

Stars, Dragons, and the Letter “M”: Consequential Symbols in California Prison Gang Policy

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California prison policy relies on symbols to identify prison gang affiliated inmates. This policy leads to many false positives and results in long-term solitary confinement of individuals who, in fact, are not affiliated with any gang at all. This Note examines the evolution of California’s symbol-driven policy, including regulations before 2012, after 2012, and the recent Ashker settlement. This Note finds that these symbols and their corresponding interpretations provide unreliable indicators of prison gang affiliation, resulting in unwarranted consequences for prisoners. By allowing prison officials to rely on nonindicative symbols in its process, California uses an unsound policy for managing prison gangs.

Moving forward, the California Legislature should demand that prison officials limit their reliance on visual symbols when making prison gang identifications. California should implement a predominantly behavior-based process for identifying prison gang affiliates, with visual symbols used only to support the nexus between the behavior and a prison gang. The visual symbols that prison officials use to demonstrate this nexus should undergo public and prisoner comment before prison officials may use them. Furthermore, the Legislature should provide for annual commenting periods designed to foster critique and revision of symbolic meanings. Finally, prison officials should provide a full list of all nexus-demonstrating symbols to prisoners and the public to afford proper notice. By implementing these changes, California will take a step toward amending its faulty prison gang identification process by imposing consequences to only those prisoners who are truly prison gang members.

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INTRODUCTION

Three symbols—a star, a huelga bird, and the number fourteen—were used to condemn Ernesto Lira to eight years of solitary confinement at Pelican Bay State Prison.¹ Prison officials viewed these symbols, along with a jail-yard “incident” with Southern California Latino prisoners and information from a “confidential informant” that listed Mr. Lira’s name on a laundry list of prison gang members, as indicative of Mr. Lira’s prison gang membership.² But Mr. Lira was not a prison gang member.³ He challenged the determination, but

1. *Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *5–7, *16 (N.D. Cal. Sept. 30, 2009); Erica Goode, *Fighting a Drawn-Out Battle Against Solitary Confinement*, N.Y. TIMES (Mar. 30, 2012), <http://www.nytimes.com/2012/03/31/us/battles-to-change-prison-policy-of-solitary-confinement.html> [https://perma.cc/PD65-NYJQ].

2. *Lira*, 2009 U.S. Dist. LEXIS 91292, at *12–19.

3. *See id.* at *7–8.

remained in solitary confinement for over eight years before Judge Susan Illston of the Northern District of California reversed the determination.⁴

For those eight years, Mr. Lira was housed indefinitely in solitary confinement, as were nearly all prisoners identified as prison gang members prior to 2015. It meant twenty-three hours per day in a 7.6-by-11 foot concrete cell; behind perforated steel doors; without access to a phone, family visits, or educational programming; and ineligibility for parole.⁵ Mr. Lira has said of solitary confinement, “[y]ou take a person and you just peel back the skin and make him just some raw flesh in a tomb and all he has is his mind.”⁶ Though Mr. Lira won his case and the wrongful determination of his prison gang affiliation was reversed and remedied,⁷ the damage he endured could not be undone. As a result of his solitary confinement at Pelican Bay, even years after his release, Mr. Lira battles depression, experiences social anxiety, avoids crowds, and covers his windows to block the light.⁸

In *Ashker v. Brown*, a class of prisoners—all identified as prison gang members or associates by the California Department of Corrections and Rehabilitation (CDCR)—brought a constitutional challenge against CDCR’s practice of holding prisoners like Mr. Lira in prolonged solitary confinement.⁹ Many of the class members alleged that their decades-long, no-end-in-sight assignments to solitary confinement were not based on their security threat risk but merely on their prison gang status.¹⁰ They further identified the weak evidence that supported their prison gang status determinations. For example, one class member alleged that he had been detained in solitary confinement for

4. See *id.* at *1–6.

5. See Goode, *supra* note 1; see also Mariam Hinds & John Butler, *Solitary Confinement: Can the Courts Get Inmates out of the Hole?*, 11 STAN. J. C.R. & C.L. 331, 336–37 (2015) (describing the Pelican Bay Secure Housing Unit, which is one of the facilities that housed Mr. Lira).

6. Goode, *supra* note 1.

7. See *Lira*, 2009 U.S. Dist. LEXIS 91292, at *7–8 (“The Court finds that plaintiff is entitled to a judicial declaration that his gang validation was never supported by accurate or reliable evidence and was implemented in violation of his procedural rights. The Court also finds that plaintiff is entitled to an order . . . to expunge plaintiff’s validation as a Northern Structure associate from [California Department of Corrections and Rehabilitation] records, to report the expungement to all gang-related law enforcement databases . . . and to remove all documents related to the validation from plaintiff’s prison file.”).

8. Goode, *supra* note 1.

9. *Ashker v. Brown* was initially filed as an individual lawsuit, but in 2012 several other plaintiffs joined the lawsuit. See Plaintiffs’ Second Amended Complaint, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. May 31, 2012). In 2013, Chief Judge Claudia Wilken of the Northern District of California refused to dismiss the case and granted a motion for class certification of “all inmates who are assigned to an indeterminate term at the Pelican Bay [Secure Housing Unit] on the basis of gang validation, under the policies and procedures in place as of Sept. 10, 2012” for a “Due Process Class” and “all inmates who are now, or will be in the future, assigned to the Pelican Bay [Secure Housing Unit] for a period of more than ten continuous years” for an “Eighth Amendment Class.” See Order Granting in Part Motion for Class Certification; Denying Motion to Intervene, No. C 09–5796 CW, 2014 WL 2465191, at *9 (N.D. Cal. June 2, 2014); Order Denying Motion to Dismiss, No. 4:09-cv-05796-CW, 2013 WL 1435148 (N.D. Cal. Apr. 9, 2013).

10. Plaintiffs’ Second Amended Complaint, *supra* note 9, ¶¶ 6, 14–23.

more than twenty years “based on nothing more than his appearance on lists of alleged gang members discovered in some unnamed prisoners’ cells and his possession of allegedly gang-related drawings.”¹¹ Another class member, who purportedly “never incurred a serious disciplinary violation,” spent thirteen years in solitary confinement, and had recently been reidentified as a prison gang member “because he possessed allegedly gang-related Aztec artwork.”¹²

In 2015, CDCR and the plaintiffs in *Ashker* reached a settlement agreement, which has received final approval by the court.¹³ The *Ashker* settlement addressed some of the concerns regarding the penalty attached to prison gang status, but the process of identifying prison gang affiliates remained unchanged. As an illustration of the effect of the settlement, Mr. Lira’s initial identification as a prison gang member would have been the same, but he would not have been assigned to solitary confinement absent a serious rule violation. Nonetheless, if at some later point he committed a solitary-eligible rule violation, he likely would have been subjected to two additional years of solitary confinement beyond the term imposed for the rule violation itself because of his prison gang status. Thus, what is notable is that even under the *Ashker* settlement, Mr. Lira would still have faced substantial consequences based on an initial determination that did not reflect his true status.

Like Mr. Lira, many prisoners in California have suffered, or will suffer, a false or unsubstantiated determination of prison gang membership. Before the *Ashker* settlement, prisoners exhibited tremendous interest in avoiding identification as a prison gang member because such a finding resulted in indefinite solitary confinement. Mental health experts and social scientists have demonstrated that solitary confinement has annihilating effects on prisoners’ long-term mental and physical health, such as a loss of identity, acute depression, and exacerbation of preexisting physical conditions.¹⁴ This

11. *Id.* ¶ 6.

12. *Id.* ¶ 22.

13. See Order Granting Final Approval of Class Action Settlement Agreement, *Ashker v. Brown*, Case No. 09-05796 (N.D. Cal. Jan. 26, 2016).

14. See, e.g., Brief of Professors & Practitioners of Psychology as Amicus Curiae in Support of Respondent at 4, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495) (concluding that “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than [sixty] days failed to find evidence of negative psychological effects”); Craig Haney, “*Infamous Punishment*”: *The Psychological Consequences of Isolation*, 8 NAT’L PRISON PROJECT J. 3 (1993); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116 (2008) (“[C]onditions of prolonged solitary confinement have long been known to cause serious mental harm.”); Joane Martel, *To Be, One Has to Be Somewhere*, 46 BRIT. J. CRIMINOLOGY 587, 609 (2006) (identifying that prisoners in solitary “vanish in time and . . . space” and risk losing their identity); AMNESTY INT’L: THE EDGE OF ENDURANCE: PRISON CONDITIONS IN CALIFORNIA’S SECURITY HOUSING UNITS 28 (2012) (detailing other conditions that have been reported by California prisoners, including balance problems, vitamin D deficiency, chronic asthma exacerbated by the enclosed conditions, severe insomnia, and memory loss).

evidence shows that Mr. Lira’s chronic suffering represents the norm among prisoners housed in long-term solitary confinement.¹⁵ The *Ashker* settlement substantially reduced the use of solitary confinement.¹⁶ However, even under this settlement, prisoners identified as prison gang members continue to face severe repercussions. Many will likely still spend two additional years in solitary confinement, and some will spend even more time in a restrictive facility.¹⁷

This Note considers a narrow slice of California’s unsound management of prison gangs. It examines the visual symbols that prison officials use to assess a prisoner’s relationship to a prison gang, which was unchanged by the 2015 *Ashker* settlement. It finds that these symbols, and prison officials’ interpretations thereof, provide untrustworthy indicators of prison gang affiliation. By allowing prison officials to rely on unreliable symbols in its process, California uses a flawed policy for identifying prison gang affiliates. However, the Legislature has the opportunity to remedy the deficiencies in the process used to identify prison gang members.

In asserting these points, this Note makes three novel contributions to legal scholarship. First, it provides a description of CDCR’s most recent policies for managing prison gangs, including the 2015 *Ashker* settlement. Second, it takes a close look at the symbols relied on in California’s prison gang policy and analyzes the identification and use of these symbols. Third, it makes an original proposal for legislative reform.

Part I provides a primer on California prison gangs and CDCR’s regulatory response to these violent organizations. It traces prison gangs’ evolution and explores their varied structures, goals, and practices. It also describes CDCR’s approach to prison gangs, including its pre-2012, post-2012, and *Ashker* settlement regulatory regimes. This Part aims to orient the reader to prison gangs, establish the scope and importance of effectively managing them, and identify their key complexities that make membership and behavior difficult to interpret. It also aims to outline the broader regulatory process in which visual symbols are used as evidence of prisoners’ prison gang affiliations.

Part II discusses the symbols used by CDCR in identifying prison gang affiliates. This Part examines the wisdom, or lack thereof, of CDCR’s reliance

15. See *Cal. Assembly Comm. on Pub. Safety: Hearing on SHU Conditions in Cal. Dep’t of Corr. and Rehab.*, 2011 Leg. (Cal. 2011) (statement of Craig Haney, Professor) (reporting that well over half of prisoners in solitary confinement at Pelican Bay had headaches, heart palpitations, and other symptoms associated with hypertension); Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J.L. & PSYCHIATRY 49 (1986).

16. See Settlement Agreement, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Aug. 31, 2015).

17. See *id.* ¶ 22 (explaining the basic two-year process for most inmates and providing that prisoners who do not comply with the two-year program may be transferred to a restrictive facility).

on the symbols and interpretive mechanisms to make determinations of prison gang status. This Part concludes by finding that CDCR's process for using and interpreting symbols fails to ensure accurate results.

Part III proposes a legislative solution to remedy the inaccuracies in California's current process for identifying prison gang affiliates. California should implement a predominantly behavior-based rubric for identifying prison gang affiliates, with visual symbols used only to support the nexus between the behavior and a prison gang. The visual symbols that prison officials use to demonstrate the nexus should undergo public and prisoner commenting before prison officials may use them. Additionally, the state should require annual commenting periods designed to foster critique and revision of previously approved symbolic meanings. Finally, prison officials should provide a full list of all nexus-demonstrating symbols to prisoners and the public to afford proper notice. By implementing these changes, California will take a step toward imposing consequences for prison gang membership on only those prisoners who are truly prison gang members. This Part also identifies the benefits of this proposal, and addresses some of the likely critiques.

Three terms require attention at the outset. First, California has shifted its terminology from "prison gangs" to "security threat groups" (STG).¹⁸ This Note uses the term "prison gang" because it addresses the narrower ambit of prison gang symbols, rather than the broader STG symbols. When discussing the regulations that dictate CDCR's treatment of prison gang members, however, this Note adopts the regulatory language (STG) where appropriate.

Second, California officials use the term "affiliate" to denote a prisoner deemed part of the prison gang.¹⁹ In turn, "affiliates" include "members" (accepted into the prison gang) and "associates" (more loosely a part of the prison gang, "involved periodically or regularly").²⁰ This Note uses the term "affiliate" for the same purpose—to identify those individuals who have ties to a prison gang, either as members or associates.

Third, CDCR disclaims any use of solitary confinement in California prisons, including in its high-security "Secure Housing Units" that facilitate minimal social interaction between prisoners, largely on the ground that

18. See *CDCR Implementing Its New Gang Management Reforms*, CDCR TODAY (Nov. 8, 2012, 1:26 PM), <http://cdcrtoday.blogspot.com/2012/11/cdcr-implementing-its-new-gang.html> [<http://perma.cc/6BYY-WX8N>] (explaining that "[t]he term security threat group (STG) will generally replace the terms prison gang, disruptive group, and/or street gang within CDCR").

19. See CAL. DEP'T OF CORR. & REHAB., INSTRUCTIONAL MEMORANDUM: PILOT PROGRAM FOR SECURITY THREAT GROUP IDENTIFICATION, PREVENTION, AND MANAGEMENT PLAN 12 (Oct. 11, 2012), <http://sfbayview.com/wp-content/uploads/2012/12/CDCR%E2%80%99s-Oct.-11-2012-Security-Threat-Group-Pilot-Program.pdf> [<https://perma.cc/HG7X-9PNY>] [hereinafter CDCR PILOT PROGRAM].

20. See *id.* at 12–13.

prisoners in Secure Housing Units often have cellmates.²¹ Even though prisoners have cellmates in Secure Housing Units, this Note adopts the view of many scholars that CDCR imposes solitary confinement through Secure Housing Units and Administrative Segregation Units, the two primary types of housing for prison gang affiliates.²² Hence, this Note refers to both Secure Housing Units and Administrative Segregation Units as solitary confinement.

Finally, while it is possible to poke holes in California's process for identifying prison gang affiliates, it is important to note that the development and rise of complex prison gangs poses a serious challenge to California. Additionally, "[n]o scholar writing in the law-abiding world . . . can capture the reality of prison life in all its brutality."²³ Consequently, this Note does not seek to minimize the threat or scope of the prison gang problem, or to provide readers with a full understanding of the threat prison gangs pose. Instead, this Note questions CDCR's response to this challenge, namely, its use of common and unreliable visual symbols to determine prison gang affiliation, and identifies an opportunity to develop a different response.

I.

CALIFORNIA PRISON GANGS AND CDCR'S RESPONSE

In California, prison gangs threaten safety both within and beyond prison walls.²⁴ Inside prison, prison gangs have designed systems for bringing in drugs and other contraband, and have orchestrated complex schemes to kill or

21. See CAL. DEP'T OF CORR. & REHAB., FACT SHEET: SECURE HOUSING UNITS (Oct. 2013), <http://www.cdcr.ca.gov/stg/docs/Fact%20Sheet-SHU%20with%20photos.pdf> [<http://perma.cc/M7BH-PQBZ>].

22. See CAL. PENAL CODE § 2933.6 (2010); see, e.g., Madrid v. Gomez, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) ("The combination of being in extremely close proximity with one other person, while other avenues for normal social interaction are virtually precluded, often makes any long-term, normal relationship with the cellmate impossible. Instead, two persons housed together in this type of forced, constant intimacy have an 'enormously high risk of becoming paranoid, hostile, and potentially violent towards each other.');" Seward Smith, *Studies of Small Groups in Confinement*, in SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH 374, 374-76 (John P. Zubek ed., 1969) (finding that individuals confined in small groups but otherwise largely isolated become irrationally territorial and act with hostility toward perceived trespasses by the others with whom they are isolated); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 357-58 (2006) (providing that double-celling prisoners can simultaneously cause both isolation and overcrowding); Haney & Lynch, *supra* note 14, at 497.

23. Graeme Wood, *How Gangs Took Over Prisons*, ATLANTIC, Oct. 2014 (noting that prison officials have begun to see prison gang leaders as "brilliant managers of violence" rather than mere wreckers of havoc).

24. DENNISE ORLANDO-MORNINGSTAR, FED. JUDICIAL CTR., SPECIAL NEEDS OFFENDERS BULLETIN: PRISON GANGS 10 (1997) ("Prison gangs almost universally endorse the use of violence."); CDCR PILOT PROGRAM, *supra* note 19, at 3 ("CDCR [California Department of Corrections and Rehabilitation] manages the most violent and sophisticated [prison gang] members and associates in the nation."); Wood, *supra* note 23 (discussing the brutal nature of prison gangs in California prisons and explaining that "[t]he gangs have business out on the streets, too, but their principal activity and authority resides in prisons, where other gangs are the main powers keeping them in check").

harm other prisoners and guards.²⁵ Outside prison, prison gangs have directed street gangs within their control to collaborate with drug cartels, and to assault or kill on the prison gang's behalf.²⁶ Prison gangs continue to wreak such havoc throughout California prisons and communities.²⁷ As a result of prison gangs' immense threat to safety, prison officials have a substantial interest in minimizing the power of these violent groups and in protecting themselves, other prisoners, and the public from their harms.

Such powerful prison gangs did not just appear; their complex structures and violent networks emerged over time.²⁸ The discussions in this Part set the stage for the latter discussions by providing historical and structural perspectives on prison gangs, and by providing insight into California's regulations that establish a broader system within which the symbols and interpretations discussed in Part II fit.

25. Wood, *supra* note 23. *But see* Donald Specter, *Prison Reform: Commission on Safety and Abuse in America's Prisons: Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J.L. & POL'Y 125 (2006) ("Most people assume that prisons are dangerous because they house violent convicts. . . . Yet, in the last twenty years . . . only one California prison guard has been killed by a prisoner, but hundreds of prisoners have died from medical neglect, suicide, or guard brutality.").

26. *See, e.g.*, Jeremiah Dobruck & Adolfo Flores, *Mexican Mafia Indictment Names Woman Found Dead in Newport*, L.A. TIMES (Sept. 24, 2013), <http://articles.latimes.com/2013/sep/24/local/la-me-ln-mexican-mafia-20130924> [<https://perma.cc/N39S-W9NF>] (reporting that the Orange County District Attorney issued a "sweeping indictment against more than 100 members or associates of [the Mexican Mafia] accused of running drugs, order[ing] beatings and keeping a list of people it wanted killed"); Victoria Kim, *Mexican Mafia Member's Daughter Allegedly Did His Bidding*, L.A. TIMES (Dec. 7, 2012), <http://articles.latimes.com/2012/dec/07/local/la-me-mexican-mafia-20121207> [<https://perma.cc/552N-QW6V>] (detailing the role of an imprisoned Mexican Mafia leader's daughter, and noting that among the crimes allegedly ordered by the [Mexican Mafia] "were a May 2012 murder of a man who owed a \$230 drug debt; an August 2011 plot to murder a witness who had testified against a gang member; and a December 2011 armed robbery of three USC students"); Sam Quinones et al., *Attack on Family in Compton Latest Incident in Wave of Anti-Black Violence*, L.A. TIMES (Jan. 25, 2013), <http://articles.latimes.com/2013/jan/25/local/la-me-0126-compton-20130126> [<http://perma.cc/ZSP8-KMMD>] (reporting on the wave of attacks against African-Americans, allegedly committed by Latino street gangs under the control of the Mexican Mafia); Richard Winton, *U.S. Issues Indictments in Alleged Mexican Mafia, Drug Cartel Scheme*, L.A. TIMES (Aug. 6, 2013), <http://articles.latimes.com/2013/aug/06/local/la-me-mafia-cartel-20130807> [<http://perma.cc/T2E3-Y9TP>] (providing that federal authorities disrupted a planned merger between the Mexican Mafia and a major Mexican methamphetamine cartel, and in the course of the investigation seized \$19 million worth of methamphetamine).

27. *See supra* text accompanying note 24; *see also* *Hits and Misses: Valentine's Kiss for Fabulous Three-Day Weekend*, MONTEREY CNTY. HERALD (Feb. 16, 2015), <http://www.montereyherald.com/article/NF/20150216/LOCAL1/150219831> [<http://perma.cc/3AK2-MF8G>] ("[A]n operation targeting Norteño gang members in Salinas with ties to the Nuestra Familia prison gang resulted in a dozen people arrested on charges ranging from homicides and drug trafficking to prostitution.").

28. *But see* TONY RAFAEL, *THE MEXICAN MAFIA* 276 (2007).

A. Prison Gangs in California

Prison gangs have been studied in depth,²⁹ so this Part examines only those aspects needed to understand the scope of their threat and complexity for purposes of this Note. Each of those concepts, in turn, informs whether CDCR’s regulatory response approach is effective, just, and wise.

1. The Emergence and Growth of California Prison Gangs

Prison gangs emerged throughout the United States in the 1950s, with several originating in California prisons.³⁰ For instance, the Mexican Mafia (a.k.a. La Eme) formed in 1957 in Deuel Vocational Institution, a California state prison.³¹ The emergence of prison gangs in the 1950s coincided with a steep rise in inmate population and the growing diversity of prisoners in California.³²

The Mexican Mafia formed when Southern California Latino prisoners, once rivals in Los Angeles street gangs, became allies to gain power in prisons.³³ The gang initially organized its internal structure nonhierarchically: “It was to be an organization of equals with only one rank—Carnal, or brother.”³⁴ They targeted other racial groups, including Northern California Latino prisoners.³⁵ In part as a response to the immense threat of organized violence posed by the Mexican Mafia, other racially and geographically distinct prison gangs developed: the Black Guerilla Family (mostly black prisoners), the Aryan Brotherhood (mostly white prisoners), and La Nuestra Familia (mostly Northern California Latino prisoners).³⁶

Some scholars have posited alternatives to the view that these prison gangs emerged as a response to internal strife. For instance, some have

29. See, e.g., JULIA REYNOLDS, *BLOOD IN THE FIELDS: TEN YEARS INSIDE CALIFORNIA’S NUESTRA FAMILIA GANG* (2014); DAVID SKARBEB, *THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM* (2014); RAFAEL, *supra* note 28. *But see* SKARBEB, *supra*, at 9 (noting that “[c]ompared to research on street gangs, criminologists and sociologists have done relatively little work on prison gangs”).

30. ORLANDO-MORNINGSTAR, *supra* note 24, at 1.

31. *Id.*; see also RAFAEL, *supra* note 28, at 273–74.

32. See Wood, *supra* note 23.

33. RAFAEL, *supra* note 28, at 276 (“Given such deep street rivalries, it was a marvel that Luis Flores [the founder of the Mexican Mafia] ever got so far as to suggest the idea that inmates who were enemies on the streets should abandon that animosity when they hit the prisons. But he did, and it worked.”).

34. *Id.*

35. See Michael P. Phelan & Scott A. Hunt, *Prison Gang Members’ Tattoos as Identity Work: The Visual Communication of Moral Careers*, 21 *SYMBOLIC INTERACTION* 277, 282 (1998) (“The Nuestra Familia was believed to have been formed at San Quentin in 1968 by the ten most wanted inmates on the Mexican Mafia hit list [because they sought self-protection].”).

36. See, e.g., Joe Mozingo, *Prison Gang Trial Reveals a Treacherous World*, *L.A. TIMES* (Dec. 30, 2006), <http://articles.latimes.com/2006/dec/30/local/me-aryan30> [<http://perma.cc/Q62J-9W7F>] (providing that “[t]he Aryan Brotherhood began among Irish American inmates in San Quentin in the 1960s to protect themselves from black and Latino gangs”); ORLANDO-MORNINGSTAR, *supra* note 24, at 1–3; Wood, *supra* note 23.

theorized that prison gangs formed as the result of prison administrators' actions.³⁷ Others have viewed the creation of these gangs, however violent their tactics may be, as crucial to sustaining prison order. One prison gang scholar, David Skarbek, illustrates:

[A]t lights-out in some prisons, the leader of each gang will call out goodnight to his entire cellblock [which includes members from rival gangs]. The sole purpose of this exercise is for each gang leader to guarantee that his men will respect the night's silence. If a white guy starts yelling and keeps everyone awake, the Aryan Brothers will discipline him to avoid having blacks or Hispanics attack one of their members. White power is one thing, but the need to keep order and get shut-eye is paramount.³⁸

As these theories demonstrate, the origin and growth of prison gangs is multidimensional. What matters for this Note, however, is that prison gangs exist and exert power inside and outside of prison.

2. Governance Structures of California Prison Gangs

Over time, prison gangs developed unique characteristics and structures, and grew to pose distinct threats within the prison and to the community at large.³⁹ Some prison gangs coalesced and grew to traffic drugs and make a profit,⁴⁰ while others advanced political agendas.⁴¹ Some developed complex, formal, and rigid governance structures, while others cultivated a more diffuse membership.⁴² Some sought to exert power primarily within the prison, while

37. See, e.g., Azadeh Zohrabi, Note, *Resistance and Repression: The Black Guerilla Family in Context*, 9 HASTINGS RACE & POVERTY L.J. 167, 178 (2012) (suggesting that prisoners did not create the Black Guerilla Family as a prison gang, but rather that prison administrators turned an otherwise political organization into a prison gang); see also Dale Noll, Note, *Building a New Identity: Race, Gangs, and Violence in California Prisons*, 66 U. MIAMI L. REV. 847, 850 (2012) (asserting that gang identity is a "negotiated settlement" that includes the participation of prison officials and the Department of Corrections).

38. Wood, *supra* note 23.

39. See ORLANDO-MORNINGSTAR, *supra* note 24, at 1 ("Over the years, the type, nature, and number of prison gangs have changed dramatically. Prison gangs today range from national 'supergangs' to small regional gangs structured along paramilitary lines.").

40. *Id.* (establishing that the Aryan Brotherhood's "primary 'business'" is drug trafficking); Wood, *supra* note 23.

41. See ORLANDO-MORNINGSTAR, *supra* note 24, at 2 (providing that the Black Guerilla Family orients itself based on "Marxist/Leninist/Maoist revolutionary philosophy"); see also Justin L. Sowa, Note, *Gods Behind Bars: Prison Gangs, Due Process, and the First Amendment*, 77 BROOK. L. REV. 1593, 1613 (2012) ("The [Black Guerilla Family] was formed with two primary purposes: The first, immediate goal was to improve the conditions of incarceration for African-Americans by advocating their right to self-defense. The second was to advocate the revolutionary overthrow of the racist American establishment, through violent means if necessary." (footnote omitted)).

42. RAFAEL, *supra* note 28, at vii–viii; see also SKARBEB, *supra* note 29, at 9 ("Many [prison] gangs have elaborate written constitutions that guide their operations. . . . Compared to street gangs, prison gang members are typically more organized, entrepreneurial, covert, selective, and strict."); Wood, *supra* note 23 (quoting a prison gang scholar, David Skarbek, who said, "Prison gangs end up

others focused on their presence in the community at large.⁴³ For instance, the Aryan Brotherhood has limited reach beyond prison, while the Mexican Mafia maintains strong and violent ties to the public community.⁴⁴

Prison gangs have also subdivided into various sects and subsidiaries, and collaborated with other prison gangs.⁴⁵ The Mexican Mafia split into distinct, and sometimes hostile, California and Texas branches.⁴⁶ The Aryan Brotherhood split into the federal branch and the California branch.⁴⁷ The Black Guerilla Family may have experienced a “reformation” to become the Black Mafia.⁴⁸ Nuestra Familia split into two prison gangs—one at Pelican Bay State Prison and the other at a Colorado prison—and the street gangs within their control “may answer to either of the two [groups], causing new friction within the [prison] gang.”⁴⁹ Variable governance structures and the fluid environment of reformation demonstrate that no single “type” of prison gang exists.

3. *Complex Behaviors and Membership Structures of California Prison Gangs*

The behaviors of prison gangs vary widely and may not easily be understood by outsiders. One probation officer described prison gang behavior that could have been misinterpreted as threatening, but which the officer perceived as protective:

It was 1 p.m. and my wife and I were cutting across a parking lot, returning to our car after a festival. I saw an offender on my caseload

providing governance in a brutal but effective way . . . They impose responsibility on everyone, and in some ways the prisons run more smoothly because of them”).

43. See, e.g., Suzanne Hurt, *Sidewalk Guardians One Step to Heal Eastside Wounds*, PRESS ENTERPRISE (Feb. 10, 2015), <http://www.pe.com/articles/gang-760012-school-police.html> [<http://perma.cc/R9JN-8Y3B>] (noting that the “[v]iolence between what many call the black and brown gangs of the Eastside [of Riverside, California,] began in the early 1990s as a result of gang warfare in California prisons and prison gang leaders seeking control of lucrative illegal business out on the street”).

44. RAFAEL, *supra* note 28, at vii–viii; see also *supra* text accompanying note 26. But see H.G. Reza, *Hit List Led to Wave of O.C. Arrests*, L.A. TIMES (Dec. 16, 2006), <http://articles.latimes.com/2006/dec/16/local/me-arrests16> [<http://perma.cc/ZH39-AYMB>] (noting that “Public Enemy Number 1, a street gang involved in identity theft, credit card fraud and methamphetamine sales . . . has ties to the racist Aryan Brotherhood and Nazi Low Riders prison gangs”).

45. ORLANDO-MORNINGSTAR, *supra* note 24, at 3; see also Maeve Reston, *Ex-Guard Gets 17 1/2 Years for Helping Prison Gang*, L.A. TIMES (June 27, 2006), <http://articles.latimes.com/2006/jun/27/local/me-nazi27> [<http://perma.cc/2ZB8-X9VT>] (providing that the “Nazi Low Riders, a skinhead gang formed in the 1970s . . . has spread into prisons in California . . . and is allied with the Aryan Brotherhood” in a news story about a prison guard convicted for helping to facilitate the Nazi Low Riders’ activities in a California state prison).

46. ORLANDO-MORNINGSTAR, *supra* note 24, at 3.

47. *Id.* at 2.

48. *Id.*

49. REYNOLDS, *supra* note 29, at xii.

who was a captain in the Texas Syndicate [prison gang] walking toward me. He had five very large, very mean-looking bodyguards with him. He motioned for me to walk over, and we started talking.

As I started walking toward the offender, my wife walked over to a nearby park bench and sat down. She was immediately surrounded by the five bodyguards, who formed a ring around her and the bench. The bodyguards looked quite intimidating; however, I knew from experience working with the Texas Syndicate that the bodyguards had surrounded my wife as a sign of respect. It was not a hostile gesture. Luckily my wife also knew this! An inexperienced officer might have misinterpreted the incident, resulting in a potentially serious situation.⁵⁰

While the accuracy of this probation officer's reading of the situation remains unclear—perhaps the “bodyguards” were actually ready to harm the officer's wife if something went wrong—this story illustrates the difficulty of understanding prison gangs' behaviors.

Similarly, discerning membership presents a significant challenge. Prison gangs operate in the shadows; they seek to maintain secrecy, particularly from authorities.⁵¹ Each prison gang has different membership requirements and expectations, and no uniform checklist exists for officers to accurately determine someone's membership in any given prison gang. For example, the Mexican Mafia has maintained a “Blood In, Blood Out” policy, where prospective members must seriously harm or kill someone from a rival gang to be eligible for membership.⁵² Though it appears to be a straightforward policy, there are gray areas: What constitutes serious harm? Must the potential member harm a specific individual, or does it suffice for the potential member to harm anyone from a rival gang? Even fuzzier, some prison gangs do not appear to have strict “in” and “out” requirements.⁵³ These more diffuse prison gangs might be conceptualized as a circle with a bright core (the leaders and clear members) that radiates and fades at the edges (individuals somewhere between “in” and “out”).

Even beyond the faded edge of the circle are the castes of prisoners that may facially appear to be gang members—those prisoners with tattoos, drawings, or other items common among the prison gang—even if they are not. Some of these prisoners want to be in a prison gang, but either have been

50. ORLANDO-MORNINGSTAR, *supra* note 24, at 6.

51. *See, e.g.*, RAFAEL, *supra* note 28, at 277 (discussing the oath of secrecy that Mexican Mafia members took in the first two decades of the group's existence, where members could not even acknowledge the existence of the Mexican Mafia, except to other members).

52. *Id.*

53. *See, e.g.*, SOWA, *supra* note 41, at 1593, 1614–16 (discussing the confusion that surrounds the structure of the Black Guerilla Family, and noting that “[w]hile some, maybe even most, self-identified . . . inmates are involved in the types of violent criminal activities that characterize a traditional prison gang, it is also entirely likely that some are involved out of solidarity with George Jackson's ideas”).

rejected or have not yet been accepted into membership by the prison gang.⁵⁴ Other prisoners do not seek actual membership but want to *appear* as prison gang members for personal benefit.⁵⁵ Still other prisoners hope to return to the gang in which they were once members.⁵⁶ These prison gang “wannabes,” “imposters,” and “has beens” complicate determining prison gang membership.

B. CDCR’s Changing Response to Prison Gangs

In responding to the rise of prison gangs, California has faced a tremendous challenge and has approached the problem by establishing process via regulations. More precisely, the Legislature has conferred authority⁵⁷ to CDCR to promulgate regulations that address the threat of prison gangs. CDCR’s regulations include the establishment of a process to identify prisoners as prison gang members.⁵⁸

California’s process of identifying prison gang members entered the spotlight in 2011, and again in 2013, when its prisoners engaged in statewide hunger strikes.⁵⁹ Hunger-striking prisoners protested the conditions of their solitary confinement and the process of prison gang “validation” that led to their housing therein. California’s prison system encountered an additional crisis when the Supreme Court ordered California to reduce the number of prisoners in its overpopulated institutions.⁶⁰ As a result of these crises, vast political and institutional stirrings rankled the California prison system, and

54. JEFFREY IAN ROSS, SPECIAL PROBLEMS IN CORRECTIONS (2007).

55. See David Skarbek, *Governance and Prison Gangs*, 105 AM. POL. SCI. REV. 702, 707 (2011) (noting that individuals have operated under “the false preten[s]e of being a Mexican Mafia member” to collect “taxes” from street gangs that associate with the Mexican Mafia).

56. See, e.g., RAFAEL, *supra* note 28, at 146–48 (detailing the story of one Mr. Ramirez, who officially left the Mexican Mafia prison gang, served as an informant to prison officials, and was ordered killed by the Mexican Mafia, but continued to receive tattoos and otherwise demonstrate his loyalty to the Mexican Mafia, with the hope that he “would be rewarded by an equal loyalty to himself”).

57. CAL. PENAL CODE § 5054 (2010) (vesting CDCR with the responsibility for the “supervision, management and control of the state prisons”); *id.* § 5068 (requiring CDCR to conduct investigations and reinvestigations of prisoners to classify and house prisoners based on security threats).

58. See CAL. CODE REGS. tit. 15, § 3378 (1987) (amended 2014).

59. See Paige St. John, *Inmates End California Prison Hunger Strike*, L.A. TIMES (Sept. 5, 2013), <http://articles.latimes.com/2013/sep/05/local/la-me-ff-prison-strike-20130906> [<http://perma.cc/WC6L-A5F7>] (documenting the “series of smaller hunger strikes in 2011,” and the end of the two-month-long 2013 hunger strike that “began with 30,000 inmates refusing meals” and ended with the “promise of legislative hearings on the issue [of solitary confinement conditions]”). *But see* Jeffrey Beard, *Hunger Strike in California Prisons Is a Gang Power Play*, L.A. TIMES (Aug. 6, 2013), <http://articles.latimes.com/2013/aug/06/opinion/la-oe-beard-prison-hunger-strike-20130806> [<https://perma.cc/PN2C-ZHVU>] (positing that the hunger strike was merely a power play by prison gang leaders to “restore their ability to terrorize fellow prisoners, prison staff and communities throughout California”).

60. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (holding “that the [relevant statute] authorize[d] the relief afforded in this case and that the court-mandated population limit [was] necessary to remedy the violation of prisoners’ constitutional rights”).

opened a window for regulatory and policy change in 2012.⁶¹ Additionally, a case, *Ashker v. Brown*, gained traction and ultimately led to a settlement in 2015 that further impacted CDCR regulations.

This Part examines CDCR's regulatory efforts to address and control prison gangs by revealing the inner-workings of relevant CDCR regulations. It first analyzes the process used to identify prison gang affiliates and then analyzes the policies for housing those identified as such. In particular, this Part analyzes these regulations, pre-2012, post-2012, and post-*Ashker*, to underscore the recently instituted changes in the regulatory process. By addressing the process for identifying and housing prison gang members, this Part provides the broader context for the discussion of symbols, which officials use to identify prison gang affiliates. Under the pre-2012, post-2012, and post-*Ashker* regulations, the use of symbols as permissible evidence of prison gang affiliation has remained consistent.

1. Prison Gang Identification Process

The pre-2012 regulations provided the following framework for gang identification: California prison officials would gather and review evidence, hear from an accused prisoner, and then decide whether the evidence demonstrated prison gang affiliation.⁶²

More specifically, "Institutional Gang Investigators" tracked prison gang activities and collected evidence of prison gang association in individual prisoners' central files.⁶³ To officially identify—or "validate"—a prison gang affiliate, an Institutional Gang Investigator (Investigator) needed to collect at least three independent pieces of evidence that indicated current association or membership with a gang.⁶⁴ "Current gang activity" included any gang-related activity within the past six years.⁶⁵ Against such evidence, the prisoner had an opportunity to appear before an Investigator to contest his alleged gang affiliation.⁶⁶ The prisoner could not, however, "present evidence, examine witnesses or obtain assistance."⁶⁷ After this meeting, the Investigator would

61. A policy window is "when advocates successfully connect two or more components of the policy process: the way a problem is defined, the policy solution to the problem or the political climate surrounding their issue." SARAH STACHOWIAK, ORGANIZATIONAL RESEARCH SERVS., PATHWAYS FOR CHANGE: 6 THEORIES ABOUT HOW POLICY CHANGE HAPPENS 3 (2008).

62. See CAL. CODE REGS. tit. 15, § 3378(c) (1987) (amended 2014).

63. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1241–42 (N.D. Cal. 1995); see also *Becker v. Cowan*, No. 07cv1571-RBB, 2008 WL 802933, at *5–6 (S.D. Cal. Mar. 21, 2008) (reviewing a declaration from a CDCR custodian of records, wherein the custodian of records explained that the central file contains documentation of a prisoner's history while in prison and that it follows the prisoner when he gets transferred to a new prison).

64. *Madrid*, 889 F. Supp. at 1242; CAL. CODE REGS. tit. 15, § 3378(c)(4) (1987) (amended 2014).

65. Tit. 15, § 3378(c)(1).

66. *Id.* § 3378(c)(6); *Madrid*, 889 F. Supp. at 1146, 1242.

67. *Madrid*, 889 F. Supp. at 1146, 1242.

decide whether to pursue the validation and submit the evidence to a reviewing agency, the Office of Correctional Safety, or forgo validation.⁶⁸ If submitted, and if the evidence appeared to be in order, the inmate would be validated as a prison gang affiliate.⁶⁹

The evidence that prison officials could consider under this pre-2012 approach included a range of objects and visual symbols. For example, the regulation allowed consideration of tattoos and symbols, including “[b]ody markings, hand signs, distinctive clothing, graffiti, etc., which have been identified by gang investigators as being used by and distinctive to specific gangs.”⁷⁰ Similarly, communications that included “telephone conversations, conversations between inmates, mail, notes, greeting cards, or other communication, including coded messages evidencing gang activity” could suffice, so long as prison officials “articulate[d] why, based on either the explicit or coded content, the communication [was] reliable evidence of association or membership with the gang.”⁷¹

This pre-2012 scheme of prison gang member identification, however, changed in response to the institutional stirrings discussed above. As a result of those events, CDCR launched the post-2012 regulations as a two-year pilot program to revise its pre-2012 practice of prison gang validation.⁷² In 2014, this pilot program became CDCR’s official agency regulation, and the identification portion of the post-2012 regulations remains applicable today.⁷³

The post-2012 regulations expanded the scope of the former regulations by addressing not only prison gangs, but also other STG, such as street gangs.⁷⁴ The new regulations also changed course by implementing a points-based system for determining whether prisoners are affiliated with a prison gang.⁷⁵ Under this approach, individual pieces of evidence against the prisoner are assigned a point value, which, when aggregated, must meet a threshold to “validate” a prisoner as a prison gang affiliate. The process otherwise follows a similar model of identification as the earlier regulation, including presentation of evidence, review with limited support for an accused prisoner, and determination.⁷⁶

The post-2012 process begins with prison officials collecting evidence that correlates to point values. Officials then hold a hearing for the prisoner to

68. *Id.*; Tit. 15, § 3378(c)(6).

69. *Madrid*, 889 F. Supp. at 1146, 1243.

70. Tit. 15, § 3378(c)(8)(B).

71. *Id.* § 3378(c)(8)(L).

72. *See* CDCR PILOT PROGRAM, *supra* note 19.

73. CAL. CODE REGS. tit. 15, § 3378 (2014); CAL. OFFICE OF ADMIN. LAW, NOTICE OF APPROVAL OF REGULATORY ACTION, OAL FILE NO. 2014-0905-02 S (2014), http://www.cdcr.ca.gov/stg/docs/Final_Text_of_Adopted_Regulations_STG.pdf [<https://perma.cc/6JQG-WMJ4>].

74. Tit. 15, § 3378.

75. *Id.* § 3378.2.

76. *Cf.* CAL. CODE REGS. tit. 15, § 3378 (1987) (amended 2014).

rebut the evidence, which is followed by two layers of review (by the Office of Correctional Safety and the STG Unit Classification Committee). Finally, the reviewing officials determine whether to identify a prisoner as a prison gang affiliate.⁷⁷

There is also a possible loophole in the post-2012 regulations that may allow prison officials to bypass these articulated steps.⁷⁸ A provision suggests that prison officials could bypass the post-2012 points-based process entirely if *any* evidence links the prisoner to a gang or if the prisoner has exhibited gang-related disciplinary behavior. However, the loophole provision remains unclear and, for purpose of further exploring the post-2012 regulations, this Note assumes that the points-based system is the primary avenue for identifying prisoners as prison gang affiliates.

The difference between the pre- and post-2012 regulatory regimes lies largely in the point system that emerged with the new regime. Under the point system, prisoners receive two points for gestures or symbols that prisoners do or possess (e.g., hand signs, artwork with particular images, greeting cards with particular symbols, or graffiti); four points for written materials in their possession that link them to a prison gang (e.g., membership list, codes, books by particular authors, or other materials that prison gangs use to train new recruits);⁷⁹ and six points for tattoos or body markings that are distinct to a particular prison gang.⁸⁰

As mentioned above, the 2015 *Ashker* settlement did not change the post-2012 process, so reliance on symbols in determining prison gang status persists today.

2. Consequences of Prison Gang Identification

While this Note focuses primarily on the symbols used to identify prison gang members, the housing consequences that flow from these symbols illustrate what is at stake for prisoners. By examining the evolving housing consequences of prison gang status, it becomes apparent that changes to prison gang policy have focused much more on the consequences of prison gang affiliation, rather than the actual identification process.

Unlike the identification process, which has undergone minimal transformations, the consequences for prison gang affiliation have changed substantially in the past five years. Under the pre-2012 system, after a prisoner

77. *Id.*; see also CDCR PILOT PROGRAM, *supra* note 19, at 13–15.

78. “Although placement into the Security Housing Unit / Step Down Program (SHU/SDP) is based upon behavior with a nexus to a certified or recognized STG, *validation of an STG affiliate can occur based upon the sole use of source criteria items or based upon a combination of source criteria items and STG behavior that is reported and adjudicated via the disciplinary process.*” Tit. 15, § 3378.

79. It should be noted, however, that if the prisoner’s name is on a membership list that is found in another prisoner’s possession, the membership would also count against the named prisoner even though it is not in that prisoner’s own possession.

80. Tit. 15, § 3378.

was deemed a prison gang member, the prisoner typically received an indefinite term in solitary confinement.⁸¹ There were only four ways for a prisoner to avoid solitary confinement: snitching, whereby a prisoner revealed details of the prison gang structure and strategy;⁸² death; sentence expiration; or a minimum of six years gang inactivity as verified by a prison official.⁸³ Snitching was often an unrealistic option because it posed dangers to the prisoner.⁸⁴ This led to prisoners withering away for decades in solitary confinement while waiting for the other possibilities to occur.

For housing considerations, the post-2012 regulation made only marginal changes. It divided prisoners according to type of affiliation (member or associate) and type of STG (prison gang, street gang, or other).⁸⁵ Those perceived as most dangerous (prison gang members) were very likely to be assigned to solitary confinement, while those perceived as the second most dangerous (prison gang associates) were assigned to solitary confinement if the evidence used in making the affiliation determination included two or more rule violations.⁸⁶

The additional requirement of two rules violations for associates may appear meaningful at first glance, but this threshold was largely illusory. Rule violations included seemingly minor infractions that were used to identify the prison gang affiliate in the first place: having prison-gang-related tattoos or body markings; possessing artwork that depicted prison gang symbols; possessing other communications (e.g., mail, notes, greeting cards) that evidenced prison gang behavior; using hand signs, gestures, handshakes, slogans, distinctive clothing, or graffiti that related to a prison gang; and possessing photographs that depicted prison gang affiliation, including photos

81. *Madrid v. Gomez*, 889 F. Supp. 1146, 1243 (N.D. Cal. 1995) (“Given that it is [California Department of Corrections’] policy to confine validated gang affiliates to the [Secure Housing Unit] for an indefinite term, this is invariably the outcome. . .”).

82. *Id.* at 1146, 1244. *But see* Keramet A. Reiter, *Parole, Snitch, or Die: California’s Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC’Y 530, 536 (2012) (noting that a prisoner can “renounce his gang membership by ‘debriefing’, or ‘snitching’ on other gang members and about gang activity, in which case he will likely be placed in ‘protective custody’, in conditions which are often quite similar to standard [solitary confinement] conditions”).

83. Tit. 15, § 3378(e).

84. *See* SKARBEB, *supra* note 29, at 20 (“Inmates who inform on others are often subject to ostracism, severe beatings, and even murder. This makes many inmates—even those who are subject to violence themselves—hesitant to provide information about misconduct.”); *California Governor Blocks Parole for Ex-Mexican Mafia Gang Leader*, FOX NEWS (Feb. 21, 2015), <http://www.foxnews.com/us/2015/02/21/california-governor-blocks-parole-for-ex-mexican-mafia-gang-leader> [<http://perma.cc/ZSR9-WCK6>] (describing how the government went to great lengths to protect a former prison gang member who snitched, and detailing that the governor blocked that prisoner’s parole in order to protect the prisoner, his family, the parole officer, and the community in which he would have been placed, thus demonstrating the great dangers of snitching and the likelihood of remaining in prison longer than otherwise mandated).

85. Tit. 15, § 3378.1.

86. *Id.*

that merely had symbols or other prison gang affiliates in the picture.⁸⁷ It was therefore likely that most prisoners who met the requisite point level for identification as a prison gang associate would also meet the two-rules-violations requirement warranting solitary confinement.⁸⁸ While prison officials maintained some discretion in making housing assignments, the scope of their discretion was unclear.⁸⁹

The post-2012 regulatory scheme also made minor changes to the ways in which a prisoner could exit solitary confinement. In addition to the pre-2012 scheme's permissible avenues out of solitary confinement, the post-2012 scheme also allowed prisoners an exit if they successfully completed a four-plus year program called the "Step Down Program" (Program) that required them to cease their prison gang affiliations and demonstrate positive behavior.⁹⁰

To regain liberties under the post-2012 Program, compliant prisoners had to renounce their affiliation from the prison gang, undergo treatment, and meet certain milestones.⁹¹ The Program required prisoners to successfully complete five steps, judged by a team of prison officials.⁹² Each of the five steps was designed to take twelve months, but steps one and two could be expedited if prison officials determined the prisoner had completed all necessary components of the step at the six-month review.⁹³ If a prisoner failed to meet a step, or engaged in prohibited or STG-related behavior, the prison officials could require the prisoner to regress to a previous step.⁹⁴

At an absolute minimum, completion of the Program took four years, at least two of which were spent in the regular conditions of solitary confinement.⁹⁵ As such, the Program did not clearly diminish the stakes for prisoners facing a prison gang determination because a long-term stay in solitary confinement would result even if the prisoner fully complied with the

87. *Id.*

88. *See id.* § 3378.4(a).

89. *See id.* In one part, the regulations provide that the institutional body determining housing should look at all case factors to determine appropriate housing. In another part, the regulations provide bright-line rules about sending categories of prisoners to particular housing. For example, sending STG-I members to solitary confinement or STG-I associates to solitary confinement if they meet the rules-violations requirement.

90. *See id.* §§ 3378.3(a), 3378.5.

91. *See id.* § 3378.3(a)(3).

92. *See id.* § 3378(b) (mandating that reviews occur once every six months, except for step four where reviews happen every ninety days, and step five which consists of a twelve-month observation and monitoring period).

93. *See id.*

94. *See id.* § 3378.3(a)(2)–(4).

95. *See id.* § 3378.3; CDCR PILOT PROGRAM, *supra* note 19, at 41 (providing that the required programming for steps one and two is completed within the prisoner's cell, and all movement outside the cell is subject to restraints; during step three, the confinement is largely the same as steps one and two—programming is completed in the cell or in individual treatment modules, meals are consumed in the cell, and movement may be in restraints).

Program requirements. And, if a prisoner was inactive or unsuccessful in the Program, and did not debrief, the prisoner stayed in solitary confinement indefinitely.⁹⁶

As a general matter, under both pre- and post-2012 regimes, CDCR had made suppression the focus of its efforts by isolating prison gang affiliates in order to diminish the gangs’ threat.⁹⁷ But isolation never resulted in discernable benefits to the California prison system.⁹⁸ Perhaps California officials failed to isolate key gang members, thus leaving them free to continue prison gangs’ practices. Perhaps isolation simply did not work due to gaps that persisted in isolation, allowing prisoners to talk, direct other members, and pursue criminal ends.⁹⁹ Or perhaps isolation itself exacerbated existing violence. Studies have found mixed support for the hypothesis that solitary confinement *increases* the aggregate violence within prisons.¹⁰⁰ For example, after a Mississippi prison reduced the number of prisoners in solitary confinement, the prison’s institutional violence plummeted.¹⁰¹

The terms of the *Ashker* settlement substantially changed the housing policies for prison gang affiliates, and shifted them away from their former

96. See CDCR PILOT PROGRAM, *supra* note 19, at 40; Tit. 15, § 3378.3.

97. See CDCR PILOT PROGRAM, *supra* note 19, at 3 (“CDCR’s current strategy, which was initially developed more than [twenty-five] years ago, is a crime prevention strategy through suppression.”); see also Defendants’ Opposition to Plaintiffs’ Motion for Class Certification at 4, *Ashker v. Brown*, No. 4:09-cv-05796-CW, 2014 WL 2465191 (N.D. Cal. June 2, 2014); Michael Montgomery, *Ex-Prisoner Sues Over Years in Solitary*, NPR NEWS (Mar. 8, 2009), <http://www.npr.org/templates/story/story.php?storyId=101501841> [<https://perma.cc/V2BN-ZZDG>] (“California built the [solitary confinement institutions] in the 1980s to isolate violent prison gangs that were running crime rings behind bars and on the streets. But the state casts a wide net and locks down some inmates for indirect allegations—such as associating with other gang members or holding artwork with hidden gang signs.”).

98. See, e.g., Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1371 (2003) (concluding, after analyzing data showing that solitary confinement did not reduce violence, that “it is difficult to justify the use of supermax on the grounds that it increases prison safety”).

99. See, e.g., Wood, *supra* note 23 (“The prevalence of cellphones in the California prison system reveals just how loose a grip the authorities have on their inmates. In 2013, the [CDCR] confiscated 12,151 phones. A reasonable guess might be that this represented a tenth of all cellphones in the system, which means that almost every one of the state’s 135,600 inmates had a phone[. . .]”).

100. Briggs, *supra* note 98, at 1366–70 (noting that in Minnesota, the supermax had no effect on inmate-staff assaults; in Arizona, staff injuries increased with the use of solitary confinement; and in Illinois, staff injuries decreased).

101. See John Buntin, *Mississippi’s Corrections Reform*, GOVERNING MAGAZINE (Aug. 2010), <http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html> [<http://perma.cc/6LN4-HGWP>] (describing the transition from supermax confinement to more liberal, general population rules, resulting in reduced: physical takedowns, use of immobilizing gas by prison staff, prisoner-on-prisoner violence (by 70 percent), and prisoner-on-staff violence); see also *Solitary Is Cruel and Unusual*, 309 SCI. AM. 10 (2013) (“After the state of Mississippi reduced the number of prisoners in solitary confinement at its Parchman facility and developed new units for prisoners with mental illness, the number of violent attacks plummeted from a high of [forty-five] in March 2006 to five in January 2008. (Mississippi also saved more than \$5 million.)”).

isolationist focus.¹⁰² CDCR agreed to issue new regulations to reduce the use of solitary confinement for prison gang affiliation,¹⁰³ providing that “CDCR shall not place inmates into [solitary confinement] solely on the basis of their [prison gang] validation status.”¹⁰⁴

Under the *Ashker* settlement, prisoners identified as prison gang affiliates (STG-I inmates) will be sent to solitary confinement only if, like the rest of the prisoner population, they are found guilty of committing a solitary-eligible offense while in prison.¹⁰⁵ Guilty prisoners will serve a determinate disciplinary term for such offense.¹⁰⁶ At the expiration of their term, if the offense was proven to have a “nexus to an STG,” prisoners will be transferred into a revised Program, which occurs in solitary housing, lasts for approximately two years, and results in release for program-compliant prisoners.¹⁰⁷

There is one carve-out to the transfer to the Program. It allows CDCR to indefinitely retain a prisoner in solitary confinement if “the inmate’s case factors [(i.e., the prisoner’s past conduct)] are such that overwhelming evidence exists supporting an immediate threat to the security of the institution or the safety of others, and substantial justification has been articulated of the need for [solitary] placement.”¹⁰⁸ For these prisoners, a CDCR board will review the prisoner’s status and housing determination annually.¹⁰⁹ CDCR expects to retain “a small number of inmates” pursuant to this carve-out, and if *Ashker* counsel believes CDCR has abused its discretion under this carve-out, they may raise the issue before the court.¹¹⁰

The revised Program—to which most STG-I affiliates will transfer at the expiration of their solitary term—shortens and modifies the Program

102. The settlement also applies retroactively, thus requiring CDCR to review and bring into compliance the housing status of prisoners housed in solitary confinement on the basis of their prison gang status. Settlement Agreement, *supra* note 16, ¶ 25.

103. *Id.* ¶ 36.

104. *Id.* ¶ 13.

105. *Id.* ¶¶ 15–17. The solitary-eligible offenses are currently “murder, violence against persons, threats to kill or assault, weapons possession, distribution of controlled substances, escape, disturbance, riot or strike, harassment, gang activity that leads to a serious rule violation, serious theft or destruction of property, extortion or bribery, certain sexual misconduct, and related attempts or conspiracy.” CTR. FOR CONSTITUTIONAL RIGHTS, SUMMARY OF *ASHKER V. GOVERNOR OF CALIFORNIA* SETTLEMENT TERMS (2015), <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf> [<http://perma.cc/PN5Y-GU2Z>]; *see also* Settlement Agreement, *supra* note 16, at attach. B (providing the CDCR matrix for solitary-eligible offenses).

106. Settlement Agreement, *supra* note 16, ¶ 17.

107. *Id.* ¶¶ 15, 17. The settlement requires transfer of STG-II (i.e., street gang) affiliates to the Program only if they have committed *two* solitary-eligible offenses, with a proven nexus to an STG, within a four-year period. *Id.* ¶ 16.

108. *Id.* ¶ 29 (providing that indeterminate placement in solitary is also permissible for prisoners with three or more terms in solitary confinement within the past five years, and an articulable need to continue housing the prisoner in solitary confinement).

109. *Id.*

110. *Id.*

implemented in the 2012 legislation.¹¹¹ Rather than lasting upwards of four years, the revised Program will be two years in duration and will require the completion of four steps, rather than five.¹¹² Like the original Program, each step provides “incremental increases in privileges and freedom of movement.”¹¹³

In contrast to the former Program, which a prisoner could elect to forgo, the revised Program is mandatory for prisoners assigned to it.¹¹⁴ However, if prisoners absolutely refuse to complete the Program, they will be transferred to a “Restricted Custody General Population” (RCGP) facility, with privileges equal to the Step 3 group.¹¹⁵ The RCGP is a new type of facility for California,¹¹⁶ described as a “high security general population facilit[y].”¹¹⁷ In addition to prisoners who refuse to participate in the Program, CDCR may assign the following groups to RCGP housing: prisoners who repeatedly violate prison rules while in the Program;¹¹⁸ prisoners who have spent more than ten continuous years in solitary confinement and have recently committed a

111. *See id.* ¶ 19.

112. *Id.*

113. *Id.* ¶ 20.

114. *Id.* ¶ 22.

115. *Id.* (noting that if the prisoner continues to progress through the Program after transfer to the RCGP, the prisoner may obtain privileges commensurate with Step 4 or complete the program fully and return to a general population setting). The Step 3 group provides for:

- No family visit
- Noncontact visiting
- 45 percent maximum monthly canteen draw
- Emergency telephone calls
- One (1) phone call every [forty-five] days if [participating in the program] and no serious [rule violations] in that time period
- Yard access . . . [for] a minimum of [ten] hours per week
- Receipt of (1) personal package not to exceed [thirty] pounds, exclusive of special purchases
- Three (3) photographs if [participating in the program] and no [rules violations]
- Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU
- Small Group Programs at least two hours per week
- [A]ccess to GED, high school, and college level educational programs, with adequate academic support.

Id. at attach. A, page 1.

116. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 105, at ¶ 4.

117. Settlement Agreement, *supra* note 16, ¶ 28.

118. Repeated rules violations include the commission of three or more “serious” rules violations or five or more “administrative” rules violations while in the Program. *Id.* ¶ 23. “Serious” rules violations include new STG-related tattoos or body markings, communication between STG affiliates that demonstrates STG activity, possession of “mail, notes, greeting cards or other communication . . . which include coded or explicit messages evidencing active STG behavior.” *Id.* at attach. C (providing CDCR’s current STG Disciplinary Matrix). “Administrative” rules violations include using “hand signs, gestures, handshakes, slogans, [or] distinctive clothing,” possession of photographs depicting STG affiliation, and possession of contact information for STG affiliates. *Id.*

solitary-eligible offense; and prisoners whose safety is threatened, such that release from solitary to general population will not ensure their safety.¹¹⁹

As should be evident at this juncture, housing policies for prison gang members have transformed dramatically over the past five years and have resulted in the reduced use of solitary confinement. By contrast, the use of symbols to identify prison gang affiliates has remained constant for almost three decades. During this span of time, prison officials have collected symbol-based evidence for use against prisoners who have been given limited opportunities to contest it. The next Part looks more closely at California's use of symbols within this nonrigorous prison gang identification process.

II.

CDCR'S IDENTIFICATION AND USE OF PRISON GANG SYMBOLS

CHEEVER: 'Tis hard proof! . . . I find here a poppet Goody Proctor keeps. I have found it, sir. And in the belly of the poppet a needle's stuck. I tell you true, Proctor, I never warranted to see such proof of Hell, and I bid you obstruct me not¹²⁰

This Part examines the visual symbols that prison officials rely on in making prison gang affiliation decisions. Prison officials use the symbols so identified as evidence of prison gang affiliation within the points-based regulatory process described in Part I.B.2.

A. CDCR's Process for Identifying Prison Gang Symbols

Though visual symbols are often used to identify prison gang members, CDCR officials use a vague, nonrigorous semiotic process to link visual symbols to prison gangs and thereby identify gang members. In *Alvarez v. Cate*, the court described that prison officials identify prison gang symbols by reviewing evidence, including former prison gang members' statements.¹²¹ The post-2012 regulations provide an alternate explanation, though it is not much different in quality: to establish that a symbol is prison-gang-related, prison staff must include the following explanations to a reviewing committee that "shall review the submitted documents and approve/deny the request":

(A) Description, drawing, photo of sign or symbol[;] (B) Translation or meaning of the sign or symbol to the specific STG[;] (C) Relevance of the sign or symbol to the specific STG[;] (D) Evidence the sign or symbol has been adopted/accepted by the specific STG[;] (E) Means by which the information was obtained[; and] (F) A listing of all

119. *Id.* ¶ 27.

120. ARTHUR MILLER, *The Crucible*, in ARTHUR MILLER: COLLECTED PLAYS 1944–1961, at 403 (Tony Kushner ed., 2006).

121. *Alvarez v. Cate*, No. C 11-2034 JSW (PR), 2013 U.S. Dist. LEXIS 32577, at *4–5 (N.D. Cal. 2013) (“[Prison officials] identify the various gangs’ symbols . . . after reviewing evidence including statements from former gang members. Officials may not identify gang symbols on an ad hoc basis.”).

corresponding documentation indicative of the sign or symbol being recognized by the specific STG.¹²²

The symbols so identified are used within the regulatory process described in Part I.B.2, in which prison officials assign points to these symbols and use them as evidence of prison gang affiliation.

Under these vague explanations for interpreting symbols, few concrete standards exist to vet symbol interpretations used to determine prison gang affiliates. While prison officials must review considerations such as the translation, relevance, and means by which the symbol was obtained, there are no rules about the weights to assign to such considerations, or the standards to guide approval of these symbols. It also remains unclear whether input from current or former prison gang members is necessary to this process, though the post-2012 regulations suggest it is not. In short, this process does not likely require a prison official to engage in any sort of “quality assurance,” beyond reviewing a handful of considerations and deciding on some ambiguous grounds that the interpretation is correct.

Additionally reducing safeguards against shoddy determinations, these determinations are likely reviewed “every four years” under the same criteria described above.¹²³ Furthermore, beyond the four-year review, executed by the same persons using the same criteria, there is no timely or thorough mechanism checking prison officials’ interpretations of these symbols. This poses a great risk that prison officials—who are outside the prison gang—may formulate and thereafter rely on potentially false interpretations.

Such an unchecked semiotic system does not protect against false positives because symbol interpretations have the possibility of remaining stagnant into perpetuity. This stagnant semiotic system runs counter to expert semioticians’ complex understanding of visual symbols, where interpretation must involve a negotiation between many considerations and actors to achieve any sort of accuracy, and *must be open to change over time*.¹²⁴ These deficiencies reduce the ability of prison officials to capture true, or close-to-true, meanings and likely lead to oversimplified, crude understandings of the images that prisoners possess, express, and convey. Furthermore, the lax semiotic process leaves plenty of room for misdirection or corruption by prison

122. CAL. CODE REGS. tit. 15, § 3378.1(f)(1)-(3) (2014).

123. *Id.* § 3378.1(f)(4).

124. See, e.g., WENDY LEEDS-HURWITZ, SEMIOTICS AND COMMUNICATION: SIGNS, CODES, CULTURES 40 (1993) (“Meanings are multiple, and they are fluid. . .”); PAUL MESSARIS, VISUAL PERSUASION: THE ROLE OF IMAGES IN ADVERTISING xiii (1997) (“[A]s soon as we go beyond spatiotemporal interpretations, the meaning of visual syntax becomes fluid, indeterminate, and more subject to the viewer’s interpretational predispositions than is the case with a communicational mode such as verbal language, which possesses an elaborate set of explicit indicators of analogy, causality, and other kinds of connections between two or more concepts.”).

officials.¹²⁵ The following Part discusses the facts and circumstances of prison gangs that make the described semiotic process even more susceptible to failure.

1. *Symbols Identified by CDCR as Prison Gang Symbols*

Since California prison officials do not publicly reveal their list of prohibited symbols or the meanings they assign to such symbols,¹²⁶ cases offer the best insight into the particular visual symbols that have led to identification of prison gang affiliates. Symbols used in making prison gang status determinations, as culled from the dozens of cases that prisoners have brought to challenge their prison gang status, range from specific images to entire books.

Below, this Note highlights some of the symbols—mostly visual—that prison officials have interpreted as representative of prison gang affiliation. This list does not in any way represent an exhaustive account of the symbols that prison officials use. To the contrary, this list is curated to feature symbols that are particularly vague (e.g., “Aztec images,” “medieval weaponry,” etc.) or vulnerable to counter interpretations (e.g., an “Irish shamrock,” the “Northern Star,” foreign language training materials for the Swahili language, etc.).

Symbols Used to Identify Affiliates of the Aryan Brotherhood

- Image of an Irish shamrock.¹²⁷
- The number “666.”¹²⁸
- The letters “AB.”¹²⁹

Symbols Used to Identify Affiliates of La Nuestra Familia

- The Roman numeral “XIV.”¹³⁰

125. See, e.g., Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law “Works” Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 172 (2006) (“Overly general or vague regulations may result in the abuse of discretion, or arbitrary rule enforcement by prison staff.”); Michael Knight, Comment, *Censorship of Inmate Mail and the First Amendment: The Way of the Circuits*, 19 TEX. TECH. L. REV. 1057, 1090 (1988) (“Without some check on prison officials, the old maxim that ‘power corrupts’ and ‘absolute power corrupts absolutely’ is acted out. . .”).

126. The author submitted a public records request to the California Office of Correctional Safety on March 10, 2015, requesting such information. The request was ultimately denied pursuant to Gov. Code 6254(f) on May 27, 2015. Both the request and the denial are on file. Notably, the *Ashker* settlement does require CDCR to produce for plaintiffs’ counsel “a randomly chosen representative sample of the documents relied upon for the validation determinations,” and “all non-confidential documents relied upon” which would likely provide better insight into the actual symbols used to identify prison gang members, if made public. Settlement Agreement, *supra* note 16, ¶ 37(h), (k). The nonpublic nature of the symbols used by CDCR also raises due process concerns: is it fair to hold a prisoner accountable for a symbol when the prisoner did not know the symbol could be used against him or her?

127. *United States v. Bingham*, 653 F.3d 983, 987 (9th Cir. 2011). Notably, this symbol was identified as indicative of prison gang membership by the Ninth Circuit, not by a prison official. *Id.*

128. *Id.*

129. *Id.*

- The number “14.”¹³¹
- The letter “N.”¹³²
- Image of the Northern Star.¹³³
- Image of the Huelga bird.¹³⁴

Symbols Used to Identify Affiliates of the Black Guerilla Family

- Image of a gorilla.¹³⁵
- Image of an AK-47 gun.¹³⁶
- Image of a dragon.¹³⁷
- Image of a ball and chain.¹³⁸
- Image of medieval weaponry.¹³⁹
- Swahili names and phrases inscribed inside a book.¹⁴⁰
- Training or educational books on the Swahili language.¹⁴¹
- A picture of George Jackson.¹⁴²
- A copy of *Blood in My Eye*, a book authored by George Jackson.¹⁴³
- A photocopied newspaper article that explained the meaning

130. *Perez v. McDonald*, No. 2:10-cv-01984-MCE-JFM, 2012 WL 4510955, at *5 (E.D. Cal. Sept. 28, 2012).

131. *Id.* (“The number 14 is the alpha-numeric equivalent to the letter ‘N’ which was adopted by the Northern Structure as a gang identification symbol.”).

132. *Id.*

133. *Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *55 (N.D. Cal. Sept. 30, 2009) (“The drawing confiscated from plaintiff’s locker in December 1992 is supposed to include three Northern Structure symbols: a ‘Northern Star,’ the number ‘14,’ and part of a ‘Huelga bird.’”).

134. *Id.*

135. *Barnett v. Cate*, No. 1:10-cv-00842-JLT PC, 2011 U.S. Dist. LEXIS 129960, at *11 (E.D. Cal. Nov. 8, 2011) (interpreting a facial tattoo of a gorilla to be a “Silver Back Gorilla,” which the prison official interpreted as evidence of association with the Black Guerilla Family prison gang).

136. *Id.* (interpreting a tattoo of an AK-47 to indicate affiliation with the Black Guerilla Family prison gang).

137. *Dawkins v. McGrath*, No. CIV S-03-1643 FCD EFB P, 2009 U.S. Dist. LEXIS 118152, at *15 (E.D. Cal. Dec. 17, 2009).

138. *Id.*

139. *Id.*

140. *Hawkins v. Russell*, No. CIV S-08-2791 CKD P, 2012 U.S. Dist. LEXIS 41158, at *4–6 (E.D. Cal. Mar. 23, 2012) (“Some inmates affiliated with the [Black Guerilla Family], as well as inmates from affiliated disruptive groups, have been known to take Swahili names as their gang monikers.”).

141. *Nelson v. Woodford*, No. C04-03684 CRB (PR), 2006 WL 571359, at *9 (N.D. Cal. Mar. 2, 2006) (identifying the prison’s prohibition on certain foreign language materials including “Swahili, Nahuatl, Runic and Celtic languages” and explaining the rationale, “because prison-gang members have used these languages in the past to communicate coded messages to conceal the planning and execution of criminal activity”).

142. Notably, in this instance, a prisoner had a picture of George Jackson from *Prison Focus*, a newsletter published by an Oakland, California, based nonprofit called “California Prison Focus,” yet prison officials still used the image as evidence of prison gang affiliation. *See Hawkins*, 2012 U.S. Dist. LEXIS 41158, at *4–6.

143. *Id.*

of Black August, and “encouraged the public to attend [a] rally and learn how to become involved in the movement to free Hugo Pinell, [a Black Guerilla Family] prison gang member.”¹⁴⁴

Symbols Used to Identify Affiliates of the Mexican Mafia

- The letter “M.”¹⁴⁵
- Objects “drawn that resemble the letter ‘M.’”¹⁴⁶
- The number “13.”¹⁴⁷
- Image of the Matlactomei symbol (an ancient Meso-American symbol that has two vertical lines with a vertical column of three dots).¹⁴⁸
- Image of the Eternal War Shield (an Aztec image).¹⁴⁹
- Aztec images on the front of a greeting card.¹⁵⁰
- A prisoner’s signature on a birthday card for a “validated associate of the Mexican Mafia.”¹⁵¹
- A coded address book.¹⁵²

Collectively, these symbols illustrate prison officials’ vast power of interpretation. Prison officials have deemed categories as broad as “Aztec images” or “medieval weaponry” as indicative of prison gang affiliation. They also have deemed symbols as common as “dragons” and “gorillas” similarly indicative. With such broad categories of symbols used as evidence against a prisoner, prison officials have wide discretion to identify a wide spectrum of prisoners as prison gang affiliates, including many prisoners who are not affiliated with prison gangs whatsoever.

2. Nuances that Preclude Accuracy in CDCR’s Semiotic Process

Visual symbols fail to provide meaningful guideposts in determining whether someone participates in or affiliates with a prison gang.¹⁵³ This

144. *In re Furnace*, 110 Cal. Rptr. 3d 820, 823–24 (Ct. App. 2010).

145. *Martinez v. Fischer*, No. CIV S-10-0366 GGH P, 2011 WL 4543191, at *3 (E.D. Cal. Sept. 28, 2011).

146. *Id.*

147. *Cabrera v. Maddock*, No. 1:10-cv-00611-LJO-MJS (PC), 2012 U.S. Dist. LEXIS 124691, at *66 (E.D. Cal. Aug. 30, 2012).

148. *Id.*

149. Notably in this case, the image was within a photocopy of professional artwork that had been published in the *Low Rider* magazine. *Id.* at *62, *65–66 (explaining that “[t]he Eternal War Shield is known through gang intelligence, to demonstrate loyalty to the Mexican Mafia as many of the members and associates identify themselves as being warriors of the [Mexican Mafia]”).

150. *In re Villa*, 154 Cal. Rptr. 3d 506, 511 (Ct. App. 2013).

151. *Castro v. Terhune*, 712 F. 3d 1304, 1311 (9th Cir. 2013).

152. Prison officials used a coded address book as evidence of a prisoner’s prison gang affiliation, despite the prisoner’s assertion that he “formatted his address book simply ‘to protect his family and friends.’” *Cota v. Scribner*, No. 09cv2507-BEN (BLM), 2010 U.S. Dist. LEXIS 129687, at *40 (S.D. Cal. Nov. 10, 2010).

Subpart asserts three reasons why California’s crude semiotic system for interpreting visual symbols results in false positives.

This Note posits that these inevitable false positives relate to the many nuances that complicate the understanding of prison gangs and prisoners’ behaviors. First, the method of communication (e.g., tattoo, drawing, greeting card, etc.) impacts the meaning of the image, but does not receive consideration in the prison gang symbol identification process. Second, because prison gang affiliation is not as simple as “in” or “out,” visual symbols may not accurately reflect an “in” affiliation. Third, the overlay of prison gang symbols with general cultural symbols makes it excessively challenging for prison officials to distinguish between them. In the end, the threads converge to a single consistent thesis: too much nuance exists for CDCR’s semiotic process to achieve accurate outcomes. This guides the proposal that follows in Part III.

a. The Method of Communication Matters to the Meaning of the Symbol

The method of communicating a symbol is itself a symbol. That is, the act of getting a tattoo, creating a drawing, or receiving a greeting card, conveys meaning of its own beyond the image subject to interpretation.¹⁵⁴ The image itself is thus best understood by examining its relationship to the method of communication, which impacts the image’s overall meaning.¹⁵⁵ Such a holistic approach to interpreting individual symbols has roots in Lévi-Strauss’s approach to interpreting symbols within complex systems.¹⁵⁶ He argued that complex systems necessitate viewing particular symbols in relation to other symbols within the system.¹⁵⁷

Tattoos illustrate the importance of adopting a holistic approach, because the system surrounding the particular image is complex and has been examined by other scholars.¹⁵⁸ The method (a tattoo) is part of the wider system that supports the particular symbol (the image) and its true meaning.

153. Cases discussing false positives illustrate this point. *See, e.g.,* *Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *7–8 (N.D. Cal. Sept. 30, 2009); *In re Bean*, C072465, 2013 WL 4047100, at *1–2 (Cal. Ct. App. Sept. 4, 2013); *In re Cabrera*, 158 Cal. Rptr. 3d 121, 125 (Ct. App. 2013); *In re Villa*, 154 Cal. Rptr. 3d at 508, 518–20.

154. *See, e.g.,* J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1121 (1990) (“Thus, the relation between signifier [symbol] and signified [meaning] is mediated by the relationship of signifiers [symbols] to each other in a general system of signification. Meaning . . . then, comes from the play of differences.”).

155. *See* SUSAN TIEFENBRUN, *DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES* 52 (2010) (discussing André-Jean Arnaud, a legal semiotician, in his application of Lévi-Strauss’s methodical approach to understanding symbols structurally).

156. *See id.* at 50–51 (describing Lévi-Strauss’s structural approach to symbol interpretation and explaining that he perceived the meaning of a sign from its “contrastive relationship to other [signs]”).

157. *See id.* at 51.

158. *See, e.g.,* ORLANDO-MORNINGSTAR, *supra* note 24, at 6 (“Officers should note that tattoos are dynamic symbols of gang membership that can change over time.”); Xuan Santos, *The Chicana Canvas: Doing Class, Gender, Race, and Sexuality Through Tattooing in East Los Angeles*, 21 NAT’L

One scholar suggests that prisoners' tattoos are a "kind of secret language, understandable only to the initiated."¹⁵⁹ Another scholar suggests that tattoos "represent specific sequences of status . . . within an organizational or institutional context,"¹⁶⁰ which again indicates that an individual tattoo may represent a depth of meanings. Tattoos typically associated with prison gangs may demonstrate "pictorial life-histories, expressions of cultural values and practices, and announcements of group solidarity."¹⁶¹ By putting forth multilayered meanings, tattoos demonstrate the incredible nuances that are not captured in CDCR's crude semiotic process for identifying prison gang symbols. It is insufficient merely to look at the image itself when a whole other world of meanings that underlie the method of communication is at play.

In addition, the size and location of a prisoner's tattoo can impart meanings that reflect different levels of membership and commitment to a prison gang.¹⁶²

Large and ornate tattoos are intended to attract more attention and announce features to which the wearer is most committed. For instance, tattoos worn on the face and neck are the most visible, and thus suggest a higher level of commitment than tattoos on other less visible parts of the body.¹⁶³

Further complicating consideration of the communication method, prison gangs have variable relationships to the use of tattoos.¹⁶⁴ Some prison gangs use tattoos to signify membership or other messages, while others do not use tattoos whatsoever.¹⁶⁵ As such, the meaning of a tattoo's existence and placement varies from gang to gang.

Thus, the method of communication (tattoo), including the scope of communication (large or small), affects the meaning of the image. An oversimplified interpretation of a prisoner's tattoo—as California prison officials routinely divine—looks only at the image itself (e.g., the gorilla, the AK-47, or the number "14") and misses the other meanings that the act of tattooing conveyed. These other messages present important interpretative

WOMEN'S STUD. ASS'N J. 91 (2009) (analyzing the power that tattoo artists assert over their clients, and noting how Chicana women "use their bodies as canvases to challenge the status quo and subvert the power imposed on them by men who are tattoo artists," thus demonstrating the complex cultural practice and multiple perspectives of meaning that a tattoo evokes).

159. Arkady G. Bronnikov, *Telltale Tattoos in Russian Prisons*, 102 NAT. HIST. 50, 53 (1993).

160. Phelan & Hunt, *supra* note 35, at 280.

161. *Id.*

162. *Id.* at 283 ("The type of tattoo and its location . . . convey different levels of commitment.").

163. *Id.*

164. ORLANDO-MORNINGSTAR, *supra* note 24, at 6 ("Members may wear tattoos on the neck, chest, outside of the calf, or forearm, depending on the gang. In some cases, members may hide a gang tattoo by putting a more intricate tattoo over it or by wearing it on the scalp or under the arms. Some prison gangs do not use tattoos.").

165. *See id.*

considerations. By failing to consider other facets of the tattooing process, beyond the mere image itself, CDCR’s semiotic process is prone to error.

b. Prison Gang Relationships Exist Beyond an “In/Out” Paradigm

CDCR’s system for determining prison gang symbols fails to capture the nuances of prisoners’ complex relationships with prison gangs. CDCR’s regulatory process, as supported by its semiotic evaluations, perpetuates an “in/out” paradigm, whereby a prisoner is either affiliated with a prison gang or is not affiliated with a prison gang. This fails to recognize that some prisoners exist on a continuum, in the gray area between “in” and “out” of a prison gang, and may therefore convey symbols associated with a prison gang while not identifying or associating with that gang.¹⁶⁶ California’s semiotic approach to prison gang symbols further supports the “in/out” paradigm by sorting images into those that convey affiliation and those that do not convey affiliation:

[The Office of Correctional Safety (OCS)] has certified, based in part on intelligence received from former gang members, that the “Huelga bird” is a symbol identifying membership in the Nuestra Familia and Northern Structure gangs. A validated prison-gang member may not possess or mail property depicting the Huelga bird because it is deemed to be gang-related. The same is not true of the Christian cross, Jewish Star, Muslim crescent, the “yin and yang” symbol, or the Native American dream catcher.¹⁶⁷

These “in/out” symbols, in turn, are used to make “in/out” determinations of prisoners’ gang status. Although CDCR distinguishes between members and associates of a prison gang, both are seen as “in” affiliates of a prison gang, even though there is a wide array of involvement among members and associates.

Tattoos, again, offer a glimpse into the problem posed by CDCR’s overly simplistic semiotic system. Similar to the foregoing discussion, an examination of tattoos is largely useful because other scholars have examined tattoo use among prison gangs, and not because tattoos are necessarily a more common form of evidence used to determine prison gang status.

Some prisoners may receive tattoos before the prison gang has accepted them for membership.¹⁶⁸ These “pre-initiates”—prisoners who have not yet entered into a prison gang—may choose to get tattoos to signal to a prison gang that they have an interest in a particular prison gang membership.¹⁶⁹ Alternatively, a pre-initiate may not actually be interested in prison gang

166. See *supra* Part I.A.3 (discussing the difficult-to-discern edges of some prison gangs).

167. *Alvarez v. Cate*, No. C 11-2034 JSW (PR), 2013 U.S. Dist. LEXIS 32577, at *4–5 (N.D. Cal. Mar. 8, 2013).

168. Phelan & Hunt, *supra* note 35, at 284 (“Simple tattoos can symbolically complete the wearer’s identity as someone interested in gang membership.”).

169. See *id.*

membership, but may in some way identify with that prison gang's members along racial, ethnic, or geographic lines.¹⁷⁰ Regardless, these prisoners who convey seemingly "in" symbols may not actually be "in."

In one example, a pre-initiate received a tattoo with the number "14" and the Roman numeral "XIV,"¹⁷¹ which are images that prison officials have identified as representative of affiliation with the Northern Structure prison gang.¹⁷² Thus, these pre-initiate tattoos facially convey a prison gang relationship under the standards used by prison officials in California, but do not truly represent actual association or membership. Reliance on such symbols could produce a false positive, as in Mr. Lira's case.

c. Prison Gangs and Racial or Geographic Identities Nebulously Overlap

As prison gangs developed along racial and geographic lines, discerning membership became increasingly difficult. Some scholars have asserted that within the prison system, and even on prison administration forms, the Mexican Mafia has become synonymous with Latinos from Southern California, and the Northern Structure has become synonymous with Latinos from Northern California.¹⁷³ As one scholar noted, "while prison gangs do typically consist of members of particular races or ethnicities . . . the conflation of gang affiliation, geographic location, and racial or ethnic identity creates confusion [regarding] the role of race in prison violence."¹⁷⁴ Under these considerations, a true overlap (i.e., most Mexican Mafia members are Latinos from Southern California) and CDCR's assumptions about that overlap (i.e., that most Southern California Latino prisoners belong to the Mexican Mafia) foster tenuous symbol interpretations.

Even the Department of Justice makes such attenuated interpretations. The Department of Justice writes of prison gangs:

Although historically linked to the California based Hispanic prison gang the Mexican Mafia (La Eme), tension between the [Aryan Brotherhood] and La Eme is becoming increasingly evident as demonstrated by recent fights between Caucasians and Hispanics within the [California Department of Corrections].¹⁷⁵

170. *Id.* ("Rudimentary pre-initiate tattoos communicate basic in-group/out-group distinctions, often based on ethnic differences and geographic locations.").

171. *Id.* at 284–85.

172. *See* Perez v. McDonald, No. 2:10-cv-01984-MCE-JFM, 2012 WL 4510955, at *5 (E.D. Cal. Sept. 28, 2012).

173. Noll, *supra* note 37, at 863 ("The term Northern Hispanic is now synonymous with the gang La Nuestra Familia, while Southern Hispanic translates to the Mexican Mafia. The updated 1882 induction form [for new arrivals to a prison] requests that correctional officers identify gang affiliation, with the options Northern, Southern, and Bulldog.").

174. *Id.*

175. U.S. DEP'T OF JUSTICE, PRISON GANGS, <http://www.justice.gov/criminal-ocgs/gallery/prison-gangs> [<http://perma.cc/H76S-NBJA>] (last visited Feb. 24, 2016).

This statement conflates prison gangs with race, and then proceeds to use general violence between white prisoners and Latino prisoners as evidence of prison gang clashes.¹⁷⁶ It also suggests that all white prisoners and all Latino prisoners belong to these two gangs, which is incorrect. Regardless, the links between prison gangs and race demonstrate the very complicated system that prison officials must navigate when interpreting symbols.

Tattoos, again, offer fodder for this discussion. Certain symbols—some of which prison officials have deemed indicative of prison gang status, like Aztec symbols—are so widely shared within a cultural, ethnic, or geographic community that they cannot reliably support a positive prison gang affiliation determination.¹⁷⁷ Thus, tattoos with such images may reflect a shared cultural identity with members of a particular prison gang, rather than an interest in joining that gang.¹⁷⁸ However, prison gang officials rely on such symbols to make determinations of prison gang status.

Considering the vast nuances of systems within prison gangs, a crude semiotic system will continue to lead CDCR in the wrong direction. It will continue to support false positive determinations to the great detriment of prisoners. A better system of prison gang identification is necessary to ensure the integrity of the legal system and the fair treatment of California’s prisoners.

III.

PROPOSAL: BEHAVIOR-BASED PROCESS FOR IDENTIFYING PRISON GANG AFFILIATES

Because of the complex systems operating within and upon prison gangs, California should move away from its reliance on unchecked visual symbols in making prison gang determinations. As evidenced in Mr. Lira’s story and discussed above, California’s current prison gang identification process leads to false positives resulting in harsh consequences.

Presumably, if a prisoner who commits a solitary-eligible offense is already identified as a prison gang affiliate, it will be easier to show a nexus between the solitary-eligible offense and the prison gang. Thus, although solitary confinement will be greatly reduced pursuant to the *Ashker* settlement, it is reasonable to expect that most prisoners identified as prison gang affiliates will still face longer terms in solitary confinement (due to the revised Program) if they commit solitary-eligible offenses. Moreover, the *Ashker* settlement does

176. See *Johnson v. California*, 543 U.S. 499, 502 (2005) (finding that “[t]he [CDCR]’s asserted rationale for [sorting prisoners upon entry to an institution, based on their perceived race] is that it is necessary to prevent violence caused by racial gangs,” which conflates race and prison gangs).

177. RAFAEL, *supra* note 28, at 148 (suggesting that “Aztec symbols and Mexican flags are nearly universal tattoos among [Latinos] in the prison system,” rather than indicative of prison gang membership).

178. See *supra* note 170.

not protect against the likely high rates of false positives under CDCR's current prison gang identification system. As a result, individuals like Mr. Lira could remain subject to unjust consequence if they commit a solitary-eligible offense and prison officials determine, under vague standards, that it has a "nexus" to a prison gang. And even absent the threat of solitary confinement, using a crude semiotic process has harmful effects on prisoners who experience the unfairness of the process.¹⁷⁹

Rather than substantially relying on unreliable symbols to identify prison gang affiliates, California should move toward a predominantly behavior-based system for *identifying*, not just housing, prison gang affiliates. Furthermore, symbolic meanings that remain in use should be made available for prisoner and public comment before such symbols may be used as evidence against a prisoner, thus allowing the symbols to be analyzed, developed, and properly understood. Public and prisoner commenting should reoccur annually for previously approved symbols. Finally, all symbols relied on by prison officials should be made available to prisoners and the public, so as to afford proper notice. These changes should be instituted by the California Legislature to ensure that CDCR institutionalizes this reform.

Under these more rigorous and reliable standards, a fairer process would guide the determination of a prisoner's prison gang status because it would require a prisoner's external, observable action, rather than a prison official's unreliable interpretation of a symbol. The post-2012 regulations specify several external behaviors that could be used to make this determination, including repeatedly associating with already validated STG affiliates, visiting with persons "documented as willfully promoting, furthering or assisting STG affiliates in activities associated with the STG," communications between prisoners, self-admission, and the commission of a gang-related crime while in prison.¹⁸⁰ Beyond proving that a prisoner exhibited this behavior, prison officials would need to link the behavior to an STG (i.e., prove nexus). To prove nexus, prison officials could use symbols vetted through a public and prisoner commenting process.

Like many CDCR regulations, the symbols approved for use in making a nexus determination would be subject to public comment. In addition, it would make sense in the prison gang context to facilitate prisoner comment, since the prisoners themselves are likely to know most about the symbols' nuances. To avoid stagnant symbols and interpretations, the public and prisoner commenting period should reoccur annually. As a result of this process,

179. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 115 (2006) (noting that literature on procedural justice has largely revealed that peoples' perception of fairness affects their behavior).

180. CAL. CODE REGS. tit. 15, § 3378.2(9)-(12) (discussing whether to allow prison officials to rely on second-hand accounts from fellow prisoners, either via confidential informants or debriefing reports, of observed behaviors remains a question for further exploration, and its resolution depends on the reliability of prisoners' accounts of such observations).

symbols could become more nuanced, their context better understood, and their multilayered meanings developed and applied by CDCR officials when making a prison gang status determinations.

Finally, prisoners would have notice about the symbols that can be used against them, thus allowing prisoners to make informed choices about promoting those symbols. In turn, prisoners would be less impacted by the procedural due process effect, where the unfairness of the process inflicts harm and thereafter shapes the behavior of those subjected to it.¹⁸¹ By increasing the fairness of the process, the overall prison climate may improve.

Such a behavior-based system, with symbols that have richer meanings used to support prison gang determinations, would reduce the likelihood of error for several reasons. First, the pool of potential affiliates would shrink to those prisoners who actually exhibit observable behaviors. Second, the symbolic interpretations used by prison officials would develop patinas, allowing prison officials to more accurately determine whether the prisoner actually used and viewed the symbol to represent prison gang affiliation. Third, prisoners with the approved symbols in their possession would knowingly be choosing to have consequential symbols in their possession because they would have notice the symbols are forbidden.

A. *Response to Expected Critiques*

Some opponents could assert that this change is unnecessary because prison officials are experts in prison life, including prison gang practices.¹⁸² Indeed, some prison officials have deemed themselves “prison wise” and therefore able to discern fine distinctions in interpreting prison gang symbols.¹⁸³ Under this theory, perhaps checking mechanisms, behavior-based mechanisms, or more rigorous symbol-vetting procedures would not lead the interpretation any closer to the truth, but would instead only impose a burden on prison officials.

However, this assertion does not offer much comfort. Not all prison officials are “prison wise,” and California’s process has no mechanism to sort or prioritize determinations by “prison wise” officials from those made by “prison dumb” officials. Furthermore, it is doubtful that even “prison wise” officials have a complete understanding of visual symbols and the multilayered meanings they may represent, since prison officials are not necessarily from the same cultural groups as, and are not truly “in” with, prison gangs. Additionally, some prison gangs try to obscure their symbols to maintain a low profile, which makes it challenging for prison officials to understand the meanings conveyed

181. See, e.g., *supra* text accompanying note 179.

182. Phelan & Hunt, *supra* note 35, at 281 (asserting that one of the authors, a former prison guard, had become “prison wise” and therefore able to discern the true meanings of prisoners’ tattoos).

183. *Id.*

in those images.¹⁸⁴ Even a “prison wise” official could quickly lose touch with the true meaning of a symbol. Finally, even if prison officials make accurate interpretations, having a built-in redundancy to ensure such accuracy would not damage their ability to make accurate determinations, but it may instill confidence in their decisions.

Opponents may also respond to this proposal by saying that it will not adequately address or manage the vast threat of prison gangs, which pose threats within and outside of the prison. In addition, these opponents would assert that waiting for prison gang members to exhibit external behavior, as well as supplying prison gang members with the list of prohibited symbols, would not prevent them from exerting their power within prisons, but instead would allow them to maintain a vast, unidentified membership of individuals who further the gangs’ initiatives.

While the threat of prison gangs will persist in the years to come, the threat of misidentification, and its unjust consequences, is also great. The overinclusive and unchecked nature of the current system, and particularly the use of such broad symbols to identify prison gang affiliates, risks wrongly subjecting individuals to the consequences of misidentification. Furthermore, CDCR’s current process of identification does not appear to be working, as prison gangs continue to persist and prisoners continue to experience unrest.¹⁸⁵

Perhaps a dramatic shift away from the broad-handed identification of prison gang members is appropriate.¹⁸⁶ Indeed, “[o]fficers provide only a portion of the governance of inmates’ lives. Correctional officers cannot protect all of the inmates, all of the time,”¹⁸⁷ and perhaps a model that focuses on the most dangerous prison gang offenders—rather than every prisoner that in any way affiliates with a prison gang—will prove more effective. Furthermore, a model that focuses on punishing only the most dangerous prison gang members may minimize the resulting blowback to guards from the prisoners or their friends that results when punishment is ordered.¹⁸⁸ Finally, under the procedural due process lens, fairer practices will lead to greater

184. See *supra* text accompanying notes 51,158

185. See, e.g., Specter, *supra* note 25, at 132 (“It is commonly understood that, while locked in segregation, gang leaders continue to control the illegal activities of their members both within the prison and in the outside community. Perhaps the most graphic example of this is the fact that several California prison gang leaders are now facing the death penalty for federal criminal charges arising from their activities while imprisoned in the Security Housing Unit (SHU) at Pelican Bay, a supermax facility.”).

186. See, e.g., Wood, *supra* note 23 (quoting David Skarbek, a prison gang scholar, as saying, “Prison is set up so that most of the things a person wants to do are against the rules So to understand what’s really going on, you have to start by realizing that people are coming up with complicated ways to get around them”).

187. SKARBEEK, *supra* note 29, at 18.

188. See *id.* at 20 (providing that blowback from the inmate or his friends may occur in response to punishment).

prisoner acceptance of the results, and the restrictions placed on actual members of prison gangs will therefore be more effective.¹⁸⁹

CONCLUSION

“In short, in California, the question of how to manage prisons has resolved itself into the question of how to manage prison gangs.”¹⁹⁰

Rather than merely changing the *result* of prison gang identification, as the *Ashker* settlement implemented, this Note asserts that California should also change the *process* of prison gang identification. In other words, California should apply a behavior-based approach not only to *assignments* of solitary confinement, as put forth in the *Ashker* settlement, but to the *assignment* of prison gang affiliate status in the first place.

Prison officials should no longer rely on obscure interpretations of dragons, five-point stars, and the letter “M” to divine prison gang membership. With such an improvement, California would no longer use a crude semiotic process, but instead would rely on outward, observable, harmful behavior. Additionally, California should make available the symbols used to support the nexus between a prisoner’s behavior and the prison gang. By allowing the public and prisoners an opportunity to critique officials’ symbolic interpretations, the symbolic interpretations will become more nuanced and accurate, leading to more truthful determinations of prison gang status.

189. See Phelan & Hunt, *supra* note 35; see also *Solitary Is Cruel and Unusual*, *supra* note 101, at 10 (“After the state of Mississippi reduced the number of prisoners in solitary confinement . . . the number of violent attacks plummeted from a high of [forty-five] in March 2006 to five in January 2008.”).

190. SKARBEEK, *supra* note 29, at 1 (quoting John DiIulio, Jr.).

