-186.33 (West 1999 & Supp. 2009).

2. Terms such as "gang enhancement statute," "gang enhancement," and "penalty enhancement" are common shorthand for the gang-related penalty enhancement component of the STEP Act, which is the focus of this Article.

II. THE CONFUSING STATE OF GANG ENHANCEMENT
CASE LAW IN CALIFORNIA

California's penalty enhancement for gang-related felonies is part of the STEP Act, enacted in 1988, and is codified in Penal Code section 186.22(b).³ It provides additional penalties for felonies 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."⁴

Within the last few years, a number of appellate courts have addressed the inherently ambiguous second part of the gang enhancement statute—the specific intent element. The statutory requirement that the commission of the underlying offense "promote, further, or assist in any criminal conduct by gang members"⁵ has put before the courts the following question: to be subject to additional punishment, may a defendant intend only to facilitate contemporaneous crime (committed by codefendant gang members, or even by himself), or must he intend to facilitate secondary (or "other") crime beyond the underlying charged offense?

California appellate courts that have directly addressed the issue have each come up with a different answer. Furthermore, the federal Ninth Circuit Court of Appeals recently entered the fray, with two California appellate courts explicitly repudiating its opinion and one implicitly approving it.

A. *The Second District: Romero and Margarejo*

In *People v. Romero*, the defendant was one of two gang members involved in a drive-by shooting of non-gang members in rival gang territory.⁶ To prove that the shooting was committed to "benefit the gang," the prosecution's gang expert testified that the shooting "would elevate the status of the shooters and their entire gang."⁷ Disagreeing with the Ninth Circuit's opinion in *Garcia v. Carey*,⁸ and citing the Fourth District's opinion in *People v. Morales*,⁹ the Second District Court of Appeal held that the specific intent element of the gang enhancement statute is satisfied if the defendant "had the specific intent to 'promote, further, or assist' [his fellow gang member] in the shootings of [the victims]."¹⁰ It was enough that the defendant "intended to commit a crime, . . .

3. See CAL. PENAL CODE § 186.22(b).

4. *Id.* § 186.22(b)(1)(A)-(C) (Supp. 2009). Under the penalty enhancement, a defendant convicted of a gang-related felony faces at least two years confinement in state prison in addition to the punishment for the underlying offense, pursuant to the discretion of the court. See *id.*

5. *Id.* § 186.22(b)(1).

6. 43 Cal. Rptr. 3d 862, 864-65 (Ct. App. 2d Dist. 2006).

7. *Id.* at 865.

8. 395 F.3d 1099 (9th Cir. 2005); see also *infra* Part II.E.

9. 5 Cal. Rptr. 3d 615 (Ct. App. 2003); see also *infra* Part II.C.

10. *Romero*, 43 Cal. Rptr. 3d at 865-66 (quoting CAL. PENAL CODE § 186.22(b)(1)).

intended to help [his fellow gang member] commit a crime, . . . and knew [that his fellow gang member] was a member of his gang.”¹¹

More recently, in *People v. Margarejo*, a gang member defendant led police on a lengthy car chase while laughing and displaying gang signs with his hands to police and onlookers.¹² The prosecution’s gang expert testified that the defendant’s conduct was intended to inform the local citizenry that his gang was “in charge of the area.”¹³ As a result, the Second District held that the crime (felony evading of police officers) was committed with “the specific intent to . . . assist [other] criminal conduct by gang members,” because a “community cowed by gang intimidation is less likely to report gang crimes and assist in their prosecution.”¹⁴

B. *The Third District: Hill*

In *People v. Hill*, the defendant, a member of Nogales Gangster Crips, and his girlfriend confronted another woman over a traffic dispute that occurred earlier in the day.¹⁵ The defendant accused the other woman of disrespecting him and brandished a gun, threatening to “bop” the woman, who then drove away in her car.¹⁶ The prosecution’s gang expert testified that the defendant’s threat “benefitted the gang because it showed that the gang could not be ‘disrespected’ without consequences.”¹⁷

Agreeing with the Second District’s opinion in *People v. Romero*¹⁸ but disagreeing with the Ninth Circuit’s opinion in *Garcia v. Carey*,¹⁹ the Third District held that the gang enhancement statute does not require that the underlying offense be intended to facilitate *other* crime (whether committed contemporaneously by another gang member or in the future by the defendant or other gang members); it was enough that the defendant intended to “promote, further, or assist” the underlying offense itself, in this case a felony criminal threat.²⁰

11. *Id.* at 866.

12. 75 Cal. Rptr. 3d 465, 467 (Ct. App. 2d Dist. 2008).

13. *Id.* at 469.

14. *Id.* at 470.

15. 47 Cal. Rptr. 3d 875, 876 (Ct. App. 3d Dist. 2006).

16. *Id.*

17. *Id.*

18. 43 Cal. Rptr. 3d 862 (Ct. App. 2d Dist. 2006).

19. 395 F.3d 1099 (9th Cir. 2005); *see also infra* Part II.E.

20. 47 Cal. Rptr. 3d at 877. The Third District (like the Second, in *Romero*) refused to follow *Garcia* on the grounds that the issue before each court concerned only state law. *Id.* However, the contrary holding of *Hill* would appear to permit additional punishment for mere gang membership—a status protected by the First Amendment to the United States Constitution. *See Scales v. United States*, 367 U.S. 203, 224-30 (1961) (holding that the Constitution permits punishment for membership of a group only when the member intends to further the criminal purpose of the group).

C. *The Fourth District: Morales and Villalobos*

In *People v. Morales*, the defendant was convicted of committing a robbery with two other gang members.²¹ The prosecution's gang expert testified that "[t]he crime would benefit the individual gang members with notoriety among the gang, and the gang with notoriety among rival gang members and the general public."²² The Fourth District agreed, even though it conceded that "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."²³ The court also concluded that the specific intent element of the gang enhancement statute was met because the defendant's criminal conduct was "intended to aid and abet" the commission of the robberies committed by him and two other gang members.²⁴

In *People v. Villalobos*, the female defendant helped her gang-member boyfriend rob a man in a hotel room.²⁵ Although the defendant was not a gang member, she was aware that her boyfriend was a gang member, which helped establish the specific intent element.²⁶ According to the Fourth District, "[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime."²⁷

D. *The Fifth District: In re Frank S.*

In the case of *In re Frank S.* (a juvenile delinquency case), the minor was a Norteño street gang member who was caught carrying a concealed knife for protection against rival Sureño gang members.²⁸ The Fifth District held that without additional evidence that the minor "was in gang territory, had gang

21. 5 Cal. Rptr. 3d 615, 617-21 (Ct. App. 4th Dist. 2003).

22. *Id.* at 631.

23. *Id.* at 632.

24. *Id.*

25. 51 Cal. Rptr. 3d 678, 680-81 (Ct. App. 4th Dist. 2006).

26. *Id.* at 686-87.

27. *Id.* at 687 (citing *Morales*, 5 Cal. Rptr. 3d 615). One has to wonder what became of the defendant's gang-member boyfriend. Following the Fourth District's reasoning, would he have escaped the additional punishment imposed on his *non-gang-member* girlfriend for the exact same crime because he acted in concert with a *non-gang member*? If not, then the holding of *Villalobos* would resemble *Hill* more than *Romero* and *Morales* (both requiring that defendant act in concert with known gang members), in that mere gang membership status of one defendant would be sufficient to trigger the gang enhancement as to that defendant. See Cal. Sch. Employees Ass'n v. Governing Bd., 878 P.2d 1321, 1327-28 (Cal. 1994) (stating the established rule that statutes should not be interpreted to produce absurd results unintended by the legislature); *Kramer v. Intuit Inc.*, 18 Cal. Rptr. 3d 412, 415 (Ct. App. 2004) ("[I]t is well recognized that '[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole.'" (quoting *Silver v. Brown*, 409 P.2d 689, 692 (Cal. 1966))).

28. 46 Cal. Rptr. 3d 839, 841 (Ct. App. 5th Dist. 2006).

members with him, or had any reason to expect to use the knife in a gang-related offense,” the evidence was insufficient to prove that the offense of carrying a concealed weapon was gang-related within the meaning of the gang enhancement statute.²⁹ Relying on the First District’s decision in *People v. Martinez*,³⁰ the court concluded that “[gang] membership alone does not prove a specific intent to . . . promote, further, or assist in criminal conduct by gang members.”³¹ Rather, “[t]he crime itself must have some connection with the activities of a [criminal street gang].”³²

E. The Ninth Circuit: Garcia v. Carey

In *Garcia v. Carey*, the gang-member defendant, along with one or two fellow gang members, robbed a man inside a liquor store while invoking the name of their gang.³³ At trial, contrary to his initial statement to the police, the victim testified that he did not remember the defendant being present during the robbery, nor did he remember any gang slogans being uttered.³⁴ The prosecution’s gang expert testified that it was common for victims of gang crimes to recant because of the “fear intimidation process.”³⁵ The expert also testified that the defendant’s gang was “turf oriented.”³⁶ The Ninth Circuit Court of Appeals held that there was “no evidence indicating that this robbery was committed with the specific purpose of furthering *other* gang criminal activity.”³⁷ Despite the fact that the robbery was committed by multiple gang members and that the gang’s name was invoked during the robbery’s commission, “there [was] nothing inherent in the robbery that would indicate that it further[ed] some *other* crime.”³⁸

29. *Id.* at 844.

30. 10 Cal. Rptr. 3d 751, 754-57 (Ct. App. 1st Dist. 2004) (holding that gang membership by itself was insufficient to make an automobile burglary “gang related” for purposes of the gang registration requirement). Note that the *Martinez* court did not directly address the enhancement statute, but analogized to it when it defined what would be a “gang-related” crime warranting registration under section 186.30. *Id.*

31. *In re Frank S.*, 46 Cal. Rptr. 3d at 844 (citation omitted).

32. *Id.* at 844 (quoting *Martinez*, 10 Cal. Rptr. 3d at 756).

33. 395 F.3d 1099, 1101 (9th Cir. 2005).

34. *Id.*

35. *Id.* at 1102.

36. *Id.*

37. *Id.* at 1103 (emphasis added).

38. *Id.* (emphasis added). The Ninth Circuit provided the following examples of causal nexus between the charged crime and secondary, “other” crime that would support a finding of specific intent: violent assaults committed with the intent to intimidate the community so as to protect the gang’s drug-dealing territory from interference by law enforcement or rival gangs (citing *People v. Gardeley*, 927 P.2d 713 (Cal. 1996)); an assault on a police officer committed to facilitate the escape of a fellow gang member (citing *In re Ramon T.*, 66 Cal. Rptr. 2d 816 (Ct. App. 1997)); and a robbery and murder committed with the intent to frame a rival gang (citing *People v. Ortiz*, 67 Cal. Rptr. 2d 126 (Ct. App. 1997)). *Id.* at 1104.

F. *Unpredictable Outcomes for the Crip and the Nun*

Thus, the various interpretations of the statute tend to fall into the following three conflicting categories:

1. To be “gang-related” under the statute, the crime need not be committed by a gang member, but it *must* be intended to facilitate secondary (or “other”) gang crime. Under this approach, “self-serving” crimes, even if committed by gang members, would not be gang-related. Thus, neither the Crip nor the nun would be liable—assuming that there was no gang purpose behind the robbery.³⁹
2. A crime is “gang-related” if committed by a gang member, even if the crime is self-serving, i.e., without any secondary gang purpose. Hence, only the Crip would be liable.⁴⁰ The nun would be liable if acting with a *known* gang member. If acting alone, she would only be liable if she was facilitating “other” gang crime, despite her lack of gang “membership.”
3. A crime is “gang-related” if committed with the knowledge that one or more accomplices are gang members, even if the defendant is not a gang member and even if the crime has no secondary gang purpose. The nun would be liable, but the Crip might not be.⁴¹ This is the situation where the paradox of the non-gang-member being punished more harshly than the gang member could arise; alternatively, if the Crip were also subject to the enhancement, even though he acted without a gang member accomplice (as apparently required by *In re Frank S., Romero, Morales, and Villalobos* in the absence of evidence showing an intent to facilitate “other” gang crime beyond the charged offense), then he would be punished for mere gang membership in accordance with *Hill* and contrary to the constitutional requirements of *Scales*.

While the majority of California appellate court decisions appear to disagree with the Ninth Circuit’s requirement that the underlying crime be intended to facilitate some “other” crime, the Fourth and Second Districts have quietly

39. See generally *Garcia*, 395 F.3d 1099. Of the California Appellate cases, perhaps only *Margarejo*, 75 Cal. Rptr. 3d 465, articulates this standard.

40. This would be true under the standard in *Hill*, 47 Cal. Rptr. 3d 875, for the single gang member situation, and possibly under *Romero, Morales, Frank S., and Villalobos*.

41. This outcome would be contrary to *Garcia*, but consistent with all of the California Appellate cases, except possibly *Margarejo*. In *Villalobos*, the girlfriend was liable because she was helping her boyfriend, a gang member. Although the *Villalobos* court did not address the boyfriend’s liability, it would seem, under the court’s reasoning, that he might not be liable because—although *he* was a gang member—he was not helping a gang member. Under *Hill*, though, he *would* be liable. Also *Frank S.* implies that the single gang member defendant would have been liable *if* he were with at least one other gang member, but not on his own.

acknowledged the concept that not all self-serving crimes committed by gang members are necessarily “gang-related” within the meaning of the statute. Borrowing language from agency law, the Fourth District conceded in *People v. Morales* that gang members may engage in non-gang related “frolic[s] and detour[s].”⁴² And in *People v. Margarejo*, the Second District appears to have followed the Ninth Circuit’s rewording of the statute,⁴³ replacing the statutory requirement of facilitation of “any criminal conduct by gang members”⁴⁴ with “[other] criminal conduct.”⁴⁵ Oddly, the *Margarejo* court made no mention of the conflict between *Romero*⁴⁶ and *Hill*,⁴⁷ on the one hand, and *Garcia*, on the other.⁴⁸ In fact, the court cited no case law at all, only its own altered version of the statute.⁴⁹

Nonetheless, the Ninth Circuit and the four California appellate courts that have addressed the statute remain in conflict, leaving little guidance for those charged with interpreting, applying, or obeying the law. In addition, none of the appellate courts appear to fully understand what should truly define a “gang-related” crime within constitutional bounds and as intended under the statute.

Fortunately, a uniform standard may be derived from other areas of law, specifically those dealing with hate crime enhancements and agency liability (i.e., “*respondeat superior*”).

III. TOWARD A NEW DEFINITION: BORROWING FROM AGENCY AND HATE-CRIME LAW

A. “Agency-Assisted”/“Intended to Serve”

Although the Fourth District ultimately held in *Morales* that one gang member’s assistance to others in the commission of the same crime was sufficient to sustain the STEP Act’s gang enhancement, the court mentioned in dicta that “it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.”⁵⁰ The court’s use of the term “frolic and detour” suggests that a clearer solution to the problem of defining gang crime might lie in the area of agency law. In agency law, under the rule of “*respondeat superior*,”⁵¹ a “master” (usually an employer, but sometimes

42. 5 Cal. Rptr. 3d 615, 632 (Ct. App. 4th Dist. 2003).

43. See *Garcia*, 395 F.3d at 1103 (requiring furtherance of “some other crime”).

44. CAL. PENAL CODE § 186.22(b)(1) (West 1999 & Supp. 2009) (emphasis added).

45. *People v. Margarejo*, 75 Cal. Rptr. 3d 465, 470-71 (Ct. App. 2d Dist. 2008) (emphasis added, brackets in original).

46. *People v. Romero*, 43 Cal. Rptr. 3d 862 (Ct. App. 2d Dist. 2006).

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

48. *Garcia*, 395 F.3d 1099.

49. *Margarejo*, 75 Cal. Rptr. 3d at 470-71.

50. *People v. Morales*, 5 Cal. Rptr. 3d 615, 632 (Ct. App. 4th Dist. 2003).

51. Translated from Latin as “let the superior make answer.” BLACK’S LAW DICTIONARY 1338 (8th ed. 2004).

an “unincorporated association”⁵²) is liable for intentional torts committed by a “servant” (usually an employee or other agent of the master). The rule only applies, of course, when the servant is acting in his capacity as an agent of the master.

In the context of gang law, it would make sense, as the Fourth District suggested, to apply the STEP Act’s gang enhancement only when a gang member is actually acting (at least partially) within the scope of his agency relationship with the gang—i.e., not on a “frolic” or “detour.”⁵³ Although liability in the gang crime context would be reversed so that the agent (and not the principal) is liable based on the agency relationship (“*respondeat inferior*”), the jurisprudential goal is the same—imposing additional liability whenever an agent or servant acts within the scope of his relationship to his principal or master. The same reasoning would apply, as would the same difficulties inherent in determining whether an act was committed as part of the agency relationship.

The Second and Third Restatements of Agency provide two factors that are particularly helpful in determining the existence of agency-related liability in the gang crime context: first, whether the agency relationship facilitated the completion of the act (known as the “agency-assisted” theory), and second, whether the act was committed with the intent to serve the agency relationship (known as “intended to serve” theory).

Under section 219(2)(d) of the Restatement (Second) of Agency, “[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or *he was aided in accomplishing the tort by the existence of the agency relation.*”⁵⁴ Section 7.07(2) of the Restatement (Third) of Agency characterizes agency-related conduct as that “intended by the employee to serve any purpose of the employer.”⁵⁵

The “agency-assisted” approach is easy to analogize to some (but by no means all) gang-related crimes. In *Costos v. Coconut Island Corp.*, the court held

52. See *People v. Colonia Chiques*, 67 Cal. Rptr. 3d 70, 76–78 (Ct. App. 2007) (defining the Colonia Chiques criminal street gang as an “unincorporated association” for the purpose of allowing the “organization and the members through which it acts” to be sued for injunctive relief); see also *Barr v. United Methodist Church*, 153 Cal. Rptr. 322, 327–28 (Ct. App. 1979) (defining an “unincorporated association” as a “group whose members share a common purpose, and . . . who function under a common name under circumstances where fairness requires the group be recognized as a legal entity”).

53. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 503-04 (5th ed. 1984) (describing a “frolic” as the acts of a “servant who is not at all on his master’s business” and a “detour” as a situation “where the servant deviates from his route on a personal errand”); see also *Ryan v. Farrell*, 280 P. 945, 946–47 (Cal. 1929) (“[W]here the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.” (citations omitted)).

54. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1959) (emphasis added).

55. See RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006).

that a hotel manager's employer was liable for the manager's rape of a guest, because the agency relationship enabled the manager to locate the guest and enter her room using a key provided by his employer.⁵⁶ An analogous gang crime case might involve a drive-by shooting by a gang member using a gun obtained as a result of his gang association. Even though the supplier of the gang member's gun may never have intended that it be used for a drive-by shooting, as long as it was the gang member's relationship with the gang that facilitated his obtaining the gun, then the crime would qualify as "agency-assisted," and the gang enhancement should apply.

In other situations, agency assistance may be indirect or may only partially contribute to the successful completion of the crime. For example, a gang member with a visible gang tattoo who robs a convenience store for personal gain might be more successful in eluding capture if the victim is so intimidated by the gang tattoo that he refuses to cooperate with police. In such a situation, the perpetrator's relationship with his gang certainly assisted in the successful completion of the crime, even though the perpetrator may never have intended such a result. Should the gang enhancement apply, or should a defendant be required to at least have the specific intent to exploit the advantage gained from his relationship with his gang before he can be subjected to additional punishment?

Another indirect instance of "agency assistance" might be robberies committed by multiple gang members, such as those in *Morales* and *Garcia*.⁵⁷ Although robberies by multiple gang members might sometimes appear to be "frolics" or "detours" committed for personal gain without any intent to benefit the remainder of the gang, the additional strength of a two or three person robbery "team" might not have come about had the group not met through their common gang association. Thus, each robber's gang relationship facilitated the successful completion of the crime, albeit indirectly, via the gang-related formation of the robbery team, notwithstanding the fact that the individual robbers had no intention of furthering the gang's goals through the commission of the robbery.

The other side of the coin is the "intent to serve" theory of liability.⁵⁸ Many gang crimes are committed without any assistance arising from the defendant's relationship with the gang, yet with a clear intent to further the criminal goals of the gang. A simple example would be where the spoils of a spontaneous robbery by a single gang member are ultimately distributed to other gang members.

56. 137 F.3d 46, 50 (1st Cir. 1998).

57. See *supra* Parts II.C, II.E.

58. See, e.g., *Magnolia Petroleum Co. v. Guffey*, 102 S.W.2d 408 (Tex. 1937) (holding an employer liable for unreasonable force used by an employee to collect a debt because the act, "although itself not authorized," "was done within the scope of his authority as the agent of the company while acting in furtherance of its business" (emphasis added)).

B. “Because of”/“Substantial Factor”

Both gang-assisted crimes and crimes intended to serve the gang can, in a sense, be characterized as crimes committed “because of” the perpetrator’s relationship with the gang. Although the term “because of” sounds straightforward, it nevertheless required clarification by the California Supreme Court in the context of bias-motivated or “hate” crimes.

In *In re M.S.*, the California Supreme Court addressed California Penal Code sections 422.6 and 422.7, each of which provides additional punishment for crimes committed “because of the [victim’s] race, color, religion, ancestry, national origin, or sexual orientation.”⁵⁹ The minor in *In re M.S.* was one of several perpetrators who assaulted a homosexual man. After holding that the statutes were not unconstitutionally overbroad, the California Supreme Court went on to discuss causation.⁶⁰ Rejecting a “but for” definition of the phrase “because of,” the court held that “[w]hen multiple concurrent motives exist, the prohibited bias must be a *substantial factor* in bringing about the crime.”⁶¹

Similarly then, in gang cases, both gang-assisted crimes and crimes intended to serve the gang may be more clearly and fairly defined as crimes in which the defendant’s relationship with the gang was a substantial factor contributing to the successful completion of the crime.

Many (but not all) of the scenarios from the appellate decisions that have directly addressed the STEP Act’s gang enhancement, including *Garcia v. Carey* from the Ninth Circuit, would be considered gang-related crimes under this definition. In some cases, however, the gang-related nature of the offense might not be so clear. Some apparently gang-related offenses might have multiple concurrent causes or motives, such as self-serving robberies or assaults where a last minute gratuitous invocation of the gang name serves to subdue the victim or deter reporting. In those cases, it would ultimately be a question of fact (albeit a somewhat difficult one) for the jury to decide as to whether the defendant’s relationship with the gang was a “substantial factor” contributing to the successful completion of the crime.

Other scenarios may appear to be “gang-related” on the surface, but might, upon closer examination, not be “gang-related.” An illusory example of gang relationship causation might be a scenario like the one presented in *Margarejo*, where the gang member defendant displayed gang hand signs while being chased by the police.⁶² In *Margarejo*, the defendant’s public invocation of the gang’s name clearly served to further the gang’s criminal reputation in the community.

59. *In re M.S.*, 896 P.2d 1365, 1368 n.1 (Cal. 1995). Both sections have since been amended to include “disability” and “gender” among the protected classes of victim. See CAL. PENAL CODE §§ 422.55, 422.6, 422.7 (West Supp. 2009) (emphasis added).

60. *In re M.S.*, 896 P.2d at 1374-75.

61. *Id.* at 1377 (emphasis added).

62. *People v. Margarejo*, 75 Cal. Rptr. 3d 465 (Ct. App. 2008); see also *supra* Part II.A.

At first glance, this might look like an “intended to serve” gang crime. The problem with the *Margarejo* scenario, however, is that the defendant’s hand-waving was not an element of the crime of felony evasion, nor did it contribute anything toward the successful completion of that crime. Therefore, the *crime* was neither committed with agency assistance, nor was it committed with the intent to serve the gang (assuming, of course, that the purpose of the evasion was something other than to gain an opportunity to throw gang hand signs around town).

IV. CONCLUSION

The disparate and often conflicting attempts by California appellate courts to define the “gang-related crimes” subject to additional punishment under California’s STEP Act can easily be replaced by a single, unifying definition encompassing only those crimes that are committed “because of” the defendant’s relationship to the gang—crimes for which the defendant’s relationship to his gang is a substantial factor contributing to the successful completion of the crimes.

Such a definition would reflect the intent of the legislature⁶³ and would provide clear guidance to those charged with interpreting, applying, and obeying the STEP Act’s gang enhancement statute.

Furthermore, such a definition would avoid the danger of unconstitutionally punishing defendants for mere gang membership (as the Third District appears to have already done in *People v. Hill*⁶⁴) and would avoid the need to even define gang membership when determining whether a crime is gang-related under the STEP Act.⁶⁵ Instead of looking to see if the defendant or his cohorts are “gang members,” it would only be necessary to decide if there is a relationship between the defendant’s conduct and the criminal purpose of the gang regardless of whether the defendant or his cohorts are “gang members.”

As for the Crip and the nun, assuming that each individual neither contributed his or her booty to a criminal street gang nor invoked the name of a criminal street gang during the robbery, then neither one would be subject to additional punishment for the commission of a gang-related crime.

63. See CAL. PENAL CODE § 186.21 (West 1999) (“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.”).

64. 47 Cal. Rptr. 3d 875, 877 (Ct. App. 2006) (appearing to hold that a defendant’s mere membership in a gang during the commission of an otherwise non-gang-related offense is sufficient to subject that defendant to additional punishment); see also *supra* note 20.

65. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (finding the term “gang member” to be unconstitutionally vague). *But see* *People v. Green*, 278 Cal. Rptr. 140, 145 (Ct. App. 1991) (holding that “member” and “membership” as used in the context of the STEP Act were “terms of ordinary meaning . . . requir[ing] no further definition”), *overruled on other grounds* by *People v. Castaneda*, 3 P.3d 278 (Cal. 2000).

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