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Overdue Justice: People v. Valenzuela and the Path Toward Gang Prosecution Reform

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OVERDUE JUSTICE: *PEOPLE V. VALENZUELA* AND THE PATH TOWARD GANG PROSECUTION REFORM

*Ryan Nelson**

I. INTRODUCTION

The Street Terrorism Enforcement and Prevention Act, otherwise known as the STEP Act (the "Act"), became law in 1988 in response to the public safety concerns surrounding rising gang violence, especially in Southern California.[1] At first, it was designed to provide prosecutors with an additional tool to target the leaders of large gangs with extensive backgrounds in homicide and narcotics trafficking.[2]

But the STEP Act succumbed to the "tough on crime" era that came soon after its passage. Eventually, its original intent was lost, and the Act sprawled ever outward, aided by the California legislature,[3] the electorate,[4] and a particularly punitive form of judicial activism.[5]

This Comment will focus on that activism. It argues that even with a newly sympathetic California Supreme Court, the STEP Act has so far strayed from its original intent that reform requires a new

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1. J. Franklin Sigal, Comment, *Out of Step: When the California Street Terrorism Enforcement and Prevention Act Stumbles into Penal Code Limits*, 38 GOLDEN GATE U. L. REV. 1, 3 (2007).

2. Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 115 (2006).

3. *See* CAL. PENAL CODE § 186.22 (West 1988) (amended 1993, 2000, 2002, 2006, 2007, 2010, 2011, 2014, 2017, 2018).

4. Baker, *supra* note 2, at 115 (explaining that the electorate expanded the reach of the STEP Act through Proposition 21 in the year 2000).

5. *See* People v. Sengpadychith, 27 P.3d 739, 744 (Cal. 2001); People v. Castenada, 3 P.3d 278, 279 (Cal. 2000); People v. Gardeley, 927 P.2d 713, 719 (Cal. 1996), *abrogated on other grounds by* People v. Sanchez, 374 P.3d 320 (Cal. 2016).

legislative or electoral answer. Bringing justice to those affected by gang violence while still protecting the rights of the accused may require some judicial discretion; but, as will be shown, the labyrinth of California case law surrounding the STEP Act has made it untenable in its current form. Given the urgency of the matters surrounding the law, fixing the STEP Act can no longer be left up to judges and requires significant statutory reform.

The Comment will proceed as follows: first, it will illustrate how the STEP Act works. Next, it will explore how a conservative California Supreme Court, working in the tough-on-crime era of the Act's early years, expanded the Act's reach beyond the original legislative intent. Third, it will examine the structural issues with the Act's enforcement and the shifting attitudes toward criminal justice reform that countered the Act's expansion. And finally, it will examine *People v. Valenzuela*,[6] how this decision is distinguishable from prior California Supreme Court jurisprudence, and what that means for the Act's future.

II. THE ACT

The STEP Act provides prosecutors with two tools to aid in their fight against criminal street gangs: a stand-alone provision criminalizing a person's active participation in a gang[7] and a sentencing enhancement targeted at persons who commit crimes "for the benefit of, at the direction of, or in association with any criminal street gang."[8]

A. Subsection 186.22(a)

Subsection 186.22(a) is the stand-alone component of the Act.[9] It reads, in pertinent part, "Any 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, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . ."[10]

6. 441 P.3d 896 (Cal. 2019).
7. *See* CAL. PENAL CODE § 186.22(a) (West 2014).
8. *Id.* § 186.22(b)(1).
9. *See id.* § 186.22(a).
10. *Id.*

The Act defines "criminal street gang" and "pattern of criminal gang activity" as well.[11] In subsection 186.22(e), the statute lists thirty-three eligible crimes.[12] Under the STEP Act, a "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts"[13] listed in subsection 186.22(e).[14] That association of people must also "[have] a common name or common identifying sign or symbol, and [its] members [must] individually or collectively engage in, or have engaged in, a pattern of criminal gang activity."[15]

In order to have a "pattern of criminal gang activity," the person charged under subsection 186.22(a) must *know* that group of three or more people committed, planned to commit, or attempted to commit any of those thirty-three crimes on two separate occasions within the past three years.[16]

It is a maze of confusing statutory language. But the gist is: if a prosecutor wants to charge someone with participating in a street gang under subsection 186.22(a), the following must be proved:

1. The defendant was part of a group of three or more persons;
2. The group had a common identifying sign or symbol;
3. The group committed, tried to commit, or conspired to commit most of the thirty-three crimes listed in 186.22(e), at least twice, on different occasions, over a three-year period;
4. The defendant *knew* about these crimes; and
5. The defendant then helped the group engage in further "felonious criminal conduct."[17]

As will be elaborated later in this Comment, interpretation of subsection 186.22(a) has proven difficult and is central to the decision in *People v. Valenzuela*.[18]

B. Subsection 186.22(b)(1)

Subsection 186.22(b)(1) reads in pertinent part:

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11. *Id.* § 186.22(e)–(f).
12. *See id.* § 186.22(e).
13. *Id.* § 186.22(f).
14. *Id.* § 186.22(e)–(f).
15. *Id.* § 186.22(f).
16. *Id.* § 186.22(a), (e).
17. *Id.* § 186.22.
18. *See* People v. Valenzuela, 441 P.3d 896, 906 (Cal. 2019).

> [A]ny person who is convicted of a felony 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be [additionally] punished.[19]

This subsection is an *enhancement*; it adds additional punishment onto an established felony.

Subsection 186.22(b)(1) has also been subject to uneven jurisprudence.[20] While this Comment focuses its analysis specifically on subsection 186.22(a)—as it was at issue in *Valenzuela*—jurisprudence surrounding subsection 186.22(b)(1) remains complex and unduly punitive. Some exploration of that will be discussed below.

III. THE EXPANSION

There is no dispute that a crime wave gripped California in the 1980s.[21] The decade saw a historic peak of property crimes and a consistently high rate of violent crimes.[22] In a sign of the times, voters ousted three California Supreme Court justices in the 1986 election, all of whom had been squarely on the liberal end of the spectrum when it came to criminal justice reform.[23] The campaign against the justices cited the justices' *lack of affection* for the death penalty as a key reason to vote them out.[24] Following the election, Governor George Deukmejian installed three new justices who would soon swing the court to the right on nearly all matters in the state, including criminal justice reform.[25]

Conventional thinking at the time linked much of the increase in crime to violent street gangs—and the media played a huge role in

19. CAL. PENAL CODE § 186.22(b)(1) (West 2014).

20. *See* Martin Baker, *Crips and Nuns: Defining Gang-Related Crime in California Under the Street Terrorism Enforcement and Prevention Act*, 40 MCGEORGE L. REV. 891, 897 (2009).

21. *See* Magnus Lofstrom & Brandon Martin, *Crime Trends in California*, PUB. POL'Y INST. CAL. (Oct. 2018), https://www.ppic.org/publication/crime-trends-in-california.

22. *Id.*

23. Claire Machado, *Did the Politicalization of the Supreme Court Start in California?*, BERKELEY POL. REV. (Jan. 28, 2019), https://bpr.berkeley.edu/2019/01/28/did-the-politicalization-of-the-supreme-court-start-in-california.

24. *Id.*

25. *Id.*

defining that narrative. In February of 1988, the *New York Times* declared Los Angeles "a simmering ethnic stew pot," populated by "black gangs" that held "disdain for human life."[26] In April of the same year, the *Washington Post* announced the results of a "strike force" that tore through Los Angeles's "crime ridden neighborhoods."[27] The *Los Angeles Times*, in June of 1988, documented a raid that netted 750 gang members and 1,524 total arrests.[28] Then-Mayor Tom Bradley promised to take back the streets of the City of the Angels from "terrorists."[29]

Then, in an emergency session in September of 1988, the California legislature declared, "[T]he state of California is in a state of crisis . . . ."[30] From that hysteria the STEP Act was born.

But even amidst one of the worst crime waves in the state's history, the California legislature took great pains to ensure prosecutions under the Act were *difficult* "except in the most egregious cases."[31] As an example, the original STEP Act required that the defendant charged as a member of a gang be fully aware the gang had committed two of the statutorily defined "serious crimes" prior to the conduct at issue.[32] In 1988, there were all of seven "serious" crimes: "assault with a deadly weapon or by means of force likely to produce great bodily injury; robbery; homicide or manslaughter; sale, manufacture, and possession for sale of narcotics; shooting at an inhabited dwelling or occupied vehicle; arson; and witness and victim intimidation."[33] And the original *sponsor* of the STEP Act concluded those seven "extremely serious" crimes were "typical of street gangs."[34]

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26. Robert Reinhold, *Gang Violence Shocks Los Angeles*, N.Y. TIMES, (Feb. 8, 1988), at A10, https://www.nytimes.com/1988/02/08/us/gang-violence-shocks-los-angeles.html.

27. Jay Matthews, *More than 600 Arrested in Anti-Gang Sweep by Los Angeles Police*, WASH. POST (Apr. 10, 1988), https://www.washingtonpost.com/archive/politics/1988/04/10/more-than-600-arrested-in-anti-gang-sweep-by-los-angeles-police/ad53910b-81ba-4c32-a512-7f9ed9458056.

28. Bettina Boxall, *750 Gang Members Arrested in 2-Night Sweeps*, L.A. TIMES (June 13, 1988, 12:00 AM), https://www.latimes.com/archives/la-xpm-1988-06-13-me-3206-story.html.

29. Eric Malnic & Mark Arax, *1,000 Officers Stage Assault Against Violent Youth Gangs*, L.A. TIMES (Apr. 9, 1988, 12:00 AM), https://www.latimes.com/archives/la-xpm-1988-06-13-me-3206-story.html.

30. CAL. PENAL CODE § 186.21 (West 2019).

31. Baker, *supra* note 2, at 114 (quoting S. COMM. ON THE JUDICIARY, BILL ANALYSIS: AB 2013, Record No. 29069, 1987–88 Reg. Sess., at 7 (Cal. 1988)).

32. *Id.*

33. *Id.*

34. *Id.*

The sponsors also designed the Act to provide extra punishment if, and only if, the prosecution could prove the affiliated gang committed at least two serious crimes *prior* to the defendant being charged under the STEP Act.[35] Therefore, a defendant should have only received an enhancement or a conviction under the STEP Act *after* prosecutors proved the gang had committed, and the defendant knew of, two of those defined "serious" criminal acts.[36] The California legislature took pains to indicate the STEP Act was a tool to be used cautiously by prosecutors to take down serious criminals—loose associations of neighborhood kids who tagged buildings with their initials were, by and large, supposed to be excluded from the STEP Act's purview.[37]

IV. THE EXPLOSION: *GARDELEY*, *CASTENADA*, AND *SENGPADYCHITH*

The modesty would not last. Three cases in particular—*People v. Gardeley*,[38] *People v. Castenada*,[39] and *People v. Sengpadychith*[40]—interpreted several important parts of the STEP Act in a broader manner than intended. These will be handled in order.

A. People v. Gardeley

In 1996, the newly-conservative California Supreme Court had its first opportunity to interpret the STEP Act in *People v. Gardeley*.[41] *Gardeley* was decided in the middle of the "tough on crime era." Just two years prior, California legislature passed its infamous "three strikes law."[42] At the same time, its federal counterpart had similarly passed its own "tough on crime" bill.[43] Throughout the 1990s, the STEP Act was continuously revised and expanded—and the list of

35. *Id.* at 114–15.

36. *Id.* at 115.

37. *Id.*

38. 927 P.2d 713 (Cal. 1996), *abrogated on other grounds by* People v. Sanchez, 374 P.3d 320 (Cal. 2016).

39. 3 P.3d 278 (Cal. 2000).

40. 27 P.3d 739 (Cal. 2001).

41. *See Gardeley*, 927 P.2d at 715 ("At issue in this case are certain provisions of the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act, enacted by the Legislature in 1988.").

42. *See California's Three Strikes Sentencing Law*, CAL. CTS., https://www.courts.ca.gov/20142.htm (last visited Nov. 17, 2019).

43. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1808 (1994).

"serious" crimes ballooned from seven to thirty-three.[44] The year 1996 was also the year of the "super predator"—the entirely made up, now thoroughly discredited idea that group of evil crime-prone youths would run wild in the streets[45]—an idea Hillary Clinton parroted in a now infamous speech.[46]

It is no surprise then that in its first review of the STEP Act, the California Supreme Court lowered the burden for prosecutors. Previously, defendants were supposed to know of *two* serious crimes—from a list of seven—that their counterparts had engaged in.[47] Only after establishing knowledge of those two serious crimes could the charges be enhanced.[48]

The *Gardeley* court reduced this burden by allowing prosecutors to use the *current charges* levied against a defendant and his accomplices to prove that knowledge.[49] After *Gardeley*, if a defendant knew of *one* previous incident, but was charged with two of the serious crimes on the list found in the statute, one of those two could serve as the foundation for meeting the knowledge requirement.[50] The court also declared the knowledge could be of "uncharged," and therefore unproven, crimes.[51]

Worse still, the California Supreme Court did so by hiding behind a veneer of straight-faced legislative intent. The court noted prior precedent required them to "construe penal laws as favorably to criminal defendants as reasonably permitted."[52] But the court demurred on that, arguing that policy only arises when the language of the statute "is susceptible of two constructions."[53] The court instead contended there was "no need for construction" as the plain-faced text

44. *See* CAL. PENAL CODE § 186.22(e) (West 2014).

45. John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators.

46. Ronda Lee, *Why Hillary's Super-Predator Comment Matters*, HUFFINGTON POST (Apr. 11, 2016, 01:37 PM), https://www.huffpost.com/entry/hillarys-superpredator-comment_b_9655052.

47. *See* Baker, *supra* note 2, at 114–15.

48. *See id.*

49. People v. Gardeley, 927 P.2d 713, 726 (Cal. 1996), *abrogated on other grounds by* People v. Sanchez, 374 P.3d 320 (Cal. 2016).

50. *Id.*

51. *Id.* at 727; *see* Baker, *supra* note 2, at 115–16 (discussing how *Gardeley* lowered the burden on prosecutors).

52. *Gardeley*, 927 P.2d at 724 (citing People v. Overstreet, 726 P.2d 1288, 1290 (Cal. 1986)).

53. *Id.* (quoting *Overstreet*, 726 P.2d at 1290).

of the STEP Act sufficiently illustrated the "legislative intent" of the statute.[54] As such, the court drew its conclusion in *Gardeley* based solely on the text of the Act.[55]

Given that *Gardeley* was a case of first impression, arguably *plenty* of room existed for "two constructions" of any number of the examined terms in the statute.[56] The *Gardeley* court looked at a number of subsections of the STEP Act: 186.22(b)(1), 186.22(e), and 186.22(f).[57] Subsection 186.22(f) defines criminal street gangs as an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts," in addition to "having a common name or common identifying sign or symbol."[58] Interpretive issues abound—what defines a "primary activity" of a group? What is a common name or symbol? Who decides how common it is? In addition, subsection 186.22(b)(1) looks at one's "association" with a gang—what defines an association?[59]

This is not to say the *Gardeley* court should have, or even could have, answered these questions. But given that it was a case of first impression, the cautious thing to do would have been to explore the legislative intent further. Instead, the court chose not to, claiming that the legislative intent was obvious, and reached an erroneous decision that ultimately harmed criminal defendants.

B. People v. Castenada

People v. Castenada was the next decision that reduced the burden on the prosecution. *Castenada* came on the heels of Proposition 21.[60] Passed in March of 2000, Proposition 21 came in the wake of the "super-predator" theory and not only enhanced criminal punishment under the STEP Act but also enhanced *juvenile* punishment throughout the state of California.[61]

54. *Id.* at 723.
55. *Id.*
56. *Id.* at 724 (quoting *Overstreet*, 726 P.2d at 1290).
57. *Id.* at 720.
58. CAL. PENAL CODE § 186.22(f) (West 2014).
59. *Id.* § 186.22(b)(1).
60. *See* People v. Castenada, 3 P.3d 278, 279–80 (Cal. 2000).
61. Lizabeth N. De Vries, Comment, *Guilt by Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F. L. REV. 191, 192 (2002).

Castenada also lowered the burden for the prosecution. Previously, the First District Court of Appeal, in *People v. Green*,[62] issued the controlling law for how "active" a gang member needs to be to qualify for a stand-alone conviction under the STEP Act.[63] *Green* required the prosecution to prove a defendant "devot[ed] . . . a substantial part of [their] time and efforts" to the street gang.[64] The defendant in *Castenada* argued that the *Green* decision effectively required the prosecution to show that a defendant held a *leadership position* in the gang.[65]

The high court disagreed, striking both of those standards, and replacing it with a lower burden: participation need be only more than "nominal or passive."[66]

C. People v. Sengpadychith

The interpretation issues continued. In 2001, the California Supreme Court decided *People v. Sengpadychith*.[67] There, the court grappled with how to define "primary activities" as it related to subsection 186.22(e) of the STEP Act.[68] It first offered that "primary activity" be defined by requiring criminal conduct be the "principal" occupation of the group.[69] It also contended "*consistent*[] and *repeated*[] . . . criminal activity" may establish criminal conduct as the group's "primary activity."[70] How could a prosecutor prove consistent and repeated criminal activity? The court offered that potentially a gang police officer could testify as an expert witness—an issue that will become more apparent later.[71]

But there is another issue at play here. At the beginning of the opinion, the court acknowledged its interpretation of subsections 186.22(e) and (f) *again*—even though in *Gardeley*, the court felt it

62. 278 Cal. Rptr. 140 (Ct. App. 1991), *abrogated by* People v. Castenada, 3 P.3d 278 (Cal. 2000).

63. *Id.* at 146; *see also Castenada*, 3 P.3d at 281 (acknowledging *Green*).

64. *Green*, 278 Cal. Rptr. at 146.

65. People v. Castenada, 73 Cal. Rptr. 2d 200, 202 (Ct. App. 1998), *aff'd*, People v. Castenada, 3 P.3d 278 (Cal. 2000).

66. *Castenada*, 3 P.3d at 284–85; *see also* Baker, *supra* note 2, at 109 (discussing the lowering of the burden in *Castenada*).

67. *See* People v. Sengpadychith, 27 P.3d 739, 741 (Cal. 2001).

68. *Id.* at 744.

69. *Id.*

70. *Id.*

71. *Id.* at 743 (citing People v. Gardeley, 927 P.2d 713, 722 (Cal. 1996), *abrogated on other grounds by* People v. Sanchez, 374 P.3d 320 (Cal. 2016)).

required no additional materials to help interpret these subsections because the legislative intent was apparent enough on the face of the subsections.[72] And, recall, that the *Gardeley* court specifically eschewed precedent that would have required them to interpret the STEP Act in the way most favorable to the criminal defendant *because* the court felt the statute was easily understandable.[73]

But instead of acknowledging the mistake and acting more cautiously, the California Supreme Court continued to operate in a way that expanded the rights of the prosecutor over the accused. In *Sengpadychith*, it did so again by focusing on the *quantity* of crimes as opposed to the *quality* of crimes.[74]

V. RESISTANCE GROWS

It is no surprise that a conservative California Supreme Court expanded the prosecution's reach during the "tough on crime" era. However, the foundation of the counter-revolution bubbled underneath the general consensus on crime and punishment. Sociological researchers continued to mount evidence that indicated crime and gang-ridden areas did not need more police officers; they needed more financial support, more investment, and more social resources.[75] In 1999, researchers from University of California, Los Angeles published a study examining the relationship between socioeconomic factors and gang violence.[76] The study concluded that low-income and lack of employment opportunities in communities directly correlated with gang violence.[77]

Entering the new millennium, crime rates continued to drop in California.[78] Nevertheless, the state continued to lock up more people.[79] In the trenches, prosecutors and defense attorneys grappled

72. *Id.*at 741–42.

73. *See Gardeley*, 927 P.2d at 723 (Cal. 1996).

74. *Sengpadychith*, 27 P.3d at 744; *see also* Baker, *supra* note 2, at 116–17 (discussing the problem with the court's expansive definition of "primary activity").

75. Chase Sackett, *Neighborhoods and Violent Crime*, DEP'T HOUSING & URB. DEV. OFF. POL'Y DEV. & RES. (2016), https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html.

76. *See* Demetrios N. Kyriacou et al., *The Relationship Between Socioeconomic Factors and Gang Violence in the City of Los Angeles*, 46 J. TRAUMA 334, 334 (1999).

77. *Id.*

78. Lofstrom & Martin, *supra* note 21.

79. DEP'T. JUST., BUREAU OF JUST. STAT. BULL., NCJ 188207, PRISONERS IN 2000 1, 4 (2001) (explaining that by the year 2000, California had the most occupied prisons in the country with inmate percentage growth of 70.4 percent).

with an inconsistent and punitive judicial system when it came to gang members. And the arbitrary nature of gang prosecutions—as well their susceptibility to common human error—started making their ever-growing punishments harder and harder to justify.

Examining the process to prove a gang enhancement demonstrates how, at every turn, ample room for human error exists. It starts with the police identifying who is in a gang. For example, according to the City of San Diego, there are nine criteria their officers use in identifying potential gang members; of those nine, some include frequenting gang areas and "be[ing] identified as a gang member by an untested informant."[80]

This expansive police discretion causes problems at the source. Identified gang members are often added to a statewide database, CalGang, enabling police to track an identified person's movement throughout the state.[81] However, people often find themselves incorrectly tagged as a gang member. Those who just happen to live in gang territory or just happen to know someone in a gang are frequently misidentified as gang members.[82] Even *gang interventionists* dedicated to *preventing* gang violence have been identified as gang members by the database.[83] In 2016, a state audit found that "[l]aw enforcement agencies have failed to ensure that CalGang records are added, removed, and shared in a way that maintains the accuracy of the system and safeguards individuals' rights."[84] The lax maintenance of the database came to its logical conclusion in February of 2020, when the California attorney general announced he would investigate the Los Angeles Police Department after it was revealed that twenty officers had allegedly falsified CalGang records.[85]

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80. *See* Memorandum from the San Diego Police Dep't on Frequently Asked Questions Regarding Identifying Gangs and Gang Members, https://www.sandiego.gov/sites/default/files/legacy/police/pdf/gangfaq.pdf.

81. *See* CAL. ST. AUDITOR, REP. 2015-130, CALGANG CRIMINAL INTELLIGENCE SYSTEM 1 (2016), https://auditor.ca.gov/pdfs/reports/2015-130.pdf.

82. See Ali Winston, *You May Be in California's Gang Database and Not Even Know It*, REVEAL (Mar. 23, 2016), https://www.revealnews.org/article/you-may-be-in-californias-gang-database-and-not-even-know-it/.

83. *See* Katie Flaherty, *He's a Gang Intervention Worker. But California Police Call Him a Gang Member*, NBC NEWS (Aug. 18, 2019, 8:59 AM), https://www.nbcnews.com/news/us-news/he-s-gang-intervention-worker-california-police-call-him-gang-n1043666.

84. CAL. ST. AUDITOR, *supra* note 81, at 36.

85. Leila Miller & Anita Chabria, *California Attorney General to Investigate LAPD Gang-Framing Scandal*, L.A. TIMES (Mar. 21, 2020 1:57 PM),

In the trenches, public defenders and prosecutors acknowledged the same years before any published audit. In interviews from 2009, public defenders pointed out several instances in which someone accused of being in a gang was just from a neighborhood where it was nearly impossible *not* to interact with gangs.[86] In one example, the childhood nickname of an unaffiliated person in the neighborhood became that person's presumed gang moniker because the police assumed the nickname was gang related.[87] District attorneys similarly admitted that gang enhancements could be arbitrarily applied.[88] Further, prosecutors explained that harsher penalties—added well after the bill passed into law[89]—incentivized adding gang enhancements as it made the proving the enhancements more worth the trouble.[90]

These issues routinely spill over into court, where prosecutors are permitted to introduce highly prejudicial, and oftentimes highly speculative, gang affiliations and the testimony of expert "gang cops."[91]

All of this is to say that the path to a conviction under the STEP Act remains uniquely fraught with opportunities for error. Every step of the way, miscommunications, misunderstandings, socioeconomic factors, and potentially flat out lies contribute to an overly-punitive system.

A. People v. Albillar

Yet, in the face of growing criticism, judicial interpretation of the law shifted only slightly. At the highest level, the case law remained calcified until *People v. Albillar*[92] in 2010. There, the California Supreme Court examined the sentencing enhancement under

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https://www.latimes.com/california/story/2020-02-10/california-attorney-general-lapd-gang-scandal-calgang.

86. Erin Y. Yoshino, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 127 (2008).

87. *Id.* at 128–29.

88. *Id.* at 133.

89. *See* Baker, *supra* note 2, at 105; *see also* CAL. PENAL CODE § 186.22(b)(1)(A)–(C) (West 2014) (explaining mandatory minimums in enhancements).

90. *See* Yoshino, *supra* note 86, at 133.

91. *Id.* at 134; *see also* People v. Hernandez, 94 P.3d 1080, 1085–89 (Cal. 2004) (permitting the use of bifurcation in trials for criminal prosecutions and enhancements, but allowing gang evidence as a form of character evidence that can be used even in trials not involving gang membership).

92. 244 P.3d 1062 (Cal. 2010).

subsection 186.22(b)(1) and considered whether a crime could be committed by a group of gang members that were not acting *for the benefit of the gang*.[93]

The California Supreme Court acknowledged the possibility that a group of gang members may embark on a "frolic and detour" from their association as gang members to commit a crime.[94] The court even offered that the defense may negate any finding of an enhancement under the STEP Act.[95] But the acknowledgement was a cautious one—the court declared the defendants in *Albillar* were *not* on a "frolic and detour."[96] Nevertheless, *Albillar* marked the first instance in decades that the California Supreme Court provided criminal defendants a leg to stand on, no matter how weak. After decades of throwing the book at defendants, *Albillar* represented a potential softening of the punitive judicial activism of old.

But a turning point had not come just yet. While that "frolic and detour" language created a moment of inspiration, it was ultimately futile. Scholars published thoughts on potential new legal standards for proving gang enhancements[97] and several defense attorneys utilized the argument on federal habeas corpus petitions.[98] But as of this writing, the defense has never been successful.

B. Post Albillar

In the decade following *Albillar*, the dam on criminal justice reform broke and a number of judicial, legislative, and electoral reforms took hold in California. First came *Brown v. Plata*,[99] handed down by the United States Supreme Court in 2011, which forced California to deal with its over-incarceration habit. Following *Plata*, the California legislature passed AB 109—better known as "realignment"[100]—which helped stem the tide by providing local

93. *Id.* at 1073.
94. *Id.* at 1072.
95. *Id.*
96. *Id.* at 1072–73.
97. *See* Baker, *supra* note 20, at 897.
98. *See, e.g.*, Ramirez v. Lewis, No. 1:11-cv-01811-JLT, 2014 U.S. Dist. LEXIS 50638, at *17 (E.D. Cal. Apr. 10, 2014) (utilizing the "frolic and detour" defense but ultimately having the enhancements upheld).
99. 563 U.S. 493 (2011).
100. *See* CAL. LEGIS., AB 109, 2011–2012, Reg. Sess. (2011).

governments with more power to determine sentencing;[101] in 2014, Proposition 47 passed, which re-classified several non-violent and drug felonies as misdemeanors.[102] Then, in 2016, Californians passed Proposition 57, which opened up the possibility of parole for a wide population of non-violent offenders who had previously been ineligible.[103] In 2017, a bill passed reforming CalGang.[104] In 2018, the California legislature passed a number of criminal justice reform bills—including the end of cash bail, an increase in judicial discretion over sentencing, and the elimination of felony murder.[105] But even during a decade of change, the California legislature barely touched the STEP Act, choosing instead to tweak the bill in non-consequential ways.[106]

The most consequential change for those charged with gang enhancements was the shift in the composition of the California Supreme Court after *Albillar*. Between 2011 and 2019, five new justices were appointed to the California Supreme Court.[107]

Far from the death-penalty-loving court of old, the new justices appeared far more reform-oriented. Chief Justice Cantil-Sakauye led the cash-bail reform effort.[108] Justice Florentino-Cuéllar spent time in the Obama administration working on a host of legislation.[109] Justice Liu wrote a law review article arguing for the constitutional right to welfare.[110] Justice Groban, the most recent addition to the court,

101. Magnus Lofstrom & Brandon Martin, *Public Safety Realignment: Impacts So Far*, PUB. POL'Y INST. CAL. (Sept. 2015), https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/.

102. *Proposition 47: The Safe Neighborhoods and Schools Act*, CAL. CTS., https://www.courts.ca.gov/prop47.htm (last visited Nov. 17, 2019).

103. *The Public Safety and Rehabilitation Act of 2016*, CAL. DEP'T CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/proposition57/ (last visited Nov. 17, 2019).

104. CAL. PENAL CODE § 186.34 (West 2018).

105. *California Governor Signs Many Criminal Justice Changes into Law*, S. CAL. DEF. BLOG (Nov. 21, 2018), https://www.southerncaliforniadefenseblog.com/2018/11/california-governor-signs-many-criminal-justice-changes-into-law.html.

106. *See* CAL. PENAL CODE § 186.22 (Deering 2007).

107. Scott Shafer, *Brown's Longest-Lasting Legacy: Judges*, KQED (Dec. 28, 2018), https://www.kqed.org/news/11714131/browns-longest-lasting-legacy-judges.

108. Marisa Lagos, *California Chief Justice: Bail Reform Process 'Unassailable'*, KQED (Sept. 6, 2018), https://www.kqed.org/news/11690832/california-chief-justice-bail-reform-process-unassailable.

109. *See Associate Justice Mariano-Florentino Cuéllar*, CAL. CTS., https://www.courts.ca.gov/28724.htm (last visited Nov. 17, 2019).

110. *See* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).

worked on a number of policies for Governor Jerry Brown.[111] These changes meant the people deciding *Valenzuela* differed significantly from those deciding *Gardeley*, and even *Albillar*.

VI. *VALENZUELA* AND ITS CONSEQUENCES

A. The Road to Valenzuela

That will take us, momentarily, to *Valenzuela*. But before discussion of that case, some important foundation must be laid. *Valenzuela* reconciled three key developments in California jurisprudence: *In re Estrada*,[112] Proposition 47, and *People v. Buycks*.[113]

In re Estrada, decided in 1965, created the modern rule concerning the retroactivity of statutes reducing punishments for certain crimes.[114] In *Estrada*, the court answered a fundamental question: when a statute is amended before a defendant's case closes, does the statute at the time of the crime or the statute at the time of the case's appeal control?[115] *Estrada* definitively declared that defendants were entitled to the "ameliorating benefits" of the amendment, provided the case has not closed.[116]

Estrada rose to prominence again in 2014 when the California electorate passed Proposition 47.[117] Proposition 47 amended the California Penal Code and reduced a number of felonies to misdemeanors.[118] Proposition 47 expressly provided a mechanism for defendants to apply for re-sentencing and felony-to-misdemeanor reduction.[119] What Proposition 47 did *not* address, however, was what would become of specific enhancements that required felony convictions.

111. Bob Egelko, *Jerry Brown's Legacy: Diversifying the Judicial Bench*, S.F. CHRON. (Jan. 3, 2019, 07:28 PM), https://www.sfchronicle.com/news/article/Jerry-Brown-s-legacy-diversifying-the-judicial-13507344.php.

112. 408 P.2d 948 (Cal. 1965).

113. 422 P.3d 531 (Cal. 2018).

114. *In re Estrada*, 408 P.2d at 950.

115. *Id.*

116. *Id.* at 951 (illustrating that a case pending appeal is not considered closed).

117. *See Proposition 47: The Safe Neighborhoods and Schools Act*, *supra* note 102; *see also* CAL. PENAL CODE § 1170.18(b) (West 2019). The petitioner in *Valenzuela* was resentenced under California Penal Code section 1170.18(b), based on the changes enacted by Proposition 47. People v. Valenzuela, 441 P.3d 896, 899 (Cal. 2019)).

118. *See Proposition 47: The Safe Neighborhoods and Schools Act*, *supra* note 102.

119. *See* CAL. PENAL CODE § 1170.18(b).

Enter 2018's *Buycks*. There, three defendants successfully reduced their felonies to misdemeanors via the mechanisms created by Proposition 47.[120] At play in *Buycks* were three separate enhancements:[121] California Penal Code section 667.5, part of California's infamous "three strikes" law;[122] California Penal Code subsection 12022.1(b), which added two extra years for additional felonies committed while on bail;[123] and California Penal Code section 1320.5, which declared, "Every person who is *charged with* or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony."[124]

The *Buycks* court dismissed the enhancements brought under section 667.5 and subsection 12011.1(b), while upholding the enhancement brought under section 1320.5.[125] The key distinction laid in "plain reading" text of the statute—section 1320.5 only required a felony *charge* whereas the other two required felony *convictions*.[126] Because Proposition 47 reduced the necessary felony convictions to misdemeanors, the court determined the enhancements lacked a critical element and dismissed them.[127]

B. People v. Valenzuela

Then, *People v. Valenzuela* arrived. There, a young defendant stole a $200 bicycle.[128] The jury convicted the defendant on two grounds: grand theft and the STEP Act.[129] While the case was on appeal, Proposition 47 passed, and the defendant successfully petitioned to reduce his grand theft felony to a misdemeanor.[130]

This brought the California Supreme Court to a crucial question: with the felony charge no longer present, could the conviction under the STEP Act stand? The case turned on the phrasing of a key requirement in the statute: the defendant must assist in "any *felonious*

120. People v. Buycks, 422 P.3d 531, 535 (Cal. 2018).
121. *Id.* at 536–37.
122. CAL. PENAL CODE § 667.5 (West 2019).
123. *Id.* § 12022.1 (West Supp. 2019).
124. *Id.* § 1320.5 (West 2014) (emphasis added).
125. *Buycks*, 422 P.3d at 547–49.
126. *Id.* at 548.
127. *Id.* at 547–49.
128. People v. Valenzuela, 441 P.3d 896, 899 (Cal. 2019).
129. *Id.*; *see* CAL. PENAL CODE § 186.22 (West 2014).
130. *Valenzuela*, 441 P.3d at 899–900.

criminal *conduct* by members of that gang."[131] The State argued the term "conduct" did not require that the defendant be convicted of a felony.[132] It also stressed that the legal classification of the crime at the time it was committed controlled the outcome of the sentencing.[133]

The *Valenzuela* court disagreed. The court determined that the stand-alone conviction under the STEP Act required the "conduct" to be felonious—and since the theft was now a misdemeanor, it was by definition no longer felonious.[134] The court likened the felony conviction requirement of the *Buycks* statutes to the *felonious conduct* requirement of the STEP Act; to the court, these were one and the same requirement.[135] Since the defendant's theft was reduced to a misdemeanor and, by definition, was no longer felonious, the STEP Act conviction lacked a critical element.[136]

The court added another wrinkle: if a prosecutor wanted to argue that the conduct furthered a felony committed by the gang, even if the defendant's actions themselves were only worthy of a misdemeanor, then the prosecutor would have to draw the causal link between the misdemeanor and a specific, identified felony committed by the gang.[137] In effect, the prosecution's burden would soon become two-fold: to not only prove a misdemeanor beyond a reasonable doubt, but to prove that misdemeanor assisted in a *specific* felony committed by other gang members.[138]

The court also declared that *Estrada*'s ameliorative effects trumped the State's second argument.[139] In doing so, the court noted that "no indicia of legislative intent" concerning the STEP Act indicated a felony was "fixed for all time when the crime takes place."[140] As such, *Estrada* controlled, and the defendant deserved the precedent's ameliorative effects.[141]

The dissenting opinions provide fuller context for why *Valenzuela* is distinguishable from other California Supreme Court

131. CAL. PENAL CODE § 186.22(a) (emphasis added).
132. *Valenzuela*, 441 P.3d at 904.
133. *Id.* at 904–05.
134. *Id.* at 904.
135. *Id.* at 905.
136. *Id.*
137. *Id.* at 904 n.5.
138. *Id.*
139. *Id.* at 905.
140. *Id.*
141. *Id.*

decisions regarding gang enhancements. Justice Corrigan took the opposite stance of the majority. Instead of equating felonious conduct to a felony conviction, Justice Corrigan argued that the defendant's actions "promot[ed]" the defendant's gang—a standard Justice Corrigan felt satisfied the requirement under the STEP Act for a stand-alone conviction, even if the crime that promoted the gang was itself reduced to a misdemeanor.[142] In addition, she pointed out that Proposition 47 was not specifically designed to address crimes under the STEP Act and that doing so expanded the reach of the Proposition in a "random and haphazard" way.[143]

Justice Kruger took issue with the court's use of *Estrada* in her dissenting opinion.[144] She noted that at no point did the defense raise an *Estrada* defense.[145] In fact, she pointed out, the defendant "affirmatively disclaimed reliance on this theory."[146]

C. The Result

It is not difficult to see the California Supreme Court of the 1990s agreeing with Justice Corrigan's decision to distinguish *Buycks*. The same court that wrote *Gardeley* and *Castenada* would also likely find the *Valenzuela* court's use of *Estrada* suspect.

Yet, *Valenzuela* represents a modest step that will likely only assist a small number of defendants. At the end of the day, the STEP Act has been amended and historically interpreted in such a punitive way that modest, reform-oriented decisions like *Valenzuela* are likely the only *real* victories for criminal defendants.

VII. CONCLUSION

And that is only if there are victories at all. It is possible that California politics and judicial decisions remain firmly rooted in pursuit of criminal justice reform for the foreseeable future. Yet, that may change. A new current of punitive justice may once again spring up and take the judiciary with it.

It also remains puzzling that, even *with* public defenders, prosecutors, and the state government acknowledging the systemic

142. *Id.* at 907 (Corrigan, J., dissenting).
143. *Id.* at 909.
144. *Id.* at 911 (Kruger, J., dissenting).
145. *Id.*
146. *Id.*

issues in evaluating gang prosecutions, little action has been taken to address the issue. Instead, gang prosecutions remain in stasis—where small, modest steps like *Valenzuela* shift the tide only a little.

Reform appears necessary. To start, California legislators would do well to bring the STEP Act back in line with its original intent. At the moment, it serves as a blunt instrument rather than a careful deterrent against serious gang members.

There are a number of statutory reforms that could aid in that endeavor. To start, a statutorily defined explanation of "felonious criminal conduct" and a prohibition on using charged, but unproven, offenses as the basis for establishing gang prosecutions would aid significantly.[147]

Next, the California legislature must reduce the number of "serious" crimes available. With thirty-three enumerated offenses, it is too easy for graffiti artists or raucous kids to be slammed with harsh penalties.[148]

In addition, the Act should permit more judicial discretion in enhancement sentencing.[149] Reducing mandatory punishments and providing judges with a spectrum of available sentences would ensure that the only worst offenders are punished with the maximum sentences.

Finally, due to the extremely prejudicial nature of gang evidence, the California legislature should adopt language making the bifurcation of gang enhancements or gang prosecutions the norm. It can do so by clearly distinguishing the type of specific gang evidence that is *always* necessary, even in a "trial of guilt" that is otherwise not involved in a prosecution for gang activity.[150] These modifications would scratch the surface of what reform could look like.

The *Valenzuela* court did well by the defendant, and the likely small population of defendants situated similarly. But the fact that *Valenzuela* can so significantly depart from cases like *Gardeley*—less than twenty-five years later—speaks to the need for clarity on the matter. In order to bring about reform that helps those affected by gang violence while also respecting the rights of the criminally accused, a new, bottom-up framework is required. Judicial half-steps and tweaks

147. CAL. PENAL CODE § 186.22(a) (West 2014).
148. *Id.* § 186.22(e).
149. *Id.* § 186.22(b)(1)(A)–(C).
150. People v. Hernandez, 94 P.3d 1080, 1086 (Cal. 2004).

are no longer enough. Real reform requires new efforts on both the electoral and legislative fronts.