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### Williams v. Garcetti: Constitutional Defects in California's Gang-Parent Liability Statute

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# **WILLIAMS v. GARCETTI: CONSTITUTIONAL DEFECTS IN CALIFORNIA'S "GANG-PARENT" LIABILITY STATUTE**

## **I. INTRODUCTION**

As a result of the California Supreme Court's decision in *Williams v. Garcetti*,<sup>1</sup> parents are now subject to arrest for bad parenting—"or at least parenting so dismal that a 'reasonable person' . . . would have known that the child was in danger of becoming delinquent."<sup>2</sup> In this case, the California Supreme Court upheld the constitutionality of the 1988 amendment to California Penal Code section 272,<sup>3</sup> which provides that "a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child."<sup>4</sup> This statute holds parents or guardians who commit any act or omit any duty causing, encouraging, or contributing to the delinquency of a minor guilty of a misdemeanor.<sup>5</sup>

This Note briefly discusses the background of the Amendment.<sup>6</sup> It then examines the *Williams v. Garcetti* decision<sup>7</sup> and the California Supreme Court's analysis of the constitutional issues.<sup>8</sup> Next, this Note describes how the court incorrectly applied the overbreadth doctrine<sup>9</sup> to a case involving the right of privacy,<sup>10</sup> and did not apply the analy-

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1. 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993).

2. William W. Bedsworth, *Throwing the Book at Mom and Dad*, L.A. TIMES, Aug. 23, 1993, at B7.

3. This Note refers to the 1988 amendment to § 272 as "the Amendment."

4. CAL. PENAL CODE § 272 (West 1988 & Supp. 1994).

5. *Id.*

6. See *infra* part II.A.

7. See *infra* part II.B.

8. See *infra* part III.

9. The overbreadth doctrine is applied to cases involving First Amendment violations because of "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); see *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). "Because of the importance of the free speech guarantee, even when the state does have the power to regulate an area, it 'must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8, at 944 (4th ed. 1991) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)).

10. The right of privacy has been defined as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United*

ses prescribed by the United States Supreme Court for substantive due process and equal protection cases.<sup>11</sup> This Note then analyzes the Amendment under the Due Process and Equal Protection Clauses, using the strict scrutiny review that the court should have applied in order to invalidate the statute. Finally, this Note discusses policy reasons against the Amendment, the deficiencies of parental liability statutes, and the statute's inability to serve its intended purpose of controlling street gang activity.

## II. BACKGROUND

### A. *Legislative History of the 1988 Amendment to California Penal Code Section 272*

Penal Code section 272<sup>12</sup> was amended in 1988 as part of the Cal-

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States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The United States Supreme Court explained the right of privacy in *Roe v. Wade*, 410 U.S. 113 (1973). The Court held that although it is not explicitly mentioned in the Constitution,

the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the first Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. [479], 484-485 [(1965)]; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). . . . They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. [438], at 453-454 [(1972)]; *id.*, at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer*, [262 U.S. at 399].

*Roe*, 410 U.S. at 152-53.

11. Courts usually apply a rational basis standard of review for liberties protected by the Constitution. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961), *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955). In such cases, a statute will only be invalidated if "the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan*, 366 U.S. at 425.

However, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, [the statute] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); see *Roe*, 410 U.S. at 155-56; *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1935 (1985); Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 591 (1993).

12. Prior to its amendment, this section provided that

[e]very person who commits any act or omits the performance of any duty, which

ifornia Street Terrorism Enforcement and Prevention Act (STEP Act),<sup>13</sup> which was enacted in an effort to control violent criminal street gang activity.<sup>14</sup> However, unlike the STEP Act, the Amendment is not specifically aimed at controlling juvenile gang activity; rather, it is targeted at the *parents* of juvenile delinquents. In addition to amending section 272, the California Legislature also added chapter 2.9B to the Penal Code, entitled "Parental Diversion."<sup>15</sup> This program is intended for parents charged with "contributing to the delinquency" of their child pursuant to the Amendment.<sup>16</sup> Under the parental diversion program, parents or guardians accused of violating section 272 may seek education and rehabilitation services; resulting in the dismissal of charges upon satisfactory completion of the program.<sup>17</sup> The Los Angeles District Attorney's Office has developed procedures in order to determine whether a parent's behavior consti-

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act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto . . . is guilty of a misdemeanor . . . .

CAL. PENAL CODE § 272 (West 1988).

Under California law, a minor may be adjudged a dependent child of the juvenile court if the minor has suffered, or there is a substantial risk that the minor will suffer, among other things: (1) serious physical harm inflicted nonaccidentally by the parent or guardian; (2) serious physical harm or illness as a result of the parent's or guardian's failure or inability to supervise adequately or protect the minor, or to provide the minor with adequate food, clothing, shelter, or medical treatment, or to provide regular care for the minor due to the parent's or guardian's mental illness, developmental disability, or substance abuse; (3) serious emotional damage; (4) or sexual abuse. CAL. WELF. & INST. CODE § 300 (West 1984 & Supp. 1994).

Additionally, Welfare and Institutions Code § 601 provides that a minor may be determined to be a ward of the juvenile court if the minor persistently or habitually disobeys parents or ordinances, or if the minor is a habitual truant. CAL. WELF. & INST. CODE § 601 (West 1994).

Finally, any minor who violates any state or federal law or any local criminal ordinance other than a curfew based solely on age is within the jurisdiction of the juvenile court and may be determined to be a ward of the court. *Id.* § 602.

13. CAL. PENAL CODE § 186.20 (West Supp. 1994).

14. The STEP Act includes measures which establish criminal penalties for gang participation and its attendant criminal activities, and provides sentence enhancements for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *Id.* § 186.22. The STEP Act also defines certain buildings and places where gang activities are construed as nuisances subject to injunction, abatement, or damages. *Id.* § 186.22(b)(1).

15. See CAL. PENAL CODE §§ 1001.70-.75 (West Supp. 1994).

16. Section 272 is entitled "Causing, encouraging or contributing to delinquency of persons under 18 years; inducing disobedience to court order; punishment." CAL. PENAL CODE § 272 (West 1988 & Supp. 1994).

17. CAL. PENAL CODE §§ 1001.70-.75.

tutes a violation of the Amendment,<sup>18</sup> and whether a parent will be prosecuted, directed to the parenting program, or released for lack of sufficient evidence.<sup>19</sup>

### B. *The Facts and Procedural Background of Williams v. Garcetti*

Plaintiffs, as taxpayers, filed their original complaint on July 20, 1989 for injunctive and declaratory relief to halt the enforcement of the Amendment.<sup>20</sup> They claimed that enforcement of the Amendment would constitute a waste of public funds.<sup>21</sup> The trial court

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18. The *Referral Guidelines* portion of the City Attorney Parenting Program Procedures (CAPP) states that

While no factor will singularly determine whether a case should be accepted, each of the following criteria should be considered in any case presented for hearing or prosecution.

1. A detailed description of the acts or circumstances which brought the juvenile within Sections 300, 601, or 602 of the Welfare and Institutions Code (Although final adjudication of juvenile proceedings is not a requirement for a filing against the parent); and any available documentation of the juvenile proceedings, such as arrest reports, cite backs, parental profiles and interviews should be included in the case file;

2. A detailed description of the acts or omissions of duty on the part of the parent which caused or encouraged the juvenile to come within the above provisions;

3. The number and type of warnings given to the parent and by whom;

4. Whether any parenting programs have been offered to the parents;

5. The statements and attitude of parents and the juvenile during the investigation; or cite-back (every effort should be made to thoroughly interview parents concerning the delinquency problem and their efforts to correct it. *Miranda* warnings should be given when appropriate.);

6. The parents' inability to supervise and control the offending juvenile (discuss whether there are any circumstances beyond the control of the parent that may contribute to an inability to effectively supervise and control);

7. The experience and training of officers or others involved in the investigation or cite-back;

8. Neighborhood complaints or other corroboration of the problem with the juvenile and/or the parents.

All filing decisions will be made on a case by case basis.

L.A. CITY ATTORNEY, CITY ATTORNEY PARENTING PROGRAM 4-5 (Mar. 1993).

19. *Id.*

20. *Williams v. Reiner*, 13 Cal. App. 4th 392, 399, 2 Cal. Rptr. 2d 472, 474 (1991), *rev'd sub nom. Williams v. Garcetti*, 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993). Hereinafter, *Williams v. Reiner* will be referred to as *Williams I*, *Williams v. Garcetti* will be referred to as *Williams II*.

21. *Williams I*, 13 Cal. App. 4th at 398, 2 Cal. Rptr. 2d at 473. The pertinent part of California's Code of Civil Procedure reads:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or county and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who . . . has paid, a tax therein.

CAL. CIV. PROC. CODE § 526a (West 1979).

granted summary judgment to defendants<sup>22</sup> Ira Reiner and James K. Hahn on the basis that plaintiffs lacked standing to challenge the amendment. The court also determined the Amendment to be neither vague nor overbroad.<sup>23</sup> Plaintiffs filed a first amended complaint on December 21, 1989, reinstating their allegations that the Amendment was impermissibly vague, as it failed to provide fair and adequate notice of the parental conduct that it prohibited.<sup>24</sup> Plaintiffs also alleged that the statute was overbroad, thereby violating a parent's fundamental liberty interest in the rearing of children under both federal and state constitutions.<sup>25</sup> Finally, plaintiffs contended that the statute violated a parent's right to privacy under both federal and state constitutions.<sup>26</sup>

The California Court of Appeal reversed the judgment, and remanded the matter to the trial court, which was ordered to enter summary judgment for the plaintiffs. The appellate court first ruled that plaintiffs had standing as taxpayers,<sup>27</sup> and then held that the Amendment was impermissibly vague and therefore unconstitutional, never reaching the issues of overbreadth or impingement of the parents' right to privacy.<sup>28</sup>

On appeal, the California Supreme Court addressed only the issues of vagueness and overbreadth. The court concluded that the Amendment was neither vague nor overbroad so as to violate the California and federal constitutions and therefore reversed the judgment of the court of appeal.<sup>29</sup>

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22. The lawsuit was originally filed as *Williams v. Reiner*, 13 Cal. App. 4th 392, 2 Cal. Rptr. 2d 472 (1991). James K. Hahn was the Los Angeles City Attorney and Ira Reiner was the Los Angeles County District Attorney. Gilbert Garcetti succeeded Ira Reiner as the Los Angeles County District Attorney.

23. *Williams II*, 5 Cal. 4th at 567, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343.

24. *Williams I*, 13 Cal. App. 4th at 400, 2 Cal. Rptr. 2d at 475.

25. *Id.*

26. *Id.*

27. *Id.* at 407, 2 Cal. Rptr. 2d at 479-80. Under California law, plaintiffs who reside within the city or county of Los Angeles have standing to sue as taxpayers. CAL. CIV. PROC. CODE § 526a; see *supra* note 21 for the text of § 526a.

28. *Williams I*, 13 Cal. App. 4th at 407-08, 2 Cal. Rptr. 2d at 480. The court stated that "in view of our holding, we do not reach the plaintiffs' remaining contention that the amendment is unconstitutionally overbroad." *Id.* at 420, 2 Cal. Rptr. 2d at 488. The court also failed to reach the privacy issue, as plaintiffs did not raise this issue on appeal. *Williams II*, 5 Cal. 4th 561, 567 n.3, 853 P.2d 507, 509 n.3, 20 Cal. Rptr. 2d 341, 343 n.3.

29. *Williams II*, 5 Cal. 4th at 579, 853 P.2d at 517, 20 Cal. Rptr. 2d at 351.

### III. THE CALIFORNIA SUPREME COURT'S CONSTITUTIONAL ANALYSIS

#### A. *Vagueness*

The starting point of the court's analysis was "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. . . . [They] cannot be held void for uncertainty if any reasonable and practical construction can be given to [their] language.'" <sup>30</sup> The court then evaluated the specificity of the Amendment under the standards prescribed by the United States Supreme Court for determining whether a statute is void for vagueness.<sup>31</sup> First, a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." <sup>32</sup> If a statute meets both of these criteria, courts will consider it sufficiently specific to meet the due process<sup>33</sup> requirement.

#### 1. Notice

In determining whether the Amendment provides sufficient notice to a parent, the court confined its "analysis to section 272 as applied to juvenile delinquency through Welfare and Institutions Code sections 601<sup>[34]</sup> and 602,<sup>[35]</sup> and to the 'supervision' and 'control' elements of the duty identified in the [A]mendment."<sup>36</sup> The court reasoned that the pre-amendment language of section 272 imposes criminal liability on *any* person whose act or omission causes or en-

30. *Williams II*, 5 Cal. 4th at 568, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343 (quoting *Walker v. Superior Court*, 47 Cal. 3d 112, 143, 763 P.2d 852, 872, 253 Cal. Rptr. 1, 21-22 (1988) (citation omitted in original)).

31. See *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-66 (1972); *United States v. Harriss*, 347 U.S. 612, 617-18 (1954).

32. *Williams II*, 5 Cal. 4th at 567, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343 (quoting *Walker*, 47 Cal. 3d 112, 141, 763 P.2d 852, 871, 253 Cal. Rptr. 1, 20). See also *Kolender*, 461 U.S. at 358 (holding that statute requiring "credible and reliable" identification to peace officer by persons loitering or wandering on streets is unconstitutionally vague on its face).

33. See U.S. CONST. amends. V, XIV, § 1; Michael D. Fricklas, Note, *Executive Order 12,356: The First Amendment Rights of Government Grantees*, 64 B.U. L. REV. 447, 508 (1984).

34. CAL. WELF. & INST. CODE § 601 (West 1984).

35. *Id.* § 602.

36. *Williams II*, 5 Cal. 4th at 570, 853 P.2d at 511, 20 Cal. Rptr. 2d at 345. Welfare and Institutions Code § 300 contains a long list of conditions under which a minor can be removed from a parent's custody and declared to be a ward of the court. See *supra* note 12 and accompanying text.

courages the child to engage in delinquent acts, and that implicit in this language is the duty to make a reasonable effort to prevent the child from so doing.<sup>37</sup> The breach of this duty results in a violation of the Amendment.<sup>38</sup> The court determined that the Amendment states more definitively that a *parent* violates the statute upon failing to exercise reasonable supervision or control over the child where that omission results in the child's delinquency.<sup>39</sup>

Plaintiffs alleged that this duty of reasonable "supervision" or "control" is vague because it provides no guidance or explanation to parents as to what constitutes "reasonable duty."<sup>40</sup> However, the court resolved that the Legislature meant to incorporate the traditional definition of supervision and control from California tort law,<sup>41</sup> and did not intend to create a new duty for parents.<sup>42</sup> Therefore, the court adopted the terms supervision and control in the Amendment as defined in the law of torts.<sup>43</sup> In this way, the court was able to cure the alleged vagueness of the statute.

The court stated that even though neither the statute nor case law clearly indicates to parents what constitutes reasonable supervision and control, the duty is sufficiently certain to pass constitutional mus-

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37. *Williams II*, 5 Cal. 4th at 571, 853 P.2d at 511, 20 Cal. Rptr. 2d at 345-46.

38. *Id.*

39. *Id.*, 853 P.2d at 512, 20 Cal. Rptr. 2d at 346.

40. Plaintiffs/Appellants' Brief on the Merits at 17-18, *Williams II*, 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993) (No. S024925) [hereinafter Plaintiffs/Appellants' Brief]. To illustrate the vagueness of this "reasonable" standard, plaintiffs asked:

[D]oes a single parent who is forced by economics to work two jobs or live in an area where gang activity is pervasive fail to exercise reasonable care and supervision if their child then becomes involved in a gang, even when that involvement is only as the friend of a gang member? To avoid these elements, must this parent refuse to let their child play outside in a drug and gang-infested neighborhood? . . . The answers to these questions are not discernable from the statute for the ordinary person.

*Id.* at 19-20.

41. California follows the *Restatement (Second) of Torts*, which places upon the parent a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 316 (1965).

42. *Williams II*, 5 Cal. 4th at 572, 853 P.2d at 512, 20 Cal. Rptr. 2d at 346.

43. *Id.* The California Court of Appeal, on the other hand, had refused to "judicially criminalize a civil statute by applying the parental tort liability standard to section 272. Section 272 makes no reference to the civil laws and evinces no intent to import such a standard into a criminal statute." *Williams I*, 13 Cal. App. 4th 392, 420, 2 Cal. Rptr. 2d 472, 488 (1991). The court stated that "[t]he record contains no evidence to support a finding that the Legislature intended or even considered whether it should apply the civil tort liability standard to section 272." *Id.*



ter.<sup>44</sup> In addition, "[t]here is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind."<sup>45</sup> Furthermore, the court indicated that parents are only held liable if they are criminally negligent in breaching their duty of supervision and control.<sup>46</sup>

In addressing plaintiffs' concern that the statute punishes parents who try but are unable to control their children, the court stated that a parent who makes reasonable efforts to comply with the statute, but who is unable to do so, would not be guilty of breaching the duty of control.<sup>47</sup> The criminal negligence standard provides that the defendant's conduct must be "gross"—a greater breach of duty than is necessary for ordinary negligence.<sup>48</sup> Therefore, according to the court, breach of this duty due to ordinary negligence will not subject parents to criminal liability under the Amendment. Parents can be convicted only for gross or extreme departures from the objectively reasonable standard of care.<sup>49</sup>

## 2. Enforcement

The court began the second part of its vagueness inquiry<sup>50</sup> by citing *Kolender v. Lawson*,<sup>51</sup> reiterating that

we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless

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44. See *Williams II*, 5 Cal. 4th at 572, 853 P.2d at 512-13, 20 Cal. Rptr. 2d at 346-47.

45. *Id.* at 573, 853 P.2d at 513, 20 Cal. Rptr. 2d at 347 (quoting *People v. Daniels*, 71 Cal. 2d 1119, 1129, 459 P.2d 225, 231, 80 Cal. Rptr. 897, 903 (1969) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931))).

46. *Id.*

47. *Id.* at 575, 853 P.2d at 514, 20 Cal. Rptr. 2d at 348.

48. The court has defined criminal negligence as " 'aggravated, culpable, gross, or reckless, that is, . . . such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to [demonstrate] . . . an indifference to consequences.' " *Id.* at 574, 853 P.2d at 513, 20 Cal. Rptr. 2d at 347 (quoting *People v. Penny*, 44 Cal. 2d 861, 879, 285 P.2d 926, 937 (1955)).

The court goes even further by stating that parents will not be held criminally negligent without actual or constructive knowledge that their child is at risk of delinquency. *Id.*, 853 P.2d at 514, 20 Cal. Rptr. 2d at 348.

49. *Id.* at 575, 853 P.2d at 514, 20 Cal. Rptr. 2d at 348.

50. *Id.*, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349.

51. 461 U.S. 352 (1983).

sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."<sup>52</sup>

The California Supreme Court further distinguished the statute in *Kolender* from the Amendment by reasoning that the Amendment "does not vest 'virtually complete discretion' in law enforcement officials."<sup>53</sup> Rather, the preexisting definition incorporated from tort law gives sufficient guidance to police, prosecutors, and juries so as to minimize arbitrary or discriminatory enforcement.<sup>54</sup>

Moreover, the court found that the Amendment's requirement of a causal link between the parent's breach of duty and the child's delinquency reduced the likelihood of arbitrary or discriminatory enforcement.<sup>55</sup> Although it can be difficult to determine whether the parent's criminal negligence actually "causes or tends to cause or encourage"<sup>56</sup> the child's delinquency, the court noted that this question has not been unduly troublesome in tort liability, and therefore will not prove to be so in the criminal context.<sup>57</sup>

In conclusion, the court determined that the Amendment did not fail to provide a minimal standard for enforcement.<sup>58</sup> Therefore, the court of appeal's decision that the statute was void for vagueness<sup>59</sup> was overruled.

### B. Overbreadth

The court next considered plaintiffs' contention that the Amendment was overbroad on its face, thereby infringing on the right of intimate family association<sup>60</sup> as protected by both federal and state constitutions.<sup>61</sup> The court acknowledged the significance of this right to "be let alone by the government in 'the private realm of family

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52. *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974)).

53. *Williams II*, 5 Cal. 4th at 576, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349.

54. *Id.*

55. *Id.*

56. CAL. PENAL CODE § 272 (West 1988 & Supp. 1994).

57. *Williams II*, 5 Cal. 4th at 576, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349.

58. *Id.* at 577, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349.

59. *Williams I*, 13 Cal. App. 4th at 420, 2 Cal. Rptr. 2d at 488. The court of appeal held that "[t]he amendment is impermissibly vague . . . . [It] leaves much room for abuse and mischief in its enforcement because any law enforcement agency is free to decide, based on purely subjective factors, whether the parents exercised reasonable control and supervision over their child." *Id.* at 412, 2 Cal. Rptr. 2d at 483.

60. The right of intimate association involves "certain kinds of highly personal relationships." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). The relationships afforded constitutional protection are those involving marriage, childbirth, raising and educating children, and cohabitation with relatives. *Id.* at 619.

61. *Williams II*, 5 Cal. 4th at 577, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350.

life,'<sup>62</sup> but emphasized that a facial challenge of overbreadth is difficult to sustain.<sup>63</sup> The court then launched into a dissertation on First Amendment cases<sup>64</sup> in order to support its statement that overbreadth is a difficult doctrine to prove.<sup>65</sup> The court concluded that "[a]lthough the right of intimate family association is constitutionally protected, a statute that seeks to regulate parental behavior is not overbroad per se."<sup>66</sup> Furthermore, in order for a statute to be overbroad per se, the plaintiffs would need to "show that 'a substantial number of instances exist in which the [amendment as construed] cannot be applied constitutionally.'"<sup>67</sup> Therefore, the court held that the Amendment was not overbroad.<sup>68</sup>

#### IV. ANALYSIS

##### A. Overbreadth

##### 1. Expressive versus intimate association

The California Supreme Court incorrectly applied the overbreadth doctrine<sup>69</sup> to a case that did not involve the First Amendment.

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62. *Id.* (quoting *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 266-67, 466 P.2d 225, 230, 85 Cal. Rptr. 1, 6 (1970)).

63. *Id.*

64. The First Amendment protects the right of expressive association, while intimate family association is protected by the Fourteenth Amendment Due Process Clause. *Roberts*, 468 U.S. at 617-18. See Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 6 CORNELL L. REV. 1187, 1197 n.50 (1993); Daniel L. Schwartz, Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2140 (1987); Marian L. Zabler, Note, *When is a Private Club not a Private Club: The Scope of the Rights of Private Clubs after New York State Club Association v. City of New York*, 55 BROOK. L. REV. 327, 354 (1989); *infra* part IV.A.1.

65. The court described *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), where the United States Supreme Court refused to strike down a statute that allegedly violated the plaintiff's freedom of expressive association, protected by the First Amendment. *Williams II*, 5 Cal. 4th at 578, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350.

66. *Williams II*, 5 Cal. 4th at 578, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350. Although the amendment to § 272 was held to be constitutional on its face, the court did not rule out the possibility that it may be unconstitutional *as applied*, stating that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.*, 853 P.2d at 517, 20 Cal. Rptr. 2d at 351 (quoting *New York State Club Ass'n*, 487 U.S. at 14 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973))).

67. *Id.*, 853 P.2d at 517, 20 Cal. Rptr. 2d at 351 (quoting *New York State Club Ass'n*, 487 U.S. at 14).

68. *Id.*

69. The overbreadth doctrine is a First Amendment doctrine that deals with laws that restrict speech activity. It may be used when "(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step

Plaintiffs alleged a violation of a parent's freedom of *intimate* family association,<sup>70</sup> which is protected by the Due Process Clause of the Fourteenth Amendment.<sup>71</sup> They did not allege a violation of a parent's freedom of *expressive* association,<sup>72</sup> which is protected by the First Amendment.<sup>73</sup> According to the United States Supreme Court,

[o]ur decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the 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 constitutional scheme. *In this respect, freedom of association receives protection as a fundamental element of personal liberty.* In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition . . . .<sup>74</sup>

The United States Supreme Court thus requires that statutes impinging upon the fundamental liberty of intimate association be subject to a strict scrutiny review.<sup>75</sup> Statutes impinging upon one's freedom of expressive association—as protected by the First Amendment—are subject to a different, yet still strict, standard of review<sup>76</sup> that may in-

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from the law's reach." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-27, at 1022 (2d ed. 1988).

70. *Williams II*, 5 Cal. 4th at 577, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350.

71. This type of freedom to associate is "protected by the concept of liberty in the due process clauses and as an implicit part of the Bill of Rights guarantees; this right is connected to the fundamental right to privacy." NOWAK & ROTUNDA, *supra* note 9, § 16.41, at 1063.

72. See Plaintiffs/Appellants' Brief, *supra* note 40, at 41-45.

73. Expressive association involves "the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987).

74. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (emphasis added); see *Rotary Club*, 481 U.S. at 545.

75. See *Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1977). The *Moore* Court held that a family's right of intimate association was impinged upon by a housing ordinance that defined "family" narrowly, so as to preclude a grandmother from living in the same home as her son and her two grandsons. *Id.*

76. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court stated that

[i]f this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of "overreaching" would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional.

*Id.* at 484.

clude a rigorous test of vagueness and overbreadth.<sup>77</sup>

The California Supreme Court should have applied strict scrutiny analysis to the Amendment. It is no accident that *all* of the cases referred to in the "overbreadth" part of the court's opinion involved alleged violations of the First Amendment freedom of association.<sup>78</sup> Although "[t]he intrinsic and instrumental features of [the two distinct] constitutionally protected association[s] may . . . coincide . . . ,"<sup>79</sup> in this case they do not. There is no indication that implementation of the Amendment violates a parent's freedom of expressive association.<sup>80</sup> Therefore, any overbreadth analysis of the Amendment is extraneous and inconclusive as to its constitutional validity.

2. Plaintiffs should have argued a violation of the right to raise children without government interference, not of the right of intimate association

Although plaintiffs alleged a violation of a family's right of intimate association,<sup>81</sup> this is not the liberty upon which the Amendment actually impinges.<sup>82</sup> Section 272 does not involve freedom of intimate association because it does not interfere with "the right of an individual to choose with whom to be intimate."<sup>83</sup> The Amendment does not prevent parents from maintaining personal and private relationships with their children. Nor does the Amendment compel the government to intrude on choices concerning family living arrangements.<sup>84</sup> The right of intimate association is not synonymous with the parental right of child rearing, even though they are both commonly connected

77. See NOWAK & ROTUNDA, *supra* note 9, § 16.8, at 944; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 904 (1991).

78. These cases include: *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (upholding constitutionality of state law which exempts benevolent orders and religious corporations from antidiscrimination provision); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (holding that state regulation of political activities is constitutional because law is not substantially overbroad); *NAACP v. Alabama*, 377 U.S. 288 (1964) (involving right of NAACP to associate for purpose of "collective advocacy of ideas.") *Id.* at 309.

79. *Roberts*, 468 U.S. at 618.

80. Freedom of expressive association involves the "right to associate for the purpose of engaging in types of activity expressly protected by the first amendment." NOWAK & ROTUNDA, *supra* note 9, § 16.41, at 1063; see *TRIBE*, *supra* note 69, § 12-26, at 1013; see, e.g., *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts*, 468 U.S. at 609.

81. Plaintiffs/Appellants' Brief, *supra* note 40, at 41.

82. Intimate association, which is "a fundamental right connected to the concept of privacy[,] includes the freedom to choose one's spouse and to maintain a relationship with members of one's family." NOWAK & ROTUNDA, *supra* note 9, § 16.41, at 1063.

83. *Zobler*, *supra* note 64, at 329.

84. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

to the right of privacy.<sup>85</sup> Therefore, plaintiffs should not have asserted that the Amendment violates their right to intimate association,<sup>86</sup> rather, the liberty at issue is a parent's right to raise children without government interference.<sup>87</sup>

Plaintiffs included an extensive discussion of this liberty in their argument that the statute is overbroad,<sup>88</sup> and correctly noted that the Amendment impinges upon the parental right to rear one's children without the state's intervention.<sup>89</sup> However, this analysis is relevant to substantive due process,<sup>90</sup> not to overbreadth.<sup>91</sup>

A substantive due process test places a considerably greater burden on a state than one of overbreadth.<sup>92</sup> In a facial overbreadth challenge,<sup>93</sup> the plaintiffs are required to prove that a law substantially interferes with their constitutionally protected speech.<sup>94</sup> The state must then show that the statute's interference with protected speech is

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85. See *TRIBE*, *supra* note 69, § 15-20, at 1414-17.

86. Plaintiffs/Appellants' Brief, *supra* note 40, at 41-45.

87. The United States Supreme Court has "long recognized that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); see *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (noting "historic respect . . . [and] sanctity . . . traditionally accorded to [family] relationships"); *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (reaffirming liberty interest of parents to raise and educate their children without undue government interference); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the private realm of family life which the state cannot enter"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that "we think it entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing . . . of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding invalid state law which prohibited teaching foreign languages to children as "interfer[ing] with . . . the power of parents to control the education of their own"); see also Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 *VAND. L. REV.* 441, 460 (1991) (discussing constitutional problems presented by state parental liability statutes).

88. Plaintiffs/Appellants' Brief, *supra* note 40, at 43-45.

89. *Id.* at 44.

90. See *infra* part IV.B.1 for an impingement analysis.

91. See *supra* note 69 and accompanying text.

92. See *TRIBE*, *supra* note 69, § 12-28, at 1024-25.

93. "A plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target; and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach." *TRIBE*, *supra* note 69, § 12-27, at 1022.

94. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

"insubstantial *when compared with the law's legitimate applications*."<sup>95</sup> Therefore, the state need not prove that the statute is the least burdensome means available to achieve its goals, as is required by a substantive due process analysis.<sup>96</sup>

However, in a due process challenge involving a fundamental right, the state is put to a significantly more difficult task—the state is *required* to prove that the law is narrowly tailored to achieve a compelling interest.<sup>97</sup> The state *must* fulfill its obligation of showing that less burdensome alternatives to its chosen method would not achieve its objective.<sup>98</sup> Therefore, because the California Supreme Court mistakenly applied an overbreadth analysis to the Amendment,<sup>99</sup> the state never had to show that the Amendment fulfilled its purpose of deterring street gang activity.<sup>100</sup> California was thus relieved of the heavy burden that states must meet before they are permitted to infringe on fundamental rights.

### B. Substantive Due Process Analysis

Under the United States Constitution, the state and federal governments may not deprive a citizen of life, liberty, or property without due process of law.<sup>101</sup> Citizens are afforded both procedural and substantive<sup>102</sup> protections from government interference. Although most statutes are upheld under a rational basis standard of review,<sup>103</sup> those that interfere with fundamental liberties must pass the Supreme Court's strict scrutiny test.<sup>104</sup> Therefore, because the parental right to raise children without government interference is a fundamental right,<sup>105</sup> any statute that impinges on this right is subject to strict scrutiny.<sup>106</sup> Accordingly, the Amendment should have been analyzed under the two prongs of this test: (1) the state's objective *must* be compelling; and (2) the state's objective *must* be narrowly tailored to

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95. TRIBE, *supra* note 69, § 12-28, at 1025.

96. *See id.*

97. *See supra* note 11 and accompanying text.

98. *See infra* part IV.B.3.

99. *See supra* part III.B.

100. *See infra* part IV.B for a substantive due process analysis.

101. U.S. CONST. amends. V, XIV, § 1; *see, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

102. *See supra* note 11 and accompanying text.

103. TRIBE, *supra* note 69, § 16-2, at 1440-41; *see supra* note 11 and accompanying text.

104. TRIBE, *supra* note 69, § 16-7, at 1454.

105. *See supra* note 87 and accompanying text.

106. *See supra* note 87 and accompanying text.

achieve that objective.<sup>107</sup>

### 1. Impingement

The threshold question in a due process analysis of a fundamental right is whether the law at issue impinges upon the right.<sup>108</sup> In this case, the Amendment *does* impinge upon a parent's fundamental right to child rearing, thus triggering strict scrutiny review.<sup>109</sup> The law impinges on parental rights by adding a burden on parents heavier than that already created by the law of torts.<sup>110</sup> The California Supreme Court believed that it was not imposing a new duty on parents when it incorporated the common-law tort standard into the penal code's requirement of "reasonable care, supervision, protection, and control."<sup>111</sup> However, the court's decision *does* place a considerable additional burden on parents already subject to the common law of California.

As a result of the Amendment, parents are not only civilly liable for the acts of their children, but are now also subject to criminal prosecution.<sup>112</sup> In addition, although the civil tort only comes into play if an injured person sues the parent, parents are always subject to a penalty under the criminal statute. For example, parents are liable under the Amendment regardless of whether their children actually cause injury to another person, while the civil tort requires children to either intentionally harm or create an unreasonable risk of bodily harm to another.<sup>113</sup> Furthermore, parents may be liable under the Amendment if their children are adjudged to be delinquent or truant,<sup>114</sup> while

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107. See Toni Weinstein, Comment, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859, 873 (1991); *supra* note 11 and accompanying text.

108. *Harris v. McRae*, 448 U.S. 297, 312 (1980) ("[I]t is well settled that . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'") (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980)); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) ("[T]he Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon [a] constitutional liberty.").

109. If a court finds that a fundamental right is *not* unduly impinged upon, then it will only apply a rational basis review, merely requiring the legislation to be rationally related to a legitimate governmental purpose. *Harris*, 448 U.S. at 326; *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978); see *TRIBE*, *supra* note 69, § 15-2, at 1306-08.

110. See *RESTATEMENT (SECOND) OF TORTS* § 316 (1965) (discussing parents' duty to control conduct of child).

111. CAL. PENAL CODE § 272 (West 1988 & Supp. 1994); see *supra* part III.A.1.

112. CAL. PENAL CODE § 272.

113. *RESTATEMENT (SECOND) OF TORTS* § 316 (1965).

114. See *supra* note 12 and accompanying text.



this requirement does not exist under the civil law.

Indigent parents, who were previously unaffected by the tort law,<sup>115</sup> now face dramatically increased exposure due to the threat of criminal charges. These new criminal penalties seriously impinge upon the relationship between indigent parents and their children.<sup>116</sup> As a result of the increased burden placed on these parents, parents with "bad" children may be more likely to surrender them to the state — that is, to sever ties with their children rather than risk a criminal penalty.<sup>117</sup> Parents who are having difficulty controlling their children may be more willing to give them up, rather than keep them and potentially risk their own liberty.<sup>118</sup>

## 2. The state's compelling interest

Once it has been determined that the Amendment infringes on parental rights, the state has the burden of proving a compelling interest that the law is narrowly tailored to achieve.<sup>119</sup> According to the legislative findings of the STEP Act, the Amendment is designed to further the goal of deterring gang activity.<sup>120</sup> The legislature's findings state that

the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities . . . present a clear and present danger to public order.<sup>121</sup>

This interest may very well be seen as compelling,<sup>122</sup> since there is

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115. Due to their inability to pay damages, "[i]ndigent defendant[s] [are] already judgment proof." Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1458 (1993); see John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1633 (1993).

116. "Contributing-to-delinquency statutes, in attempting to punish parents for the behavior of their youngsters, may placate public indignation, but they also are likely to further disturb an already fractured family relationship." ARNOLD BINDER ET AL., *JUVENILE DELINQUENCY: HISTORICAL, CULTURAL, LEGAL PERSPECTIVES* 451 (1988).

117. *Id.* (stating that "[t]he possibility of punishment may also inhibit parental participation in juvenile court hearings and plans.")

118. See *id.*

119. See *supra* part IV.B.

120. CAL. LEGIS. COUNSEL DIGEST, ch. 1256, SB 1555, § 1, ¶ 186.21, at 3-4 (1988).

121. CAL. PENAL CODE § 186.21 (West Supp. 1994).

122. However, even if California's alleged interest is a compelling one, this alone is not sufficient—the state must establish that the alleged objective is the *actual purpose* underlying the statute. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), a mere intermediate scrutiny case, the United States Supreme Court held the state of Mississippi

little disagreement that gang violence in urban areas, particularly in Los Angeles, is a significant problem.<sup>123</sup>

According to Los Angeles City Attorney James K. Hahn, the interest of combating street gangs is not only important, but also vital, due to "the role they play in destroying the family unit."<sup>124</sup> Former Los Angeles District Attorney, Ira Reiner, also emphasized the importance of deterring gang activity, stating that

where the parent is not exercising responsibility, they play a major role in what's going to happen to that kid, that 10-year-old kid who's only a "want-to-be," he wants to be a gangbanger. By the time he's 16 years old, he's out on the street shooting and killing. Something needs to be done when he's at an age that he can be controlled. The parent has to exercise some responsibilities.<sup>125</sup>

However, even if the state is able to prove a compelling interest, it must also show that the statute is "narrowly drawn to express only the legitimate state interests at stake."<sup>126</sup>

3. The state's statute is not narrowly tailored to the compelling interest of deterring gang activity

After it has been established that gang activity is a compelling interest, the state still must show that it has chosen the least burdensome means to effectuate this purpose.<sup>127</sup> Therefore, to satisfy due process requirements the state must demonstrate that the statute is

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to its actual purpose of gender discrimination. The Court stated that "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Id.* at 730; *see Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969). For example, if a court were to find that California's *actual* intent was not to eliminate gang activity but to target minorities, the statute would fail the first part of the due process test and the statute would be invalidated. *See Zablocki*, 434 U.S. at 388-89.

123. According to the District Attorney's Office, there are nearly 1,000 gangs in Los Angeles County with approximately 150,000 members. L.A. COUNTY DISTRICT ATTORNEY, GANGS, CRIME AND VIOLENCE IN LOS ANGELES: FINDINGS AND PROPOSALS FROM THE DISTRICT ATTORNEY'S OFFICE iv (May 1992) [hereinafter D.A. FINDINGS AND PROPOSALS]. "Gang homicides hit a record high of 771 in 1991—approximately 8.5 gang homicides per 100,000 residents. That compares to five killings per 100,000 residents in 1980, the peak of the worst previous cycle of gang violence." *Id.* at ii.

124. Claire Cooper, 'Gang mom' law is upheld: Ruling OKs prosecution of parents, SAN DIEGO UNION-TRIB., July 2, 1993, at A1.

125. *Nightline: Parent Arrested Under New L.A. Law* (ABC television broadcast, May 2, 1989) (transcript on file with the *Loyola of Los Angeles Law Review*) [hereinafter *Nightline*].

126. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

127. *Id.*

the least burdensome way to achieve the goal of curbing gang violence, and that other less intrusive means would not achieve the goal equally as well.<sup>128</sup> However, the fact is, there *are* many less burdensome alternatives to the Amendment.

The most obvious alternative is the STEP Act itself. Instead of immediately enacting the Amendment as part of a package of anti-gang measures,<sup>129</sup> the California Legislature could have implemented the STEP Act first, to determine if it would adequately curb gang activity.<sup>130</sup> The STEP Act is clearly less burdensome on parental rights since it is aimed at gangs themselves rather than at gang members' families.<sup>131</sup> If the Legislature were to find that gang violence did not decrease after implementing the STEP Act for a number of years, then enactment of the Amendment might have been appropriate.

A second alternative to the Amendment is the already existing parental diversion program.<sup>132</sup> A parent who has been arrested for violation of the Amendment may be offered the opportunity to avoid criminal charges through participation in the diversion program.<sup>133</sup> "Many commentators believe that these parents need society's help, not its punishment."<sup>134</sup> By offering parents the opportunity to improve their parenting skills, the state would be providing a productive and educational way for parents to learn to exercise control and supervision over their delinquent children, rather than punishing parents who may not have the skills necessary to raise their children.<sup>135</sup> The state could also implement mandatory family counseling as a more

128. See *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

129. See *supra* part II.A.

130. There are already provisions within the STEP Act which include the very same criminal activities covered by § 602. These provisions include §§ 186.22(b)(1) and 186.22(c) of the STEP Act, providing sentence enhancements for persons who commit crimes "for the benefit of, at the direction of, or in association with any criminal street gang." CAL. PENAL CODE § 186.22 (West Supp. 1993).

131. See *supra* note 14 and accompanying text.

132. See *supra* part II.A.

133. See *supra* note 18 and accompanying text.

134. Parsley, *supra* note 87, at 469.

135. In a highly publicized case, Gloria Williams, a South Central Los Angeles woman, was arrested under the "gang mom" law for failing to control her teenage son, who was found guilty of participating in the four-day gang rape of a twelve year old girl. Philip Hager, *Justices to Review Parental Responsibility Law*, L.A. TIMES, Apr. 4, 1992, at A24. Although police found photos of Ms. Williams posing with members of the Crips—a Los Angeles street gang whose name derives from the word "cripple"—and graffiti on bedroom walls of her home, the City Attorney's Office dropped the charges when it learned that Ms. Williams had completed a parenting course. Cooper, *supra* note 124, at A23. The City Attorney apparently dropped the charges because he realized that under the circumstances, criminal punishment would serve no purpose.

constructive option than fines, eviction, or imprisonment.<sup>136</sup>

If the state is determined to punish parents of gang members for bad parenting, the prosecutor may bring charges against a parent for accomplice liability.<sup>137</sup> In this way, the state will not only accomplish the goal of holding parents responsible, but will also avoid the problems incurred by contributing statutes.

Another alternative is the utilization of other preexisting penal code provisions. Even though other penal statutes are not specifically targeted at gangs, a prosecutor may still bring charges against a gang member for violations of the penal code.<sup>138</sup> There is nothing in the District Attorney's Findings and Proposals<sup>139</sup> to suggest that the goal of "seek[ing] the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs . . ." <sup>140</sup> is attainable *only* by enactment of the Amendment.<sup>141</sup>

As it is, because the state did not explore alternative measures to the Amendment, it cannot carry the burden of showing that these alternatives would not have been equally effective.<sup>142</sup> Moreover, because some of these alternatives are brand new—like the diversion program—the state must test these alternatives before resorting to the more drastic criminal penalty.<sup>143</sup>

Not only is the success of criminal parenting statutes questionable as an effective measure, but it is also questionable as a *necessary* one.<sup>144</sup> "[C]ommentators long have argued that criminalizing parental behavior does not reduce juvenile crime. While state officials readily

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136. *Parents and Crime*, CHRISTIAN SCI. MONITOR, May 10, 1989, at 20.

137. CAL. PENAL CODE §§ 31, 659 (West 1988).

138. See, e.g., CAL. PENAL CODE §§ 187-199 (West 1988 & Supp. 1994) (homicide); *id.* §§ 203-206.1 (mayhem and torture); *id.* §§ 207-210 (kidnapping); *id.* §§ 211-215 (robbery and carjacking); *id.* §§ 240-247 (assault and battery); *id.* §§ 261-266j (rape); *id.* §§ 450-457.1 (arson); *id.* §§ 640-640.7 (graffiti); *id.* § 647 (disorderly conduct).

139. See *supra* note 123.

140. CAL. PENAL CODE § 186.21 (West Supp. 1994).

141. In fact, the District Attorney has even recognized the possibility that use of the Amendment may prove "impractical," in which case, "the threat of lesser prosecutions can still be effective." D.A. FINDINGS AND PROPOSALS, *supra* note 123, at 202.

142. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the Court held that Richmond's minority set-aside program for construction contracts violated the Equal Protection Clause. The program was not narrowly tailored, due in part to the city's failure to consider using race-neutral means. *Id.* at 507; see also *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 909-10 (1986) (holding that New York's residency requirement for veteran's credits failed because state interests could have been met by other less burdensome means).

143. See *Croson*, 488 U.S. at 509-10.

144. See S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain*

have assumed that [contributing] statutes actually reduce delinquency rates, the only empirical study in this area revealed that these sanctions simply do not achieve the desired results."<sup>145</sup> Parental behavior is only one of many contributing factors in the delinquency of a child,<sup>146</sup> and therefore a statute that merely addresses one aspect of the problem will not be effective in combating juvenile crime.<sup>147</sup>

[E]vidence exists that parental liability statutes may fail to deter crime. A study by the Department of Health, Education, and Welfare in 1963 examined sixteen states that had enacted civil parental liability statutes and compared the crime rates in those states with those in the rest of the country. The study revealed that the rate of juvenile delinquency in the sixteen states that had enacted parental liability statutes was slightly higher during 1957-1962 than was the national average.<sup>148</sup>

The application of contributing statutes can also have an adverse effect on the family unit.<sup>149</sup> "In general, fines under these statutes are too small to effect a change in the behavior of the parents, but often reduce the already minimal resources available for parents to provide for the family."<sup>150</sup> In addition, parents of an uncontrollable child associated with a gang may actually be afraid to attempt to discipline their child.<sup>151</sup>

This evidence clearly demonstrates that California would be un-

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*Violence by and Against Children*, 139 U. PA. L. REV. 1123, 1160-61 (1991); Parsley, *supra* note 87, at 467-72; Weinstein, *supra* note 107, at 900-01.

145. Parsley, *supra* note 87, at 467 (footnote omitted).

146. BINDER, *supra* note 116, at 88-90; *see generally* Cyril Burt, *The young delinquent: multiple causation theory*, in *JUVENILE DELINQUENCY, THE FAMILY AND THE SOCIAL GROUP* 17 (John Barron Mays ed., 1972) (discussing numerous contributory factors in juvenile delinquency).

147. Parsley, *supra* note 87, at 468. The author describes the many causes of delinquent behavior, including "social class, educational level, urbanization, living conditions, and social instability." *Id.* According to Carol Sobel, attorney for plaintiffs, "[e]veryone feels frustration with the rising violence in our culture. . . . But it's unfair to blame poor parents for something that is a failure of our society as a whole." Jennifer Warren, *Law on Prosecuting Parents of Delinquents Is Upheld*, L.A. TIMES, July 2, 1993, at A1, A30.

148. Weinstein, *supra* note 107, at 878. "Former New York Governor Harriman suggested that the statutes might 'lead to added strain in families where relationships are already tense and might even give to troublesome delinquents a weapon against their parents which they would not hesitate to use.'" *Id.* (citing Alice B. Freer, *Parental Liability [sic] for Torts of Children*, 53 KY. L.J. 254, 261 (1964) (quoting from Governor Harriman's speech made prior to his vetoing New York parental civil liability statute)).

149. BINDER, *supra* note 116, at 451.

150. *See* Parsley, *supra* note 87, at 469.

151. *See supra* notes 116-17 and accompanying text.

able to meet its burden of proving that the Amendment is necessary to achieve its purpose.<sup>152</sup> In fact, some studies show that parental contributing statutes such as the Amendment are *ineffective* in or even *detrimental* to efforts to eradicate juvenile delinquency.<sup>153</sup> Therefore, the state must show that these studies are flawed and that the Amendment *is* necessary to control gang activity.<sup>154</sup> But "section 272 does not meet the rigors of the [strict scrutiny test] because the means chosen are not sufficiently tailored to fulfill only the compelling state interest."<sup>155</sup>

In *Cleveland Board of Education v. LaFleur*<sup>156</sup> the Supreme Court applied strict scrutiny to a school regulation that required pregnant teachers to leave work at least four months prior to the expected births of their children.<sup>157</sup> The Court held that although the state's interest in "continuity of instruction is a significant and legitimate educational goal,"<sup>158</sup> there were other alternatives to achieve its goal which would have been less burdensome on parental rights.<sup>159</sup> Similarly, the California Legislature has a compelling interest in eradicating gang activity. However, like the statute in *LaFleur*, the Amendment is not narrowly tailored to achieve this goal, and should thus be unconstitutional. Moreover, although other states have also made use of criminal parental liability statutes,<sup>160</sup> "[u]nfortunately, many existing parental responsibility laws, including the California statute, do not meet fundamental constitutional standards."<sup>161</sup>

It is extremely difficult to attack the gang problem in California by arresting the parents of gang members. Parents are often unaware of their children's activities or are unable to control them. Moreover, it would be more effective for the California Legislature to focus on gang activity itself—to get to the root of the problem—rather than to attack it in a roundabout fashion. Parents are only one cause of the

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152. California did not even attempt to meet this burden, as the state was not required to prove that the Amendment is narrowly tailored to its purpose of deterring gang activity. See *supra* part IV.A.2.

153. Weinstein, *supra* note 107, at 878; see Parsley, *supra* note 87, at 467.

154. See *Croson*, 488 U.S. at 510-11.

155. Weinstein, *supra* note 107, at 878.

156. 414 U.S. 632 (1974).

157. *Id.* at 638.

158. *Id.* at 643.

159. *Id.*; see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (involving Amish parents who refused to comply with statute because of religious beliefs).

160. See, e.g., ALA. CODE § 12-15-13(a) (1986); KY. REV. STAT. ANN. § 530.060(1) (Michie 1990); N.H. REV. STAT. ANN. § 169-B:41 (1994); N.Y. PENAL LAW § 260.10(2) (McKinney 1989 & Supp. 1994).

161. Humm, *supra* note 144, at 1126.

societal dilemma of juvenile delinquency, and putting them in jail will neither eradicate nor lessen this problem.

### C. *Equal Protection Analysis*

The Supreme Court has held that neither the state nor the federal government shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>162</sup> An equal protection challenge to a statute that interferes with a fundamental right—like a substantive due process challenge—will be subjected to strict scrutiny.<sup>163</sup> The law will "thus [be] held unconstitutional absent a compelling governmental justification if [it] distribute[s] benefits or burdens in a manner inconsistent with fundamental rights."<sup>164</sup> The inequalities which result from governmental interference with the exercise of intimate personal choices<sup>165</sup>—in this case child rearing—are particularly injurious to the citizens upon whom they impinge.<sup>166</sup> Therefore, laws which significantly impact a fundamental right must meet the requirements of an exacting and rigorous test.<sup>167</sup>

#### 1. The state's compelling interest

As noted earlier, California has a compelling interest in eradicating gang activity.<sup>168</sup> Under strict scrutiny review, the state may not assert a purpose other than its actual one so as to avoid revealing any

162. U.S. CONST. amends. V, XIV, § 1; see Jeffrey A. Barker, Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1275, 1333 (1993).

163. *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); NOWAK & ROTUNDA, *supra* note 9, § 11.7, at 367; *TRIBE*, *supra* note 69, § 16-7, at 1454; Barker, *supra* note 162, at 1333-34.

164. *TRIBE*, *supra* note 69, § 16-7 at 1454; see Martha C. Foley, Note, *Hospitalization Requirements for Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 996 (1983).

165. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

166. *TRIBE*, *supra* note 69, § 16-7 at 1454. The *Zablocki* Court implied that the level of impingement for an equal protection analysis is lower than what is required for due process. See *Zablocki*, 434 U.S. at 387. Under equal protection, if the statute directly and substantially interferes with a fundamental right, then strict scrutiny will be triggered. *Id.*

167. See *Zablocki*, 434 U.S. at 386.

168. See *supra* part IV.B.2.

discriminatory intent.<sup>169</sup> In other words, the state is locked into its stated purpose.<sup>170</sup> In *Bernal v. Fainter*,<sup>171</sup> a Texas law denied aliens the opportunity to become notaries public due to their inability to "familiariz[e] themselves with Texas law."<sup>172</sup> The Supreme Court held that the state's alleged purpose was insufficient because "the State fail[ed] to advance a factual showing that the unavailability of notaries' testimony present[ed] a *real*, as opposed to a *merely speculative* problem to the State."<sup>173</sup> Therefore, for purposes of an equal protection analysis, it is critical to discern the exact purpose of the statute in question by making a factual determination.<sup>174</sup>

In the instant case, the California Legislature has made its intent to eliminate gang violence unmistakably clear in the legislative findings of the STEP Act.<sup>175</sup> District Attorney Ira Reiner sponsored the amendment to section 272, and his statements on *Crossfire* and *Nightline* also serve to establish the real purpose of the statute.<sup>176</sup> Therefore, the state is locked into its stated intention of eliminating gang violence. This is relevant in determining whether the state has employed the least discriminatory means to achieve its objective.

## 2. Section 272 is not the least discriminatory way for California to eradicate gang activity in the state

In an equal protection analysis involving fundamental rights, the method chosen by the state must be the least discriminatory way to

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169. See *supra* note 122 and accompanying text. Under both due process and equal protection analyses, the state is held to its *actual* purpose.

170. The state may not assert that its purpose is to eliminate truant and disobedient behavior in general by holding all parents liable under § 272 in order to cure the overinclusivity of the statute. If this was, in fact, the legislative purpose, then the statute would be perfectly tailored to its purpose and would satisfy the requirements of the Equal Protection Clause.

171. 467 U.S. 216 (1984).

172. *Id.* at 227.

173. *Id.* at 227-28 (emphasis added).

174. *Id.*; *Michael M. v. Superior Court*, 450 U.S. 464, 494-96 (1981) (Brennan, J., joined by White and Marshall, J.J., dissenting); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (stating that "the Equal Protection Clause requires more than the mere incantation of a proper state purpose").

175. See *supra* note 120 and accompanying text.

176. Reiner stated that "these . . . gangs are made up of nothing but just a pack of killers . . . Each and every one of them is a sociopathic killer. The Crips and the Bloods are nothing but killers . . . Frankly, I think it is very good policy to hold these kinds of parents accountable." *Crossfire* (CNN television broadcast, May 9, 1989); *Nightline*, *supra* note 125.



accomplish its goal.<sup>177</sup> The law must be narrowly tailored to effectuate *only* its compelling interest<sup>178</sup>—it may be neither under-inclusive<sup>179</sup> nor overinclusive<sup>180</sup> in terms of its goal. The Amendment, however, is *not* narrowly tailored, and as such, is fatally overinclusive.<sup>181</sup>

The purpose behind the Amendment is to rid California of gang activity. The statute, however, is aimed at *all* parents, broadly sweeping within its parameters parents whose children are *not* gang members.<sup>182</sup> These parents and their children are not the “mischief”<sup>183</sup> that the California Legislature is trying to eliminate, rather, the “trait”<sup>184</sup> that the Legislature is concerned with is the parents of gang members. “A law may be said to be over-inclusive when the legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons.”<sup>185</sup>

In the case of the Amendment, the additional group of persons included by the statutory classification is the parents of non-gang members. The law does not even make specific mention of “criminal street gangs”<sup>186</sup> as the STEP Act does.<sup>187</sup> The Amendment includes the parents of children who are merely truant and disobedient under section 601 of the Welfare and Institutions Code, even in situations where no crime has been committed.<sup>188</sup> However, this is not the substance of gang activities that the Legislature purported to target through the enactment of the Amendment. Hypothetically, even if a

177. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

178. *See Eisenstadt*, 405 U.S. at 451.

179. “Underinclusive classifications do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end.” *TRIBE*, *supra* note 69, § 16-4, at 1447. In practice, however, laws are rarely invalidated due to underinclusiveness. *Id.* at 1447 n.4.

180. *Id.* at 1449.

181. “[I]t could be said that less restrictive alternatives exist for overinclusive classifications.” *Id.* at 1450 n.23.

182. *Id.* at 1450 (“Because overinclusive classifications by definition burden some who are not similarly situated with respect to the purposes of a rule, they may of course be challenged as denying equal protection.”). Section 272 has, in fact, been labelled the “gang mom law,” even though gang parents are not the only parents who may be arrested under the law. *See Cooper*, *supra* note 124, at A1.

183. *See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949), for a general discussion of classic equal protection theory.

184. *Id.*

185. *NOWAK & ROTUNDA*, *supra* note 9, § 14.2, at 527.

186. CAL. PENAL CODE § 272 (West 1988 & Supp. 1994).

187. CAL. PENAL CODE § 186.20 (West Supp. 1994).

188. *See supra* note 12 and accompanying text.

parent has been successful in keeping a child out of a gang, that parent could *still* be held liable under the Amendment merely because the child is habitually truant.<sup>189</sup> The California Legislature could have drawn the Amendment more narrowly by limiting sections 601 and 602 of the Welfare and Institutions Code strictly to gang-related activities. This further demonstrates that the Amendment is not necessary to achieve its purpose of eliminating gang activity.

*Zablocki v. Redhail*<sup>190</sup> discusses the tightness of fit required in equal protection fundamental rights cases. In *Zablocki*, the Supreme Court struck down a Wisconsin law that prohibited any resident from marrying without court permission if that person had minor children not in his or her custody, and had failed to demonstrate: (1) proof of compliance with the support obligation; and (2) that the children covered by the support order "are not then and are not likely thereafter to become public charges."<sup>191</sup> The law impinged upon a fundamental right—the right to marry—subjecting it to strict scrutiny under the Equal Protection Clause.<sup>192</sup> The Court found that the statutory classification was fatally overinclusive.<sup>193</sup> The purpose of the law was to encourage parents of children not in their custody to pay child support. However, "[g]iven the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations."<sup>194</sup>

A statutory classification which unnecessarily impinges on a fundamental right cannot be sustained.<sup>195</sup> Because less discriminatory alternatives would accomplish the goal of eradicating gang activity, the Amendment is invalid under the Equal Protection Clause.

## V. CONCLUSION

The California Supreme Court's decision in *Williams v.*

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189. See *supra* note 12 and accompanying text. Furthermore, truancy under § 601 of the Welfare and Institutions Code does not include a gang-related activity, unless it is the singular case where a gang's oath states that the members will not go to school. See CAL. WELF. & INST. CODE § 601 (West 1984).

190. 434 U.S. 374 (1978).

191. *Id.* at 375 (quoting Wis. STAT. § 245.10 (1973)).

192. *Id.* at 384.

193. *Id.* at 390.

194. *Id.*

195. *Id.* at 388.

*Garcetti*<sup>196</sup> determined that the amendment to section 272 is constitutional by mistakenly utilizing a First Amendment analysis.<sup>197</sup> The court should have applied a due process<sup>198</sup> or an equal protection analysis,<sup>199</sup> in which case the law would have been found unconstitutional. By applying the wrong analysis, the court has set a confusing precedent as to the appropriate review a lower court should apply to laws impinging on fundamental rights. However, this decision does not state, and should not be interpreted to mean, that a future challenge to the Amendment—brought on due process or equal protection grounds—would not succeed.

The Amendment will not accomplish its goal of eradicating gang activity because parental liability statutes do not deter juvenile delinquency.<sup>200</sup> State legislatures should recognize that many factors contribute to a child's delinquency<sup>201</sup>—not just poor parenting. Families with delinquent children need counseling and therapy in order to resolve the problems that disrupt their lives—not punishment. The difficulties they face are so complex and numerous that it is nearly impossible to specify the precise ingredients that contribute to a child's delinquency. We must attack the gang problem head on, without letting ourselves be sidetracked by any single contributing factor.

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196. 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993).

197. See *supra* part IV.A.

198. See *supra* part IV.B.

199. See *supra* part IV.C.

200. See *supra* notes 148-51 and accompanying text.

201. See *supra* notes 146-47 and accompanying text.

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