

Summer 2020

STEPping into the “Wrong” Neighborhood: A Critique of the People v. Albillar’s Expansion of California Penal Code Section 186.22(a) and a Call to Reexamine the Treatment of Gang Affiliation

Samuel DiPietro

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>



Part of the [Criminal Law Commons](#)

Recommended Citation

Samuel DiPietro, *STEPping into the “Wrong” Neighborhood: A Critique of the People v. Albillar’s Expansion of California Penal Code Section 186.22(a) and a Call to Reexamine the Treatment of Gang Affiliation*, 110 J. CRIM. L. & CRIMINOLOGY 623 (2020).

<https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss3/6>

This Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

STEPPING INTO THE “WRONG” NEIGHBORHOOD: A CRITIQUE OF THE *PEOPLE V. ALBILLAR*’S EXPANSION OF CALIFORNIA PENAL CODE SECTION 186.22(a) AND A CALL TO REEXAMINE THE TREATMENT OF GANG AFFILIATION

SAMUEL DIPIETRO*

Since 1988, the number of California criminal street gangs has increased from 600 to 6,442, an increase of roughly 973%. This dramatic increase in gang participation occurred despite the California Legislature adopting increasingly harsher anti-gang laws. One such law, adopted in 1988, is the Street Terrorism and Enforcement Prevention Act (STEP Act), which contains a substantive offense for being a member of a criminal street gang and an enhancement offense for committing gang-related crimes. In 2010, the California Supreme Court, in the case of People v. Albillar, interpreted Section 186.22(a) of the STEP Act to apply to any felonious criminal conduct by gang members instead of solely gang-related felonious conduct. The court’s holding in Albillar essentially allows a defendant who is affiliated with a criminal street gang to receive an additional sentence for the commission of any felonious crime regardless of whether the crime had any relationship to the defendant’s gang membership. This Comment argues that such an application of Section 186.22(a) runs afoul of the Supreme Court’s holding in Robinson v. California, where the Court held that punishing an addict for his status of being addicted to drugs amounted to cruel and unusual punishment. While Section 186.22(a) does require a felonious act unlike the statute in Robinson, this Comment examines the Supreme Court’s holdings regarding the constitutionality of hate crime enhancements and concludes that the California Supreme Court’s holding in

* I would like to thank Professor Leonard Rubinowitz, Emelia Carroll, and Reilly Frye for their guidance and editorial support throughout this Comment’s development process. Also, I would like to thank my beautiful wife, Cheyenne DiPietro, whose interest in criminal law inspired me to write about this topic.

Albillar exceeds constitutional bounds. This Comment concludes by examining the policy rationale behind the Robinson holding and applying that rationale to gang membership, suggesting that treatment, as opposed to imprisonment, might be the proper solution to California's criminal street gang problem.

INTRODUCTION	625
I. THE STEP ACT & SECTION 186.22	626
A. A Brief History of the STEP Act.....	626
B. Section 186.22: A Substantive Crime and a Criminal Enhancement	628
II. THE <i>PEOPLE</i> v. <i>ALBILLAR</i> AND SECTION 186.22(A)'S EXPANSION TO INCLUDE NON-GANG-RELATED CRIMES.....	630
A. <i>People v. Albillar</i> : Background, Crimes, and Convictions	630
B. Subsequent Appeal and the California Supreme Court Holding	631
C. Significance of Holding and Post- <i>Albillar</i> Decisions.....	634
III. <i>ROBINSON</i> v. <i>CALIFORNIA</i> & <i>POWELL</i> v. <i>TEXAS</i> : WHEN DOES PUNISHING A STATUS GO TOO FAR?	635
A. The Requirements of Culpability: Actus Reus and Mens Rea	635
B. California's Ban on Drug Addiction and the Supreme Court in <i>Robinson</i>	636
C. <i>Powell v. Texas</i> : Defining the Limits of the <i>Robinson</i> Doctrine	638
D. Contrasting <i>Robinson</i> with <i>Powell</i> : Punishing a Desire as Contrasted with Punishing an Action.	641
IV. APPLYING <i>ROBINSON</i> AND <i>POWELL</i> TO SECTION 186.22(a)	642
A. As a Substantive Offense, Section 186.22(a) Should Be Deemed Unconstitutional	642
B. If Classified as An Enhancement Offence, Section 186.22(A) Should Be Deemed Unconstitutional	645
V. GANG AFFILIATION SHOULD BE TREATED THROUGH REHABILITATION RATHER THAN THROUGH CRIMINALIZATION AND IMPRISONMENT	648
A. Why Punishing Addiction Amounts to a Cruel and Unusual Punishment	648
B. The Policy Rationale for Treating Rather than Imprisoning	

Drug Addicts Also Applies to Gang Affiliates.....	651
CONCLUSION.....	654

INTRODUCTION

What do we know to be true about gang violence? We know we will fail if we fixate on the symptoms and not address what undergirds it.¹

Imagine a world where a society has determined that fraternities are against social policy. However, a Constitution prevents this society from punishing mere fraternity membership, so the society creates a law that increases the punishment for active fraternity members who commit crimes by up to three years. By including an underlying criminal offense, this society deems that the law does not punish being a member of a fraternity, but only fraternity members who commit crimes. But this additional sentence only applies to fraternity members when they commit a crime; if a non-fraternity member committed the same crime, they would not receive an additional sentence. Since it is difficult to determine who is a fraternity member, courts in this world allow fraternity experts to testify as to whether a defendant is a member of or associated with a fraternity. Furthermore, prosecutors can present evidence of a defendant’s fraternity association, such as a defendant’s family history, fraternity membership, the community where a defendant lives, and even the type of clothes that a defendant wears. In the context of fraternity membership, such a world might seem absurd. But this world is very real in the context of gang membership and gang affiliation in California under the Street Terrorism Enforcement and Prevention Act (STEP Act), codified in Section 186.22 of the California Penal Code.

In the past decade, numerous journal articles have critiqued and often criticized the STEP Act; however, the Act has fallen out of the jurisprudential spotlight as of late. This is despite several California Supreme Court decisions that have expanded the applicability of the Act to encompass more and more criminal activities. In addition, in the past few years, other state courts have begun to question the constitutionality of their gang enhancement provisions when examining similar gang enhancement statutes.² Therefore, it is time that the STEP Act is reexamined.

¹ Gregory J. Boyle, *A Lethal Absence of Hope*, L.A. TIMES, (Oct. 15, 2002), <http://articles.latimes.com/2002/oct/15/opinion/oe-boyle15> [<https://perma.cc/S6W4-VE4T>].

² See, e.g., *State v. Turner*, No. E201600651CCAR3CDE2016-00651-CCA-R3-CD, 2017 WL 1830106 *19 (Tenn. Crim. App. May 5, 2017) (holding Tennessee’s gang enhancement statute unconstitutional); *Rodriguez v. State*, 671 S.E.2d 497, 503 (Ga. 2009) (holding Georgia’s gang enhancement statute constitutional).

This Comment examines the modern-day STEP Act, discusses the impact of *People v. Albillar*'s interpretation of Section 186.22(a) to include non-gang-related felonies, and argues that Section 186.22(a) has exceeded Constitutional limits in light of the Supreme Court's decisions in *Robinson v. California* and *Powell v. Texas*. This Comment then proceeds to argue that, as a matter of public policy, gang affiliation—like drug addiction—is better treated through rehabilitation programs as opposed to imprisonment. Part I of this Comment summarizes the history of the STEP Act and introduces Sections 186.22(a) and 186.22(b). Part II introduces and discusses the importance of *People v. Albillar*'s expansion of Section 186.22(a) to include non-gang-related felonious offenses. Part III introduces the foundational requirements of culpability and examines the application of these requirements in the Supreme Court cases *Robinson v. California* and *Powell v. Texas*. Part IV then applies *Robinson* and *Powell* to Section 186.22(a), concluding that Section 186.22(a), post-*Albillar*, is unconstitutional. Part V makes a policy related argument that, like drug addiction, gang affiliation should be treated with rehabilitation rather than punished with imprisonment.

I. THE STEP ACT & SECTION 186.22

A. A BRIEF HISTORY OF THE STEP ACT

Anti-gang legislation increases the ability of prosecutors to prosecute gang activities. Examples of anti-gang legislation are statutes that criminalize gang recruitment and gang solicitation.³ Anti-gang legislation is oftentimes justified based on the notion that gangs protect their associates and, because many gang crimes are committed in groups, it is more difficult for law enforcement to curb gang crime absent laws that specifically target gang members.⁴ This justification is what led California to become the first state to adopt anti-gang legislation through the adoption of the STEP Act in 1988.⁵

The preamble to the STEP Act (the Act) provides that the Act was enacted to address the nearly 600 criminal street gangs operating in California.⁶ The Act attempted to curb gang membership by making it a criminal offense to engage in certain gang activities.⁷ Almost immediately

³ Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 32 (1998).

⁴ *People v. Albillar*, 244 P.3d 1062, 1068 (Cal. 2010).

⁵ *Id.*

⁶ See Cal. Penal Code § 186.21 (West 2012).

⁷ See Bjerregaard *supra* note 3, at 32.

after enactment, the Act was in the public spotlight.⁸ Dubbed “Baby RICO,” enforcement of the Act began with police officers asking suspected gang members to sign “special-delivery notices” that served to notify suspected gang members of the new law; these were considered admissible as evidence of gang membership in court.⁹ Enforcement of the Act immediately became controversial in 1989 when police, relying on the Act, arrested a mother for allegedly supporting her son’s gang involvement.¹⁰ Specifically, the mother was arrested for failing to supervise her son and for creating an environment that encouraged his gang involvement.¹¹ While the mother’s case was ultimately dismissed after she successfully completed a parenting program, such arguably broad applications of the Act led the American Civil Liberties Union of Southern California (ACLU) to file suit on the grounds that the Act was unconstitutionally vague.¹² The ACLU’s lawsuit was successful, and within the first two years of the Act taking effect, the provision of the Act that was used to prosecute the mother was deemed unconstitutional for failing

⁸ See Mike Reilly, *Law to Check Gang Violence Sparks Debate*, OMAHA WORLD-HERALD, Oct. 13, 1990, at 13.

⁹ Michele Fuetsch, *New Weapon in Gang Wars: Compton Police Serve Written Notice of Street Terrorism Act*, L.A. TIMES (June 1, 1989), <https://www.latimes.com/archives/la-xpm-1989-06-01-hl-1288-story.html> [<https://perma.cc/9WHT-SHBW>]; see also Mike Ward, *Pasadena Police Plan Crackdown on Gangs: Department Assigns More Officers and Is Ready to Prosecute Under State Law on Street Terrorists*, L.A. TIMES (May 21, 1989), <https://www.latimes.com/archives/la-xpm-1989-05-21-ga-655-story.html> [<https://perma.cc/9QHR-HEX4>] (the notice that police attempted to have suspected gang members sign provided in part “IRA REINER DISTRICT ATTORNEY . . . IN RE: THE MATTER OF GANG TO: MEMBERS OF THE GANG AND, YOU ARE HEREBY NOTIFIED that the GANG is a criminal street gang engaging in a pattern of criminal street gang activity within the meaning of Penal Code Section 186.22 . . . YOU ARE FOR THIS REASON FURTHER NOTIFIED THAT ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG COULD SUBJECT YOU TO IMPRISONMENT IN THE STATE PRISON FOR A PERIOD OF UP TO THREE YEARS PURSUANT TO THE STREET TERRORISM ENFORCEMENT ACT OF 1988”).

¹⁰ See Editorial, *Holding Parents Responsible for Teens*, CHI TRIBUNE (May 9, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-05-09-8904110259-story.html> [<https://perma.cc/D65E-7QA6>] (claiming that the first use of the STEP Act to arrest an alleged gang member’s mother “reflects widespread frustration with teenage crime and drug dealing and is intended to serve notice to parents that they cannot abandon their responsibilities”); see also Bruce Buursma, *When Mom’s Just One of the Gang, L.A. Gets Tough*, CHI TRIBUNE (May 7, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-05-07-8904100543-story.html> [<https://perma.cc/V5D7-SZ9G>].

¹¹ See Buursma, *supra* note 10.

¹² Associated Press, *Appeals Court Voids ‘Gang Mom’ Law*, L.A. TIMES, (Dec. 22, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-12-22-mn-1615-story.html> [<https://perma.cc/RJ65-XB6R>]; Paul Lieberman & Elizabeth J. Mann, *Anti-Gang Law Hit in ACLU Suit: Measure That Holds Parents Responsible Called Unfair to Poor*, L.A. TIMES, (July 21, 1989), <https://www.latimes.com/archives/la-xpm-1989-07-21-me-4332-story.html> [<https://perma.cc/7F34-NC6Q>].

to define “reasonable parenting.”¹³ Since then various other provisions of the Act have also been challenged on constitutional grounds.¹⁴ The Act’s most commonly challenged sections are Section 186.22(a) and 186.22(b).

B. SECTION 186.22: A SUBSTANTIVE CRIME AND A CRIMINAL ENHANCEMENT

Section 186.22 of the Act contains both a substantive offense and a sentencing enhancement; Section 186.22(a) criminalizes actively participating in a criminal street gang and Section 186.22(b) enhances a sentence for committing crimes that benefit or promote a criminal street gang.¹⁵ While these sections are distinct in the sense that they can be prosecuted separately, they can also be prosecuted simultaneously.¹⁶ The ability to prosecute these offenses simultaneously can dramatically increase the minimum sentence for most felonies. For example, while a conviction for witness intimidation in California generally carries a maximum sentence of three years, the application of Section 186.22 can increase the sentence to life imprisonment.¹⁷ This is due to any felonious offense committed under Section 186.22(a) or 186.22(b) counting towards California’s “three-strike” law which increases the sentences for habitual offenders. Thus, a defendant could receive two strikes in the same complaint if he is convicted of violating both Section 186.22(a) and 186.22(b).¹⁸

While subtle, the distinction between a substantive offense and an enhancement offense is important. A substantive offense is “[a] crime that is complete in itself and is not dependent on another crime for one of its elements.”¹⁹ Unlike a substantive offense, an enhancement offense is “[a]n offense that has a greater degree of severity than the normal offense of the

¹³ See Associated Press, *supra* note 12.

¹⁴ See, e.g., *In re Alberto R.*, 1 Cal. Rptr. 2d 348, 357 (Cal. Ct. App. 1991) (holding gang enhancement provision did not violate the Equal Protection Clause’s prohibition on vagueness); *People v. Gamez*, 286 Cal. Rptr. 894, 902 (Cal. Ct. App. 1991) (holding that the gang enhancement provision did not violate defendant’s First Amendment rights).

¹⁵ *Wes Reber Porter, Threaten Sentencing Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea*, 3 TEX. A&M L. REV. 261, 295 (2015).

¹⁶ See generally *People v. Albillar*, 244 P.3d 1062, 1064 (Cal. 2010) (affirming both the substantive offense under Section 186.22(a) and the enhancement offense under Section 186.22(b)).

¹⁷ See Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 105 (2006).

¹⁸ *Id.*

¹⁹ See *Offense, Crime*, BLACK’S LAW DICTIONARY (10th ed. 2014).

same kind, [] because of aggravating circumstances.”²⁰ An illustrative example, not related to the Act, would be robbing a store with a weapon. Robbing a store would be a substantive offense in and of itself, whereas the use of a weapon to rob a store would be an enhancement offense; it carries a greater degree of severity than just robbing a store but cannot exist independently from robbing the store.

Despite the distinction between an enhancement and substantive offense, both offenses require the prosecutor charging a defendant under the Act to prove the existence of a criminal street gang. Section 186.22(f) defines a criminal street gang as “any ongoing organization . . . of three or more persons . . . having as one of its primary activities the commission of one or more of the criminal acts enumerated [in Subsection (e)].”²¹ Subsection 186.22(e) provides a laundry list of criminal activities that qualify as gang activities including: assault, unlawful possession of a firearm, sale and manufacture of controlled substances, fraud, theft, rape, and vandalism.²²

The substantive offense requires that the prosecutor prove the following elements: the defendant was an active participant in a criminal street gang, the defendant knew that the gang’s members engage in a pattern of criminal activity, and the defendant willfully assisted in any “felonious criminal conduct by [gang] members.”²³ Common proof of active participation in a street gang is: the existence of gang tattoos or gang paraphernalia, admission by the defendant to being an active participant in a criminal street gang, presence with known gang members at the time of arrest, witness testimony establishing the defendant’s affiliation with a gang, and circumstantial evidence indicating active participation, such as close association between the defendant and gang members.²⁴ However, since there is not a widely accepted definition for what being a “gang member” is, there is not a requirement that a defendant actually be a member of the gang. Instead, affiliation with a gang, as evidenced by the aforementioned common proof of active participation, is deemed adequate to show active participation in a gang. In addition to the above, the enhancement offense requires that the prosecutor prove the defendant committed a felony for the benefit of a criminal street gang and with the intent to further the gang’s criminal

²⁰ *Id.*

²¹ Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act, 18 U.S.C. § 186.22(f) (2018).

²² *Id.* at § 186.22(e).

²³ *People v. Lamas*, 169 P.3d 102, 106 (Cal. 2007).

²⁴ J. Franklin Sigal, *Out of Step: When the California Street Terrorism Enforcement and Prevention Act Stumbles into Penal Code Limits*, 38 GOLDEN GATE U. L. REV. 1, 32 (2007).

conduct.²⁵ Prosecutors often prove intent to further the gang's criminal conduct by using an expert witness, which is someone with general knowledge of criminal street gangs based on training, education, or experience, and who can thus provide the jury with testimony in regards to whether the defendant is a member of a criminal street gang.²⁶

Section II and Section IV of this Comment will focus on the “any felonious criminal conduct by [gang] members” element in Section 186.22(a). Originally, “any felonious criminal conduct” was interpreted to mean felonious conduct that was gang-related.²⁷ The significance of this was that in order for the defendant to be criminally liable, the prosecutor would have to prove that the defendant was “an aider and abettor to any specific crime committed by a member or members of a criminal street gang.”²⁸ Thus, if a gang member committed a felony unrelated to his or her gang membership, Section 186.22(a) would be inapplicable when prosecuting the gang member for the felonious crime. But in 2010, *People v. Albillar*, as discussed in the next section, extended the application of Section 186.22(a) to felonious crimes committed by gang members that were unrelated to their gang membership.

II. THE *PEOPLE v. ALBILLAR* AND SECTION 186.22(A)'S EXPANSION TO INCLUDE NON-GANG-RELATED CRIMES

A. *PEOPLE v. ALBILLAR*: BACKGROUND, CRIMES, AND CONVICTIONS

In December 2004, John Madrigal, Albert Albillar and Alex Albillar raped fifteen-year-old Amanda M.²⁹ In addition to numerous sex offenses, all three were charged with violating Section 186.22(a) and Section

²⁵ § 186.22(b).

²⁶ *People v. Blessett*, 232 Cal. Rptr. 3d 164, 198 (Ct. App. 2018) *as modified on denial of reh'g* (May 24, 2018). The Author would like to note that an Editor, when reviewing this Article, made the excellent observation that California Rule 720 requires an expert witness to have “special knowledge” as opposed to merely “general knowledge.” Without going into too much depth, California courts have allowed expert testimony concerning an expert’s “general knowledge;” for an excellent analysis of what an expert can and cannot testify to *see* *People v. Sanchez*, 63 Cal. 4th 665, 676 (2016) (“[K]nowledge in a specialized area is what differentiates the expert from a lay witness . . . [a]s such, an expert’s testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.”).

²⁷ *People v. Ngoun*, 105 Cal. Rptr. 2d 837, 839 (Cal. 2001).

²⁸ *People v. Green*, 278 Cal. Rptr. 140, 148 (Ct. App. 1991).

²⁹ *People v. Albillar*, 244 P.3d 1062, 1065 (Cal. 2010).

186.22(b).³⁰ While all three admitted to being members of the Southside Chiques street gang, a gang known for committing a wide assortment of crimes in the Oxnard, California area, they claimed that the rape was not gang-related because they did not commit the rape on behalf of, or to the benefit of, the Southside Chiques gang.³¹

At trial, Oxnard Police Detective Neil Holland testified as an expert witness.³² Holland testified that members of the Southside Chiques gang obtain status in the gang through the commission of crimes.³³ Holland further testified that the defendants’ actions were likely for the benefit of the Southside Chiques gang because the viciousness of the crime would increase the gang’s notorious reputation.³⁴ But Holland also acknowledged that Hispanic gangs, like the Southside Chiques, punish rape, and “[i]f a gang member were convicted of rape, he would ‘lose status within the gang.’”³⁵ Weighing Holland’s somewhat conflicting testimony, the jury convicted the three defendants of violating Section 186.22(a) and Section 186.22(b) along with numerous other sex crimes.³⁶

B. SUBSEQUENT APPEAL AND THE CALIFORNIA SUPREME COURT HOLDING

As previously discussed, prior to *People v. Albillar*, it was commonly understood that Section 186.22(a) was only applicable to gang-related conduct.³⁷ Based on this understanding, the defendants appealed the Section 186.22(a) conviction on the grounds that Section 186.22(a) includes an “implied requirement that the felonious criminal conduct be gang related” and, as evidenced by Holland’s testimony, the Southside Chiques gang opposed rape.³⁸ Reviewing the defendants’ appeal, the California Supreme Court began by examining the plain language of Section 186.22(a). The court noted that the text of Section 186.22(a) states *any* felonious conduct rather than just *gang-related* felonious conduct and thus, by the statute’s plain language, it “targets felonious criminal conduct, not [solely] felonious

³⁰ *Id.* at 1064.

³¹ *Id.* at 1066.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1067.

³⁵ *People v. Albillar*, 76 Cal. Rptr. 3d 383, 390 (Cal. Ct. App. 2008), *review granted and opinion superseded*, 190 P.3d 534 (Cal. 2008), and *aff’d*, 244 P.3d 1062 (2010).

³⁶ *Albillar*, 244 P.3d at 1065.

³⁷ *See People v. Ngoun*, 105 Cal. Rptr. 2d 837 (2001).

³⁸ *Albillar*, 244 P.3d at 1067.

gang-related conduct.”³⁹ The court justified its interpretation by explaining that crimes committed by gang members in conjunction with one another pose dangers to the public not present in crimes committed by persons with no gang affiliations.⁴⁰ For example, witnesses might be less likely to testify against a gang member knowing that they might face retaliation from the gang.

The court noted that the gravamen of Section 186.22(a) is the active participation requirement rather than whether the underlying crime is gang-related.⁴¹ The defendants challenged this interpretation as a violation of *Scales v. United States*, 367 U.S. 203 (1961), which held in part that criminal liability cannot be based on mere membership.⁴² The California Supreme Court rejected this challenge by distinguishing *Scales* from the present case. The court held that while *Scales* barred guilt based solely on membership, *Scales* did not bar guilt based on *active* membership—membership that is more than nominal or passive.⁴³

The court, relying on its prior decision in the *People v. Castenada*, 3 P.3d 278 (Cal. 2000), held that the active participation requirement of Section 186.22(a) allows the statute to withstand the *Scales* requirements.⁴⁴ The defendants called attention to the *Castenada* court’s dicta that “section 186.22(a) would pass constitutional muster only if it were to link a defendant’s criminal liability to a separate felony offense committed by street

³⁹ *Id.* at 1068.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; see *Scales v. United States*, 367 U.S. 203, 227 (1961) (discussing that “membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization’s alleged criminal activity, that is, an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions on that basis”).

⁴³ *Albillar*, 244 P. 3d at 1069. (“The high court [United States Supreme Court] construed the statute to require active membership and, as so construed, upheld it despite the absence of any element requiring a specific act of criminality, placing active membership in the same category as criminal conspiracy and complicity—” particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.”) (internal citations omitted); see also *infra* Section I.B (discussing the evidence commonly used to show active participation. Since the question of whether the defendant was an “active participant” is a question of fact there is not a “bright line” definition, rather the trier of fact must weigh the evidence and determine whether they believe the defendant to be an active participant in the gang.).

⁴⁴ *Albillar*, 244 P. 3d at 1070; see also *People v. Castenada*, 3 P.3d 278 (Cal. 2000) (holding that the “actively participates” requirement of Section 186.22(a) was not unconstitutionally vague and that the distinction between active and nominal participation was well understood in common parlance).

gang members in furtherance of the gang.”⁴⁵ The *Castenada* court’s rationale was that the underlying felonious criminal conduct must be related to the defendant’s gang membership in order to prove active participation as opposed to participation that was merely nominal or passive.⁴⁶ The *Castenada* court’s concern was that, absent a gang-related underlying felony, Section 186.22(a) would punish mere gang association and thus render the statute unconstitutional.⁴⁷

The *Albillar* court responded that in *Castenada*, they were not asked to address whether the underlying offense must be gang-related; therefore, the defendants’ reliance on *Castenada* was misplaced.⁴⁸ The court examined the legislative history of Section 186.22(a) and noted that the original bill read, “[a]ny person who actively conducts or participates, directly or indirectly, in any gang, with the specific intent to promote or further any of its criminal *gang-related activity* or to assist in continuing its pattern of criminal *gang-related activity*.”⁴⁹ Since the amended bill omitted the italicized portions of the proposed bill, the court concluded that the legislature intended Section 186.22(a) to apply to any felonious conduct.⁵⁰

The court further justified this interpretation of the statute by noting that gang members tend to protect each other regardless of whether the conduct was gang-related, and thus, gang membership poses unique “dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation.”⁵¹ Addressing the *Castenada* court’s concern that applying Section 186.22(a) to non-gang-related crimes might lead to the punishment of passive membership, the *Albillar* court held that proof of active participation, including guilty knowledge, would be enough to prevent Section 186.22(a) from penalizing the nominal or passive gang member.⁵² Having considered the argument, the court concluded that felonious conduct in Section 186.22(a) applies to all felonious conduct regardless of whether it is gang -related.⁵³

⁴⁵ See *Albillar*, 244 P. 3d at 1070.

⁴⁶ See *Castenada*, 3 P.3d at 285.

⁴⁷ *Id.*

⁴⁸ *Albillar*, 244 P. 3d at 1068.

⁴⁹ *Id.* at 1068.

⁵⁰ *Id.* at 1068–69.

⁵¹ *Id.* at 1068.

⁵² *Id.* at 1067–68.

⁵³ *Id.* at 1068–69.

C. SIGNIFICANCE OF HOLDING AND POST-*ALBILLAR* DECISIONS

The *Albillar* holding amounts to a significant departure from other states' interpretation of their gang affiliation statutes to require that the underlying crime be gang-related.⁵⁴ States that require a nexus between gang membership and the underlying felonious crime have concluded that absent a nexus, a gang enhancement would inherently punish mere gang membership.⁵⁵ Deviating from this interpretation, post-*Albillar* California cases have subjected California defendants to substantive gang sentences for crimes such as carjacking, robbery, drug possession, and felony possession of a firearm even when the crimes had no benefit to a criminal street gang.⁵⁶ In 2012, the California Supreme Court, seemingly attempting to narrow the scope of Section 186.22(a) post-*Albillar*, held that while Section 186.22(a) can apply to non-gang-related felonious conduct, the felonious conduct must be committed by two or more persons.⁵⁷ Logically, this requirement would seem to suggest that there exists a link between the underlying felonious conduct and the gang in the sense that two or more gang affiliates acting in concert to commit a crime would seem inherently gang -related. But the court specifically reiterated that the underlying crime need not be gang-related.⁵⁸ Furthermore, as shown in Section IV, this requirement can easily be manipulated, and the issue of the substantive gang offense applying to non-gang-related conduct still remains.⁵⁹ The next sections will introduce *Robinson v. California* and *Powell v. Texas*, two Supreme Court cases that discuss the punishment of status, and will serve as the baseline to determine whether Section 186.22 is constitutional.

⁵⁴ See *State v. Turner*, No. E2016-00651-CCA-R3-CD, 2017 WL 1830106 at *19 (Tenn. Crim. App. May 5, 2017) (“[T]he statutory provision offends the principle of due process because it fails to tie membership in a gang to the offense at issue.”); see also *Rushing v. Virginia*, 726 S.E.2d 333, 338 (Va. 2012) (“A defendant charged with gang participation . . . may be convicted upon a showing that he participated in a gang-related crime.”); *State v. Caldwell*, 815 N.W.2d 512, 517 (Minn. Ct. App. 2012) (“The state here had to prove that Caldwell shot P.B. intending to benefit the Crips . . .”).

⁵⁵ See *Turner*, 2017 WL 1830106, at *17.

⁵⁶ See, e.g., *Ruiz v. Gipson*, No. 1:14-cv-00224-LJO-JLT (HC), 114CV00224LJOJLTHC, 2017 WL 1064650, at *1 (E.D. Cal. Mar. 9, 2017); *Corcoles v. Lewis*, No. SACV 11-0648-JSL (RNB), 2013 WL 1401369, at *2 (C.D. Cal. Jan. 16, 2013).

⁵⁷ See *People v. Rodriguez*, 290 P.3d 1143, 1153 (Cal. 2012).

⁵⁸ *Id.*

⁵⁹ See *People v. Lopez*, No. A133997, 2013 WL 4784760, at *1 (Cal. Ct. App. Sept. 9, 2013) (affirming defendant's Section 186.22(a) conviction for unlawful firearm possession at a home where he had lived with his sister who was also associated with the gang. The section 186.22(b) was also affirmed because possessing a gun was deemed to benefit a street gang.).

III. *ROBINSON V. CALIFORNIA* & *POWELL V. TEXAS*: WHEN DOES PUNISHING A STATUS GO TOO FAR?

A. THE REQUIREMENTS OF CULPABILITY: ACTUS REUS AND MENS REA

Prior to discussing *Robinson v. California* and *Powell v. Texas*, it is worthwhile to provide a brief background on the requirements of culpability underlying the *Robinson* Court’s decision. Two Latin terms to which first-year law students quickly become accustomed in their criminal law course are “mens rea” and “actus reus.” Actus reus requires that liability be attached to a certain action, and mens rea refers to the culpable state of mind that must accompany the action for a criminal sentence to be imposed.⁶⁰ Taken together, both terms establish the bedrock for imposing criminal liability.

To better illustrate the concepts of actus reus and mens rea, consider the following example. A defendant is charged with vandalism due to crashing through a store window. The actus reus would be crashing through the store window and the mens rea would be the defendant’s intent to crash through the window or his negligence in doing so. But had the defendant been hit by a car that propelled him into the window, then there would be no actus reus on the part of the defendant because there was not a volitional act by the defendant. Likewise, mens rea would be absent in the case where the defendant was hit by a car because the defendant had no intent to be propelled into the window and the defendant’s negligent actions did not cause the crash. In both cases, the defendant crashed through the window, but in the second case, where the defendant was hit by a car, the defendant would not be liable due to the absence of mens rea and actus reus.

The imposition of both an actus reus and a mens rea requirement aligns with the higher purposes of criminal law: to deter, to punish, and to rehabilitate. The purpose of deterrence is to impose a punishment that will both prevent the guilty person from committing the offense in the future and prevent others in the community from committing the offense.⁶¹ For example—returning to the defendant hit by a car causing the crash through the window—the law would not punish the defendant because doing so would have no deterrent effect; it was not the defendant’s fault that the crash occurred. The retributive purpose of criminal law has the goal of punishing offenders to make them realize the moral depravity of their actions.⁶²

⁶⁰ See MODEL PENAL CODE §§ 2.01, 2.02 (1962).

⁶¹ John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 452 (1993).

⁶² *Id.* at 455.

Likewise, the defendant who is struck by a car causing the defendant to crash through the window did not commit a morally reprehensible action and thus punishment would not serve a retributive effect.

The final purpose of criminal law is rehabilitative. Rehabilitation has the goal of integrating an offender back into society and restoring the rule of law to the community.⁶³ In the case of a defendant who purposefully crashed into a store window and was not hit by another car, the rehabilitative goal would be to integrate the defendant back into society so that the defendant does not break more windows in the future. Whereas in the case where the defendant was hit by a car, there would be no rehabilitative effect because it is unlikely that the defendant could control being hit by a car in the future. The distinction between what is appropriate to punish and what is not appropriate to punish underlies the Supreme Court's decisions in *Robinson v. California* and *Powell v. Texas*.

B. CALIFORNIA'S BAN ON DRUG ADDICTION AND THE SUPREME COURT IN *ROBINSON*

In the 1962 case, *Robinson v. California*, the United States Supreme Court examined a California law that subjected drug addicts to criminal prosecution for their status drug addicts. The law provided that "[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics" and imposed a sentence from ninety days to a year if convicted.⁶⁴ Under this statute, Lawrence Robinson was arrested when an officer noticed what he suspected to be needle marks on Robinson's arm.⁶⁵ After being convicted of being a drug addict, Robinson appealed on the grounds that the statute violated his Eighth and Fourteenth Amendment rights⁶⁶, and the United States Supreme Court granted certiorari.⁶⁷ Justice Stewart, writing for the majority, concluded that the law violated the Eighth Amendment's ban on cruel and unusual punishment.⁶⁸

⁶³ *Id.* at 456.

⁶⁴ *Robinson v. California*, 370 U.S. 660, 661–62 n.1 (1962).

⁶⁵ *Id.* at 661.

⁶⁶ See Appellant's Opening Brief at 11, 29, *Robinson v. California*, 370 U.S. 660 (1962) (No. 554). The Eighth Amendment bars the infliction of cruel and unusual punishments. See, e.g., Richard Visek, *Cruel and Unusual Punishment*, 74 GEO. L.J. 875 (1986) (providing more insight into what constitutes a "cruel and unusual" punishment); see also *infra* Section V.A. The Fourteenth Amendment guarantees due process and provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. 2.

⁶⁷ See Appellant's Opening Brief, *supra* note 66, at 11; *Robinson*, 370 U.S. at 661.

⁶⁸ *Id.* at 667.

The Court first held that the California drug addiction statute lacked an actus reus requirement because, instead of punishing a defendant for an action related to drug use, the statute punished a defendant for the “status of narcotic addiction.”⁶⁹ The Court noted that the statute created an offense by which the defendant would be continually guilty regardless of whether he or she had actually possessed or used drugs in the State of California.⁷⁰ The notion of continuous guilt was embedded in the common proof submitted to sustain a conviction of drug addiction: red eyes, pupil size, scars, and a history of narcotics use.⁷¹ In fact, the defendant in *Robinson* was convicted primarily based on the discolorations and scabs on his arms and the testimony of two officers familiar with the signs of drug addiction.⁷² Justice Stewart, writing for the majority, held that this statute was unconstitutional because it “[made] the ‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms.’”⁷³ Justice Harlan, concurring, further noted that punishment for the bare desire to commit a criminal act is unconstitutional because a defendant cannot control his or her bare desires.⁷⁴

In addition to finding the lack of an actus reus, the *Robinson* Court struck down the California addiction statute for punishing a disease.⁷⁵ The notion that punishing a disease is unconstitutional would seem to lend itself to the concept of mens rea because punishing a disease does not punish a guilty intention—no one intends to be an addict. This argument is evidenced in Justice Douglas’s concurring opinion. Justice Douglas began with a discussion of the development of society’s treatment of the mentally ill, from punishment to rehabilitative.⁷⁶ He attributed this transition to the recognition of insanity as a disease and the fact that punishing the insane would not serve to deter the insane from committing crimes because the insane cannot change the fact that they are insane—insanity is not purposeful.⁷⁷ Justice Douglas

⁶⁹ *Id.* at 666; see also *supra* Section III.A (discussing the concept of actus reus).

⁷⁰ *Robinson*, 370 U.S. at 666.

⁷¹ See Edwin C. Conrad, *The Admissibility of the Nalline Test as Evidence of the Presence of Narcotics*, 50 J. CRIM. L. & CRIMINOLOGY 187, 188 (1959).

⁷² *Robinson*, 370 U.S. at 661–63.

⁷³ *Id.* at 666.

⁷⁴ *Id.* at 678.

⁷⁵ *Id.* at 667.

⁷⁶ *Robinson v. California*, 370 U.S. 660, 668–69 (1962) (Douglas, J., concurring).

⁷⁷ See *id.* at 668 (“Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing.” (quoting TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 56 (5th ed.

extended this argument to a drug addict, who, through taking drugs, becomes dependent upon them and cannot control being an addicted to them.⁷⁸ Justice Douglas noted that convicting an addict was not cruel and unusual punishment, but rather that convicting an addict of a crime which serves not to cure but to penalize was cruel and unusual punishment.⁷⁹

Analogizing to the breaking the window illustration in Section III.A, convicting a drug addict for being addicted to drugs is akin to convicting someone for being hit by a car and breaking a window. A drug addict cannot control his or her bare desires just as a person cannot control if they break a window after being hit by a car on the sidewalk. In both cases, punishment would lack a rehabilitative or a deterrent effect because both the actus reus and the mens rea would be outside of the defendant's control. Thus, *Robinson* set two precedents, the foremost being that it is unconstitutional to punish a status and the second being that convicting an addict for his or her illness amounts to cruel and unusual punishment.

C. *POWELL V. TEXAS*: DEFINING THE LIMITS OF THE *ROBINSON* DOCTRINE

Four years after the Court's decision in *Robinson*, the Supreme Court was asked to decide whether to extend the *Robinson* doctrine to public intoxication and alcoholism. Leroy Powell was convicted in the State of Texas for being intoxicated in public. The law that Powell violated provided that "[w]hoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."⁸⁰ On appeal to the Supreme Court, Powell argued that his conviction should be overturned due to *Robinson's* prohibition of punishing a status because, like drug addiction, alcoholism is a disease.⁸¹

Addressing the question of whether the Texas law punished a status, the Court held that the law did not prohibit the defendant from being an

1871))). *Id.* The Author notes that the modern-day trend is to classify individuals as suffering from "mental illness" as opposed to labeling them as "insane." The Author has chosen to retain the use of the word "insane" to preserve authenticity of the language used by Justice Douglas.

⁷⁸ See *id.* at 673 ("But we do know that there is 'a hard core' of 'chronic and incurable drug addicts who, in reality, have lost their power of self-control.'" (quoting S. REP. NO. 84-2033, at 8 (1956))).

⁷⁹ *Id.* at 676.

⁸⁰ *Powell v. Texas*, 392 U.S. 514, 517 (1968) (quoting TEX. PENAL CODE ANN. § 477 (West 1954)).

⁸¹ *Id.* at 521.

alcoholic, but rather punished the defendant’s behavior in public. The majority noted:

The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant’s behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.⁸²

The Court clarified that *Robinson* did not stand for the proposition that a person cannot be convicted for a status, but rather for the proposition that to punish a status requires a criminal act, an *actus reus*.⁸³ Justice White clarified what the Court meant by this in his concurring opinion. Powell was not convicted for being an alcoholic, but rather for being inebriated in a public place. While subtle, this distinction is vital to reconcile *Robinson* with *Powell*. In *Robinson*, the Court examined addiction, which was “remote in time from the application of the criminal sanctions contemplated . . . [and] relatively permanent in duration.”⁸⁴ Public intoxication, unlike addiction, “is not far removed in time from the acts of ‘getting’ drunk and ‘going’ into public, and it is not necessarily a state of any great duration.”⁸⁵ Thus Justice White explained that the question to ask when determining whether a law targets a status, as defined by *Robinson*, is “whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it to be permissible to impose penal sanctions on the ‘condition.’”⁸⁶

Powell, in addition to alleging that the Texas law punished a status, argued that alcoholism should be considered a disease much like drug addiction in *Robinson*.⁸⁷ Powell’s support for this argument was mainly testimony by Dr. David Wade, who testified that Powell was a chronic alcoholic who, by the time he reached intoxication, would be unable to control his actions due to his compulsion to drink.⁸⁸ However, Dr. Wade also admitted that there was no consensus in the medical community as to whether alcoholism was a disease or even a consensus on the definition of

⁸² *Id.* at 532.

⁸³ *Id.* at 533.

⁸⁴ *Powell v. Texas*, 392 U.S. 514, 550 n.2 (1968) (White, J., concurring).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 517 (“[Powell’s] counsel urged that [Powell] was ‘afflicted with the disease of chronic alcoholism’ . . .”).

⁸⁸ *Id.* at 517–18.

alcoholism.⁸⁹ On cross-examination, Powell testified that on the day of the trial, he had one drink, and when asked why he had only one drink, Powell responded that he exercised willpower.⁹⁰ With this being said, on redirect examination, Powell admitted that he only had enough money for one drink, suggesting that Powell's willpower might not have been what ultimately deterred him from the second drink.⁹¹

As previously discussed, the Court distinguished the present case from *Robinson* on the basis that Powell was convicted for an action as opposed to being convicted due to his status of being an alcoholic. But the Court did discuss whether it would be appropriate to classify alcoholism as a disease and the appropriateness of prison sentences for crimes committed by alcoholics while drunk. Focusing on whether alcoholism is a disease, the Court discussed the lack of consensus in the medical community as to whether alcoholism could properly be classified as a disease and the fact that alcoholics can manifest inconsistent symptoms.⁹² In Powell's case, the Court noted that his first drink was a voluntary exercise of his willpower and that Powell did not claim to suffer physical symptoms of withdrawal when deprived of alcohol.⁹³ This led the Court to determine that it is inconclusive whether alcoholism can properly be classified as a disease.⁹⁴

Next, the Court discussed the appropriateness of the criminal process as applied to alcoholics. The Court noted that there did not exist a widely accepted rehabilitation method for treating alcoholics, and thus civil commitment, as suggested in *Robinson* for drug addicts, was impractical.⁹⁵ The Court also clarified that nothing in the Constitution requires that incarceration have a rehabilitative effect.⁹⁶ Furthermore, Justice Black noted in his concurrence that prison might serve a deterrent effect because the threat

⁸⁹ *See id.* ("Dr. Wade sketched the outlines of the 'disease' concept of alcoholism; noted that there is no generally accepted definition of 'alcoholism'; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically 'addicting' or merely psychologically 'habituating'; and concluded that in either case a 'chronic alcoholic' is an 'involuntary drinker,' who is 'powerless not to drink,' and who 'loses his self-control over his drinking.'")

⁹⁰ *Id.* at 519.

⁹¹ *Id.* at 520.

⁹² *Id.* at 522–23.

⁹³ *Id.* at 526 ("It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a 'compulsion' to take a drink, but that he also retains a certain amount of 'free will' with which to resist.").

⁹⁴ *Id.* (noting that psychiatry is undeveloped, the definition of compulsion is inconsistent, and importing science and medicine into the law is difficult).

⁹⁵ *Id.* at 529–30.

⁹⁶ *Id.* at 530.

of incarceration keeps alcoholics from drinking excessively in public.⁹⁷ The Court pointed to the high percentage of alcoholics who conceal their drinking problems by not engaging in public drunkenness as potential evidence of this deterrence effect.⁹⁸ In addition, the Court noted that imprisoning an alcoholic gives him or her time to sober up and also takes him or her off of the street, which increases the overall safety of the public.⁹⁹ Based on this analysis, the Court was unwilling to declare alcoholism a disease. Thus, the holding of the *Powell* Court was that when a status is sufficiently proximate to a criminal act, *Robinson* does not preclude liability.

D. CONTRASTING *ROBINSON* WITH *POWELL*: PUNISHING A DESIRE AS CONTRASTED WITH PUNISHING AN ACTION.

Contrasting the *Robinson* court’s holding with the Court’s holding in *Powell* provides a standard by which to evaluate Section 186.22(a). As previously discussed, the Court struck down the California addiction statute because it punished a continual status—a compulsion—as opposed to the defendant’s actions. Essentially, the defendant in *Robinson* did not commit a crime in addition to his status as a drug addict, whereas the conviction of the alcoholic in *Powell* was upheld because his status of being an alcoholic was linked to the crime of public intoxication. Therefore, in order for a defendant to be criminally liable, the status itself must not be the underlying crime, but rather the defendant’s actions must give rise to culpability.

A practical illustration of the distinction between a culpable action and liability based on a status is the California Appellate Court case *People v. Zapata*, which was decided immediately after the Supreme Court’s holding in *Robinson*. In *Zapata*, the defendant was charged with the unlawful possession of heroin.¹⁰⁰ *Zapata* contested the trial court’s guilty verdict on the grounds that it violated *Robinson* because he possessed the heroin due to being a drug addict.¹⁰¹ The Court, upholding the sentence, distinguished the present case from *Robinson* on the grounds that *Robinson* focused on a status, whereas the present case focused on an antisocial act, *Zapata*’s possession of the heroin.¹⁰² Likewise, in *Powell*, had the Texas law imposed culpability for *Powell*’s mere desire to drink, unrelated to *Powell* being drunk in public, it would have run afoul of *Robinson*. But instead of punishing a desire, the law in *Powell* punished the antisocial act of being intoxicated while in public.

⁹⁷ *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring).

⁹⁸ *Id.* at 530–31.

⁹⁹ *Id.* at 538.

¹⁰⁰ *People v. Zapata*, 34 Cal. Rptr. 171, 173 (Cal. Ct. App. 1963).

¹⁰¹ *Id.*

¹⁰² *Id.*

For example, had Zapata received an additional punishment for being an addict, as opposed to just being punished for his possession of heroin, the *Robinson* analysis would be applicable. Because Zapata was only punished for his possession of heroin, the *Powell* doctrine applied instead of *Robinson*. When applied to Section 186.22(a), the distinction between *Robinson* and *Powell* points to Section 186.22(a) punishing a status as opposed to an antisocial action.

IV. APPLYING ROBINSON AND POWELL TO SECTION 186.22(A)

A. AS A SUBSTANTIVE OFFENSE, SECTION 186.22(A) SHOULD BE DEEMED UNCONSTITUTIONAL

Disregarding the fact that Section 182.22(a) requires an underlying felonious offense, penalizing a person for the status of being a gang affiliate undoubtedly runs afoul of *Robinson*. When examining the California addiction statute, the *Robinson* Court found that the law creating a continuous offense lacked the “actus reus” element required for culpability.¹⁰³ Likewise, Section 186.22(a) also creates a continuous offense absent a clear actus reus. The California Supreme Court has held on numerous occasions that Section 186.22(a) does not criminalize gang membership but rather “active participation.”¹⁰⁴ The basis for this rationale is that the active participation and knowledge of a gang’s criminal activity distinguishes Section 186.22(a) from a status offense, such as in *Robinson*.¹⁰⁵ But the evidentiary requirements to prove the active participation and the requisite knowledge of the gang’s criminal activity amount to proving merely that the defendant was associated with a gang.

All that the prosecutor needs to show in order to prove active participation is that the defendant’s participation was more than nominal or passive.¹⁰⁶ In essence, the actus reus of a Section 186.22(a) offense is being an active member in a criminal street gang. However, the California

¹⁰³ *Robinson v. California*, 370 U.S. 660, 660 (1962).

¹⁰⁴ *See, e.g.,* *People v. Rodriguez*, 290 P.3d 1143, 1149 (Cal. 2012) (“The Legislature thus sought to avoid punishing mere gang membership . . .”); *People v. Albillar*, 244 P.3d 1062, 1069–70 (Cal. 2010) (“[T]he Legislature expressly required in section 186.22(a) that a defendant not only ‘actively participates’ in a criminal street gang . . . but also that the defendant does so with ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and that the defendant ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ These statutory elements necessary to prove a violation of section 186.22(a) exceed the due process requirement of personal guilt.”) (citations omitted).

¹⁰⁵ *See generally Albillar*, 244 P.3d at 1069–70.

¹⁰⁶ *People v. Castenada*, 3 P.3d 278, 280 (Cal. 2000).

Supreme Court has not defined what nominal or passive means.¹⁰⁷ In the absence of a clear definition, common evidence used by prosecutors to prove active participation includes the existence of gang tattoos, close association with known gang members, and testimony establishing that the defendant is in, or is associated, with a gang.¹⁰⁸ Allowing close association with gang members to constitute conclusive evidence for active participation would seem to be the definition of criminalizing gang membership. It seems necessary that gang members, even passive members, would be somewhat affiliated with other gang members considering that most gangs are part of a local community. Furthermore, relying on tattoos as evidence of active gang membership baselessly presupposes that a passive member would not get a tattoo and that a formally active member would have the tattoo removed.

The current standard of proving gang affiliation is extremely problematic. Absent the underlying crime being gang-related, the prosecution asks the jury to essentially see whether a shape fits into a hole—to apply their stereotype of what an active gang member is to the defendant being tried. Unsurprisingly, convictions based on this type of evidence result in a disproportionate number of young minority, urban males being convicted of active participation in a criminal street gang.¹⁰⁹ In addition, like the drug addiction law in *Robinson*, it is impossible to tell whether a gang member is an active member, a passive member, or even a former member based on evidence common to anyone affiliated with a gang. The only concrete way to know if a defendant is currently an active gang member or an affiliate is for the individual to commit a gang-related crime.

Furthermore, the requirement that the defendant has knowledge of the gang’s criminal activities is insufficient without a corresponding requirement that the underlying crime be gang-related, which would serve to prove the defendant’s specific intent to further those activities. The *Albillar* court relied on *Scales* to uphold Section 186.22(a), noting that the defendants had both knowledge of the gang’s criminal activities and specific intent to commit a crime. But the *Scales* opinion states that the member who “lacks the requisite specific intent to bring about the overthrow of the

¹⁰⁷ See Baker, *supra* note 17, at 108–12.

¹⁰⁸ Placido G. Gomez, *It Is Not So Simply because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence*, 34 ST. MARY’S L.J. 581, 610 (2003).

¹⁰⁹ Sara Lynn Van Hofwegen, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 683 (2009) (noting that “[i]n the Los Angeles County gang database, approximately half of all African American men between the ages of sixteen and twenty-four in Los Angeles County are listed as gang members or associates”).

government . . . [is] not by this statute made a criminal.”¹¹⁰ Thus, *Scales* does not support the *Albillar* court’s assertion that the intent to commit any crime satisfies the specific intent requirement. Rather, *Scales* affirms that the specific intent must be tied to the criminal act; the underlying crime must be gang-related. Likewise, the only way to determine whether a defendant has the specific intent to further a gang’s crimes is for the defendant to commit or assist in a gang-related crime.

Consider the following illustrative case. On April 22, 2010, police conducted a search of parolee Mario Antonio Lopez’s apartment.¹¹¹ Inside a dresser, the police found an unloaded handgun.¹¹² Lopez was charged with unlawful possession of a firearm and active participation in a criminal street gang pursuant to Section 186.22(a).¹¹³ At trial, Detective Brian Sinigiani testified as an expert witness that Lopez had tattoos consistent with gang membership, that Lopez’s family was known for having gang affiliations, that Lopez possessed letters addressed to gang members, and that a firearm would be a benefit to a gang because firearms are often used to commit gang crimes.¹¹⁴ Lopez was convicted on both counts and sentenced to a term of nine years.¹¹⁵ On appeal, the Section 186.22(a) conviction was sustained on the basis that Sinigiani’s testimony was sufficient for a jury to conclude that Lopez was actively involved in a street gang and that possessing the firearm was a felony, thus satisfying the elements of Section 186.22(a).¹¹⁶

This case illustrates the inherent problems of Section 186.22(a) as applied to non-gang-related crimes. The jury was asked to make a determination as to whether Lopez was an active participant in a criminal street gang not based on any action by Lopez, but based solely on the testimony of a police detective.¹¹⁷ Like in *Robinson*, where two officers testified against the defendant as to whether he was a drug addict, it is unsurprising that a jury would rule against the defense when the defendant was a convicted felon. Such an application of Section 186.22(a) creates a continuous crime for which a person may be prosecuted at any instance without the ability to reform. Like someone accused of being a drug addict, a person accused of violating Section 186.22(a) is criminalized based on

¹¹⁰ *Scales v. United States*, 367 U.S. 203, 229–30 (1961) (internal quotations omitted).

¹¹¹ *People v. Lopez*, No. A133997, 2013 WL 4784760, at *1 (Cal. Ct. App. Sept. 9, 2013).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *3.

¹¹⁵ *Id.* at *1.

¹¹⁶ *Id.* at *5.

¹¹⁷ Lopez’s sister also testified that Lopez did not own the gun. However, the testimony was not discussed in-depth on appeal.

affiliation—a status, rather than an act. The law does not purport to punish a person for committing gang crimes or for acting in concert with a gang, but rather punishes the mere association with gang members.¹¹⁸

It is worth noting that there is a dissimilarity between the *Robinson* law and Section 186.22(a). While an addict was subject to prosecution at any time, Section 186.22(a) requires that a felonious crime be committed for prosecution to occur. An argument could be made that the requirement of an underlying crime serves as an actus reus and thus shields Section 186.22(a) from the *Robinson* Court’s rationale. But as previously noted, Section 186.22(a) is a substantive offense and thus the underlying crime is extraneous.¹¹⁹ If the addiction law had required an unrelated underlying felonious crime, the *Robinson* analysis would remain the same because the status of drug addiction would still be criminalized. Therefore, the requirement that an underlying felony be committed does not shield Section 186.22(a) from the *Robinson* rationale.

B. IF CLASSIFIED AS AN ENHANCEMENT OFFENCE, SECTION 186.22(A) SHOULD BE DEEMED UNCONSTITUTIONAL

Since Section 186.22(a) requires an underlying felony, it could be argued that Section 186.22(a) is not in fact a substantive offense, but rather an enhancement offense. The observation that Section 186.22(a) might not be properly classified as a substantive offense would seem to be supported by the fact that Section 186.22(a) is dependent on an underlying felonious crime and, absent the felonious crime, Section 186.22(a) would be inapplicable. The significance of this argument is that *Robinson* did not examine punishing a status tied to an unrelated act. For example, consider replacing the gang language of Section 186.22(a) with *addiction* to read: any person who *is addicted to narcotics* with knowledge that *narcotics are criminal*, and who willfully promotes, furthers, or assists in any felonious criminal conduct by *narcotics addicts*, shall be punished.¹²⁰ Such a statute

¹¹⁸ The *Robinson* Court likewise noted that the California addiction statute “is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration . . . [r]ather, we deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense.” *Robinson v. California*, 370 U.S. 660, 666. (1962).

¹¹⁹ See *supra* Section I.B (discussing the difference between a substantive and an enhancement offense).

¹²⁰ See CAL PENAL CODE § 186.22(a) (West 2018) (“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 by imprisonment in a

would seem to make *Robinson* inapplicable because liability would be based on both a status and action, as opposed to just a status even though the action might be unrelated to the status. But even when coupled with an action, an offense unrelated to the status would still likely fail constitutional muster based on the analysis in the proceeding paragraphs.

While the United States Supreme Court has never examined drug addiction or gang enhancements tied to unrelated felonies, there are several Supreme Court cases examining the application of hate crime enhancements in such contexts. While the definition of what constitutes a hate crime may vary by state, hate crime enhancements, in general, are “heightened penalties when certain crimes, independently punishable under other penal code sections, are committed because of the victim’s race, color, religion, ethnicity, or other such characteristic.”¹²¹ Hate crimes can appropriately be analogized to narcotics use by an addict in the sense that the status of hating another racial group does not trigger a sentence enhancement, but rather the commission of the hateful acts towards that group triggers the sentence enhancement.¹²² The question of whether hate crime enhancements could constitutionally be applied to non-hate crimes was discussed by the Supreme Court in *Wisconsin v. Mitchell*.

In *Wisconsin v. Mitchell*, the Supreme Court, affirming Mitchell’s conviction of race-based aggravated battery, analyzed when enhancements for hate crimes were appropriately assessed on an underlying crime by contrasting two cases: *Dawson v. Delaware* and *Barclay v. Florida*.¹²³ In *Dawson*, the defendant was convicted of first-degree murder.¹²⁴ During the sentencing phase of the trial, the prosecution introduced evidence that Dawson was a member of the Aryan Brotherhood, a violent white nationalist gang, but the prosecutor failed to link Dawson’s crime to his membership in the Aryan Brotherhood.¹²⁵ Vacating the judgment, the Supreme Court noted that had the prosecutor linked Dawson’s membership in the Aryan Brotherhood to his crimes, then his membership in the Aryan Brotherhood would have been relevant to his sentencing.¹²⁶ Because Dawson’s membership was unrelated to his crimes, the Court held that Dawson’s

county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”).

¹²¹ Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1315 (1993).

¹²² See generally *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993).

¹²³ *Id.*

¹²⁴ *Dawson v. Delaware*, 503 U.S. 159, 161 (1992).

¹²⁵ *Id.*

¹²⁶ *Id.* at 165.

sentence violated the First Amendment as “the evidence proved nothing more than Dawson’s abstract beliefs.”¹²⁷

The *Mitchell* Court then compared the holding in *Dawson* with the holding in *Barclay v. Florida*.¹²⁸ In *Barclay*, the defendant was a member of the Black Liberation Army who, along with other members, killed a random white man with the goal of starting a revolution and racial war.¹²⁹ In affirming Barclay’s death sentence, the Supreme Court, in a plurality opinion, held that Barclay’s racial hatred was relevant as an aggravating factor because Barclay’s hatred led him to commit the murder.¹³⁰ Despite both *Dawson* and *Barclay* dealing with the sentencing phase as opposed to a hate crime enhancement, the *Mitchell* Court concluded that the rationale in both were relevant as “death, [is] surely the most severe ‘enhancement.’”¹³¹ The *Mitchell* Court noted that the purpose of an enhancement is to punish “conduct [that] is thought to inflict greater individual and societal harm.”¹³² Thus, applying both cases, the *Mitchell* Court concluded that bias is relevant only when an enhancement seeks to penalize *bias-inspired conduct* on the grounds that different crimes—those motivated by bias as opposed to *unbiased crimes*—¹³³ should have different severities of punishment.¹³⁴

The application of Section 186.22(a) as an enhancement offense where the underlying crime is non-gang-related is akin to the testimony that Dawson was a white supremacist and likewise, is irrelevant when not connected to the underlying crime. If the goal of an enhancement penalty is to punish crimes of different severity with different sentences, then it does not make sense to punish crimes of the same magnitude differently. The application of Section 186.22(a) to non-gang-related crimes ultimately punishes the defendant for his or her membership, which is akin to punishing the defendant for his or

¹²⁷ *Id.* at 167.

¹²⁸ *Wisconsin*, 508 U.S. at 486.

¹²⁹ *Barclay v. Florida*, 463 U.S. 939, 942 (1983).

¹³⁰ *Id.* at 949.

¹³¹ *Wisconsin*, 508 U.S. at 486.

¹³² *Id.* at 487–88.

¹³³ The notion is that *biased crimes* have a greater degree of societal harm than *unbiased crimes*. See Sarah G. Vincent, *The Hate Within Ourselves: Criminal Law’s Attempt to Overcome Bias*, 16 HARV. BLACKLETTER L.J. 229, 234 (2000). For example, graffitiing an X on a wall (an unbiased crime) harms the wall’s owner but is unlikely to affect the community at large. Whereas, graffitiing a swastika (a biased crime) on the wall would both harm the wall’s owner and would also likely harm the community at large “because [the] community perceives the harm as a personal attack, and they feel threatened.” *Id.* Thus, society seeks to punish *biased crimes* with a greater degree of severity in response to the greater severity of harm that they cause.

¹³⁴ *Mitchell*, 508 U.S. at 488.

her abstract beliefs. This is evidenced by the fact that just because a felonious crime was committed by a gang member does not make it anymore heinous than if the felonious crime was committed by a non-gang member, when gang membership is irrelevant to the felonious crime. Therefore, even if Section 186.22(a) was deemed an enhancement offense, as opposed to its current classification as a substantive offense, it would likely fail constitutional muster per *Dawson*.

V. GANG AFFILIATION SHOULD BE TREATED THROUGH REHABILITATION RATHER THAN THROUGH CRIMINALIZATION AND IMPRISONMENT

The remainder of this Comment will argue that, as a matter of public policy, gang membership should be treated similarly to the modern-day treatment of drug addicts as opposed to punished by way of imprisonment. The basis for this argument is the underlying policy reasons emphasized in the *Robinson* Court's second holding, that it would be a cruel and unusual punishment to punish a person for having a disease.¹³⁵ Instead of focusing solely on Section 186.22(a), this argument expands to include gang enhancements in general, which would include Section 186.22(b). Admittedly, considering the Court's decision in *Powell*, the argument that gang membership should be considered a disease is a difficult argument to make. But as discussed in the following subsections, in many ways, gang membership parallels drug addiction, perhaps even more closely than alcoholism parallels drug addiction, and thus the *Robinson* rationale should extend to gang membership.

A. WHY PUNISHING ADDICTION AMOUNTS TO A CRUEL AND UNUSUAL PUNISHMENT

Prior to comparing addiction to gang affiliation, it is paramount to understand the policy reasons behind the *Robinson* Court's decision that punishing an addict is akin to punishing a person for having a disease. While there is not a clear definition of what constitutes a disease, the *Robinson* Court's decision does classify drug addiction as a disease. According to DiClemente's *Addiction and Change*, the essential elements of an addiction are:

- (1) the development of a solidly established, problematic pattern of an appetitive—that is, pleasurable and reinforcing—behavior; (2) the presence of physiological and psychological components of the behavior pattern that create dependence; and (3) the

¹³⁵ See *supra* Section III.B (discussing the *Robinson* case).

interaction of these components in the individual’s life that make the behavior very important and resistant to change.¹³⁶

In the case of drug addiction, these elements are oftentimes readably observable.¹³⁷ Common environmental factors that contribute to the development of an individual’s addiction to drugs include: “poverty, limited material conditions, disorganized families . . . [and] group affiliation to drug users.”¹³⁸ These environmental factors are then coupled with the early age of drug users; the most common age being between eighteen and twenty-five.¹³⁹ The culmination of these factors leads to an appetite for drugs as a means of escaping a less than desirable social condition.¹⁴⁰

While the environmental factors create the desire for drug use, the physiological and psychological components of drug addiction create a dependence on drugs. This dependence can be described as a necessity to use drugs to maintain normal physiological symptoms.¹⁴¹ For example, users of methamphetamine (meth) experience a euphoric state of invulnerability which users describe as “a vacation from loneliness and sorrow.”¹⁴² In addition to the psychological effects of meth, the physiological effects of meth further cause dependence. Meth causes the brain to release large quantities of dopamine which results in an intense pleasurable high.¹⁴³ Once dopamine levels return to normal the only way for the user to regain their

¹³⁶ CARLO C. DICLEMENTE, *ADDICTION AND CHANGE: HOW ADDICTIONS DEVELOP AND ADDICTED PEOPLE RECOVER* 4 (2d ed. 2018).

¹³⁷ Note that the Author does not mean to say all drug addicts perfectly fit the following profiles. However, as discussed in the preceding sentences, modern research does support that environment plays a key role as to whether a subject becomes an addict. See Douglas Wright & Zhiwei Zhang, *Do People, Family, and Neighborhood All Matter in an Individual’s Chances of Illicit Drug Use?* (Aug. 1999) (Paper presented at Joint Statistical Meeting in Baltimore, Maryland); cf. Bruce K. Alexander et al., *Effect of Early and Later Colony Housing on Oral Ingestion of Morphine in Rats*, 15 *PHARMACOLOGY BIOCHEMISTRY & BEHAV.* 571 (1980) (finding that rats tended to avoid using morphine when housed in colonies, whereas rats housed in isolation consumed morphine at higher rates).

¹³⁸ Ruxandra Rascanu, *The Personality Profile of the Drug Addict*, 1 *EUROPE’S J. OF PSYCHOLOGY* (2005), <https://ejop.psychopen.eu/index.php/ejop/article/view/354/html>. [<https://perma.cc/VT34-B8U5>].

¹³⁹ REBECCA AHRNSBRACK ET AL., *SAMHSA, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH* 1 (2017).

¹⁴⁰ See generally Rascanu, *supra* note 138.

¹⁴¹ DAVID P. AUSUBEL, *DRUG ADDICTION: PHYSIOLOGICAL, PSYCHOLOGICAL, AND SOCIOLOGICAL ASPECTS* 9 (1958).

¹⁴² PERRY N. HALKITIS, *METHAMPHETAMINE ADDICTION: BIOLOGICAL FOUNDATIONS, PSYCHOLOGICAL FACTORS, AND SOCIAL CONSEQUENCES* 4 (2009).

¹⁴³ *Id.* at 28–31.

high is to take more meth, thus creating the physiological dependence.¹⁴⁴ The culmination of these factors makes it difficult, if not impossible, for a drug addict to stop using drugs absent treatment.

Applying the purposes of criminal law, it is this difficulty in quitting that makes the imprisonment of addicts a form of cruel and unusual punishment.¹⁴⁵ As the *Robinson* Court noted, “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁴⁶ Punishing a drug addict for being a drug addict does not deter the individual from using drugs in the future because punishment fails to address the underlying cause of addiction—the addict’s physical and psychological dependence on the drug. The ineffectiveness of imprisonment is evidenced by the fact that an estimated 95% of convicted drug users return to substance abuse once released from imprisonment.¹⁴⁷

Therefore, instead of imprisonment, the modern-day focus is treating drug addicts through rehabilitation programs.¹⁴⁸ While drug addicts are still charged for committing crimes, their addiction is not considered a crime but instead a treatable disease. As a result of this change in focus, rehabilitation program participants have been found to be up to 67% less likely to recidivate.¹⁴⁹ The next section will contrast the archetypical gang member with the archetypical drug addict and argue that mandatory rehabilitation, as opposed to incarceration, should be advocated rather than criminalization as imposed by Section 186.22.¹⁵⁰

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* Section III.A (discussing purposes of criminal law).

¹⁴⁶ *Robinson v. California*, 370 U.S. 660, 667 (1962).

¹⁴⁷ Adam Chamberlain et al., *Illicit Substance Use After Release From Prison Among Formerly Incarcerated Primary Care Patients: A Cross-Sectional Study*, 14 ADDICTION SCI. & CLINICAL PRAC. 1, 6 (2019).

¹⁴⁸ For example, “drug courts” are court programs which “offer individuals the opportunity to enter long-term drug treatment and agree to court supervision rather than receiving a jail sentence.” *What are Drug Courts?*, NATIONAL DRUG COURT RESOURCE CENTER (Mar. 19, 2019), <https://ndcrc.org/what-are-drug-courts-2/> [<https://perma.cc/HV22-MFWT>]; see also Jerome Eckrich & Roland Loudenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. REV. 171, 171 (2012) (noting that as of December 31, 2009, there were 2,459 “drug courts” in the United States).

¹⁴⁹ DOUG MCVAY ET AL., TREATMENT OR INCARCERATION? 9 (2004).

¹⁵⁰ The Author has found only a single California case where this argument was raised. However, it was dismissed on procedural grounds. See *Soto v. Uribe*, No. CV 11-272 AHM (MRW), 2011 WL 7070392, at *4 (C.D. Cal. Aug. 30, 2011).

B. THE POLICY RATIONALE FOR TREATING RATHER THAN IMPRISONING DRUG ADDICTS ALSO APPLIES TO GANG AFFILIATES

The archetypal gang affiliate parallels that of a drug addict. The average gang member comes from a family with low socioeconomic status, living in a neighborhood with high existing gang membership.¹⁵¹ Often, the archetypal gang affiliate has a family history of gang membership and criminality that indoctrinates family members in the gang lifestyle from a young age.¹⁵² While it is unclear what the average age of a gang member is, several studies have concluded that gang membership peaks around the ages of fourteen and fifteen.¹⁵³

As previously discussed, addicts often use drugs to fulfill a need, such as a means of escaping a less than desirable social condition.¹⁵⁴ Likewise, gang affiliation provides a means for affiliates to seemingly escape their less than ideal social conditions. In one respect, gang affiliation provides physical support to affiliates.¹⁵⁵ Gangs are most prevalent in neighborhoods with the highest rates of violence.¹⁵⁶ Gangs serve a protection function for affiliates.

Furthermore, those who live in these impoverished communities and refuse to join a neighborhood gang risk physical retaliation by the gang against them and their family.¹⁵⁷ Community members in such neighborhoods often have a strong distrust towards law enforcement based on historical mistreatment.¹⁵⁸ Furthermore, gangs are known to enforce strict “no-snitch rules” that punish and sometimes even kill community members

¹⁵¹ Emma Alleyne & Jane L. Wood, *Gang Involvement: Psychological Involvement: Psychological and Behavioral Characteristics of Gang Members, Peripheral Members, Peripheral Youth, and Nongang Youth*, 36 *AGGRESSIVE BEHAV.* 423, 424 (2010).

¹⁵² *Id.*

¹⁵³ Finn-Aage Esbensen & Dena C. Carson, *Who Are the Gangsters?: An Examination of the Age, Race/Ethnicity, Sex, and Immigration Status of Self-Reported Gang Members in a Seven-City Study of American Youth*, 28 *J. CONTEMP. CRIM. JUST.* 465, 467 (2012).

¹⁵⁴ See *supra* Section V.A.

¹⁵⁵ Martin Sanchez Jankowski, *ISLANDS IN THE STREET GANGS AND AMERICAN URBAN SOCIETY* 40–45 (1991).

¹⁵⁶ David Bjerck, *Thieves, Thugs, and Neighborhood Poverty*, 68 *J. URB. ECON.* 231, 238 (2010).

¹⁵⁷ See Jankowski, *supra* note 155, at 58–59; see also Peggy Y. Lee, *Youth Who Tried to Stay Out of Gang Is Shot: Violence: The family of John Diaz says the Oceanside teenager was harassed several times by gang members before being wounded while he slept*, *L.A. TIMES*, (July 17, 1991), <https://www.latimes.com/archives/la-xpm-1991-07-17-me-2301-story.html> [<https://perma.cc/HM8D-E287>].

¹⁵⁸ Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 *S. CAL. L. REV.* 1219, 1223 (2000).

who look for support outside of the gang.¹⁵⁹ Thus, like a drug addict, a gang affiliate's environment has a significant impact on the gang affiliate joining and remaining in a gang.

Once a person becomes affiliated with a gang it is extremely difficult to end that affiliation due to the possibility of physical harm and psychological dependence. The risk of physical harm in leaving a gang mirrors the physical addiction of drug users. Take for example the story of Keith Smith, a fifteen-year-old who was beaten into a coma for attempting to leave his gang.¹⁶⁰ This situation is not uncommon as gangs frequently enforce a "blood in, blood out" policy whereby members who attempt to leave risk severe beatings or even being killed.¹⁶¹ Like an addict who takes drugs to achieve a desired physical state, a gang affiliate must remain affiliated with a gang to maintain his or her physical state.

Furthermore, the physical need for gang affiliation is accompanied by an even greater psychological dependence. As previously discussed, people affiliate with gangs to fulfill a need. This is often the need to cope with a less than ideal socioeconomic condition.¹⁶² Gangs use this fulfillment to bond with their community and provide their members with protection and a means of identity. In some cases, gang membership has existed in communities for generations.¹⁶³ For gang affiliates to cease being affiliated with their gang would thus require them to separate from their community and perhaps even their family. This requirement is shown in several studies, which concluded that ex-gang members who remain in contact with gang members, such as by living in the same community, experience higher rates of victimization by the gang.¹⁶⁴ In conjunction with the economic infeasibility of leaving their community, gang affiliates might reasonably believe their only option is to remain affiliated with their gang.

Thus, in many ways, the reasons for why a person joins and remains in a gang parallels why a drug addict remains addicted to drugs. The development of both drug addiction and gang affiliation stems from a problematic underlying condition and is difficult to change due to

¹⁵⁹ Katie M. McDonough, *Combating Gang-Perpetrated Witness Intimidation with Forfeiture by Wrongdoing*, 43 SETON HALL L. REV. 1283, 1283–84 (2013).

¹⁶⁰ Jerry Thomas & Steve Johnson, *Getting Out of Gang Tougher Than Saying, 'I Quit'*, CHI. TRIB. (Sept. 12, 1991), <https://www.chicagotribune.com/news/ct-xpm-1991-09-12-9103090026-story.html> [<https://perma.cc/7C2X-C52W>].

¹⁶¹ David C. Pyrooz & Scott H. Decker, *Motives and methods for leaving the gang: Understanding the process of gang desistance*, 39 J. CRIM. JUST. 417, 419 (2011).

¹⁶² See Alleyne & Wood, *supra* note 151.

¹⁶³ See Jankowski, *supra* note 155, at 181–82.

¹⁶⁴ See Pyrooz & Decker, *supra* note 161, at 419.

physiological and psychological dependencies. The *Robinson* Court noted that the criminalization of drug addiction did not attempt to cure the underlying problem but merely served to punish.¹⁶⁵ Likewise, California’s punishment of gang members through imprisonment does not cure California’s gang problem but has rather exasperated it. When Section 186.22(a) was enacted, the number of gangs in California was estimated to be nearly 600.¹⁶⁶ That number has increased to over 6,442 since the enactment of Section 186.22(a)—an increase of roughly 973%.¹⁶⁷ While California is undoubtedly sending more gang members to prison, prisons have been described as a “breeding ground” for gang membership, and in some areas, the number of gang members in prison has climbed by over 32% in the last decade alone.¹⁶⁸ Numerous studies have concluded that prison is ineffective at treating the gang problem. In one study, gang affiliates were shown to be six percentage points more likely to return to prison than prisoners without gang affiliation.¹⁶⁹ In another study, 83.2% of gang members returned to prison within three years compared to only 44.8% of non-gang members.¹⁷⁰ These statistics highlight that the criminalization process, specifically imprisonment, is ineffective at preventing and deterring gang membership.

Instead of criminalization, California should spend its resources on the intervention and rehabilitation of gang members. Programs aimed at rehabilitating gang members and preventing gang membership in the first place like the California Gang Reduction, Intervention and Prevention (CalGRIP) program, have shown to drastically decrease gang member recidivism.¹⁷¹ Likewise, the switch from criminalizing drug addicts to treating them has drastically reduced their recidivism rate.¹⁷² Thus, treating

¹⁶⁵ See *Robinson v. California*, 370 U.S. 660, 666 (1962).

¹⁶⁶ See *supra* note 6.

¹⁶⁷ See CAL. DEP’T OF JUSTICE DIV. OF LAW ENF’T, ORGANIZED CRIME IN CALIFORNIA 3 (2010), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/org_crime2010.pdf [<https://perma.cc/V3CC-ZKRW>].

¹⁶⁸ See Kathleen Harris, *More Prisoners Joining Gangs Behind Bars*, CBC NEWS (July 31, 2012), <https://www.cbc.ca/news/politics/more-prisoners-joining-gangs-behind-bars-1.1196311> [<https://perma.cc/M28H-SNER>].

¹⁶⁹ Brendan D. Dooley et al., *The Effect of Prison Gang Membership on Recidivism*, 42 J. CRIM. JUST. 267, 272 (2014).

¹⁷⁰ JESSICA SAUNDERS ET AL., POST-RELEASE RECIDIVISM AMONG GANG AND NON-GANG PRISONERS IN ARIZONA FROM 1985 THROUGH 2004 5 (2009).

¹⁷¹ See CAL. GANG REDUCTION, INTERVENTION AND PREVENTION (CALGRIP), FINAL EVALUATION REPORT 2 (2018) <http://www.bscc.ca.gov/wp-content/uploads/San-Jose-CalGRIP-Final-Evaluation-Report.pdf> [<https://perma.cc/6UA7-XXKW>] (noting that juvenile gang recidivism decreased by 48% after the program’s implementation).

¹⁷² See MCVAY ET AL., *supra* note 149.

gang members would likely result in a drastic decrease in their recidivism rate considering how the underlying factors of gang affiliation mirror the underlying factors of drug addiction. In addition to reducing recidivism, studies have shown the cost of gang rehabilitation programs is significantly lower than the cost of incarcerating gang affiliates.¹⁷³

CONCLUSION

The purposes of criminal law are to deter, punish, and rehabilitate.¹⁷⁴ Section 186.22(a) accomplishes none of these objectives. A gang affiliate is not deterred from gang affiliation by a system that does nothing to cure the underlying causes of gang affiliation because gang affiliation, like a disease, cannot be cured by a prison sentence. While proponents of the STEP Act cite the difficulty of convicting gang affiliates for their crimes as a justification for Section 186.22(a), such an argument does not validate a law which punishes mere gang affiliation.¹⁷⁵ Furthermore, when gang affiliates commit crimes, they are still subject to the sentences that their crimes carry. Incarcerating a gang member in hopes of deterring the gang member from remaining in the gang is akin to exposing someone with a disease to other people who have that disease and hoping that the increased exposure will cure the disease. Until the cause of gang affiliation is properly treated, more people will continue to receive additional sentences for a crime akin to having a cold.

¹⁷³ Stuart Adams, *A Cost Approach to the Assessment of Gang Rehabilitation Techniques*, 4 J. RES. CRIME & DELINQ. 166, 181 (1967).

¹⁷⁴ See *supra* Section III.A (discussing the purposes of criminal law).

¹⁷⁵ Compare *People v. Albillar*, 244 P.3d 1062, 1068 (Cal. 2010) (“Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement.”) with *Robinson v. California*, 370 U.S. 660, 677–78 (1962) (“[T]he means must stand constitutional scrutiny, as well as the end to be achieved . . . [T]he prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick.”).