

Comments

Guilt By Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California

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TIFFANY, A TWELVE-YEAR-OLD middle school student, was “jumped” by gang members in the bathroom and escaped without being raped only because a teacher walked in to use the facilities.¹ After she told her eleven-year-old gang-member brother about the attack, he punched one of his sister’s assailants at school the next day. Based on Proposition 21’s expanded definition of a gang member, Tiffany may be charged with assault as well as felony gang affiliation.²

Fourteen-year-old Bobby is the oldest of six children and lives with his family in a gang-ridden, low-income neighborhood. When his single mother fell ill, Bobby accepted money from a neighbor so he could buy groceries for his family that week. Because Bobby knew the

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1. The true names of all the children used as examples in this Comment have been omitted or changed. These scenarios are taken from pending cases or situations envisioned by practicing public defenders. This Comment generally refers to defendants and potential gang members using masculine pronouns, although Proposition 21 applies equally to females.

2. See CAL. PENAL CODE § 186.22(a) (West Supp. 2002). This statute includes language which allows a prosecutor to charge a defendant with the substantive offense of gang affiliation as either a misdemeanor or a felony, which is a type of law known as a “wobbler” offense. For purposes of this Comment, the offense will be treated as a felony.

neighbor was in a gang that sold drugs, and he benefited from felonious gang activities, Bobby may be charged with Proposition 21's newly created felony of gang-related conspiracy.³ As a co-conspirator, Bobby could also be charged for any crime committed by members of his neighbor's gang.⁴

These essentially innocent minors are nonetheless potential felons under the "Gang Violence and Juvenile Crime Prevention Act of 1998,"⁵ also known as Proposition 21. Before Proposition 21, minors could be punished for gang affiliation under the 1988 Street Terrorism Enforcement and Prevention Act⁶ ("STEP Act")—the first law in California to define a "criminal street gang."⁷ The STEP Act also established a felony for "gang affiliation," a substantive offense trig-

3. See CAL. PENAL CODE § 185.2 (West Supp. 2002). No conspiracy law existed specifically for gang members before this new law was created.

4. Compare CAL. PENAL CODE § 185.2 (West Supp. 2002), with CAL. PENAL CODE § 185 (West 1999). The new gang conspiracy law triggers a traditional conspiracy analysis with respect to gang members. Under traditional conspiracy, once a person is found to be a co-conspirator, he may be charged for crimes committed by co-conspirators if the act was committed in furtherance of the original conspiracy.

5. CAL. BALLOT PAMPHLET, PRIMARY ELECTION (Mar. 7, 2000) pp. 44–49, available at http://holmes.uchastings.edu/ballot_pdf/2000p.pdf [hereinafter *Cal. Proposition 21*] (last visited on June 21, 2002) (official title, summary, analysis, arguments and text of Prop. 21).

6. CAL. PENAL CODE §§ 186.22–186.33 (West 1999 & West Supp. 2002). The STEP Act contains numerous provisions that have different functions: Section 186.22(a) is the focus of this Comment, which is a substantive offense referred to as "active participation in a criminal gang." This offense is referred to in this Comment as "gang affiliation" so as to not confuse the substantive offense with the included element referred to as "active participation." Subsection (b) is a sentence enhancement that may be charged in conjunction with the conviction of certain crimes. See *People v. Herrera*, 83 Cal. Rptr. 2d 307, 313 (Ct. App. 1999) (discussing the legislative history of the STEP Act active participation requirement and distinguishing subsection (a) as punishing active participation because of gang affiliation and subsection (b) as a sentence enhancement for gang-related crimes). This sentence enhancement is for one to ten years in addition to any sentence associated with an underlying felony. See CAL. PENAL CODE § 186.22(b) (West 1999 & West Supp. 2002). The time added depends on the gravity of the crime, although that section is not addressed in this Comment. See *id.* Only subsection (a) requires a showing of "active participation."

7. CAL. PENAL CODE § 186.22(f) (West Supp. 2002). The STEP Act defines the criminal street gang as an organization of three or more persons who identify themselves with a name or sign, whose members collectively have engaged in a pattern of criminal gang activity. Common knowledge tells us that young people generally prefer to socialize in small groups that can easily meet the non-criminal requirements of this definition. Thus, the differentiating factor between legal and criminal gangs is a pattern of criminal gang activity. See *id.* Further, if a young person does commit a crime and is between fourteen and fifteen years old, the data tells us they are committing that crime with another person. See FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 13–14 (1998). However, group involvement plays a much smaller role in crimes committed by adults. *Id.* at 14. Therefore prosecuting youth for the group aspect of their crime will have a particularly harsh effect on minors.

gered by “actively participating” in a criminal street gang.⁸ Before being revised by Proposition 21, the STEP Act precluded prosecutors from charging gang-related offenses against people like Tiffany and Bobby, who are examples of “fringe-offenders.”⁹

In March 2000, Proposition 21 enacted two revisions to the California Penal Code that dramatically altered the identification and punishment of fringe-offenders.¹⁰ First, a defendant need not be a member to be charged as an active participant in a gang.¹¹ Second, and most importantly, Proposition 21 enacted a conspiracy law allowing gang participants to be charged as co-conspirators for any crime a fellow gang member commits.¹² Under this newly created conspiracy theory, a juvenile may now be sentenced for a gang-related crime in which he did not participate.

Under these revised statutes, a prosecutor has the discretion to charge a minor with either gang affiliation or gang conspiracy based on virtually identical elements, which include: (1) active participation in a gang; (2) knowledge of a criminal street gang’s crimes; and (3) commission of a felony to aid and abet a gang.¹³ There is one excep-

8. See CAL. PENAL CODE § 186.22(a) (West 1999 & West Supp. 2002). The same term, “active participation,” refers to two interrelated concepts: first, a threshold element based on associational conduct for the STEP Act (and the new conspiracy charge); and second, a substantive felony under the STEP Act. *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 353 (Ct. App. 1991) (clarifying that prior to the STEP Act, there was no California law which made the crimes committed by gang members a separate distinct offense from an underlying crime). Active participation as an element defines the relationship necessary to charge an individual defendant as a member or participant of a specific gang. The element of “active participation” shall be referred to as such, while the substantive charge of “active participation” shall be referred to in this Comment as “gang affiliation.” The active participation element is necessary but not sufficient to trigger both statutes. The California Supreme Court has also interpreted the element of active participation even more broadly in recent years, so that now active participation may be found if a person has only been associated with a single gang-related crime. See *People v. Castenada*, 3 P.3d 278 (Cal. 2000).

9. “Fringe-offenders” refers to minors who do not belong in a gang themselves, but rather are tangentially affiliated through their relationships with family, friends, and neighbors. While these gang laws apply equally to adults and minors, the focus of this Comment is exclusively on minors.

10. Numerous changes enacted by Proposition 21 affected gang members both by directly revising the STEP Act and expanding the definitions of crimes typically committed by juveniles. Additionally, these changes revised the application of the Three Strikes Law. See *infra* note 138. These important issues are beyond the scope of this Comment.

11. See CAL. PENAL CODE § 186.22(i) (West Supp. 2002). The revised definition for the element of active participation states it is no longer “necessary to prove that the person is a member of the criminal street gang.” *Id.*

12. Compare CAL. PENAL CODE § 182.5 (West 2002), with CAL. PENAL CODE § 182 (West Supp. 2002) (defining gang and traditional conspiracy).

13. Compare CAL. PENAL CODE § 186.22(a) (West Supp. 2002), with CAL. PENAL CODE § 182.5 (West Supp. 2002). See also CAL. JURY INSTRUCTIONS CRIM. 6.50 (6th ed. 1996).

tion to this phenomenon: The gang conspiracy law includes an alternative conduct element to charge juveniles who “benefit from” a gang’s crimes rather than requiring the minors aid and abet a gang’s felonious activities.

California courts have yet to review the new gang conspiracy law.¹⁴ The purpose of this Comment is to analyze the gang conspiracy statute through analogy to judicial interpretations of the gang affiliation section of the STEP Act. Part I reviews the background of the STEP Act and Proposition 21. Part II describes the constitutionally acceptable forms of punishment for associational conduct and applies United States Supreme Court standards to gang affiliation both before and after Proposition 21’s changes. Part III evaluates whether the new gang conspiracy statute complies with Due Process and First Amendment tenets. It further analyzes the deleterious effects on fringe-offenders.

Part IV offers suggestions for both legislative and judicial reforms to revise both the gang affiliation and gang conspiracy statutes. In particular, it suggests a narrowing of the “active participation” element so that it only applies to those for whom the STEP Act was originally designed—felonious offenders who specifically intended their personal criminal conduct would aid and abet a criminal street gang’s crimes. Finally, this section concludes that a policy predicated upon extended incarceration for younger “active participants” in gangs offers a counterproductive form of “intervention” which ultimately will guarantee the escalation, rather than prevention, of California’s gang-related youth violence.

I. The STEP Act and Proposition 21: History and Politics of Juvenile Crime in California

A. STEP Act: Why Minors Are Prosecuted Like the Mafia

Changes in our juvenile justice laws over the past twenty years have been influenced by individual political ambitions, media depictions of violence, and the increased availability of handguns.¹⁵ In re-

14. These changes have not been reviewed by any court as of this journal’s publication.

15. See, e.g., WILLIAM J. BENNETT, ET AL., *BODY COUNT: MORAL POVERTY—AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 27 (1996) (asserting that “common sense alone should be sufficient to prove that the one-drive-by-shooting-a-night gangs of the late 1980s and early 1990s represent a far greater physical and moral menace than the one-knife-fight-a-year street gangs of earlier decades”); Lori Dorfman & Vincent Schiraldi, *Off Balance: Media Coverage of Youth Crime* 58:2 *GUILD PRAC.* 75 (Spring 2001) (showing startling

sponse to dramatic stories in the media and an increase in youth violence associated with gun-related deaths starting in the late 1980s, lawmakers identified a cause for the escalation in crime—ultra-violent and sophisticated gangs.¹⁶ The issue became a focus of national news headlines when Los Angeles gangs, namely the Bloods and the Cripps, gave a face to the gang profile.¹⁷

However, a closer analysis of the five most violent crimes committed by fourteen to seventeen-year-olds from 1980 to 1996 reveals a more precise problem. The incidence of only two crimes increased during this period, homicide and aggravated assault. Although the underlying conduct had not changed, these acts now included a handgun to augment the severity and number of these crimes.¹⁸

Politicians responded to these events with a “get tough on crime” platform and the national political agenda for juvenile delinquents shifted from one focused on rehabilitation to one incorporating varying degrees of retribution and deterrence through incarceration.¹⁹ Most states passed legislation to severely punish gang crimes on the premise that minors in gangs were sophisticated criminals like their adult counterparts in the mafia.²⁰ These gang laws were modeled after the Racketeering Influenced and Corrupt Organizations Act (RICO) in order to penalize youth for the group aspect of any gang-related

statistics such as fifty-three percent of California news stories about youth in 1993 were about youth involved in violence, while only two percent of youth were in fact perpetrators or victims of violence that year).

16. See PETER ELIKANN, *SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW* 42 (1999).

17. See generally Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 954–55 (1993) (documenting the media’s hyped coverage of the Bloods and Cripps in Los Angeles as sophisticated national groups of organized criminals).

18. See, e.g., ZIMRING, *supra* note 7, at 36–37 (1998) (explaining the increased availability of handguns directly correlated to these increases in violent crime). Youth and adult arrest rates for homicide were based on Federal Bureau of Investigations statistics from 1976–93, 1994, 1995–96 and gun versus non-gun homicides from 1976 to 1992 based on United States Department of Justice studies. *Id.*

19. See Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California’s Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 233–234 (2000) (documenting that no major change had occurred in California’s juvenile justice system until enactment of the STEP Act in 1988 and Proposition 21 in 2000, which dramatically revised the overarching penal policy from one of rehabilitation to one of retribution and deterrence). See also In re Alberto R., 1 Cal. Rptr. 2d 348, 353 (Ct. App. 1991) (describing history of the STEP Act as a way to deter gang violence).

20. See Mayer, *supra* note 17, at 954–55; see also ZIMRING, *supra* note 7, at 11–12 (describing the array of federal and state statutes that emerged during this period ranging from gun-free schools to curfew ordinances).

crime.²¹ It was in this climate that California passed the STEP Act of 1988, which was later revised by Proposition 21 in 2000.²²

Under the STEP Act, defendants who have knowledge of a gang's criminal activities, and who commit a felony with the specific intent to aid and abet a criminal street gang's endeavors, could be charged with two distinct crimes: (1) an underlying felony; and (2) committing this felony with the specific intent of aiding and abetting a gang's criminal activities.

For example, Tiffany's underlying felony, introduced at the beginning of this Comment, would be conspiring with her brother to assault her attackers. In addition, Tiffany's underlying felony would qualify as a gang-related assault because her brother was retaliating for a gang attack in the first place. If the STEP Act gang affiliation crime is charged, Tiffany will then face two distinct counts for the same allegedly criminal conduct: (1) assault (an underlying "gang-related" felony); and (2) gang affiliation.

B. Proposition 21: A Response to the Superpredator Theory

In 1996, an election year, influential political commentators articulated a popular theory that there was a "coming storm" of violent youth:²³

America is now home to thickening ranks of juvenile "super-predators"—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create

21. See, e.g., Bart H. Rubin, *Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute*, 66 *FORDHAM L. REV.* 2033, 2051 (1998) (listing traits identified by President Clinton's Commission on Organized Crime to describe a criminal organization under RICO which displays the following characteristics: "continuity of operations over a long period of time, a hierarchical management structure, restricted membership based upon a common trait among the individuals in the group, reliance on continuing criminal activity as a source of income, systematic violence used as a means of control and protection, . . . and a motivation to enhance its power in the community and its level of profits.").

22. Compare CAL. PENAL CODE § 186.22 (West 1999) (enacted Sept. 23, 1988), with CAL. PENAL CODE § 186.22 (West Supp. 2002) (enacted Mar. 7, 2000 by Proposition 21).

23. The founders of this juvenile social theory included: William J. Bennett, former secretary of education and national drug czar under President George Bush; John P. Walters, current drug czar under President George W. Bush; and John J. DiIulio Jr., current director of the office of Faith-Based and Community Initiatives under President George W. Bush. See Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, *N.Y. TIMES*, Feb. 9, 2001, at A19; William J. Bennett, *Teaching September 11*, *WALL ST. J.*, Sept. 10, 2002, at A12; Michael Hedges, *Former William Bennett Aide Will Be Drug Czar Sources Say*, *HOUSTON CHRON.*, Apr. 24, 2001, at A6.

serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment or the pangs of conscience.²⁴

The theory was nationally promulgated and accepted by politicians and constituents despite the fact that during the mid-1990s the incidence of juvenile crime started to decline.²⁵

In response to the superpredator theory, Congress drafted legislation that called for incarcerating a child as young as thirteen years old in adult prisons and blocking funds to states that did not pass similar types of laws.²⁶ Pete Wilson, former Governor of California (who was preparing for the Presidential campaign in 2000 as a Republican candidate) responded by drafting a version of Proposition 21.²⁷ Mr. Wilson's drastic revisions to the juvenile justice system were rejected twice by California's legislators in part because the new "active participation" definition and gang conspiracy law created the potential for the unnecessary and unconstitutional incarceration of a new generation of juvenile delinquents.²⁸

24. BENNETT, *supra* note 15, at 27. See also ELIKANN, *supra* note 16, at 4. Interestingly, Mr. Dilulio has since retracted his assertion and found that only prevention programs will truly deter youth violence. See Becker, *supra* note 23, at A19.

25. See ZIMRING, *supra* note 7, at 31–35.

26. See, e.g., *Violent Youth Predator Act of 1996: Hearings on H.R. 3565 Before the House Subcomm. on Crime*, 104th Cong. (statement of Bill McCullom, Chairman). The Act's sponsor testified before Congress about the theory's virtues: "No population poses a larger threat to public safety than young adult criminals. Teenagers account for the largest portion of all violent crime in America." *Id.* However, national statistics were telling the opposite story—youth violence had decreased four percent from 1994 to 1995, prompting then Attorney General Janet Reno to lobby a "nationwide effort to stop youth violence before it starts." Cf. Robert Suro, *Violent Crime Drops Among Young Teens*, WASH. POST, Dec. 13, 1996, at A1.

27. See Raymond, *supra* note 19, at 252–53 (documenting the fact that then California Governor Wilson tried to pass over eleven "get-tough on juvenile crime" bills from 1995 to 1998 before having the California District Attorneys Association sponsor the Proposition 21 initiative); Mark Smallen, *Kidding Ourselves on Juvenile Crime*, THE RECORDER, Mar. 1, 2000, at 5 (commenting on former Governor Wilson's 1996 and 1997 attempts to pass juvenile justice reforms through the Legislature).

28. See Assembly Comm. on Public Safety, Bill Analysis for AB 33 (amended Jan. 7, 1998), *Argument in Opposition*, p. 7 (hearing date Jan. 20, 1998), available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_33_cfa_19980116_164551_asm_comm.html:

[I]ncreased sentences will cost vast sums of money to build and run the necessary prisons. . . . [T]he need for this bill is questionable. There is no showing that gang members charged with crimes are not being adequately and severely punished. There has been no showing that the present sentencing scheme is so lenient that gang crime is on the increase. In fact, the opposite is true: statistics show that crime in all categories is dropping. . . . This bill does nothing to prevent gang crime or prevent children from becoming gang members. Perhaps this money would be better spent in gang prevention and youth guidance efforts which

Shortly thereafter, Proposition 21 was re-packaged as a voter initiative for the 2000 presidential election year.²⁹ The campaign to pass the initiative was very well-funded.³⁰ Not surprisingly, the voters passed it by a large majority.³¹ The initiative proposed a nearly complete overhaul of California's juvenile justice system, ranging in scope from trying and sentencing teenagers as adults,³² to revising the Three

would reduce crime and spare another generation from falling victim to the gang/crime lifestyle.

Id.

29. See *Robert L. v. Super. Ct.*, 109 Cal. Rptr. 2d 716, 721 (Ct. App. 2001) (discussing the legislative history of the initiative as being the reincarnated language from S.B. 1455 and A.B. 1735 which were both rejected in the state Legislature).

30. See Matt Isaacs, *For Pete's Sake: Why Giant Corporations Like PG&E Bankrolled a Juvenile Crime Initiative*, S.F. WEEKLY, Jan. 12, 2000, (identifying primary funding sources as utility and oil companies, and investment bankers) at <http://www.sfweekly.com/issues/2000-01-12/bayview.html/1/index.html> (last visited on June 21, 2002). Interestingly, the initiative was funded by groups that traditionally had no interest in juvenile justice issues, but may have been involved in the timely politics of a would-be presidential candidate.

31. CALIFORNIA SECRETARY OF STATE, *Vote 2000 California Primary Election Report on State Ballot Measures* (stating that sixty-two percent of the electorate voted for Proposition 21), available at <http://primary2000.ss.ca.gov/returns/prop/00.htm> (last visited on June 21, 2002). Note that Proposition 21 revised numerous California Penal code sections. In a concurring opinion in a matter considering the constitutionality of Proposition 21, Justice Moreno of the California Supreme Court suggests the general public probably did not understand what a yes or no vote meant for Proposition 21 because of the numerous matters to be decided in that election year and the complexity of Proposition 21's breadth and scope. See *Manduley v. Super. Ct.*, 41 P.3d 3, 35 (Cal. 2002).

On the March 7, 2000 ballot on which Proposition 21 appeared, there were 17 initiatives and one referendum, including complex and important matters involving election reform, limits on same-sex marriages, voting requirements for school bonds, and approval of Indian gaming compacts. The texts of the proposed laws took 56 double-columned pages of small (9 point) type. The ballot summaries and arguments were 78 pages long. It is doubtful that the average judge or lawyer, let alone the average layperson, comprehended all the material within those pages.

Id. at 35 (Moreno, J., dissenting).

32. See CAL. WELF. & INST. CODE §§ 602, 707 (West Supp. 2002). See generally *Manduley v. Super. Ct.*, 41 P.3d 3, 32-33 (Cal. 2002) (affirming that prosecutors may charge minors as adults and expose them to a sentence in adult prison without violating constitutional tenets requiring a separation of powers between the different branches of government). Justice Kennard wrote an eloquent dissent in this recent California Supreme Court decision, describing why a policy that makes it easier to try and sentence minors as adults is a more harmful than effective overall policy. See *id.* at 39-45. The most controversial change produced by Proposition 21 was to eradicate the hearing previously required for teenagers as young as fourteen to be tried as adults and sentenced in adult prison.

The juvenile court system and the adult criminal courts serve fundamentally different goals. . . . [There are] seven objectives in sentencing a criminal defendant [who is an adult]. They include punishment, deterrence, isolation, restitution, and uniformity in sentencing, but they do not include goals important in the treatment of juvenile offenders such as maturation, rehabilitation, or preservation of the family. In contrast, the juvenile court system seeks not only to protect the

Strikes Law's policies,³³ and increasing the number of serious and nonviolent felonies.³⁴ Proposition 21 included a particularly harsh emphasis toward would-be gang members by creating this gang conspiracy law and dramatically increasing punishments for gang members by revising the STEP Act.³⁵

C. Proposition 21's Changes Affecting Fringe-Offenders

To begin with, Proposition 21 revised the gang affiliation law by redefining the element of "active participation" which defines who qualifies as a "gang member." Previously, the prosecution had to show a defendant's relationship with a gang was more than nominal, passive, inactive, or purely technical, and, that the defendant devoted all, or a substantial part of his time and efforts to the criminal street gang.³⁶ The new requirement states:

[I]t is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.³⁷

In other words, a defendant need not actually be a gang member to be an active participant, nor must he make a substantial time commit-

public safety, but also the youthful offender. . . . The practical consequences [of a minor being tried as an adult] are immense. [For example, an] adult court may sentence a defendant to life imprisonment; a juvenile court cannot impose confinement beyond the age of 25.

Id. at 40–41 (Kennard, J., dissenting).

33. See CAL. PENAL CODE § 667.5 (West Supp. 2002). The way the Three Strikes Law works is as follows: A defendant who commits any serious felony with one prior strike of a serious felony must be sentenced to twice the base term of the currently charged felony. If he has two or more prior strikes, he must be sentenced to a minimum of twenty-five years to life in state prison for the non-violent or serious current offense. See *id.*

34. See discussion *infra* Part II.C.2. Proposition 21 greatly expanded the underlying list of serious felonies to trigger the Three Strikes Law. See CAL. PENAL CODE § 1192.7(c) (West Supp. 2002).

35. See CAL. PENAL CODE §§ 186.22(b), 1192.7, 667.5 (West Supp. 2002) (enacted Mar. 7, 2000 by Proposition 21). The STEP Act was amended by Proposition 21 to increase penalties for gang related felonies to add two, three or four years as a sentence enhancement under CAL. PENAL CODE Section 186.22(b)(1), unless the underlying felony is a "serious felony" within the meaning of CAL. PENAL CODE Section 1192.7, in which case the additional penalty is five years, or unless the underlying felony is a "violent felony" within the meaning of CAL. PENAL CODE Section 667.5, in which case the additional penalty is ten years. See *id.* See also *Manduley*, 41 P.3d at 39–45 (Kennard, J., dissenting) (describing changes implemented by Proposition 21).

36. See *People v. Green*, 278 Cal. Rptr. 140, 146 (Ct. App. 1991) (quotations omitted).

37. CAL. PENAL CODE § 186.22(i) (including language from *In re Lincoln J.*, 272 Cal. Rptr. 852, 856 n. 4 (Ct. App. 1990) as amended by Proposition 21 in Mar. 7, 2000).

ment to a gang to satisfy the element of active participation. Because of this expansive new definition, the courts' interpretation will be critical to determine whether a defendant may be charged with gang affiliation or conspiracy.³⁸

The second change examined here pertains to the newly created gang conspiracy law which states:

[A]ny person who actively participates in any criminal street gang, . . . with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, . . . and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished [under the traditional conspiracy theory] as specified in subdivision (a) of Section 182.³⁹

Under Proposition 21's new law, any defendant who satisfies most of the same elements as the gang affiliation law, or "benefits from" a gang's crime, may be charged as a co-conspirator for any crime committed by other gang participants.⁴⁰ Gang conspiracy also includes the element of "active participation" as defined by the STEP Act's gang affiliation law and revised by Proposition 21.⁴¹

It remains unclear whether the revised associational scheme under both statutes complies with Due Process and the First Amendment.

II. Constitutional Requirements Under Which States May Punish Defendants for Associational Conduct

A. Due Process

In *Scales v. United States*,⁴² the Supreme Court established the test for whether a statute that punishes affiliation with an organization sat-

38. This change must be considered in the context that active participation is but one of three elements required under the gang affiliation charge: active participation, knowledge of a gang's crimes, and commission of a felony to aid and abet a gang. See CAL. PENAL CODE § 186.22(a) (West 1999, West Supp. 2002); CAL. JURY INSTRUCTIONS CRIM. 6.50 (6th ed. 1996).

39. CAL. PENAL CODE § 182.5 (West Supp. 2002).

40. See CAL. PENAL CODE § 182(a) (West Supp. 2002) (prohibiting traditional conspiracy which allows someone dubbed as a "co-conspirator" to be charged with crimes committed by other co-conspirators, here relating to other gang participants).

41. It is the author's assumption that the active participation requirement in the new conspiracy statute is a threshold element, not a substantive crime. See discussion *supra* note 8 (discussing the difference between the substantive offense and element called "active participation"). The definition for the element of "active participation" will come from statutory language and subsequent judicial interpretations of the STEP Act. See CAL. PENAL CODE § 186.22(i) (West Supp. 2002) (defining active participation).

42. 367 U.S. 203 (1961).

isfies the Due Process clause.⁴³ The *Scales* Court held that to satisfy Due Process, three distinct elements must be included in such a statute: active participation, specific intent to further the organization's criminal endeavors, and knowledge of the organization's criminal activity.⁴⁴

In *Scales*, the Court considered whether a defendant who was a leader of the Communist Party could rightfully be charged for the criminal acts of his colleagues who belonged to the same organization.⁴⁵ The Court held that guilt by association, even in an illegal organization, must be based upon a defendant's active participation in the organization and not merely his affiliation:⁴⁶

It is settled that criminal liability may not be predicated on nothing more than membership; i.e., nothing more than some association with a group. Rather, it has been held that a "member" may not be subjected to criminal liability for the acts of the association to which he is a member unless his membership is "active," a term which has been held to be well understood in common parlance.⁴⁷

Guilt by association is only justified when the relationship between an individual defendant and an illicit group is substantial:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.⁴⁸

43. Due Process requires that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7.

44. *Scales*, 367 U.S. at 227. In addition to these three elements, the *Scales* personal guilt theory requires an individual's otherwise non-criminal act not be defined as criminal simply based on its associational setting. *See id.* The associational analysis relating to the Due Process theory of personal guilt is more clearly discussed in the context of a First Amendment violation, but equally applies to the Due Process argument.

45. *See id.* at 205.

46. *See id.* at 227-28.

47. *People v. Green*, 278 Cal. Rptr. 140, 145 (Ct. Appeal 1991) (applying *Scales*). However, the term "active participation" is not understood in common parlance as it applies to teenagers associating with their peers. Analyzing whether teenagers belong to a particular group is a very different process from determining whether members of an organized political party may be classified as "active" or "inactive."

48. *Scales*, 367 U.S. at 224-25.

The Court considered both the amount and quality of time a defendant would need to devote to the organization:⁴⁹ "To be active he must have devoted all, or a substantial part, of his time and efforts to the [group]."⁵⁰

A law may also violate Due Process if it is too vague. Under this test, a law may be invalidated in either of two ways: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."⁵¹ This test requires that each element be analyzed to determine whether the prohibited conduct is clearly described by the statutory language or its judicial interpretations. Certain prohibitions may also be deemed unconstitutional if they invade specifically protected rights under the First Amendment.

B. First Amendment

The Constitution clearly states that no law may punish someone because of mere association.⁵² The First Amendment requires that criminal liability be predicated upon personal culpable conduct, and not on mere association, even with a criminal organization:⁵³ "[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."⁵⁴ For example, people may not be constitutionally prohibited from associating with known criminals.⁵⁵

The First Amendment also protects many types of association rights. For example, intimate relationships, also considered a fundamental right, are protected by both the First and Fourteenth Amendments:⁵⁶

[T]he Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our consti-

49. *See id.* at 224.

50. *Id.* at 224–25.

51. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

52. U.S. CONST. amend. I.

53. *Scales*, 367 U.S. at 224–25.

54. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

55. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

56. *See Roberts*, 468 U.S. at 618.

tutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.⁵⁷

However, these rights of association are not absolute and are subject to government regulation and interference. "Infringements on . . . [First Amendment] right[s] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."⁵⁸ A law that infringes on the right of expression or association must survive strict scrutiny, which requires the law be narrowly tailored to address only the government's specific interest.⁵⁹

When regulating conduct, the scrutiny required is based on a lower standard:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁶⁰

The intermediate scrutiny test requires that a law substantially further the government's interest, and be tailored so as not to infringe on association rights any more than is essential to the furtherance of that interest.

The Supreme Court considered the relationship between the right to associate and a charge of conspiracy in *NAACP v. Claiborne Hardware*.⁶¹ In that case, local politicians refused to recognize the NAACP's demands for racial equality. In response, the NAACP organized a peaceful boycott against the white owners of seventeen stores, who in turn sued the NAACP on a claim of conspiracy to cause severe property losses.⁶² Members of the NAACP, by virtue of their association with the organization, were charged as co-conspirators. The

57. *Id.* at 618–19.

58. *Id.* at 623.

59. *See id.* at 623. Under strict scrutiny, the regulation must not be under or over inclusive in the sweep of potential defendants to whom it may apply.

60. *Claiborne Hardware*, 458 U.S. at 912.

61. 458 U.S. 886, 908 (1982).

62. *See id.* at 888–89, 903, 907.

Court warned that absent personal criminal conduct, a defendant may not be charged with conspiracy in conjunction with other people's purported crimes:

If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.⁶³

Applied to California's gang laws, the First Amendment protects fringe-offenders in two ways: It precludes the state from passing laws that criminalize mere association and it protects certain types of associational relationships subject to state interference. Because defendants need not be gang members to qualify as participants under the new standard, the First Amendment's protection of relationships and association may be violated if the state's regulation does not comply with the proper level of scrutiny.⁶⁴

C. California's Gang Affiliation Law Satisfied Due Process and First Amendment Principals Before Proposition 21

Historically, California courts have found the gang affiliation law complies with Due Process and the First Amendment⁶⁵ because the violation only applied to active gang participants who had the requisite knowledge and committed a felony with the specific intent to aid and abet a criminal gang's felonious acts.⁶⁶ However, the elements of active participation and felonious conduct have been significantly al-

63. *Id.* at 909 (citations omitted).

64. While the Supreme Court refused to recognize that social contact between gang members confers an affirmative right of association, fringe-offenders' rights to associate with potential gang participants may be protected based on their intimate relationships or for other reasons. *See City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). For example, the Supreme Court has recognized a First Amendment right for conduct of a purely social nature, particularly if it relates to a public meeting place like a dance hall. Logically, the protection does not recognize a right to associate for the purpose of conducting criminal conduct. *See id.*

65. *See, e.g., People v. Castenada*, 3 P.3d 278, 282 (Cal. 2000); *People v. Gardeley*, 927 P.2d 713, 719 (Cal. 1996); *People v. Loeun*, 947 P.2d 1313, 1319 (Cal. 1997); *People v. Zermeno*, 986 P.2d 196, 199 (Cal. 1999). *See also Raffy Astvasadoorian, California's Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions*, 19 J. JUV. L. 272, 278-87 (1998).

66. CAL. PENAL CODE § 186.22(a) (West 1999 & West Supp. 2002). *See also* CAL. JURY INSTRUCTIONS CRIM. 6.50 (6th ed. 1996).

tered by Proposition 21.⁶⁷ Since both of these elements are necessary to charge fringe-offenders with either gang affiliation or gang conspiracy, an historical interpretation of these elements is necessary to determine whether Proposition 21's revisions comport with constitutional tenets.

1. Active Participation in a Gang: Hanging Out Will Suffice

Active participation is the first element required for a gang affiliation charge. Before Proposition 21, prosecutors established active par-

67. Two elements that are also required to prove gang affiliation are not analyzed in depth in this Comment. First, the rule for knowledge is the defendant must have "knowledge" the group qualifies as a "criminal street gang." See CAL. PENAL CODE § 186.22(a), (e) (West 1999 & West Supp. 2002). Knowledge is a subjective requirement that may be more difficult to show in the negative than in the positive sense. It is assumed that if a defendant is affiliating with a certain class of people, he must know the genre of people with whom he is spending his time. Second, a "criminal street gang" is defined by a group that engages in or has engaged in a "pattern of criminal activity." See CAL. PENAL CODE § 186.22(e)-(f) (West 1999 & West Supp. 2002); discussion *supra* note 7 (defining "criminal street gang"). A "pattern of criminal activity" is satisfied if within a specific time frame, gang members have collectively committed two or more predicate offenses. The crimes that qualify as predicate offenses must be included in a list of felonies designated in the STEP Act. See CAL. PENAL CODE § 186.22(e) (West 1999 & West Supp. 2002). Proposition 21 facilitated the predicate offense finding by adding "conspiracy" as a theory to include predicate offenses, and by increasing the number of trigger felonies from eight to twenty-six enumerated crimes. See also CAL. PENAL CODE § 186.22(e) (West 1999); CAL. PENAL CODE § 186.22(e) (West Supp. 2002); *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 354-55 (Ct. App. 1991) (analyzing the difference between punishing general criminal conduct and specifically punishing crimes committed by gangs with a primary activity of "one or more of the eight specified offenses in section 186.22 subdivision (f)"). Other gang members' criminal records, although not gang-related, may also satisfy the pattern of activity requirement. See *People v. Sengpadychith*, 27 P.3d 739, 744 (Cal. 2001) (holding either prior conduct or acts committed at the time of the charged offense can be used to establish that a gang has commission of enumerated crimes as one of its primary activities); *People v. Galvan*, 80 Cal. Rptr. 2d 853, 856 (Ct. App. 1998) (holding either prior conduct or acts committed at the time of the charged offenses can be used to establish a gang's primary activities); *People v. Loeun*, 947 P.2d 1313, 1314, 1320 (Cal. 1997) (holding that current charges against any gang member satisfies this requirement, even if charges to prove predicate offenses are not related to the individual defendant's history); *People v. Gardeley*, 927 P.2d 713, 719 (Cal. 1996) (holding predicate offenses do not have to be gang related, and may have been committed by a fellow gang member so long as present charges arising out of defendant's felonious conduct are sufficiently related to aiding and abetting the criminal street gang). Note that Proposition 21 determinations are not retroactive, although predicate offenses may be as they are satisfied by the collective records of all the "members" associated with the gang. See *People v. James*, 111 Cal. Rptr. 2d 292, 294 (Ct. App. 2001) (holding Proposition 21 convictions are not retroactive but a defendant's prior serious felony conviction under the Three Strikes Law must be based on serious felonies defined in Penal Code section 1192.7(c)).

ticipation based on the two-part test adopted from *Scales* in *People v. Green*.⁶⁸

To be convicted of . . . [gang affiliation] a defendant must have a relationship with a criminal street gang which is (1) more than nominal, passive, inactive or purely technical, and (2) the person must devote all, or a substantial part of his time and efforts to the criminal street gang. So construed, we see little likelihood that the phrase will permit arbitrary law enforcement or provide inadequate notice to potential offenders.⁶⁹

In *Green*, the defendant was convicted and sentenced for the felonies of drug possession and sale, assault with a firearm, and theft of a vehicle, but appealed a conviction for gang affiliation.⁷⁰ In response, the *Green* court announced the preceding test. The *Green* standard was adopted by the California Supreme Court in numerous California decisions during a ten-year span, and forestalled any successful constitutional attack against the STEP Act's gang affiliation crime.⁷¹

In 2000, the California Supreme Court redefined the element of active participation in *People v. Castenada*.⁷² In *Castenada*, the prosecution charged the defendant with robbery, attempted robbery and gang affiliation.⁷³ The issue presented was whether a defendant must hold a leadership position to satisfy the active participation prong.⁷⁴ The unanimous *Castenada* decision turned on the specific facts in that case. The defendant admitted to a police officer that he was affiliated with the subject gang and the officer testified he had seen defendant with known gang members on seven occasions.⁷⁵ The *Castenada* court

68. 278 Cal. Rptr. 140 (Ct. App. 1991).

69. *Id.* at 146.

70. *See id.*

71. *See* *People v. Zermeno*, 986 P.2d 196, 199 (Cal. 1999); *People v. Loeun*, 947 P.2d 1313, 1319 (Cal. 1997); *People v. Gardeley*, 927 P.2d 713, 719 (Cal. 1996).

72. 3 P.3d 278, 280–81, 284 (Cal. 2000) (holding that a defendant who was seen seven times within one year cavorting with known gang members and admitted to being part of a gang did not have to be the leader to have actively participated in the gang). *Castenada* specifically abrogated *Green*. It is important to recognize that *Castenada* was decided based on pre-Proposition 21 provisions even though the decision was published after the Proposition took effect.

73. *See Castenada*, 3 P.3d at 280.

74. *See id.* at 283.

75. *See id.* at 280, 283, 285. However, "admitting" or "claiming" membership in a certain gang must be considered in context. For many teenagers, the gang admission often takes place in the form of a routine traffic stop, where a police officer pulls over a car for a minor traffic violation and simultaneously fills out a "field identification" card on all of the vehicle's occupants. Each young person is asked questions about his purported gang affiliation. If one juvenile "claims" a certain gang, it is likely the others will feel compelled by peer pressure to do the same. Officers also record tattoos, which may also represent membership in one gang or another, and other identifying marks. These cards are recorded

broadened the active participation standard from one who must devote a substantial amount of time to the gang, to “one who simply has more than mere passive or nominal participation.”⁷⁶

Proposition 21 further revised the active participation element by stating that an active participant need not be a member of a gang.⁷⁷ Proposition 21 authors based this revision on footnote language from *In re Lincoln J.*,⁷⁸ a California Court of Appeal case which considered whether there was sufficient evidence to prove active participation based on a defendant’s prior gang membership.⁷⁹ In *Lincoln J.*, the defendant admitted to the testifying officer that while he was not currently a member of the gang, he had been a member in the past.⁸⁰ The court found that it would be unreasonable for the prosecutor to prove a member’s active, or current, gang status to satisfy this prong.⁸¹ The decision included a footnote stating that current membership was not a prerequisite to prosecuting a defendant for a gang-related crime under the STEP Act.⁸² However, this distinction was incorporated into the STEP Act out of context.⁸³

The revised standard was probably written to assist prosecutors in proving the elusive evidentiary requirement of active participation under *Green*. The timeless saga of *West Side Story*⁸⁴ is a case in point. In that story, Tony, a non-gang member, kills Bernardo, the leader of the Sharks (the Jets’ rival gang), during a gang fight. A prosecutor would have had difficulty showing active participation under the *Green* standard to charge Tony for gang affiliation or gang conspiracy because Tony did not expend a substantial amount of time or energy with the gang. However, under the revised definition of active participation, Tony may be charged under both statutes since he no longer needs to be a member or spend any amount of time with gang members to qualify as an “active participant.”

and then referenced when an officer testifies that on a certain number of occasions an individual was “seen with” purported gang members. Interview with Nona Klippen, Deputy Public Defender, Santa Clara Public Defender’s Office, in San Jose, Cal. (Aug. 12, 2002).

76. *Castenada*, 3 P.3d at 283–84.

77. See CAL. PENAL CODE § 186.22(i) (West Supp. 2002) (enacted Mar. 7, 2000).

78. 272 Cal. Rptr. 852 (Ct. App. 1990).

79. See *Lincoln J.*, 272 Cal. Rptr. at 856 n.3 (describing how the pattern of criminal gang activity was not satisfied).

80. See *id.* at 855–56.

81. See *id.*

82. See *id.* at 856 n.4.

83. See CAL. PENAL CODE § 186.22(i) (West Supp. 2002) (incorporating language from *In re Lincoln J.*).

84. LEONARD BERNSTEIN, *WEST SIDE STORY* (1958).

2. Commission of an Underlying Felony with the Specific Intent to Aid and Abet a Gang

The felonious conduct component is the second element a prosecutor must show to charge a defendant with gang affiliation. Prior to Proposition 21, the California Supreme Court upheld the STEP Act's gang affiliation provision because it was a constitutionally sound punishment triggered when a defendant committed a felony with the specific intent to aid and abet a criminal street gang.⁸⁵ Felonious conduct therefore incorporated two requirements: felonious conduct of aiding and abetting a gang-related felony and specific intent to do so.

Proposition 21 revised the felonious conduct prong indirectly by expanding the number and definition of felonies, including conduct typically associated with juvenile delinquent behavior.⁸⁶ For example, if a young person named Alliyah and her sister painted graffiti on a school wall causing \$400 worth of damage prior to Proposition 21, their act would have been charged as a misdemeanor. Today the same conduct may qualify as a felony under the revised vandalism statute.⁸⁷ Further, because Alliyah's sister drew a gang sign, the act is gang-related, and thus Alliyah qualifies for three felony charges: vandalism, gang affiliation, and gang conspiracy.

85. *People v. Castenada*, 3 P.3d 278, 283 (Cal. 2000). To aid and abet is to act "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing or of encouraging or facilitating commission" of an offense. *Id.* A defendant who aids and abets may be punished equally as the perpetrator of the crime under a gang affiliation charge. *See People v. Ngoun*, 105 Cal. Rptr. 2d 837, 839-840 (Ct. App. 2001) (holding gang affiliation applies to both the perpetrator of the crime and the defendant who aids and abets).

86. For example, Proposition 21 increased the damage minimum necessary for vandalism to be a felony to \$400. At this dollar amount, the charge could be either a misdemeanor or a felony. *See CAL. PENAL CODE* § 594(b)(1) (West 1999 & West Supp. 2002). Any type of public offense, even if it were a misdemeanor (i.e., here for property damage under \$400), may now qualify a young defendant for a sentence enhancement as a gang member. *See CAL. PENAL CODE* § 186.22(d) (West Supp. 2002). *But see People v. Arroyas*, 118 Cal. Rptr. 2d 380, 388 (Ct. App. 2002) (holding the STEP Act enhancement cannot be applied to a public misdemeanor offense made a felony such as vandalism).

87. *Compare CAL. PENAL CODE* § 594(b)(1) (West 1999), *with CAL. PENAL CODE* § 594(b)(1) (West 2002). Before Proposition 21, a defendant had to inflict over \$5,000 in property damage to be charged with a felony. Now the threshold is merely \$400, although the charge is a wobbler, i.e., it could be either a misdemeanor or a felony. Post-Proposition 21, Alliyah could spend three years in jail for this offense. If the prosecutor charged the vandalism crime as a felony (or even if charged as a misdemeanor) and it were done in conjunction with a gang, the prosecutor could charge the defendant with the STEP substantive charge and the sentence enhancement as well. *See CAL. PENAL CODE* § 186.22(a), (b), (d) (West Supp. 2002). *But see Arroyas*, 118 Cal. Rptr. 2d at 388. Recently one California Court of Appeals has denied this application of the STEP Act enhancement.

The specific intent element required by *Scales* is by definition satisfied under an aiding and abetting theory.⁸⁸ The intent required to show gang affiliation is a distinct and separate intent from the underlying felony because of the aiding and abetting requirement.⁸⁹

[Under the gang affiliation offense of the STEP Act,] the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. [Gang affiliation] requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess two independent, even if simultaneous, objectives.⁹⁰

Even after Proposition 21's revisions, the gang affiliation charge has retained the required specific intent prong through the aiding and abetting requirement.

This intent element may be illustrated by considering how the West Side Story scenario would be prosecuted today. Under the STEP Act, the question would be whether Tony stabbed Bernardo with the specific intent to aid and abet the Jets, or whether it was a heat of passion killing based on Bernardo's killing of Tony's best friend, Riff, the leader of the Jets. If the prosecutor could show Tony committed this felony with the specific intent to further the Jets' criminal endeavors, Tony could be charged with three felonies: assault or murder, gang affiliation, and gang conspiracy.⁹¹ At issue here is when gang conspiracy could be charged against a "side" player such as Maria (Tony's girlfriend and Bernardo's sister), who had knowledge of both gang's criminal activities and may have "actively participated" under the new standard.⁹²

88. See CAL. JURY INSTRUCTIONS CRIM. 3.01 (6th ed. 1996) (requiring that a person who aids and abets have the specific intent or purpose of committing or encouraging or facilitating the commission of the crime).

89. See, e.g., *People v. Gardeley*, 927 P.2d 713, 724–25 (Cal. 1996) (finding the STEP Act enhancements constitutional because they punished individual criminal conduct). Note that the enhancement does not require active participation to apply, but does have a specific intent requirement written into the statute in addition to the aiding and abetting language. See CAL. PENAL CODE § 186.22(b) (West 1999 & West Supp. 2002).

90. *People v. Herrera*, 83 Cal. Rptr. 2d 307, 313 (Ct. App. 1999) (quotations and citations omitted) (holding the legislative intent of the gang affiliation crime included an independent intent element so charging a defendant with two crimes complied with Penal Code section 654).

91. Even prior to Proposition 21's changes, Tony's crime would probably also qualify for the gang-related enhancement under the STEP Act that does not require a showing of active participation. This distinction arguably differentiated the gang enhancement from the crime of gang affiliation. Compare CAL. PENAL CODE § 186.22(a) (West 1999 & West Supp. 2002), with CAL. PENAL CODE § 186.22(b) (West 1999 & West Supp. 2002).

92. Although some of these arguments could be made against the STEP Act and gang affiliation, this Comment will focus only on the gang conspiracy charge.

III. Gang Conspiracy: Bad Law and Bad Policy

Before Proposition 21's creation of gang conspiracy, prosecutors could only charge defendants with the gang aspect of their crime under the STEP Act. Prosecutors could also charge gang members for their involvement in conspiratorial conduct if they could prove a different set of elements under a conspiracy statute. After Proposition 21 passed, a new conspiracy crime was created specifically allowing gang participants to be charged with both gang affiliation and gang conspiracy based on virtually identical elements, except that under gang conspiracy an alternative option was added as a replacement for the aiding and abetting requirement. A comparison of the elements required under traditional conspiracy and gang conspiracy demonstrates how the two conspiracy statutes differ.

To prove traditional conspiracy, the prosecution needs to prove: (1) agreement to commit a specific crime; (2) two or more persons with an unlawful object or means; and (3) an overt act towards its completion.⁹³ It is the agreement and not the act that is the gravamen of the crime, although both are required.⁹⁴ Conspiracy is a specific intent crime that requires both the intent to agree, or conspire, and the intent to commit the offense that is the object of the conspiracy.⁹⁵ The overt act need not be unlawful or amount to an attempt to commit the underlying offense to be considered conspiracy.⁹⁶ Co-conspirators may be charged for the crimes of other co-conspirators as if they were the perpetrators of the underlying crime.⁹⁷

Gang conspiracy elements differ from those required in traditional conspiracy.⁹⁸ The elements of gang conspiracy include: (1) active participation in a criminal street gang; (2) knowledge of a pattern of criminal gang activity; and (3) promoting, furthering, assisting, or

93. See 1 WITKIN CAL. CRIM. LAW ELEMENTS 2d § 68 (2000); CAL. PENAL CODE § 186.22(a) (West 1999 & West Supp. 2002).

94. See *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 357 (Ct. App. 1991) (applying this thinking to the STEP Act).

95. See *People v. Swain*, 909 P.2d 994, 997 (Cal. 1996). In California, the prosecution must show the co-conspirators intended to agree and to commit the elements of the crime.

96. See *People v. Morante*, 975 P.2d 1071, 1080 (Cal. 1999).

97. Conspiracy is a distinct offense from the actual commission of the crime that is the object of the conspiracy. See *Morante*, 975 P.2d at 1079. Liability of a co-conspirator is like that of a defendant who aids and abets: it is vicarious and extends to the reasonably foreseeable crimes carried out to fulfill the criminal objective. See *People v. Croy*, 710 P.2d 392, 397-98 n.5 (Cal. 1985).

98. Compare CAL. PENAL CODE § 185.2 (West Supp. 2002), with CAL. PENAL CODE § 185 (West 1999).

benefiting from felonious gang activity.⁹⁹ These elements are identical to gang affiliation, except that gang conspiracy includes the element of “benefiting from” a gang’s criminal act as an alternative to requiring the defendant aid and abet a gang.¹⁰⁰

The elements for traditional and gang conspiracy are theoretically analogous to one another.¹⁰¹ The gang conspiracy active participation and knowledge elements, defined by the STEP Act, may act as a substitute for the traditional conspiracy element requiring an agreement to commit a specific crime.¹⁰² The rationalization could be that an active participant in a gang should be liable for the reasonably foreseeable consequences of participating in the gang—the commission of crimes by fellow gang members—because the defendant knows the purpose of the gang is to commit crimes.¹⁰³ The criminal conduct of either aiding and abetting or benefiting from a gang’s felony may substitute for the overt act. Although the elements appear to “line up” with each other, the nature of the criminal conduct which will trigger gang conspiracy based on a “benefiting from” analysis is very different from traditional conspiracy or gang affiliation.

99. See CAL. PENAL CODE § 182.5 (West 1999 & West Supp. 2002). The knowledge element, as discussed above for the STEP Act, is a fairly straight-forward determination.

100. Compare CAL. PENAL CODE § 185.2 (West Supp. 2002), with CAL. PENAL CODE § 186.22(a) (West Supp. 2002).

101. These assumptions are the author’s and not based on any legal source. The new conspiracy law and its dependence on the revised STEP Act’s definition of the element of active participation have yet to be reviewed by any California court as of the date of publication.

102. However, the new scheme may be subject to other challenges. For example, a statute may not be written to conclusively presume an element of a crime, such as active participation for the agreement requirement of a conspiracy. See *Sandstrom v. Montana*, 422 U.S. 510, 522 (1979). Also consider that under the STEP Act, the punishment is rationalized that the individual gang participant’s conduct is punished *because* the defendant also furthered a criminal street gang’s endeavors. However, under the conspiracy charge, no such goal is implicated because the punishment is now extended to make an individual defendant liable and punished for other gang members’ crimes.

103. Telephone Interview with Rey Cedeno, Specialist, San Jose Police Department (Aug. 22, 2002). Officer Cedeno found that eight-year olds know that gangs are dangerous, as the words they choose when they think of gangs universally are “blood, knife, death, drugs, violence.” *Id.* This reasoning resembles the felony-murder theory that is predicated on the notion that if one commits a particular type of felony and a murder ensues, the defendant may also be liable for murder by virtue of committing that particular felony. The difference between these two types of crimes is that in the first, the defendant has committed what has been defined as a particularly serious and violent felony, whereas for the would-be active participant gang member, any felony is considered serious. For example, should additional charges and years be added to a sentence based on the new felony trigger of a \$400 vandalism charge? See story about Alliyah, *supra* Part II.C.2.

No court has analyzed the gang conspiracy law for its constitutional or policy implications. Cases addressing the gang affiliation elements discussed above provide analogies as to how a court may rule on similar gang conspiracy elements of active participation, specific intent and “benefits from,” as discussed below.

A. Gang Conspiracy Violates a Fringe-Offender’s Due Process Rights Under the “Benefiting From” Theory

When a prosecutor charges a defendant with gang conspiracy based on the theory that a defendant “benefits from” a gang’s felonious activities, the statute in part prohibits associational conduct.¹⁰⁴ As required by *Scales* and the vagueness rules, gang conspiracy’s elements of active participation and “benefits from” must therefore contain the requisite safeguards to assure Due Process rights are protected.

Active participation may be too vague to satisfy Due Process when applied to anyone who is or is not a gang member. This definition fails to describe what conduct is necessary to trigger gang conspiracy—the standard may be satisfied if a defendant spends any time with a gang. For example, Bobby (mentioned in the introduction to this Comment), could not avoid being categorized as an active participant even though he is not a gang member, as members of his family and neighborhood acquaintances are gang members. A prosecutor could easily show Bobby actively participates in a gang simply because of the broad definition of active participation.

However, even if the new active participation standard is found to be too vague, this determination may not suffice to render the entire gang conspiracy statute unconstitutional. California courts historically

104. An Equal Protection and Eighth Amendment argument also may be made to challenge these laws, but are beyond the scope of this Comment. In theory, the reason conspiracy crimes are more severely punished than the underlying offense is that the punishment is now focused on the fact that, act was the subject of a concerted effort, and therefore, more likely to be completed. *See People v. Morante*, 975 P.2d 1071, 1080 (Cal. 1999). However, in practice the underlying problem is that the definition of a “gang member” is inherently tied to race and class. Minority youth represent over eighty percent of the population incarcerated by the California Youth Authority. *See CALIFORNIA YOUTH AUTHORITY, SYSTEMS AND MEASURES FOR EVALUATING PROGRAM EFFECTIVENESS WITH AN INCREASINGLY VIOLENT YOUTHFUL OFFENDER POPULATION, REPORT TO THE LEGISLATURE IN RESPONSE TO SUPPLEMENTAL REPORT TO THE 1997–98 BUDGET ACT 5* (Mar. 1998) (documenting that as of March 1998, the ethnicity breakdown of California Youth Authority inmates was forty-eight percent Latino, thirty percent African American, fifteen percent White and six percent Asian), available at http://www.cya.ca.gov/publications/tna_report.pdf. (last visited on June 21, 2002). Startling statistics include that one in five black men will spend time in prison during his lifetime and one in three will be convicted of a felony. *See Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, Aug. 10-16, 2002, at 25–26.

have upheld gang affiliation against vagueness challenges because the conduct proscribed is not “active participation,” but instead the underlying felony committed with the specific intent to further a criminal street gang’s endeavors.¹⁰⁵

To analyze a Due Process claim against the gang conspiracy law, the critical element is the proscribed felonious conduct. Gang conspiracy, like gang affiliation, includes an element of aiding and abetting which has a legal definition that incorporates a defendant’s specific intent to further a gang’s crimes.¹⁰⁶ What distinguishes gang conspiracy from gang affiliation is that there is an alternative conduct element a prosecutor may choose to apply in lieu of aiding and abetting: benefiting from any felonious criminal conduct by members of that gang.¹⁰⁷

However, if the conduct being prosecuted is based on the alternative element of “benefiting from,” the words themselves do not include in their legal definition any type of specific illegal behavior.¹⁰⁸ Instead, the defendant need not personally participate in or agree to or even know of any crime being committed by any other gang member to be charged as a co-conspirator. In contrast, for the defendant who commits the traditional aiding and abetting crime, the proscribed conduct is defined as an “act or advice [that] aids, promotes, encourages or instigates the commission of the crime.”¹⁰⁹ The passive act of “benefiting from” is not prohibited.

105. See, e.g., *People v. Castenada*, 3 P.3d 278, 285 (Cal. 2000).

106. See CAL. JURY INSTRUCTIONS CRIM. 3.01 (6th ed. 1996) (requiring that a person who aids and abets have the [specific] intent or purpose of committing or encouraging or facilitating the commission of the crime). Note that this is a different intent requirement from the underlying felony.

107. CAL. PENAL CODE § 182.5 (West Supp. 2002).

108. This language is different from the gang affiliation charge which allows a gang to benefit from a defendant’s felonious acts. Compare CAL. PENAL CODE § 186.22(a) (West Supp. 2002), with CAL. PENAL CODE § 182.5 (West Supp. 2002). The STEP Act specifies that the gang affiliation charge and enhancement will lie if the crime committed by the defendant is for the “benefit of” the gang, whereas the conspiracy charge is triggered if the defendant receives a benefit from the gang’s criminal conduct. See *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 356 (Ct. App. 1991). The court defined the term “benefit” in evaluating the enhancement statute as “anything contributing to an improvement in condition, advantage, help or profit.” *Id.* at 356. When applied to the gang affiliation law, a gang will receive a benefit from a defendant, explained by the court as follows: “[I]t becomes clear the Legislature intended ‘benefits’ to be interpreted by the qualifying language of the statute, thereby limiting the scope of such conduct to only those acts committed ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .’” *Id.* For gang conspiracy, the defendant receives rather than offers a benefit.

109. CAL. JURY INSTRUCTIONS CRIM. 3.01(3) (6th ed. 1996).

Unlike aiding and abetting, the newly criminalized conduct of “benefiting from” does not include in its legal definition any specific intent to further the gang’s criminal activities.¹¹⁰ In compliance with *Scales*, the aider and abettor need not be the perpetrator of the crime, but must specifically intend to aid and abet the gang in the commission of an underlying felony.¹¹¹ In contrast, the defendant who benefits from a gang’s acts need not have any specific intent to contribute to the gang’s crimes, but only intend to benefit himself.¹¹² For example, a prosecutor could charge Bobby, who accepted money from his gang-member neighbor to buy groceries for his family, based on his action that “benefits from” a gang’s felonious drug sales. However, no specific intent is present in Bobby’s case—his action is motivated by pure self-interest to feed himself and his family.

Therefore, gang conspiracy under the alternative element of “benefiting from” fails to satisfy Due Process for two reasons. First, the description of prohibited conduct is too vague to adequately define prohibited association or conduct to give sufficient guidance to law enforcement or warn potential defendants. Second, it lacks the required *Scales* element of specific intent yet punishes defendants based on their associational conduct.¹¹³ The *Green* court warned if an associational punishment were triggered by the commission of non-criminal conduct or even a misdemeanor, it would encroach upon protected conduct: If a statute “makes criminal the promotion, furtherance or assistance of conduct which is not itself criminal . . . such a construction would impinge on protected conduct.”¹¹⁴ This type of Due Process violation may trigger a First Amendment protection as well.

110. CAL. PENAL CODE § 182.5 (West Supp. 2002). The language of the current version of the statute does require the act be done “willfully,” however, that does not substitute for the specific intent required under *Scales*.

111. *People v. Herrera*, 83 Cal. Rptr. 2d 307, 313 (Ct. App. 1999) (quotations and citations omitted) (holding the legislative intent of the gang affiliation crime included an independent intent element so charging a defendant with two crimes complied with Penal Code section 654).

112. The crime is similar to receiving stolen goods, since both require the element of knowledge. The difference between selling stolen stereos and buying groceries with gang-related money from your neighbor is the specific intent of the defendant to commit a specified criminal act.

113. Additionally, under Due Process, the gang conspiracy law is subject to scrutiny under the *Scales* personal guilt theory, which is very similar to First Amendment analysis. It requires that an individual’s otherwise non-criminal act not be defined as criminal simply based on its associational setting. See *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

114. *People v. Green*, 278 Cal. Rptr. 140, 148 (Ct. App. 1991). Nor does “benefiting from” trigger any specific felonious act. Similar arguments could also be made to render other provisions of the revised STEP Act unconstitutional for Due Process and Cruel and Unusual Punishment reasons. For example, misdemeanors considered “crimes against the

B. Gang Conspiracy Violates Fringe-Offenders' First Amendment Rights of Association

The First Amendment protects fringe-offenders by prohibiting laws that criminalize conduct simply because of association. When criminality of a defendant's otherwise non-felonious conduct is based solely on the company he keeps, First Amendment protections are triggered.¹¹⁵ An example demonstrates the inconsistency of how an aiding and abetting charge plays out in the lives of two sixteen-year-olds, Fatimah and Nikki.

Fatimah, the sister of Alliyah (who was charged with vandalism), spends time with gang members and therefore is an "active participant" of a gang according to the STEP Act's expansive definition. Nikki's boyfriend is the captain of the water polo team at a suburban high school. Both teens coincidentally are present during fist fights between rival teenagers—Fatimah's friends and another gang, and Nikki's boyfriend and a player on another school's football team.

During the fight, Nikki may yell "football players are U-G-L-Y and do not have an alibi" with her friends to cheer on her boyfriend's comrades. Nikki's conduct is not criminal. Fatimah may chant gang slogans or make gang hand gestures in support of her friends' gang during the melee. Fatimah's acts may be construed to "contribute, further and assist" a gang-related fight.¹¹⁶ Consequently, Fatimah may be charged with aiding and abetting an assault, gang affiliation, and conspiracy (and any charges against other gang members).¹¹⁷

Gang conspiracy may also be charged if a defendant "benefits from" another's crime. Bobby, who received cash from a gang member to buy groceries, may also be guilty of the new conspiracy crime simply because of his association with a gang member. The "benefits from" element bases its criminality on an individual's associations.

public" may qualify for enhancements under the STEP Act. *See* CAL. PENAL CODE § 186.22(d) (West Supp. 2002). *But see* *People v. Arroyas*, 118 Cal. Rptr. 2d 380, 388 (Ct. App. 2002) (holding the STEP Act enhancement cannot be applied to a public misdemeanor offense made a felony such as vandalism).

115. While Eighth Amendment and Equal Protection claims also may be valid here, they are beyond the scope of this Comment. *See* discussion on Equal Protection, *supra* note 104.

116. Interview with Nona Klippen, Deputy Public Defender, Santa Clara Public Defender's Office, in San Jose, Cal. (Aug. 12, 2002).

117. Note the standards in juvenile court differ from those in adult court because juvenile cases are heard and decided by a judge, not a jury. Therefore, a prosecutor's burden is lessened in that he must only convince one person, as opposed to twelve, of any charge asserted.

This construction directly contravenes Due Process and the First Amendment.

The First Amendment also may protect fringe-offenders charged with gang conspiracy if the defendant's active participation is established through a specifically protected relationship.¹¹⁸ For example, the association between Alliyah and her sister Fatimah would qualify as an "intimate relationship" since family members are involved.¹¹⁹ Even for non-familial associations, a person may not be charged with conspiracy based on his association alone.¹²⁰

The state may infringe upon associational rights (by criminalizing gang conspiracy) only if the government can demonstrate a substantial interest is addressed by the regulation and that the law is tailored to address that interest.¹²¹ Here, the government interest is to protect citizens from violent criminals who commit serious felonies, and thereby make our streets safer for the rest of society.¹²²

However, the fine print of the ballot pamphlet reveals the true government interest is to prevent only *hypothetical* future crimes: "The problem of youth and gang violence will, without active intervention, increase, *because the juvenile population is projected to grow substantially* by the next decade."¹²³ Despite a substantial and consistent four-year decline in overall crime, the ballot states "violent juvenile crime has proven most resistant to this positive trend."¹²⁴ The government's spe-

118. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Note that these relationships may also be protected under the Fourteenth Amendment as fundamental rights, a relevant issue beyond the scope of this Comment.

119. See *id.*

120. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

121. See *id.* at 912, n.47.

122. See *Cal. Proposition 21*, *supra* note 5, at § 2(d) (positing that young people are becoming more numerous and violent, therefore youth crime will significantly increase over the next ten years).

123. *Id.* at § 2(d) (emphasis added). This assumption is based on the statistic that more than one million juveniles between the crime-prone ages of twelve to seventeen-years-old are projected to be born in United States from 1997 to 2007. *Id.*

124. *Id.* at § 2(c). *But see, e.g.*, OFFICE OF THE ATTY. GEN., CAL. DEP'T OF JUSTICE, REP. ON JUVENILE FELONY ARRESTS IN CAL., 1998 24 (2000) (offering California crime statistics which directly contradict Proposition 21 assertions by showing that youth violence has been declining) (last visited on June 21, 2002), available at http://caag.state.ca.us/cjsc/publications/misc/juvarr_98.pdf. The authors only discussed the increase in youth gang violence from the early 1980s through 1994. See *Cal. Proposition 21*, *supra* note 5, § 2(d). Outdated statistics noted that "juvenile arrest rates for weapons-law violations increased one hundred and three percent between 1985 and 1994, while juvenile killings with firearms quadrupled." *Id.* The number of homicide offenders tripled from 1984 to 1994. See *id.* Statistics documenting the recent and dramatic decline in youth violence from 1990 through 2000 were omitted from the authors' discussion of gang problems. See OFFICE OF THE ATT. GEN., CAL. DEP'T OF JUSTICE, REP. ON JUVENILE FELONY ARRESTS IN CAL., 1998 22 (2000), available

cific interest to create a gang conspiracy law was to address the seemingly intractable issue of gang violence.¹²⁵ “Gang-related felonies should result in severe penalties”¹²⁶ because “[c]riminal street gangs have become more violent, bolder and better organized in recent years.”¹²⁷

Where the new law fails to satisfy the First Amendment is that it is not specifically tailored to prevent gang-related crime because relatively harmless fringe-offenders may also be caught in gang conspiracy’s dragnet. It is over-inclusive in that it may subject defendants to criminal charges based solely on their association with gang members. It is also under-inclusive in that it will not subject non-active participants in gangs who are nonetheless violent youth who have committed the same or lesser offenses to fewer charges than their gang-participating counterparts. If the gang conspiracy law affected all youth similarly, like a curfew requirement, then the fact that the government’s conduct may incidentally impede fringe-offenders from certain conduct would not violate the First Amendment.¹²⁸ Here, in contrast, the government has imposed a conspiracy statute only for active participants in gangs, which targets a specific act of association. Thus, the gang conspiracy law is not a statute that can be neutrally applied. Because the regulation invades more protected conduct than is permit-

at <http://caag.state.ca.us/cjsc/publications/misc/juvarr98.pdf>. The arrest rates for juveniles have dropped more than thirty percent since 1990, and homicides have dropped fifty percent in the same time period. *See id.* According to California Attorney General Bill Lockyer, arrests of young males declined over ten percent from 1988 to 1998. *See id.* at 24. Yet youth crime increased by thirty percent for females in the same period. *See id.* This important and relevant statistic was not mentioned in the Proposition 21 literature. Furthermore, drug arrests were three times lower for juveniles than for adults. *See id.* This statistic directly contradicts commonly held beliefs that youth gangs are heavily involved in drug-dealing. *See, e.g.,* *People v. Gardeley*, 927 P.2d 713, 717–18 (Cal. 1996) (explaining that Detective Boyd found the incident was “gang-related” because injuring a stranger was a typical vehicle for a gang to secure its “drug-dealing stronghold” in a neighborhood).

125. The theory behind gang conspiracy is to nip the problem in the bud with a crime that affixes criminality before a crime has been completed, or to charge tangentially involved offenders with a more serious crime to deter them from ever becoming involved in the first place. The theory must be that associating with gangs is like entering into a conspiratorial crime. As an inchoate crime, conspiracy fixes the point of legal intervention at the time of an agreement to commit a crime, or in this case at the time of active participation, and thus reaches further back into preparatory conduct than an attempt charge. *See People v. Swain*, 909 P.2d 994, 997 (Cal. 1996).

126. *Cal. Proposition 21*, *supra* note 5, at § 2(h).

127. *Id.* at § 2(b).

128. *See* David Cole, *Hanging Out With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 54 SUP. CT. REV. 203, 237 (1999).

ted for a state to regulate a person's association rights, it violates the First Amendment.

Gang conspiracy may therefore violate the First Amendment in a variety of scenarios: First, the conduct element of aiding and abetting or benefiting from may not be satisfied based on conduct that becomes criminal because of the setting in which it takes place. Second, absent conduct that would be considered felonious in its own right, the defendant's relationship to the purported gang member may not be predicated upon a constitutionally protected relationship. Therefore, the gang conspiracy statute as written under the benefits from analysis violates the First Amendment.

C. Gang Conspiracy: Counterproductive and Harmful Public Policy

Even if gang conspiracy satisfied constitutional requirements, the ultimate question remains whether incarceration of fringe-offenders as a policy response to preventing gang violence will truly make our streets safer. At best an effective policy would achieve California's public safety goals of deterring minors from committing violent gang crimes, or at least, not exacerbate the problem by increasing the number of career criminals trained in youth detention halls and adult prisons. What Proposition 21 did was to significantly raise the stakes for a juvenile both identified as or convicted of a gang-related crime.

To begin with, Proposition 21 significantly altered the juvenile justice system's treatment of a minor who has only been identified as an active participant in a gang.¹²⁹ Whether or not he has been convicted of any crime, a minor identified as a gang member must register with the police.¹³⁰ His name and profile are recorded and maintained for five years in a statewide database called "CAL/GANG."¹³¹ Juveniles who have not officially registered may still be included if their names have been entered following police investigations, a determination that will significantly impact their rights.¹³² This newfound status lowers this minor's Fourth Amendment rights.

129. See, e.g., CAL. PENAL CODE §§ 186.22, 186.26, 186.30, 186.33 (West Supp. 2002).

130. See CAL. PENAL CODE § 186.30 (West Supp. 2002). It is a misdemeanor not to register. See § 186.33. See also discussion on claiming a gang *supra*, note 75.

131. See Anne-Marie O'Connor, *Massive Gang Member List Now Clouded by Rampart*, LOS ANGELES TIMES, Mar. 25, 2000, at A1.

132. See discussion on field identification cards and youth who claim a gang in response to peer pressure, *supra* note 75.

For example, wiretapping standards are significantly less stringent for gang members.¹³³

If a minor gets convicted of a gang-related crime, the ramifications of being sentenced as a gang-related felon are quite serious. For example, a gang-related offense may qualify as a “strike” under the Three Strikes Law and significantly increase a minor’s sentence to juvenile custody or state prison if he is charged as an adult.¹³⁴ Gang-related murder constitutes a special circumstance which may lead to the death penalty.¹³⁵ Finally, if a minor is released from custody, this gang-related charge may never be expunged from his record.¹³⁶

However, the authors of Proposition 21 argue that incarceration offers an effective policy because it deters gang violence.¹³⁷ The shortcomings of this argument are evident from three perspectives: when a minor is threatened with incarceration,¹³⁸ through his time served in prison,¹³⁹ and even after he has been released from custody.¹⁴⁰

133. See CAL. PENAL CODE § 629.52(a)(3) (West Supp. 2002).

134. See CAL. WELF. & INST. CODE § 707 (West Supp. 2002). The general rule for a prior to be calculated as a “strike” against a minor of sixteen or older is that a crime must be listed in section 707(b) of the Welfare & Institutions Code for minors, and also be included in the adult list under section 667.5(c) of the Penal Code to count as a strike against that juvenile defendant. Note that fewer crimes will trigger a strike against a minor than an adult. Compare CAL. WELF. & INST. CODE § 707(b), with CAL. PENAL CODE §§ 1192.7, 667.5(c) (West Supp. 2002) (including a reference to the gang-related statute for Penal Code section 186.22 as one of the serious felonies for adults included in the Habitual Offender’s Act also known as the Three Strikes Law). For example, residential burglary and most attempt crimes are not included in the list for minors. However, the fact that any crime was gang-related, which in no way speaks to whether it “should” be included as a strike for a presumably “violent and serious” felony, automatically counts as a strike against that minor. See CAL. WELF. & INST. CODE § 707(d)(2)(C)(ii) (West Supp. 2002).

135. See CAL. PENAL CODE § 190.2(a)(22) (West Supp. 2002).

136. See CAL. WELF. & INST. CODE § 781(d) (West Supp. 2002) (stating that a juvenile’s record shall be sealed five years after the request was made unless that juvenile was charged as an adult under Proposition 21’s new scheme for gang-related felonies, as one of the “serious” crimes listed in the Welfare & Institutions Code section 707(b), which includes by cross-reference the gang-related special circumstance described in section (d) of that code).

137. See *Cal. Proposition 21*, *supra* note 5, at § 2, subd. (i) p. 119 (suggesting that the previous laws were not sufficiently punitive for the more serious and violent crimes children commit today and implying that by increasing incarceration time, these behaviors can be deterred).

138. See ELIKANN, *supra* note 16, at 130–31.

139. See generally Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1125–27 (1995) (describing prison gang proliferation in California).

140. See, e.g., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 1998 NATIONAL YOUTH GANG SURVEY (Nov. 2000), available at <http://virlib.ncjrs.org/JuvenileJustice.asp> (last visited on June 21, 2002) [hereinafter 1998 GANG SURVEY]; OFFICE OF JUVENILE

Deterrence is only effective if an offender-to-be is sufficiently rational in his decision-making, and is concerned with avoiding long prison terms.¹⁴¹ Typically, children under eighteen-years-old are disinterested in long-term consequences and engage in more risky activities than adults.¹⁴² Even when adolescents possess and use comparable information, they may assign different subjective values to alternative consequences.¹⁴³ An effective sentencing policy must recognize that minors will not be specifically deterred because of a more severe sentence scheme.¹⁴⁴ Increasing sentences for minors will not alter juvenile behavior.¹⁴⁵

Once a youth is incarcerated in a California prison, he will discover that gangs are the "chief operational fact of life."¹⁴⁶ Prisoners are housed, and managed on a daily basis largely based on the gang with which they may be affiliated.¹⁴⁷ Gangs in prison pose a security threat to the prison system itself because inside this "criminal breeding ground," gangs encourage prisoners to commit crimes they may otherwise not commit.¹⁴⁸

When convicts are released from custody, they return to society and negatively influence inexperienced gang members.¹⁴⁹ A compara-

JUSTICE AND DELINQUENCY PREVENTION, HIGHLIGHTS OF THE 2000 NATIONAL YOUTH GANG SURVEY (Feb. 2002), (citing statistics that seventy-two percent of adults released from prison back negatively impact gang crime), available at <http://virlib.ncjrs.org/JuvenileJustice.asp> (last visited June 21, 2002) [hereinafter 2000 GANG SURVEY].

141. See ELIKANN, *supra* note 16, at 130–31.

142. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 310, Oxford Univ. Press (1999).

143. See *id.* at 311.

144. See *id.* at 315.

145. Analogous to the war on drugs, a policy implemented to achieve this goal will ultimately fail. The government has attempted increasing sentences with mandatory minimum guidelines for drug offenders, which has also resulted in the increase, not decrease, of drug-related charges. See JONATHAN P. CAULKINS, ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY* (1997); JUDGE JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2001); MARC MAUER, *RACE TO INCARCERATE: THE SENTENCING PROJECT 1–14*, 147–60 (1999).

146. Tachiki, *supra* note 139, at 1125 (describing prison gang proliferation in California).

147. See *id.* at 1125–26.

148. *Id.*

149. See 1998 GANG SURVEY, *supra* note 140; 2000 GANG SURVEY, *supra* note 140. One reason for this catch-22 cycle is that ex-convicts, when freed, will probably commit more crimes rather than less for having spent time in prison. Two-thirds of released prisoners are rearrested within three years of release. See *Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, Aug. 10–16, 2002, at 25–26. One reason for this is that ex-convicts return to society with a significant hurdle to surmount—a felony on their records. For example, most American job applications ask if you have ever been convicted of a felony. Sixty-five

tive study of the Office of Juvenile Justice and Delinquency Prevention between 1998 and 2000 demonstrates this influence increased from forty-nine to seventy-two percent.¹⁵⁰ Former prisoners are not only returning to a life of gang crime themselves, but they are also contributing to the increased violence among local gang members.¹⁵¹ “[I]nvolvement of ex-convicts in youth gangs increases the life of gangs and their level of violent crime, in part because [of] the ex-convicts’ increased proclivity to violence following imprisonment and the visibility and history they contribute to gangs.”¹⁵²

From a public policy perspective, it is counterproductive to incarcerate fringe-offenders. Incarceration only increases the number of minor inmates, lengths of prison terms, career criminals trained in adult prisons, and new gang members.¹⁵³ Instead, the national government has recognized the importance of addressing youth violence issues with a community approach rather than a punitive sentence. In response to high school shootings, former Attorney General Janet Reno concluded the only way to stop youth violence is to intervene in the lives of troubled minors before they are convicted of any crime.¹⁵⁴ Likewise, one author of the superpredator theory has since recanted his position and now evangelizes: “Prevention [rather than incarceration] is the only reasonable way to approach these [youth violence] problems.”¹⁵⁵

Preventive programs addressing the precursors to youth crime would be a more effective means to achieve the same goals of reducing youth violence. These factors include but are not limited to teen-

percent of employers surveyed admitted they would not knowingly hire an ex-convict. *See id.*

150. Compare 1998 GANG SURVEY, *supra* note 140, with 2000 GANG SURVEY, *supra* note 140. *See also* Tachiki, *supra* note 139, at 1127 (describing prison gang proliferation in California).

151. *See* 2000 GANG SURVEY, *supra* note 140 (increasing their gang members’ access to weapons and propensity to conduct crimes in drug trafficking).

152. 1998 GANG SURVEY, *supra* note 140, at 35.

153. *See* 2000 GANG SURVEY, *supra* note 140 (citing statistics that seventy-two percent of adults returning from prisons have negative impacts on gang crime); Tachiki, *supra* note 139, at 1125–27 (describing prison gang proliferation in California).

154. CRITICAL INCIDENT RESPONSE GROUP, DEPARTMENT OF JUSTICE, *The School Shooter: A Threat Assessment Perspective* 1, 52 (2000), available at <http://www.fbi.gov/publications/school/school2.pdf> (last visited June 21, 2002). For example, the FBI calls on schools and all of society to band together to address suburban school shootings as a community by focusing on improving children’s education, mental health, and family needs.

155. Becker *supra* note 23, at A19 (quoting Mr. DiIulio who now advocates building more churches than prisons after his predictions were proven false because the rate of juvenile crime had dropped fifty percent).

age pregnancy, illiteracy, mental illness, drug addiction, and poverty issues, including lack of housing and health care.¹⁵⁶ Similarly, intervention programs and the education of young people about anger management and violence issues have been proven to reduce youth crime. For example, the San Jose Police Department is teaching violence prevention and anger management tools to eight-year-olds in local schools. One of their programs has a seventy-eight percent success rate for children who brought weapons to school, but never reentered the juvenile justice system.¹⁵⁷ That number should be compared to the sixty-six percent recidivism rate for ex-convicts who commit crimes only three years after being released from prison.¹⁵⁸ These numbers and national directives call for a common sense conclusion: California will be a safer community if fringe-offenders are never incarcerated.

IV. Proposed Solutions for Gang Conspiracy

The Legislature has the power to resolve some of the problems identified in this Comment. To start, it could redefine the active participation element by revising its definition in the STEP Act. This legislative definition should embrace the *Green* standard so as to omit fringe-offenders from being swept into a possible charge of either

156. See *Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, Aug. 10–16, 2002, at 25–26 (finding fifty percent of California's inmates are mentally ill); Maria Alicia Gaura, *Santa Clara County's Preventable Health Woes*, S.F. CHRON., June 13, 1985, at A13 (quoting executive director of Planned Parenthood, Linda T. Williams, who said: "Almost ninety percent of the young men in prison today are the children of teen parents."); Ethan A. Nadleemann, *Commonsense Drug Policy*, FOREIGN AFFAIRS, Jan./Feb. 1998, at 111–26 (noting that because of drug-related charges, eight times as many prisoners have been incarcerated from 1980 to 1997 in the United States, and advocating for a harm-reduction model rather than incarceration as a more humane and effective solution to the underlying drug issues); LISABETH B. SCHORR, *WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE* (1989) (tracing juvenile crime to a series of risk factors including poverty, teen pregnancy, and poor education).

157. Telephone Interview with Rey Cedeno, Specialist, San Jose Police Department (Aug. 22, 2002). The San Jose Police Department has developed two programs. The first, *Challenges and Choices (C2)*, began in 1997. It is offered at half of the one hundred and sixty-five public schools in San Jose. The waiting list is currently eighteen months. No statistics have been generated thus far to track the success rate of this program, as it would require a long-term and expensive study to follow participating eight-year-olds through their adolescence. The program runs for ten weeks for one hour per week, focusing on ten topics: where violence originates; violence in the media; anger and conflict management; self-esteem and bullying; conflict resolution; peer pressure; drugs; gangs; and finally, law and crime. The second program, *Safe Alternative Violence & Education (SAVE)*, requires first-time young weapon offenders to attend the all-day Saturday course with a parent.

158. See *Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, Aug. 10–16, 2002, at 25–26.

gang affiliation or gang conspiracy. The challenge in changing any provision of a voter-approved law is that it will require a two-thirds vote in the Legislature or another initiative measure.¹⁵⁹

The Judiciary could also provide workable solutions to revise the active participation element. The courts could begin by setting forth a clearly defined active participation standard that mandates a closer relationship between the individual and the gang. If the relationship is based on one felonious act, then that defendant's personal act must also be a sufficiently serious felony which aided and abetted the gang so as to justify charging a defendant twice for the same conduct.

A heightened analysis should be required where the defendant has only one criminal contact or a series of non-criminal associational contacts with the gang. By relying on an analogous use of the minimum contacts test used to resolve personal jurisdiction matters, the courts could implement a judicial test incorporating the following language:¹⁶⁰

A court may only find a juvenile defendant "actively participated" if the nature and purpose of his act or history of involvement with a specific criminal street gang demonstrates a relationship that is so substantial that a finding of a gang-related violation will not offend traditional notions of Due Process or First Amendment rights of association.

The proposed language triggers what is in effect a two-part test. The first part evaluates the relationship at issue between the individual defendant and the gang. The second part measures whether the defendant's individual criminal conduct was sufficiently purposeful to aid and abet the gang.

As applied in Tiffany's case (described in the introduction), assuming her brother's retaliation is the only connection between Tiffany and her brother's gang, she could not be automatically considered an active participant. Neither her affiliation with her brother nor her status as a victim of gang crime should suffice to establish active participation. The nature of her personal conduct—the alleged agreement with her brother to attack her assailants—does not

159. See CAL. CONST. art. II, § 10 (c).

160. See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (establishing the test for minimum contacts for a personal jurisdiction analysis):

[D]ue process requires that in order . . . to subject a defendant to [jurisdiction of a particular court], . . . he have certain minimum contacts with . . . [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

amount to a purposeful act that aids and abets a gang.¹⁶¹ The agreement here is not a sufficiently purposeful act, nor was it designed to further any gang's criminal endeavors. By applying this proposed test, fringe-offenders like Tiffany, who do not have a substantial relationship with a gang, could not be charged with gang-related crimes.

For gang conspiracy, the best legislative solution would be to sever the entire provision from the enactment clause of Proposition 21, without disturbing the remainder of its provisions.¹⁶² Likewise, the courts should invalidate gang conspiracy as violative of Due Process and the First Amendment. As a secondary and significantly less desirable approach, the Legislature or the courts should strike the "benefits from" clause. Instead, the statute should require a defendant aid and abet a particularly serious or violent felony with the specific intent to further a gang's criminal activities.

Conclusion

Fringe-offenders for whom this Comment advocates are the juveniles living on the edge, who would have never been charged under the STEP Act or traditional conspiracy before Proposition 21's revisions were implemented. Under Proposition 21's new gang conspiracy statute, minors may be charged for being at the wrong place, at the wrong time, with the wrong people. This dragnet could result in the incarceration of troubled juveniles such as Tiffany, Bobby, Alliyah, and Fatimah. This form of intervention is both unconstitutional and counterproductive for it will only encourage more rather than less youth violence.

The changes proposed in this Comment offer a form of damage control to curb the devastating effects Proposition 21 had on the state's juvenile justice system.¹⁶³ If the suggested measures were implemented, the remaining framework would include a set of laws under

161. The *International Shoe* case was further interpreted by the Supreme Court to require that the nature and purpose of the conduct be evaluated. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Applied in the gang conspiracy or gang affiliation context, the type of single act or conduct that would justify a finding of criminal behavior on the part of a young person should likewise consider the nature and purpose of the underlying criminal act.

162. See CAL. PENAL CODE § 182.5 (West 2002) (describing statute history).

163. This Comment was also written to contribute to and elicit an ongoing discourse to improve California's juvenile justice policies. See Raffy Astvasadoorian, *supra* note 65, at 278–87 (arguing that the STEP Act was constitutional because of the active participation standard under *Green* and the strict felonious conduct requirement, which both have been dramatically expanded by Proposition 21).

which prosecutors could charge defendants who aid and abet serious gang-related felonies. Convictions would be based on a defendant's personal conduct rather than crimes defined by the gang-related setting in which they occur.

Resources should not be allocated to perpetuate the incarceration of juvenile delinquents in violation of their constitutional rights. Instead, California should focus on the precursors of juvenile crime and provide preventive services in the areas of: education, mental illness, reproductive healthcare, alcohol and drug treatment, and affordable housing. California as a state and as a community simply cannot afford to sentence wayward kids to spend their youth in custody, with felony strikes on their records that will haunt them for the rest of their lives.

