

UNJUST AND INEFFECTIVE: A CRITICAL LOOK AT CALIFORNIA'S STEP ACT

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I. INTRODUCTION

Today, gang activity in the United States remains at its lowest level in years.¹ Gang membership declined by almost 100,000 individuals from 1996–2004, and the number of jurisdictions reporting gang activity has likewise decreased.² However, public fear of gangs has “skyrocketed,”³ fueled by heightened and sensationalized media coverage, as well as increased political reaction to gang violence.⁴ Similarly, law enforcement accounts of gang activity have described gangs as a growing threat to American society.⁵ Federal Bureau of Investigation (“FBI”) Director Robert S. Mueller III has asserted that gangs are spreading “like a cancer” throughout the United States.⁶ In Los Angeles, California, a city councilman went so far as to say, “Gang violence has become Los Angeles’ urban Katrina.”⁷

In response to heightened fear of gang activity, local and national law enforcement agencies have sharpened their focus on combating gangs.⁸ Los Angeles police announced renewed “crackdowns” on gang activity and have increased “gang sweeps” of neighborhoods where they believe gang activity is high.⁹ In addition, prosecutors have begun to file elevated

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¹ JUDITH GREENE & KEVIN PRANIS, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 3 (Just. Pol’y Inst. 2007), available at http://www.justicestrategies.net/files/Gang_Wars_Full_Report_2007.pdf.

² *Id.* at 34.

³ *Id.* at 3.

⁴ Deborah Lamm Weisel, *The Evolution of Street Gangs: An Examination of Form and Variation*, in THE MODERN GANG READER 86, 86 (Arlen Egley Jr. et al. eds., Oxford Univ. Press 3d ed. 2006).

⁵ GREENE & PRANIS, *supra* note 1, at 33.

⁶ Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Address Before the Los Angeles Chamber of Commerce (Jan. 18, 2007), transcript available at <http://www.fbi.gov/pressrel/speeches/mueller011807.htm>.

⁷ Patrick McGreevy, *L.A. Urged to Alter Gang Tactics*, L.A. TIMES, Jan. 18, 2007, at B4, available at <http://articles.latimes.com/2007/jan/18/local/me-gang18>.

⁸ Beth Bjerregaard, *Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls*, in THE MODERN GANG READER, *supra* note 4, at 381, 381 [hereinafter Bjerregaard, *Potential Impact*]; NATIONAL YOUTH GANG CENTER, HIGHLIGHTS OF GANG RELATED LEGISLATION (2008), <http://www.iir.com/nygc/gang-legis/highlights-gang-related-legislation.htm> (last visited May 1, 2009) [hereinafter NATIONAL YOUTH GANG CENTER, HIGHLIGHTS].

⁹ Patrick McGreevy, *D.A. Accused of Inflating the Charges in Gang Cases*, L.A. TIMES, Mar. 29, 2007, at B1, available at <http://articles.latimes.com/2007/mar/29/local/me-gangs29> [hereinafter McGreevy, *D.A. Accused*].

charges against suspected gang members and seek the maximum sentences possible for their offenses.¹⁰

Legislatures have also responded to this heightened fear of gang activity by enacting anti-gang legislation throughout the United States. Today, every region of the United States and ninety-two percent of all states have enacted anti-gang legislation,¹¹ and they continue to develop and enact new legislation designed to combat gangs.¹² Legal efforts to fight gangs commonly include increased sentences and penalties for gang activity,¹³ injunctions preventing gang members from associating with each other in particular locations, and the criminalization of active gang participation.¹⁴

In Los Angeles, following an announcement of a renewed crackdown on gangs in January 2007, the District Attorney's Office increased its filing of gang sentence enhancements.¹⁵ Los Angeles Mayor Antonio Villaraigosa asked the federal government for an additional thirty-million dollars to aid in the crackdown, and California Governor Arnold Schwarzenegger declared the state of California wanted to "declare a war on gangs."¹⁶ This new war on gangs had an immediate impact—police arrested more than eight-hundred-and-twenty alleged gang members in the first two months of the crackdown,¹⁷ and prosecutors have since become increasingly more likely to use their prosecutorial discretion to elevate the charges against suspected gang offenders.¹⁸ They are also more likely to charge juveniles as adults when they are accused of gang related crimes¹⁹ and more inclined to file felony charges against an accused, even when they have the discretion to charge the defendant with a misdemeanor.²⁰ In addition, prosecutors now charge sentence enhancements on top of elevated felony charges, resulting in alleged gang members facing more than triple the prison time they would otherwise serve.²¹

¹⁰ *See id.*

¹¹ NATIONAL YOUTH GANG CENTER, HIGHLIGHTS, *supra* note 8.

¹² *Id.*; *see also* Lee Davidson, *Bills Aimed at Curbing Gang Activity*, DESERET MORNING NEWS, Feb. 5, 2008, available at <http://deseretnews.com/article/1,5143,695250515,00.html> (describing anti-gang legislation passed by the state of Utah in February of 2008). Elk Grove, California is even considering a measure making parents of gang members criminally responsible for their children's gang activities. Loreta Kalb, *Elk Grove to Look at Anti-Gang Law*, SACRAMENTO BEE, Jan. 25, 2008.

¹³ NATIONAL YOUTH GANG CENTER, HIGHLIGHTS, *supra* note 8.

¹⁴ *See* NATIONAL YOUTH GANG CENTER, COMPILATION OF GANG RELATED LEGISLATION (2007), <http://www.iir.com/NYGC/gang%2Dlegis/>; GREENE & PRANIS, *supra* note 1, at 27.

¹⁵ McGreevy, *D.A. Accused*, *supra* note 9; GREENE & PRANIS, *supra* note 1, at 13.

¹⁶ Patrick McGreevy, *Mayor Seeks Record Number of Police Officers*, L.A. TIMES, Mar. 30, 2007, at B3, available at <http://articles.latimes.com/2007/mar/30/local/me-cops30> [hereinafter McGreevy, *Mayor Seeks*].

¹⁷ Patrick McGreevy, *Effects of Gang Initiative Mixed*, L.A. TIMES, Mar. 24, 2007, at B1, available at <http://articles.latimes.com/2007/mar/24/local/me-gangs24>.

¹⁸ McGreevy, *D.A. Accused*, *supra* note 9.

¹⁹ Raul Hernandez, *Juveniles Tried as Adults Up 170%: D.A. Cites Gang Prosecution*, VENTURA COUNTY STAR, Feb. 17, 2008, available at <http://www.venturacountystar.com/news/2008/feb/17/juveniles-tried-as-adults-up-170-da-cites-gang/>.

²⁰ McGreevy, *D.A. Accused*, *supra* note 9.

²¹ *Id.*; Martin Baker, *Struggling with Interpretation and Application of California's Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 101–02, 105 (2006).

Tougher gang penalties have been lauded by government and law enforcement agencies²² but criticized by those who argue that they are disproportionately applied to minority and low-income communities,²³ unfairly prejudice juries against criminal defendants,²⁴ and violate the accused's constitutional rights to freedom of association²⁵ and equal protection.²⁶ However, the majority of constitutional challenges to anti-gang legislation have been consistently rejected by courts.²⁷

This paper looks at anti-gang legislation in California, focusing specifically on gang related sentence enhancements imposed by California's Street Terrorism Enforcement and Prevention Act ("STEP Act"). Part I discusses the legislative purpose behind the STEP Act and the particular penalties it inflicts on gang members and gang activity. Next, Part II examines the fairness of the STEP Act's sentence enhancements, arguing that its increased sentences impose punishments that are vastly disproportionate to their underlying crimes. Part III looks at the effects of the gang sentence enhancements, documenting their failure to decrease gang involvement or to impact crime rates. Finally, Part IV suggests alternative methods for combating crime in general and criminal gang activity more specifically.

II. THE STREET TERRORISM ENFORCEMENT AND PREVENTION ACT

In 1988, the state of California passed the STEP Act in order to "seek the eradication of criminal activity by street gangs" in California.²⁸ In enacting the STEP Act, the legislature declared that California was in "a state of crisis" caused by "violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods" and sought to impose increased penalties on suspected street gang activity.²⁹ The STEP Act's provisions were enhanced several times over the next two decades, most notably when California voters passed California Proposition 21 in 2000.³⁰ California courts have also adopted a broad interpretation of the Act, applying it to all gang activity, whether violent or nonviolent.³¹

²² See Mueller, *supra* note 6 (arguing that more gang cases should be brought in federal court where longer sentences may be imposed).

²³ John Munford, *Fayette DA: No Tolerance for Gangs*, THECITIZEN.COM, Jan. 22, 2008, <http://www.thecitizen.com/~citizen0/node/24719>; GREENE & PRANIS, *supra* note 1, at 6.

²⁴ Patrick Mark Mahoney, Note, *House Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385, 409–10 (2004).

²⁵ Baker, *supra* note 21, at 113; Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 36 (1998) [hereinafter Bjerregaard, *Constitutionality*].

²⁶ Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 345–46 (2007).

²⁷ Bjerregaard, *Constitutionality*, *supra* note 25, at 39–43.

²⁸ CAL.PENAL CODE § 186.21 (2008).

²⁹ *Id.*

³⁰ *Id.* § 186.22; see also Lizabeth N. De Vries, Comment, *Guilt By Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F. L. REV. 191 (2004).

³¹ See, e.g., *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925–26 (Ct. App. 2004).

Under the STEP Act, participation in a street gang is illegal and punishable by imprisonment in county jail for up to one year or in state prison for sixteen months, two years, or three years.³² The STEP Act broadly defines street gang to include any group that meets the following characteristics: 1) a formal or informal group of three or more individuals, 2) with a primary activity of committing one or more crimes, 3) who have a common name or identifying symbol, and 4) whose members individually or collectively engage in a pattern of criminal activity.³³

Moreover, the STEP Act also provides for increased sentences for gang related crimes.³⁴ Sentence enhancements may be given when a defendant commits a felony 1) “for the benefit of, at the direction of, or in association with any criminal street gang” and 2) “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”³⁵ The exact sentence received by a defendant who commits a gang related offense depends on the crime itself and the time must be served in addition to the sentence imposed for the criminal act.³⁶ Extra prison time varies from two to four years for less serious felonies to five years for “serious felonies.”³⁷ Violent felonies receive an additional ten years, and defendants who commit home invasion, carjacking, or felony shootings can find themselves facing an additional fifteen years in prison.³⁸ As a result of the enhancement, criminal defendants may face sentences more than tripling the time in prison they would otherwise serve for the underlying offense.³⁹

III. UNFAIR PUNISHMENT

A. THE STEP ACT’S GANG ENHANCEMENTS ARE UNFAIR BECAUSE THEY ARE DISPROPORTIONATELY APPLIED TO MEMBERS OF RACIAL MINORITY GROUPS

When envisioning the typical gang member, the traditional conception is of a young minority, urban male.⁴⁰ However, despite this common perception, recent trends reveal that gangs are becoming increasingly suburban.⁴¹ Trends also show that there has been a rise in both female and Caucasian gang members.⁴² In fact, white youth now compose the largest

³² CAL.PENAL CODE § 186.22(a) (2008).

³³ *Id.* § 186.22(f). “Pattern of criminal activity” is likewise broadly defined to require the commission, attempted commission, or conspiracy to commit two or more crimes. The qualified crimes are taken from a lengthy list, that includes drug possession, burglary, carjacking, and murder. *Id.* § 186.22(e).

³⁴ *Id.* § 186.22(b).

³⁵ *Id.* § 186.22(b)(4).

³⁶ *Id.* § 186.22(b)(1).

³⁷ *Id.* § 186.22(b)(1)(A)–(b)(1)(B).

³⁸ *Id.* § 186.22(b)(1)(C), (b)(4)(B).

³⁹ See Baker, *supra* note 21, at 105.

⁴⁰ James C. Howell et al., *Modern Day Youth Gangs*, JUV. JUST. BULL., June 2002, <http://www.ncjrs.org/pdffiles1/ojdp/191524.pdf>.

⁴¹ *Id.*

⁴² *Id.*

group of adolescent gang members,⁴³ and Caucasians are the prominent racial group for all gangs formed after 1991.⁴⁴

Nonetheless, in application, the STEP Act and other anti-gang legislation overwhelmingly led to the incarceration of individuals belonging to minority racial groups.⁴⁵ In sharp contrast to studies showing that gangs are becoming increasingly white, law enforcement agencies continue to assert that gangs are primarily composed of minority youth.⁴⁶ The Department of Justice's National Youth Gang Survey ("NYGS") reported in the year 2000 that only thirteen percent of all gang members were white.⁴⁷ The report also asserted that forty-seven percent of all gang members were Hispanic and thirty-one percent were African American.⁴⁸ In contrast, another law enforcement study found that ninety percent of all gang members were African American or Hispanic.⁴⁹ Similarly, the annual reports on gangs published by California's Attorney General consistently focus on black, Hispanic, and Asian gangs and make only passing reference to white street gang members.⁵⁰ A 2003 report from the Attorney General describes white gangs as "the smallest percentage" of all gangs and asserts white gangs can be primarily identified as white supremacy groups.⁵¹

Gang databases, kept by law enforcement agencies as records of gang members and their associates, consist primarily of suspected gang members who are African American or Hispanic.⁵² In the Los Angeles County gang database, approximately half of all African American men between the ages of sixteen and twenty-four in Los Angeles County are listed as gang members or associates.⁵³ Gang databases are used by police gang units and other law enforcement agencies to identify suspects for particular crimes and to label particular crimes as gang activity.⁵⁴ The records are also used by prosecutors as evidence to establish an individual's identity as a gang

⁴³ GREENE & PRANIS, *supra* note 1, at 4.

⁴⁴ Howell et al., *supra* note 40. There is variation even among non-law enforcement estimates of gang composition; for example, in 1998, Finn-Aage Esbensen and L. Thomas Winfree agreed that whites compose a larger percentage of gangs than assumed and estimated that whites comprise a total of twenty-five percent of all gang memberships. Finn-Aage Esbensen & L. Thomas Winfree Jr., *Race and Gender Difference Between Gang and Nongang Youth: Results from a Multi-Site Study*, in THE MODERN GANG READER, *supra* note 4, at 162, 168.

⁴⁵ GREENE & PRANIS, *supra* note 1, at 8.

⁴⁶ See, e.g., ARLEN EGLY, JR., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS FACT SHEET, NATIONAL YOUTH GANG SURVEY TRENDS FROM 1996 TO 2000 (2002), <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200203.pdf>; CAL. ATT'Y GEN., GANGS 2000: A CALL TO ACTION—GANG TRENDS (1993), available at <http://www.cgiaonline.org/gangs2000/gangtrends.html>.

⁴⁷ EGLY, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ Esbensen & Winfree, *supra* note 44, at 165.

⁵⁰ See, e.g., OFFICE OF THE ATT'Y GEN., STATE OF CAL., ORGANIZED CRIME IN CALIFORNIA—2003 (2003), http://ag.ca.gov/publications/org_crime.pdf [hereinafter OFFICE OF THE ATT'Y GEN., 2003]; OFFICE OF THE ATT'Y GEN., STATE OF CAL., ORGANIZED CRIME IN CALIFORNIA—2004 (2004), http://ag.ca.gov/publications/org_crime2004.pdf [hereinafter OFFICE OF THE ATT'Y GEN., 2004]; OFFICE OF THE ATT'Y GEN., STATE OF CAL., ORGANIZED CRIME IN CALIFORNIA—2005 (2005), http://ag.ca.gov/publications/org_crime2005.pdf.

⁵¹ OFFICE OF THE ATT'Y GEN., 2003, *supra* note 50, at 19.

⁵² GREENE & PRANIS, *supra* note 1, at 6.

⁵³ *Id.*

⁵⁴ Jason D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 117–19 (2005).

member or associate, and to further prove that the crime committed was gang activity.⁵⁵

Government statistics on gangs have been sharply criticized as inaccurate.⁵⁶ In their study on law enforcement gang task forces, Deborah Lamm Weisel and Sarah O'Connor Shelley found that gang statistics compiled by law enforcement agencies are unreliable, are heavily contingent on police efforts, and "lack the integrity necessary for reliable counting."⁵⁷ In fact, even the administrators of the NYGS admit that changes in the Survey's estimates of gang compositions are largely due to changes in definitions and approaches to measuring gangs.⁵⁸

The discrepancy between law enforcement data gathering techniques and other statistics describing gang composition can be explained in part by the refusal of some law enforcement agencies to label white groups as gangs, even when they meet all the elements of a particular jurisdiction's definition of a gang.⁵⁹ Moreover, the NYGS's definition of gangs excludes hate groups and motorcycle gangs, which are more likely to be predominantly white.⁶⁰ Likewise, Noelle Fearn, Scott Decker, and David Curry argue that members of anti-gang taskforces base their perceptions of gangs on "the least reliable" source of gang information, the media.⁶¹

Due to this inaccurate perception of gangs on the part of law enforcement officials, scholars argue that gang databases are poor representatives of actual gang involvement because police target certain communities and place minority men in a database with little or no evidence of gang involvement.⁶² For example, police commonly place African American youth in gang databases merely because they have a childhood nickname or are seen congregating on a street corner with friends.⁶³ Once an individual is placed in a gang database, his friends are also likely to find themselves in the database because of their association with a "known" gang member.⁶⁴ As a result of these practices, black and other minority males are disproportionately targeted, arrested, and incarcerated for gang involvement at far higher rates than their actual participation dictates.⁶⁵

⁵⁵ *Id.*

⁵⁶ DEBORAH LAMM WEISEL & TARA O'CONNOR SHELLEY, SPECIALIZED GANG UNITS: FORM AND FUNCTION IN COMMUNITY POLICING 4-9 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/207204.pdf>; GREENE & PRANIS, *supra* note 1, at 33-34.

⁵⁷ WEISEL & SHELLEY, *supra* note 56.

⁵⁸ *Id.* at 15-16 (citing personal correspondence with Arlen Egley, senior research associate for the Department of Justice).

⁵⁹ See Linda S. Beres & Thomas D. Griffith, *Gangs, Schools, and Stereotypes*, 37 LOY. L.A. L. REV. 935, 949-50 (2004); see also Ludeke, *supra* note 26, at 312-13. One common group that often meets the definition of a gang but is not considered a gang is a fraternity; fraternities are distinct groups with strong identifying characteristics, and many are frequently involved in criminal activity and other behavior that is viewed negatively. Robert J. Bursik Jr. & Harold J. Grasmick, *Defining and Researching Gangs*, in THE MODERN GANG READER, *supra* note 4, at 2, 2.

⁶⁰ GREENE & PRANIS, *supra* note 1, at 33.

⁶¹ Noelle E. Fearn, Scott H. Decker, & G. David Curry, *Public Policy Responses to Gangs: Evaluating the Outcomes*, in THE MODERN GANG READER, *supra* note 4, at 312, 312.

⁶² Beres & Griffith, *supra* note 59, at 949.

⁶³ Bjerregaard, *Potential Impact*, *supra* note 8, at 387.

⁶⁴ *Id.*; see also Beres & Griffith, *supra* note 59, at 949.

⁶⁵ GREENE & PRANIS, *supra* note 1, at 6.

This disproportionate impact on minority men and boys reveals that the STEP Act is unfair in its application.⁶⁶ Fairness in the legal system is a fundamental ideal of liberal democracies such as the United States.⁶⁷ Our commitment to fairness is rooted in the belief that we are all equal before the law,⁶⁸ a belief that provides a central tenant upon which the United States was created.⁶⁹ To be fair, a law must be imposed evenhandedly on all people.⁷⁰ Thus, to live up to our ideal of fair implementation of the law, we must equally apply our statutes to all individuals regardless of their race, socioeconomic status, or any other factor.⁷¹ Criminal laws that are only applied to select groups in society are unfair and should be eliminated.⁷²

The STEP Act is thus unfair because it is clear that law enforcement agencies apply its provisions to minority individuals disproportionately.⁷³ Law enforcement agencies frequently and inaccurately perceive that gangs are a primarily urban, minority, and male problem, causing them to ignore white involvement and furthermore, focus disproportionate resources on perceived minority gang involvement.⁷⁴ Law enforcement bias is seen in the tendency of gang task forces to label many minority juveniles as gang members with little or no evidence of any gang involvement.⁷⁵ This bias is further increased by the refusal to recognize primarily Caucasian groups as gangs, even when they clearly meet the provisions of the STEP Act.⁷⁶ As a result of these biases, the STEP Act is disproportionately applied to minority individuals who find themselves more likely to face harsher sanctions for suspected gang activity than white individuals who engage in the same behaviors.⁷⁷ The failure to apply the STEP ACT equally to all individuals violates American principle of equality under the law. This failure of equal application makes the STEP Act unjust.

Moreover, the STEP Act is also unfair because of the broad discretion it provides law enforcement to label particular individuals as gang members and choose what activities count as gang activities. As discussed above, the STEP Act uses broad definitions to identify gangs, gang participation, and criminal activity.⁷⁸ Researchers, including Robert Bursick and Harold Grasmick, argue that a significant problem with anti-gang legislation is the absence of clear and narrow standards defining what constitutes criminal

⁶⁶ *See id.*

⁶⁷ Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 447 n.168 (2005); Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Opinions*, 24 ST. MARY'S L.J. 1, 96 (1992).

⁶⁸ Donnelly, *supra* note 67.

⁶⁹ *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).

⁷⁰ Donnelly, *supra* note 67.

⁷¹ *See, e.g.*, Markel, *supra* note 67. This is especially important for criminal laws, which often lead to the physical loss of liberty if violated.

⁷² Of course, it is neither possible nor desirable for every single law to be applied regardless of group—for example, laws providing for the age of consent make distinctions based on age and welfare statutes on the basis of socio-economic status. However, in general, I can conceive of no good reason for a criminal to distinguish based on the social group of an offender.

⁷³ GREENE & PRANIS, *supra* note 1, at 6.

⁷⁴ *Id.*

⁷⁵ Beres & Griffith, *supra* note 59, at 949.

⁷⁶ *Id.*; *see also* Ludeke, *supra* note 26, at 313; Bursick & Grasmick, *supra* note 59.

⁷⁷ GREENE & PRANIS, *supra* note 1, at 6.

⁷⁸ Bjerregaard, *Potential Impact*, *supra* note 8, at 386.

activity.⁷⁹ The loose standards give police broad discretion to determine whether a group is a gang.⁸⁰ Similarly, the STEP Act's other broad definitions allow law enforcement to use its overestimation of the role of minority men and boys in gangs to disproportionately target, arrest, and incarcerate black males for gang involvement.⁸¹ By providing law enforcement broad discretion to apply the Act's provisions only to minority offenders while ignoring similar crimes committed by whites, the STEP Act perpetuates unfair discrimination among racial divisions.

B. THE STEP ACT'S GANG ENHANCEMENTS ARE UNFAIR BECAUSE THEY IMPOSE SENTENCES DISPROPORTIONATE TO THE UNDERLYING OFFENSES COMMITTED

The STEP Act is also unfair because it provides for criminal sanctions that are not justified punishments given an offender's behavior. In contemplating appropriate criminal sanctions, lawmakers and theorists base their conclusions on several different theories of punishment.⁸² These theories advance differing purposes for sentencing and take into consideration different values when determining appropriate criminal sanctions.⁸³ However, the punishments imposed by the STEP Act cannot be justified by any major theory of punishment because the Act imposes sanctions far more stringent than justice should allow.

1. *Theories of Punishment: Utilitarian, Retributionist, and Rehabilitationist Approaches*

Legislatures, policy advocates, and theorists invoke three common rationales to justify particular criminal sanctions or anti-crime policies. This section looks at theories of utilitarianism, retribution, and rehabilitation in turn.

The first common rationale used to justify a criminal sanction is rooted in a utilitarian perspective.⁸⁴ Utilitarians focus on overall social good and favor policies that benefit all of society, regardless of the impact on particular individuals.⁸⁵ Therefore, the utilitarian perspective is not concerned with the culpability of a particular individual or whether that individual subjectively deserves a specific punishment for his or her actions.⁸⁶ Instead, utilitarians argue that a criminal sanction is justified if it leads to an overall reduction in the crime that would otherwise occur in society.⁸⁷ Lawmakers invoke this perspective when they assert that tougher

⁷⁹ Bursik & Grasmick, *supra* note 59, at 10.

⁸⁰ *See id.*

⁸¹ GREENE & PRANIS, *supra* note 1, at 6.

⁸² *See, e.g.*, Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 853–54 (2005); Dru Stevenson, *Towards a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1536–37 (2005); Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 87–89 (2007).

⁸³ *See sources cited supra* note 82.

⁸⁴ Dressler, *supra* note 82, at 853.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 854.

criminal sanctions will deter individuals from committing a particular act and thus make society safer overall.⁸⁸

Other lawmakers use theories of retributive justice to defend the criminal sanctions they advocate.⁸⁹ Retributive justice theorists argue that the purpose of criminal sanctions is to punish criminal offenders for their actions.⁹⁰ The most common basis for retributive justice is the theory of “just deserts”, which asserts that individuals deserve to be punished whenever they choose to violate society’s laws.⁹¹ Proponents of just deserts assert that individuals deserve different punishments based on the severity of their actions and the depravity of the moral offenses they have committed.⁹² Just desert theory is not concerned with overall social good; rather, it focuses on whether or not the individuals themselves deserve punishment.⁹³ The theory also focuses on examining personal characteristics and circumstances in order to determine whether an individual deserves a particular punishment.⁹⁴

Other retributive justice theorists argue that criminal sanctions should be based on the desire to punish offenders because punishment recognizes the moral agency of offenders.⁹⁵ Punishment communicates to offenders that their actions are wrong and that they, along with all people, are equally subject to the law.⁹⁶ From this perspective, retributive justice theorists are concerned with recognizing the dignity and value of all people.⁹⁷ The dignity of victims is restored through acknowledging and addressing the harm caused to them.⁹⁸ At the same time, the dignity of offenders is respected because they are given moral agency and held capable of formulating their own choice.⁹⁹

Finally, others argue that the purpose of the criminal justice system and the punishments it imposes should be to rehabilitate offenders.¹⁰⁰ Under the rehabilitative model, criminal offenders are seen as “ill” and in need of

⁸⁸ *Id.* Utilitarian-based deterrence justifications face significant critique in their application. Some argue that deterrence rationales are used as rhetoric to increase a legislature’s electability and are typically asserted in the absence of any supporting data. *Id.* at 855. Others point out that deterrence theories cannot explain why ignorance of a law is not an excuse for failure to follow it or why individuals are still held accountable when they had no realistic way of being deterred. Stevenson, *supra* note 82, at 1536.

⁸⁹ See, e.g., Markel, *supra* note 67, at 411.

⁹⁰ *Id.*

⁹¹ Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1294 (2006).

⁹² *Id.*

⁹³ See *id.* Retributive justice based on just deserts has been criticized for over subjectivity and failure to provide clear standards of punishment because perceptions of an individual’s culpability and the punishment he or she deserves vary widely based on perspective and individual circumstances. *Id.* at 1295–96. Thus, arguments for just deserts allow individuals to insert their own biases and prejudices in asserting an individual deserves a particular punishment. *Id.* at 1296.

⁹⁴ *Id.* at 1301 (citing Joel Feinberg, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 61 (Princeton Univ. Press 1970)).

⁹⁵ Markel, *supra* note 67, at 430 & n. 104.

⁹⁶ *Id.* at 430.

⁹⁷ Ristroph, *supra* note 91, at 1300.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1300–01.

¹⁰⁰ Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016 (1991); Adam Lamparello, Note, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating Crimes of Addiction*, 16 OHIO ST. J. ON DISP. RESOL. 335, 360 (2001).

treatment in order to be capable of obeying society's laws.¹⁰¹ The purpose of the criminal justice system is to provide this treatment and reform criminals into law abiding members of society.¹⁰² Rehabilitationists argue that we should look at the context of an individual and the external factors that lead him or her to commit crimes and then help that person respond to these factors more productively.¹⁰³ Rehabilitationists are less concerned with punishment for an individual crime or overall social benefit; rather, they focus on reforming individuals and ensuring that they do not commit future crimes.¹⁰⁴

The rehabilitationist model is often seen in parole hearings, where a parole board determines whether a convicted offender should be released into the public or remain incarcerated.¹⁰⁵ In determining whether an individual will be released, parole boards seek to determine whether the individual has been rehabilitated from their past crimes and can now be a successful member of society.¹⁰⁶ If the individual is found to be rehabilitated, his or her prison term is deemed successful and he or she is more likely to be released.¹⁰⁷ Similarly, the rehabilitationist model is seen in drug courts, which aim to provide treatment programs for drug offenders rather than long criminal punishments.¹⁰⁸

2. *The Gang Enhancement Is Not Justified By Any of the Major Theories of Punishment*

Although the theories of utilitarianism, retribution, and rehabilitation provide differing justifications for criminal penalties and may support different sanctions for a particular offense, none of the above theories justify the STEP Act or its sentencing enhancements.

First, the STEP Act cannot be justified by a utilitarian perspective because it does not lead to the reduction of crime rates. Despite the common perception that gang activity is correlated with overall criminal activity, there is no clear relationship between gangs and crime.¹⁰⁹ Many cities reporting increased gang activity have also experienced decreased crime rates.¹¹⁰ On a national level, gangs are responsible for a relatively low percentage of crimes, committing, for example, only one out of every ten homicides,¹¹¹ and only three to four percent of all serious property and violent crimes within the United States in 1993.¹¹²

¹⁰¹ Vitiello, *supra* note 100; Lamparello, *supra* note 100.

¹⁰² Lamparello, *supra* note 100.

¹⁰³ *Id.* at 359.

¹⁰⁴ Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 209-10 (1990).

¹⁰⁵ *Id.* at 210.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Lamparello, *supra* note 100, at 363-64.

¹⁰⁹ GREENE & PRANIS, *supra* note 1, at 4.

¹¹⁰ *See, e.g., id.*

¹¹¹ *Id.*

¹¹² GREENE & PRANIS, *supra* note 1, at 55 (citing crime statistics recorded by the Federal Bureau of Investigation's Uniform Code and Reporting Program in 1993).

In Los Angeles, gangs do account for a somewhat higher percentage of crime rates, with one study finding that gangs are responsible for up to fifty percent of all homicides in Los Angeles County.¹¹³ However, like other jurisdictions, the overall crime rate in Los Angeles is decreasing even though gang membership and activity has actually increased in the years since the STEP Act was passed.¹¹⁴ Gang members are also becoming less significant contributors to other crimes in Los Angeles, with gang members accounting for only one in four drug sales and only one out every seven gang member selling drugs at least monthly.¹¹⁵ Increased punishment for gang related crimes does not lead to an overall reduction of crime rates because the prevalence of gang related crimes does not impact overall crime rates.

Moreover, alternative utilitarian arguments that the STEP Act's sentencing enhancements serve the greater social good by combating gangs in general are also flawed. Accepting the assumption that gangs are an independent social ill and society will be improved if they are eliminated, little evidence supports the conclusion that sentencing enhancements are effective tools to combat gangs.¹¹⁶ As discussed below, evidence suggests that the Act's sentencing enhancement may actually strengthen gangs by increasing gang solidarity,¹¹⁷ elevating antagonism to law enforcement and authority,¹¹⁸ heightening individuals' gang involvement as a prison survival strategy,¹¹⁹ and decreasing the legitimate opportunities for gang members to re-enter society once released from prison.¹²⁰ Thus, the STEP Act's gang enhancement cannot be justified by the utilitarian model of punishment.

Similarly, the STEP Act's extensive punishments cannot be justified by retributive theories of punishment. Under the STEP Act, an offender's sentence may be increased by anywhere from two to fifteen years, depending on the underlying offense committed.¹²¹ Application of the enhancement may triple the amount of prison time an individual serves.¹²² This vast increase in a prison sentence violates principles of retribution and just deserts because one individual is not deserving of such a significant increase in sentencing merely because a crime is committed while in a gang. Although one could argue that gang offenders are more subjectively culpable under a theory asserting that they commit crimes in order to further a criminal organization, it is difficult to accept they are deserving of three times more punishment than non-gang affiliated offenders. Moreover, one could easily argue that gang offenders are less subjectively culpable

¹¹³ *Id.* at 56.

¹¹⁴ *Id.* at 13; *see also* Maggie Shepard, *Tough Tactics on Gangs Debated*, ALBUQUERQUE TRIB., Jan. 31, 2008, available at http://www.justicepolicy.org/newsitem_show.php?item=112.

¹¹⁵ GREENE & PRANIS, *supra* note 1, at 4.

¹¹⁶ *See, e.g.,* Bjerregaard, *Potential Impact*, *supra* note 8, at 385; McGreevy, *D.A. Accused*, *supra* note 9.

¹¹⁷ Bjerregaard, *Potential Impact*, *supra* note 8, at 385.

¹¹⁸ *Id.* at 384.

¹¹⁹ McGreevy, *D.A. Accused*, *supra* note 9.

¹²⁰ GREENE & PRANIS, *supra* note 1, at 7.

¹²¹ CAL.PENAL CODE § 186.22(b) (2008).

¹²² Baker, *supra* note 21, at 105; *see also* Brandon Bailey, *Judge Spares Gang Member from Life Term*, MERCURY NEWS, Mar. 22, 2008 (the gang enhancement provided the court discretion to impose a life sentence on a suspected gang member for serving as the getaway driver in a home invasion robbery).

than other offenders under a theory of just deserts because their moral culpability is mitigated by the difficult life circumstances that lead individuals to join gangs.¹²³ Under such a theory, gang offenders deserve less punishment, not more. Thus, the STEP Act's sentence enhancements cannot be justified by retributive theories of punishment either.

Finally, the STEP Act's gang enhancement is not justified under the rehabilitationist model of punishment because increased prison sentences do not reform gang members and do not cause them to leave their gangs or lives of crime. In fact, many argue that harsher sentences for minor gang related crimes may actually increase gang commitment because individuals are forced to join gangs and strengthen their gang ties in order to survive in prison.¹²⁴ Studies have found that gangs are prevalent in prison,¹²⁵ although the exact number of prisoner-gang involvement remains unknown.¹²⁶ Many street gangs also endure in prison, and thus many gang members retain their previous gang membership while incarcerated.¹²⁷ Moreover, there are at least six major active prison gangs, including the Mexican Mafia, Aryan Brotherhood, Black Guerilla Family, La Nuestra Familia, the Texas Syndicate, and the Mexikanemi.¹²⁸ These gangs have significant influence over prison inmates and prison life; they are also better organized than street gangs and have a more centralized leadership structure.¹²⁹ The prevalence of prison gangs makes it difficult for incarcerated individuals to leave the gang lifestyle and reform their lives while in prison.¹³⁰ Unsophisticated gang members become increasingly hardened as they spend more time in prison and upon finding it difficult to secure a job that pays decent wages once released, they often find themselves reverting back to crime on the streets—their status in their respective gangs may have been elevated by having served time.¹³¹

High recidivism rates provide concrete evidence that the increased prison sentences imposed by the STEP Act have been unsuccessful in reforming inmates. The majority of gang members who serve prison sentences return to their gangs once they are released from incarceration.¹³² In many gangs, surviving a long prison sentence earns a member increased respect and authority within the gang, and with this newfound authority, the

¹²³ See, e.g., GREENE & PRANIS, *supra* note 1, at 11. I will discuss the contextual reasons that lead individuals to join gangs in greater detail later in this Note.

¹²⁴ McGreevy, *D.A. Accused*, *supra* note 9.

¹²⁵ See, e.g., Mark S. Fleisher & Scott H. Decker, *An Overview of the Challenge of Prison Gangs*, in THE MODERN GANG READER, *supra* note 4, at 151, 153; GEORGE W. KNOX ET AL., THE FACTS ABOUT GANG LIFE IN AMERICA TODAY: A NATIONAL STUDY OF OVER 4,000 GANG MEMBERS (Nat'l Gang Crime Research Ctr. 1997).

¹²⁶ Difficulties estimating the membership levels of prison gangs stem from the lack of official documentation, difficulty conducting research in prison, and the secretive nature of prison gangs themselves. Fleisher & Decker, *supra* note 125. However, some estimates suggest there are, at minimum, 100,000 prison gang members in the United States. *Id.*

¹²⁷ *Id.* at 154; see also KNOX ET AL., *supra* note 125.

¹²⁸ Fleisher & Decker, *supra* note 125, at 153–55.

¹²⁹ *Id.* at 153, 155.

¹³⁰ See *id.* at 158.

¹³¹ Marshall Allen, *Life 'Outside' Hard on Gang Members*, L.A. DAILY NEWS, Sept. 27, 2004, http://lang.dailynews.com/socal/gangs/articles/sgvnp2_release.asp; see also GREENE & PRANIS, *supra* note 1, at 68.

¹³² See sources cited *supra* note 131.

gang member's criminal involvement is likely to increase and intensify.¹³³ An Illinois study found that incarceration decreases the likelihood that individuals will age out of a gang, and instead leads to longer gang involvement.¹³⁴ Further studies have revealed that a major predictor of gang activity is prior incarceration.¹³⁵ Finally, Fearn, Decker, and Curry argue that increased prison sentences for gang members strengthens gangs because incarcerating gang members together for lengthy prison terms increases the resilience of prison gangs.¹³⁶ As we have seen, stronger prison gangs work to increase the level of commitment for incarcerated gang members and can serve, in reverse, to strengthen street gangs.¹³⁷

The overall recidivism rate for California felons was fifty-four percent in 2004;¹³⁸ in 2006, forty-one percent of convicted felons were reincarcerated within a year of release.¹³⁹ In Los Angeles County, recidivism rates are much higher, with estimates as high as seventy percent.¹⁴⁰ A study of inmates released from prison in Los Angeles further found that only 18.7 percent remained arrest free throughout its two year period.¹⁴¹ High recidivism rates and the prevalence of prison gangs show that the STEP Act's sentence enhancements fail to reform gang members and cannot be justified by the rehabilitative theory of punishment.

The STEP Act thus cannot be justified under any major theory of punishment and imposes unfair sentence enhancements on offenders. In fact, many argue that the Act's provisions were developed, not to more effectively punish perpetrators, but as a response to increased public fear of gangs.¹⁴² For example, Beth Bjerregaard asserts that many of the penalties imposed by the STEP Act were enacted because lawmakers felt pressure to respond to society's sense of "moral panic" concerning gangs, and not because of objective data about gangs or a belief that stricter sanctions would make society safer.¹⁴³ The STEP Act does not serve to protect society or improve the lives of its citizens and is not justified under any theory of punishment.

¹³³ See sources cited *supra* note 131.

¹³⁴ JUSTICE POLICY INSTITUTE, FACT SHEET—GANG CRISIS IN CONTEXT: WHAT'S THE REAL CRISIS AND WHAT ARE THE REAL SOLUTIONS? 2 (2006), available at http://www.act4jj.org/media/factsheets/factsheet_14.pdf.

¹³⁵ *Id.*

¹³⁶ Fearn, Decker, & Curry, *supra* note 61, at 313.

¹³⁷ *Id.*

¹³⁸ JUSTICE POLICY INSTITUTE, *supra* note 134.

¹³⁹ Office of the Mayor of L.A., Monthly Newsletter (Mar. 2007), http://www.lacity.org/MAYOR/stellent/groups/ElectedOfficials/@MYR_CH_Contributor/documents/Contributor_Web_Content/LACITY_004808.htm.

¹⁴⁰ Seth Mydans, *Racial Tensions in Los Angeles Jails Ignite Inmate Violence*, N.Y. TIMES, Feb. 6, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990ce1de163ef935a35751c0a963958260>.

¹⁴¹ JOAN PETERSILIA, SUSAN TURNER, & TERRY FAIN, PROFILING INMATES IN THE LOS ANGELES COUNTY JAILS: RISKS, RECIDIVISM, AND RELEASE OPTIONS 36 (2000), <http://www.ncjrs.gov/pdffiles1/nij/grants/189733.pdf>.

¹⁴² Bjerregaard, *Potential Impact*, *supra* note 8, at 383.

¹⁴³ *Id.*

IV. THE STEP ACT IS INEFFECTIVE IN THE “WAR ON GANGS”

In 1988, the California legislature enacted the STEP Act in order to “seek the eradication of criminal activity by street gangs” within the state of California.¹⁴⁴ In the two decades since the Act was approved, it has been amended several times in order to more effectively combat gangs.¹⁴⁵ Recently, the state of California announced a renewed “war on gangs,” and, in early 2007, Los Angeles County law enforcement began escalating gang crackdowns in order to eliminate gangs.¹⁴⁶ As part of the war on gangs, Los Angeles County prosecutors have become increasingly likely to seek the STEP Act’s sentencing enhancements in order to elevate the prison terms of suspected gang offenders.¹⁴⁷ The City of Los Angeles has been so aggressive in attempting to combat gangs that it has spent over one billion dollars on surveillance and policing, and the incarceration costs of its increased sentences for gang members over the past twenty years.¹⁴⁸

However, despite the aggressiveness on the part of law enforcement officials and prosecutors in using the STEP Act’s sentence enhancements in order to combat gangs, the Act has not been a successful tool in the war on gangs.¹⁴⁹ Moreover, it has not been successful in combating crime more generally because its provisions have not contributed to the decrease of criminal activity in Los Angeles County or the State of California.¹⁵⁰

In the twenty years, since the STEP Act was enacted in 1988, gang involvement in Los Angeles has skyrocketed.¹⁵¹ Today, there are at least six times as many gangs and twice the number of gang members in Southern California than in 1988.¹⁵² Gang researchers estimate that there are approximately seven-hundred active gangs in Los Angeles¹⁵³ and anywhere from forty-thousand to two-hundred-thousand gang members.¹⁵⁴ Also, according to FBI Director Robert Mueller, gang activity has particularly increased in Los Angeles in recent years,¹⁵⁵ with Los Angeles Chief of Police William Bratton asserting gang activity increasing by almost sixteen percent in 2006 alone.¹⁵⁶ The continued rise in gang activity has led many to conclude that “the STEP Act has done little or nothing to resolve [Los

¹⁴⁴ CAL. PENAL CODE § 186.21 (2008).

¹⁴⁵ *Id.* § 186.22; *see also* De Vries, *supra* note 30, at 193.

¹⁴⁶ McGreevy, *Mayor Seeks*, *supra* note 16.

¹⁴⁷ McGreevy, *D.A. Accused*, *supra* note 9.

¹⁴⁸ GREENE & PRANIS, *supra* note 1, at 25. The Vera Institute of Justice has further estimated that approximately \$243,764,532 are spent annually to arrest individuals in Los Angeles for gang related crimes, \$9,798,562 are spent prosecuting defendants for gang related crimes, and \$230,289,975 on the incarceration of individuals convicted for gang related crimes. MEGAN GOLDEN, JENA SIEGAL, & DALL FORSYTHE, VERA INSTITUTE OF JUSTICE—COST BENEFIT ANALYSIS 9–12 (2006), http://www.advanceproj.org/doc/p3_cost.pdf.

¹⁴⁹ *See* GREENE & PRANIS, *supra* note 1, at 83.

¹⁵⁰ *See id.* at 13.

¹⁵¹ *See id.*

¹⁵² THE ADVANCEMENT PROJECT, CITYWIDE GANG ACTIVITY REDUCTION STRATEGY: PHASE III REPORT 1, 1 (2006), http://www.advanceproj.org/doc/p3_report.pdf; GREENE & PRANIS, *supra* note 1.

¹⁵³ THE ADVANCEMENT PROJECT, *supra* note 152.

¹⁵⁴ *Id.*; *see also* James Diego Vigil, *A Multiple Marginality of Framework of Gangs*, in THE MODERN GANG READER, *supra* note 4, at 20, 21.

¹⁵⁵ Mueller, *supra* note 6.

¹⁵⁶ GREENE & PRANIS, *supra* note 1, at 13.

Angeles]'s gang problem."¹⁵⁷ The failure of the STEP Act and other gang suppression strategies to decrease gang activity in Los Angeles leads to the inevitable conclusion that Los Angeles is "losing the war on gangs."¹⁵⁸

Many argue that the major reason Los Angeles has had little success in combating gangs is because the vast majority of anti-gang resources in Los Angeles are used to implement gang suppression strategies, which form the backbone of the STEP Act.¹⁵⁹ The STEP Act's provisions criminalizing gang activity and imposing harsher criminal sanctions for gang related offenses contribute to the use of gang suppression strategies to combat gangs because, like other suppression strategies, the Act focuses on eliminating gangs through more stringent punishments for gang activity.¹⁶⁰ This suppression approach contrasts with prevention and intervention tactics, which seek to prevent individuals from joining gangs and to help gang members end their gang involvement.¹⁶¹

Suppression strategies are considered by many to be the least effective strategy for combating gangs in a particular community.¹⁶² As mentioned earlier, many argue that law enforcement's use of suppression strategies and increased criminal penalties to combat gang activities actually strengthens gangs.¹⁶³ Law enforcement efforts that focus primarily on suppression have the effect of increasing the solidarity of gang members¹⁶⁴ and developing increasingly antagonistic relationships between gang members and the police.¹⁶⁵ When youth are labeled as gang members and punished more stringently for suspected gang involvement, their unity as members of a particular gang is likely to increase.¹⁶⁶ This is because gang suppression techniques increase gang solidarity by magnifying a gang's alienation from both mainstream society and its community.¹⁶⁷ Gangs develop an "us against them" mentality that strengthens their members' ties to each other and to their gang.¹⁶⁸ Further, a law enforcement agency's focus on a particular gang may also strengthen the gang by providing the gang with a more cohesive identity¹⁶⁹ and increasing their importance as a group worthy of police attention.¹⁷⁰

Moreover, the focus on suppression frequently leads minority individuals and communities to develop antagonistic relationships with the

¹⁵⁷ *Id.* at 83.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ THE ADVANCEMENT PROJECT, *supra* note 152, at 5; *see also* GREENE & PRANIS, *supra* note 1, at 29; *Report: Gang Suppression Doesn't Work*, U.S.A. TODAY, July 18, 2007, available at http://www.usatoday.com/news/nation/2007-07-18-gang-report_N.htm.

¹⁶⁰ *See* GREENE & PRANIS, *supra* note 1, at 68; *Report: Gang Suppression Doesn't Work*, *supra* note 159.

¹⁶¹ *Report: Gang Suppression Doesn't Work*, *supra* note 159.

¹⁶² Fearn, Decker, & Curry, *supra* note 61. Despite the ineffectiveness of gang suppression strategies, Greene and Pranis argue that they remain popular because suppression provides a society with a sense that something concrete is being done to combat gangs. GREENE & PRANIS, *supra* note 1, at 72.

¹⁶³ GREENE & PRANIS, *supra* note 1, at 6; *Report: Gang Suppression Doesn't Work*, *supra* note 159.

¹⁶⁴ Bjerregaard, *Potential Impact*, *supra* note 8, at 384.

¹⁶⁵ *Id.* at 385.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ GREENE & PRANIS, *supra* note 1, at 68.

¹⁶⁹ Bjerregaard, *Potential Impact*, *supra* note 8, at 385.

¹⁷⁰ GREENE & PRANIS, *supra* note 1, at 68.

police.¹⁷¹ Police are often viewed in minority communities as a source of unjust punishment and harassment rather than as a source of protection.¹⁷² As a result, “an oppositional culture” is likely to develop as gangs and community members face harassment by police gang units.¹⁷³ Youth lose their respect for authority and become less likely to follow laws in a system they believe is illegitimate.¹⁷⁴ Community members also become more likely to view the police as illegitimate because of gang suppression efforts that lead to the harassment of community members.¹⁷⁵ They become less likely to assist in police investigations, and their lack of cooperation may significantly hinder law enforcement investigations of serious gang crimes.¹⁷⁶

Further, as discussed above, the STEP Act’s sentence enhancements have not been a successful suppression strategy because increased incarceration for gang members does little to decrease their gang involvement.¹⁷⁷ In fact, many gang members retain their gang affiliation while incarcerated,¹⁷⁸ and the prevalence of well organized prison gangs leads them to increase their overall gang involvement while in prison.¹⁷⁹ Defense attorneys argue that sending nonviolent offenders to prison to serve elevated sentences for relatively minor crimes increases the likelihood they will become hardcore gang members in order to survive in prison.¹⁸⁰ As a result, the majority of gang members continue their gang involvement after they are released from prison.¹⁸¹

Additionally, the STEP Act has not been effective in combating crime. Despite the common assumption that gang activity is highly indicative of crime in a community, in reality, gang activity does not have a positive correlation with overall crime rates.¹⁸² Across the United States, cities reporting increased gang activity have, at the same time, experienced decreased crime rates.¹⁸³ For example, in Los Angeles, crime rates have been declining; however, there has been a rise in gang related criminal activity in the past several years.¹⁸⁴ The lack of correlation between gang activity and overall crime rates suggests that the gang suppression tactics authorized by the STEP Act have had little impact on crime rates within the city. In fact, since the enactment of Proposition 21, which imposed stricter punishments on gang members, gang related homicides have risen in California, despite Los Angeles’ declining crime rates.¹⁸⁵

¹⁷¹ Bjerregaard, *Potential Impact*, *supra* note 8, at 384.

¹⁷² *Id.*; Vigil, *supra* note 154, at 22.

¹⁷³ GREENE & PRANIS, *supra* note 1, at 71.

¹⁷⁴ See Bjerregaard, *Potential Impact*, *supra* note 8, at 384.

¹⁷⁵ GREENE & PRANIS, *supra* note 1, at 71.

¹⁷⁶ *Id.*

¹⁷⁷ McGreevy, *D.A. Accused*, *supra* note 9.

¹⁷⁸ KNOX ET AL., *supra* note 125.

¹⁷⁹ Allen, *supra* note 131; see also GREENE & PRANIS, *supra* note 1, at 71.

¹⁸⁰ McGreevy, *D.A. Accused*, *supra* note 9.

¹⁸¹ Allen, *supra* note 131; see also GREENE & PRANIS, *supra* note 1, at 71.

¹⁸² GREENE & PRANIS, *supra* note 1, at 4.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 13.

¹⁸⁵ OFFICE OF THE ATT’Y GEN., 2004, *supra* note 50.

Therefore, Los Angeles County's increased gang activity, in contrast to its decreasing crime rates, reveals that the STEP Act has been ineffective in combating gangs and crime within Los Angeles County, especially considering the nonexistent correlation between gangs and crime rates. The strong evidence that the STEP Act and other suppression tactics have not been successful in combating gangs has led even the federal government's Bureau of Justice Assistance to conclude that suppression tactics are not effective tools in the war on gangs.¹⁸⁶ If law enforcement and lawmakers wish to effectively eliminate both gang activities and overall crime, they must turn to other tactics.

V. ALTERNATIVES TO SUPPRESSION TACTICS

In recent years, law enforcement and other government agencies seeking to combat gangs have increasingly emphasized suppression tactics rather than alternative strategies of gang prevention and intervention.¹⁸⁷ In Los Angeles, as in many cities, suppression is the primary strategy used by law enforcement to combat gang activity, and two thirds of all funds designated for gang reduction are directed at gang suppression efforts rather than intervention or prevention strategies.¹⁸⁸ The failure of the STEP Act and other suppression strategies to decrease gang activity in Los Angeles has led many to believe that suppression alone is not an effective reduction strategy.¹⁸⁹ In fact, many prominent researchers assert that suppression is the least effective strategy for combating gangs.¹⁹⁰

A more effective strategy involves a focus on prevention and intervention strategies that address the reasons why gangs are formed and why they are able to maintain their membership levels.¹⁹¹ The STEP Act does not include any provisions focusing on the fundamental reasons for gang membership, and law enforcement and lawmakers should move away from the Act's suppression-based provisions in responding to gang violence.¹⁹² Instead strategies designed to combat gang violence should focus on eliminating causes of criminal gang activity and seek to provide at-risk youths with alternatives to gang involvement.

The economic and social marginalization of low income and minority communities is the major factor that leads many juveniles to join gangs.¹⁹³ James Diego Vigil argues that street gangs exist as an outcome of the marginalization of particular individuals and communities.¹⁹⁴ Vigil asserts that individuals join gangs because they are the only place where low-

¹⁸⁶ GREENE & PRANIS, *supra* note 1, at 96 (citing the Bureau of Justice Assistance website).

¹⁸⁷ Bjerregaard, *Potential Impact*, *supra* note 8.

¹⁸⁸ GREENE & PRANIS, *supra* note 1, at 29.

¹⁸⁹ THE ADVANCEMENT PROJECT, *supra* note 152.

¹⁹⁰ Fearn, Decker, & Curry, *supra* note 61, at 313.

¹⁹¹ Scott H. Decker & Janet L. Lauritsen, *Leaving the Gang*, in THE MODERN GANG READER, *supra* note 4, at 60, 69; Terence P. Thornberry, *Membership in Youth Gangs and Involvement in Serious and Violent Offending*, in THE MODERN GANG READER, *supra* note 4, at 224, 230.

¹⁹² Fearn, Decker, & Curry, *supra* note 61, at 313.

¹⁹³ Vigil, *supra* note 154, at 22; see also Malcom W. Klein, *Street Gangs: A Cross National Perspective*, in THE MODERN GANG READER, *supra* note 4, at 104, 109; Bjerregaard, *Potential Impact*, *supra* note 8, at 383.

¹⁹⁴ Vigil, *supra* note 154, at 22.

income and minority boys are accepted and do not feel marginalized.¹⁹⁵ Similarly, Malcolm Klein argues that the gang problem is not unique to any particular racial group.¹⁹⁶ Rather, it is “the disadvantaged, marginalized and alienated” that are most likely to join gangs.¹⁹⁷ This is true even of white gangs, whose members are likely to feel economically or socially marginalized.¹⁹⁸

The relationship between economic marginalization and gangs is indicated by statistics which reveal an inverse correlation between gang prevalence in a particular area and the income of that community.¹⁹⁹ Low-income youth are far more likely to join gangs than middle and upper class individuals.²⁰⁰ This disparity exists because low-income individuals are often excluded from participation in the mainstream economy and face significant difficulties finding legitimate employment.²⁰¹ Gangs thus become a popular option as a source of employment for urban youth and men who are increasingly excluded from industry and unskilled labor jobs.²⁰² For some, gang participation may be a matter of economic survival.²⁰³

Thus, helping at-risk youths find employment is crucial for combating gangs, and resources should be developed to create more living wage jobs in low-income communities.²⁰⁴ Increased employment is strongly correlated with decreased crime and an increase in law abiding behavior.²⁰⁵ In fact, a ten percent increase in wages has been shown to lead to a 1.8 percent decrease in crime.²⁰⁶ Additional resources should also be directed toward the economic development of at-risk communities, including increased job training for vulnerable individuals,²⁰⁷ and efforts should be made to increase the number of legitimate jobs available in low-income communities.²⁰⁸ The Advancement Project also suggests helping students find summer jobs as a way of both encouraging them to become involved in the work force and also giving them a productive way to spend their summers, thereby eliminating their motivation and opportunity to join gangs.²⁰⁹

Additionally, resources should be devoted to increasing the quality of education for individuals in at-risk communities and to maintaining a safe environment in school.²¹⁰ Individuals will be more likely to find employment if their levels of education improve because, like employment,

¹⁹⁵ *Id.*

¹⁹⁶ Klein, *supra* note 193.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; see also Bjerregaard, *Potential Impact*, *supra* note 8, at 383.

²⁰⁰ See Klein, *supra* note 193, at 109; Bjerregaard, *Potential Impact*, *supra* note 8, at 383.

²⁰¹ *Id.*; Fearn, Decker, & Curry, *supra* note 61, at 313.

²⁰² GREENE & PRANIS, *supra* note 1, at 11; Klein, *supra* note 193.

²⁰³ See GREENE & PRANIS, *supra* note 1, at 11.

²⁰⁴ See, e.g., THE ADVANCEMENT PROJECT, *supra* note 152, at 71.

²⁰⁵ JUSTICE POLICY INSTITUTE, *supra* note 134.

²⁰⁶ *Id.*

²⁰⁷ THE ADVANCEMENT PROJECT, *supra* note 152, at 71.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 95.

²¹⁰ GREENE & PRANIS, *supra* note 1, at 97.

increased education levels are strongly inversely correlated with a reduction in crime.²¹¹ Schools are also essential to helping youth gain skills to find jobs and develop productive commitments and attachments that will keep them from turning to gangs.²¹² Low-income schools should be given additional funding in order to better educate a vulnerable population and help children gain skills and tools to find legitimate employment.²¹³

Another strategy for combating gangs involves policies which work to strengthen family and community ties among at-risk groups.²¹⁴ Many researchers and scholars suggest that youth often join gangs because they lack alternative social networks and family support.²¹⁵ Gang members are more likely to live in single parent homes than non-gang members, and single parents who struggle to provide for their children may not have the time or the resources to help their children develop a sense of belonging and support.²¹⁶ Research suggests that the prevalence of single parent families is elevated in low-income communities because the struggle for economic survival places a substantial stress on the family unit.²¹⁷ An intervention policy that directs resources into providing increased economic opportunity for individuals within a community will help families remain together thereby reducing the difficulties which can cause familial dissolution. These policies will also prevent youth from seeking a sense of belonging through gang membership. Additionally, more support should be given to single parent families attempting to raise children. If these families were given economic support, single parents would have more resources and additional time to spend with their children. Community ties can also be strengthened by increasing after school programs, which provide youth with positive, community building alternatives to spend their time after school.²¹⁸

The STEP Act and other suppression based efforts to combat gangs also contribute to the prevalence of single parent homes in low-income communities.²¹⁹ The increased sentences cause increasing numbers of fathers to be incarcerated for significant periods of time.²²⁰ This increased incarceration perpetuates the cycle of gang membership by increasing the likelihood that children with incarcerated parents will turn to a gang for

²¹¹ *Id.*

²¹² *See, e.g.,* THE ADVANCEMENT PROJECT, *supra* note 152, at 95–97 (discussing changes that have taken place in Los Angeles Unified School District (“LAUSD”), and additional changes that need to take place in order to make schools an effective combatant to gangs).

²¹³ *Id.* at 95; *see also* GREENE & PRANIS, *supra* note 1, at 97.

²¹⁴ Fearn, Decker, & Curry, *supra* note 61, at 313.

²¹⁵ *Id.*; *see also* Stephanie Hooper, *Man's Longing for Family Leads to Gang, Prison*, NASHUA TELEGRAPH, Oct. 18, 2005, available at <http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/20051018/NEWS01/51018001/-1/gangs>.

²¹⁶ Esbensen & Winfree, *supra* note 44, at 168.

²¹⁷ THE ADVANCEMENT PROJECT, *supra* note 152, at 2–3.

²¹⁸ *Id.* at 2.

²¹⁹ Joe Murray, *Fathers in Prison*, ACTION FOR PRISONERS' FAMILIES (2002), <http://actionpf.org.uk/fathersinprison.html>; *see also* Justin Dryer, *Prison, Fathers, and Identity: A Theory of How Incarceration Affects Men's Paternal Identity*, 3 FATHERING 201, 201–19 (2005).

²²⁰ *See id.*

identity and belonging, due to the lack of familial support.²²¹ A main reason children of gang members are also likely to join gangs is because one or both of their parents spent a significant period of time incarcerated while they were young.²²² In fact, studies show that children with incarcerated fathers are seven times more likely to go to prison themselves.²²³ Forty-eight percent of prison inmates have parents who have been incarcerated,²²⁴ and half of all imprisoned juveniles have a parent who is also currently behind bars.²²⁵ Policy makers should consider the contribution of lengthy prison terms to the perpetual cycle of imprisonment within families when developing sentencing guidelines. Moreover, resources should be utilized to help incarcerated gang members remain involved in their children's lives and to help children with incarcerated parents receive support and guidance they so desperately need.

Next, a successful gang intervention strategy should work to promote legitimate opportunities for gang members once they are released from prison.²²⁶ Gang members are often unable to secure employment when they return to their communities because their criminal records and conspicuous tattoos signify their history of gang involvement.²²⁷ Reducing criminal background check requirements for employment is one way to help former gang members find employment.²²⁸ Policy makers should note that organizations seeking to provide employment opportunities for former gang members have been extremely successful preventing gang members from returning to their lives of crime when they are released.²²⁹

For example, Homeboy Industries, a Los Angeles based gang intervention organization that helps former gang members find employment, has been lauded for its efforts to help gang members leave the gang lifestyle.²³⁰ True to its slogan, "Jobs, not Jails," Homeboy Industries helps approximately three-hundred individuals find employment each year, many of whom are gang members recently released from prison.²³¹ The organization also provides free tattoo removal for former gang members and has helped over fifteen-hundred individuals remove their gang tattoos, which is an important step in helping former gang members find

²²¹ See, e.g., Erin Roach, *MSC Missionary Works to Stop Prison Cycle in Ky. Homes*, KENTUCKY BAPTIST CONVENTION, June 6, 2007, <http://www1.kybaptist.org/kbc/welcome.nsf/pages/hrawana>; Fox Butterfield, *Father Steals Best: Crime in an American Family*, N.Y. TIMES, Aug. 21, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9C00E1D91F3DF932A1575BC0A9649C8B63>; Kevin Johnson, *For Many of USA's Inmates, Crime Runs in the Family*, U.S.A. TODAY, Jan. 28, 2008, available at http://www.usatoday.com/news/nation/2008-01-28-crime-families_N.htm.

²²² Jody Miller, *Getting into Gangs*, in THE MODERN GANG READER, *supra* note 4, at 52.

²²³ Roach, *supra* note 221.

²²⁴ Johnson, *supra* note 221.

²²⁵ Butterfield, *supra* note 221.

²²⁶ GREENE & PRANIS, *supra* note 1, at 7.

²²⁷ *Id.*

²²⁸ THE ADVANCEMENT PROJECT, *supra* note 152, at 3.

²²⁹ See, e.g., James Flannigan, *Small Businesses Offer Alternatives to Gang Life*, N.Y. TIMES, Mar. 20, 2008, available at http://www.nytimes.com/2008/03/20/business/smallbusiness/20edge.html?_r=1&oref=slogin; Ellie Hidalgo, *Homeboy Industries Breaks Ground for New Bakery*, TIDINGS ONLINE, Mar. 17, 2006, <http://www.the-tidings.com/2006/0317/homeboy.htm>; Edward Iwata, *Homeboy Industries Goes GangBusters*, U.S.A. TODAY, July 11, 2005, available at <http://www.usatoday.com/educate/college/careers/Entreprs/7-11-05.htm>.

²³⁰ Flannigan, *supra* note 229.

²³¹ Iwata, *supra* note 229.

employment.²³² Moreover, Homeboy Industries works specifically with recently released gang members in their transitions from prison back into their communities, helping previously incarcerated individuals find housing, schooling, and job training.²³³ Anti-gang resources should be dedicated to developing organizations like Homeboy Industries, which are successful in helping gang members, especially those who have been incarcerated, find legitimate alternatives to criminal gang activity.

Next, law enforcement agencies should seek to lower crime rates as a whole, rather than specifically focusing on gang related crime. As discussed above, the prevalence of criminal activity by gangs is unrelated to the level of criminal activity in a jurisdiction.²³⁴ Gangs are responsible for a relatively small percentage of crime within the United States.²³⁵ Even though gangs contribute to overall crime rates in Los Angeles, gang activity in the city has continued to increase while overall crime rates have decreased.²³⁶ Nationally, gangs are responsible for only three to four percent of serious crime in the United States.²³⁷ While gangs are responsible for a significant percentage of juvenile crime, the majority of juvenile crimes are still committed by non-gang members.²³⁸ Juvenile gang members are responsible for only twenty-six percent of juvenile delinquency, thirty-two percent of juvenile drug crimes, and only nineteen percent of juvenile arrests.²³⁹ Therefore, law enforcement agencies seeking a safer society should broaden their focus to all crimes, rather than just gang related criminal activity.

One city that has been successful combating gangs and decreasing the level of gang violence is New York City.²⁴⁰ New York City faced a widespread gang problem from the 1940s through the 1960s but has successfully curbed the problem over the past three decades.²⁴¹ In sharp contrast to the increased panic concerning gangs in most of the United States, many in New York now say, "New York really doesn't have a chronic gang problem."²⁴² The city's success is largely attributed to its widespread use of social programs to combat gangs.²⁴³ These programs include job training, mentoring, after-school activities, and recreational programs that have been successful in helping at-risk individuals both avoid and leave gangs.²⁴⁴ New York City's history of gang intervention started in 1947 when the New York City Youth Board was established.²⁴⁵

²³² Homeboy Industries, Ya' Stuvo Tattoo Removal, <http://www.homeboy-industries.org/tattoo-removal.php>.

²³³ Homeboy Industries, Pre-Release/Transition, <http://www.homeboy-industries.org/pre-release-transition.php>.

²³⁴ GREENE & PRANIS, *supra* note 1, at 4.

²³⁵ *Id.*

²³⁶ *Id.* at 13; *see also* Shepard, *supra* note 114.

²³⁷ GREENE & PRANIS, *supra* note 1, at 55.

²³⁸ *Id.* at 54.

²³⁹ *Id.*

²⁴⁰ Tom Jackson, *Social Programs to Combat Gangs Seen as More Effective than Police*, WASH. POST, July 18, 2007, at B03; GREENE & PRANIS, *supra* note 1, at 6.

²⁴¹ Jackson, *supra* note 240; GREENE & PRANIS, *supra* note 1, at 15.

²⁴² Jackson, *supra* note 240.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ GREENE & PRANIS, *supra* note 1, at 16.

Board members built relationships with gangs members, helped them develop employable skills and find jobs, and organized neighborhood athletic competitions and social events.²⁴⁶ The Youth Board's success in decreasing violent gang activity was so great that, by the mid sixties, gangs were no longer considered a major problem in New York City.²⁴⁷ Despite periodic resurgences in gang activity, gang membership in New York has not reached previous heightened membership levels, even when gang membership skyrocketed throughout the rest of the country.²⁴⁸ New York City's success at keeping violence levels low has been largely attributed to its long term investment in gang prevention and intervention.²⁴⁹ Its method of building community structures and helping gang members find employment can be a model and an inspiration for Los Angeles and other cities seeking to more effectively combat gangs.

Thus, those wishing to combat gangs and crime in Los Angeles and other parts of California should move away from suppression strategies such as the STEP Act and develop gang intervention and prevention strategies. Alternative strategies include investing in legitimate employment and education for at-risk individuals and those who have been involved in gangs, working to strengthen families through economic opportunities and decreased prison sentences, and seeking economic development for at-risk communities.

VI. CONCLUSION

The Street Terrorism Enforcement and Prevention Act raises important concerns of fairness and effectiveness and should be reconsidered as a means of combating criminal gang activity within California. The Act is fundamentally unjust because law enforcement agencies disproportionately apply its provisions to minority community members. At the same time, the Act permits those agencies to define gangs in ways that overlook and misclassify the crimes committed by white "gang" members. Moreover, its sentence enhancements impose punishments vastly disproportionate to the crimes committed by offenders. The STEP Act is not helpful in combating gangs and has done little to decrease gang violence in Los Angeles; in fact, its measures may actually strengthen gangs.

If Governor Schwarzenegger, Mayor Villaraigosa, and the California legislature are sincere in their desire to combat gangs and crime in Los Angeles, they should reconsider use of the STEP Act and other suppression based tactics. Instead of seeking maximum punishment for suspected gang offenders, resources should be allocated to eliminate the root causes of gangs, including poverty and marginalization. If we work to improve education, to strengthen families and communities, to create jobs, and to help low-income communities develop economically, we will be able to

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 16–17.

²⁴⁸ *Id.* at 17–18.

²⁴⁹ *Id.* at 15–17.

decrease gang violence more effectively and help at-risk youth be successful in society.

