RACIALIZED IMPLICATIONS OF OFFICER GANG EXPERT TESTIMONY

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INTRODUCTION

On a cool April night in San Francisco's Bayview District, Mr. Jones, a Black[1] man, shot Mr. Williams with a handgun. Mr. Williams survived.

Officer Katz, a fifteen-year veteran of the Bayview District[2] gang unit, was assigned to investigate this shooting. He set upon his investigation with knowledge that West Mob and Big Block are two primarily African-American gangs with "turf" in the Bayview District and have been actively involved in a violent rivalry for decades. Officer Katz believed Mr. Jones to be a West Mob member and Mr. Williams to be a Big Block member.

According to Officer Katz, weeks before Mr. Williams was shot, a West Mob member was killed by a Big Block member in a drive-

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[1] In this Article, I follow the lead of an increasing number of scholars and media organizations and capitalize Black when I refer to Black people and Black communities. Professor Kimberlé Crenshaw explains, "Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Blackness is an ethnic identity, inclusive of Black people from the African diaspora as well as from Caribbean and Central/South American countries. For many, Blackness represents a shared sense of history and identity—for some, "[t]o capitalize *Black* [may be] to acknowledge that slavery 'deliberately stripped' [those who were and whose ancestors were] forcibly shipped overseas 'of all other ethnic/national ties.'" Mike Laws, *Why we capitalize 'Black' (and not 'white')*, COLUM. JOURNALISM REV. (June 16, 2020) (quoting his colleague, Alexandria Neason), https://www.cjr.org/analysis/capital-b-http://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/5DEE-TY47]. By extension, I choose not to capitalize white in this Article because doing so would not have parallel significance: "whites do not constitute a specific cultural group." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991).

[2] Bayview/Hunters Point has the highest concentration of Black people of any San Francisco neighborhood and is predominantly Black. Adam Brinklow, *San Francisco has done everything to the Bayview except fix problems*, CURBED (Feb. 18, 2020, 1:24 PM), https://sf.curbed.com/2020/2/18/21142590/bayview-black-population-sfmta-transit-report [https://perma.cc/D33Z-JKVU]; *Race and Ethnicity in San Francisco, California (City)*, STAT. ATLAS, https://statisticalatlas.com/place/California/San-Francisco/Race-and-Ethnicity [https://perma.cc/M6KS-7FCT] (last updated Sept. 10, 2018) (showing the concentration of San Francisco neighborhoods by race and ethnicity in fig.26). The percentage of the Bayview population who identify as African American is now decreasing, but in 1980, an estimated 72 percent of its population identified as African American. *Id.*

by shooting. He opined that Mr. Williams's shooting was likely an act of revenge by West Mob members.

No witnesses to Mr. Williams's shooting would talk with Officer Katz. Based on information learned from non-percipient witnesses about what they had heard around the neighborhood about the shooting, Officer Katz arrested Mr. Jones for shooting Mr. Williams. Mr. Jones was charged with attempting to murder Mr. Williams, illegal use of a firearm for gang purposes, and a sentence enhancement charge related to the gang offense. The sentence enhancement charge exposed Mr. Jones to ten years in prison, to be consecutive to the sentence(s) imposed on the other charges.

At Mr. Jones's trial, Officer Katz testified as a fact witness about his interviews of witnesses and other investigation that led to his arrest of Mr. Jones.

He also testified as a gang expert witness. In that capacity, based on a police-developed theory for gang member identification, he told the jury about his belief that Mr. Jones was a West Mob member. He was allowed to opine that Mr. Jones shot Mr. Williams as revenge for the earlier shooting of Mr. Jones's fellow West Mob member.

Although Mr. Williams's shooting was the only event at issue at Mr. Jones's trial, the court allowed Officer Katz to testify that members of West Mob and Big Block share cars and guns within their respective gangs. He told the jury that those gangs have been known to commit crimes such as rape, murder, assault with firearms, car and narcotics thefts, and burglary, all to enhance their gang's reputation and to profit financially. He explained that, while some of the crimes committed by those two gangs are organized, most are opportunistic.

Mr. Jones presented two witnesses, both Black and both of whom had alleged ties to West Mob, who testified in his defense. They told the jury that at the time of Mr. Williams's shooting, Mr. Jones was with them at their home. They remember that day well because it was their son's third birthday party and Mr. Jones brought a gift that was a huge hit with the toddler-aged party guests.

For jurors totally unfamiliar with gang membership and dynamics, Officer Katz's expert testimony painted a picture of West Mob members as Black, dangerous, and motivated to benefit and

protect themselves and their fellow members at any cost, even by giving perjured testimony.

Despite a credible alibi defense, a majority-white jury sided with the prosecution and convicted Mr. Jones of both substantive crimes with which he was charged in under an hour; they also convicted him of the gang sentence enhancement charge.

Due to the admission of officer gang expert testimony, people like Mr. Jones are unfairly prejudiced, their fundamental constitutional rights eviscerated, at criminal trials at which decades of their liberty may be at stake. This Article unpacks two problems that arise due to the admission of officer gang expert testimony and argues that the combined impact of those problems so fundamentally undermines the fairness of the trials in which officer gang experts testify that criminal courts should exclude all police officer gang expert testimony.

The consequences of filing gang sentence enhancement charges can be significant in terms of an accused person's sentencing exposure: criminal charges under anti-gang laws often carry mandatory prison sentences upon conviction. Compounding the problem, statistics show that communities of color are targeted for prosecution under anti-gang laws. For example, of the ninety-seven people arrested and prosecuted under Mississippi's gang laws from 2010-2017, one hundred percent were Black.[3] Because prosecutors easily secure convictions in gang-related cases with the benefit of officer expert gang testimony, people of color are disproportionately exposed to long mandatory prison terms.

This Article proceeds in three parts. Part I offers a brief history of the rise of police officers as expert witnesses at criminal trials and discusses the road that led to the degree of judicial deference afforded police as officer gang experts today.

Part II discusses the reason for and substance of anti-gang laws and sets forth some of the topics on which officers testify as gang expert witnesses. It also critiques the racially disparate ways in which anti-gang laws are enforced.

Part III discusses two main problems that arise in cases in which officer gang expert testimony is admitted and due to the

[3] *See infra* Part II.

structural unfairness permeating those trials, argues for exclusion of officer gang expert testimony in criminal trials.

I. THE RISE OF POLICE AS EXPERT WITNESSES

Today, broad judicial deference is afforded to police officers endorsed as expert witnesses. They are seen as possessing specialized knowledge and unique insight into topics the average juror does not. That specialized knowledge is offered to justify officers' qualifications as experts in many topic areas without thoughtful judicial scrutiny of their qualifications or proffered testimony. Topics on which officers testify as experts range from drug and intoxication recognition to handwriting analysis, accident reconstruction to gang structure and organization, membership, and behavior. Police have not always been afforded this degree of judicial deference. The next section explores the history of police officers as expert witnesses and the road to the current degree of judicial deference afforded officers as experts.

Police practices around the prohibition era led to public perception of officers as corrupt, incompetent, and lawless.[4]

In the 1950s and '60s, to improve their public image, reformers set out to "professionalize" police departments.[5] The goal of reform efforts was for officers to be seen anew by the public as experts in their field, committed to ideals and values of public service, independent from and impenetrable by external influence.[6] They ran ads and articles favorable to police on various forms of broadcast and print media, and individual departments conducted community outreach to disseminate similarly propitious messaging.[7]

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[4] Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2005 (2017). During prohibition, "[p]olice systematically took payoffs to allow illegal drinking, gambling and prostitution . . . [and] actively participated in vote-buying and ballot-box-stuffing." Gary Potter, *The History of Policing in the United States, Part 2*, EKU ONLINE (Jul. 2, 2013), https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-2/ [https://perma.cc/4H5R-PKBX]. During that time, police "had no discernable qualifications for policing and little if any training in policing." *Id.*

[5] Lvovsky, *supra* note 4, at 2004.

[6] *Id.* (citing MICHAEL K. BROWN, WORKING THE STREET 40 (1981)).

[7] *Id.* at 2008-09; ROBERT M. FOGELSON, BIG-CITY POLICE 147-48, 236-37 (1977)).

To improve perception among the public, police departments also implemented formalized training programs and initiated specialty units, such as drug and gang task forces in which officers focused their attention on learning jargon and behavior common to specified types of criminal activity.[8]

Courts did not easily purchase reformers' efforts to establish a clean police image. A string of Warren Court decisions in the 1960s, including *Mapp v. Ohio*,[9] *Miranda v. Arizona*,[10] and *Messiah v. United States*,[11] were seen by reformers "as a disastrous impediment in the fight against crime."[12] Because those cases' holdings limited police investigative powers, winning the respect of the judiciary became chief among reformers' goals.[13]

Efforts to convince the judiciary of police expertise were multifaceted. To "maximize the appearance of police expertise before the bench," departments invited judges to present at their training workshops and preside over police training graduation ceremonies.[14] In these settings, officers were held out as well-trained, articulate, polished experts in the field of on-the-street crime detection, in possession of a body of specialized knowledge and skills not available to ordinary people.[15]

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[8] *Id.* at 2007-08. Larger police departments such as the Los Angeles and New York Police Departments engaged to a greater extent with reform efforts than did smaller departments. *Id.* (citing W.H. Parker, *The Police Role in Community Relations*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 368, 372 (1956)).

[9] Mapp v. Ohio, 367 U.S. 643, 655-57 (1961) (announcing the exclusionary rule, holding that all evidence obtained in violation of the Fourth Amendment is inadmissible in state court).

[10] Miranda v. Arizona, 384 U.S. 436, 444, 474 (1966) (holding that defendants were entitled to enumerated warnings before being subjected to custodial interrogation and that statements obtained by police in violation of the Fifth Amendment are inadmissible at trial in the state's case-in-chief).

[11] Massiah v. United States, 377 U.S. 201, 205-07 (1964) (holding that incriminating statements deliberately obtained by police in the absence of counsel after initiation of formal proceedings violate the Sixth Amendment right to counsel and were inadmissible in the state's case-in-chief).

[12] Lvovsky, *supra* note 4, at 2009 (citing WILLIAM W. TURNER, THE POLICE ESTABLISHMENT 242-43 (1968)).

[13] *Id.* at 2010.

[14] *Id.* at 2010-11, 2010 n.81 (quoting Josh Segal, Note, *"All of the Mysticism of Police Expertise": Legalizing Stop-and-Frisk in New York, 1961-1968*, 47 HARV. C.R.-C.L. L. REV. 573, 589 (2012)).

[15] *Id.* at 2010-12.

In an article published in a 1964 volume of the *Fordham Law Review*, a New York Police Inspector urged courts to consider trained officers' "experience with past crimes, . . . observation of the actions of criminals, and . . . training in the *modus operandi* of criminals [which] gives [them] a specialized type of knowledge."[16]

Critics of police reform resisted these efforts to re-cast police as experts, reasoning that they "'acquire most of their knowledge and skill on the job,'" and they "'do not produce . . . knowledge about their craft.'"[17] They critiqued police training as "cursory," "outdated," and "unhelpful."[18] Some argued that no matter the helpfulness of the training, police tended to disregard it when they got on the street in favor of a rogue culture that "primed [officers] to see danger in any ['unusual['] behavior."[19] According to some, racial bias among police was most visible in Black neighborhoods, "where ordinary 'street life . . . [was] perceived as an uninterrupted sequence of suspicious scenes.'"[20] It follows that police reform efforts were not viewed positively in communities of color, where officers' concentrated surveillance and enforcement was seen as hostile to them, which heightened their distrust of and created a greater divide between them and the police.[21]

Over time, police reform efforts gained traction within the judiciary. By the 1970s, some police departments were in the practice of "'inviting judges to [participate] . . . in round-table or seminar-type discussions which encourage a two-way flow of information' as an 'effective device' for addressing unfavorable judicial rulings."[22] Relatedly, judicial opinions took on a tone indicating their view of "police work as something both lending

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[16] John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211, 235 (1964).

[17] Lvovsky, *supra* note 4, at 2013 (quoting JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 30 (1968)).

[18] *Id.* at 2013-14. Critics highlighted the lack of any formalized training in smaller departments. *Id.* at 2013.

[19] *Id.* at 2014.

[20] *Id.* (quoting Carl Werthman & Irving Piliavin, *Gang Members and the Police*, *in* THE POLICE: SIX SOCIOLOGICAL ESSAYS 56, 56 (David J. Bordua ed., 1967)).

[21] *Id.* at 2014-15.

[22] *Id.* at 2011 (footnote omitted) (quoting O. W. WILSON & ROY CLINTON MCLAREN, POLICE ADMINISTRATION 48-49 (Robert P. Rainier & John M. Morriss eds., 3d ed. 1972)).

itself to and producing unique, systematic professional knowledge."[23]

Courts' increasingly positive view of police can be detected in the expanding deference they have afforded officers over time in qualifying and allowing them to testify as expert witnesses.

In early cases involving officers as experts, police would explain the meaning of jargon commonly used and behavioral habits among those engaged in a particular type of crime. For example, in a case involving a sex work-related charge, officer experts would explain the purpose of client lists and common means of soliciting business among those in the sex trade.[24] In these cases, officers were qualified as experts based on having served for years in a specialized section of a police department, their participation in hundreds or thousands of offense-specific arrests, and/or their running an offense-specific training program for other officers in the field.[25]

The scope of topics to which officers were allowed to testify as experts expanded significantly throughout the 1960s. In that decade, courts allowed officer drug experts to opine in areas previously reserved for physicians, such as whether a person was under the influence of narcotics and which drug they ingested, as well as the source and age of a person's track marks.[26] Courts reasoned that such testimony was appropriate because officers were "trained in police schools and experienced in dealing with narcotics" and, as one appellate court put it, could "be trusted over the 'abstruse' reasoning of doctors."[27]

Courts began to allow officer experts to opine on an accused person's likely intent in a given situation, based on factual circumstances to which the officer also testified. For example, officers began to testify that they found narcotics in a person's possession near small baggies and a scale commonly used to weigh illegal substances and that in their opinion, based on indicia such as quantity, packaging, and other items such as scales found near

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[23] *Id.* at 2015.

[24] *Id.* at 2018, 2018 nn.138-41.

[25] *Id.* at 2005-08.

[26] *Id.* at 2020.

[27] *Id.* at 2021 (quoting People v. Kesey, 58 Cal. Rptr. 625, 627 (Cal. Ct. App. 1967)) (This quote was telling because it indicated police expert testimony may be more easily relatable to jurors than that of expert physicians.).

the narcotics, the substance was more than likely intended for sale than personal use.[28]

As the scope of officer gang expert testimony expanded, the credentials needed to be judicially qualified as an expert relaxed. Courts began to weigh an officer's participation in training in favor of their expertise, regardless of the depth or content of the training, even if the officer had relatively little on-the-street experience.[29] An officer could be qualified as a drug expert as long as they had some formalized training on narcotics, even if they had "only months on the job, had no demonstrable record of arrests, or did not even specialize in narcotics."[30]

Judicial deference to police as experts was not limited to cases involving the sex and drug trades. From the late 1980s, as anti-gang laws were promulgated to curb a perceived increase in gang-related crime, prosecutors began to endorse officers as gang experts.[31] The next Part looks briefly at the enactment of anti-gang legislation and the groups typically prosecuted under it before turning to the two main problems with the admission of officer gang expert testimony and an argument for its exclusion in criminal trials.

II. ANTI-GANG LEGISLATION AND OFFICERS AS GANG EXPERTS

All fifty states, Washington, D.C., and the federal government have enacted laws to target a perceived increase in gang-related crime.[32] Both substantive and sentence enhancement charges under anti-gang laws may increase the presumptive penalty for a

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[28] *Id.* at 2021, 2021 n.166.

[29] *Id.* at 2022-24.

[30] *Id.* at 2023 (first citing Stevens v. State, 275 N.E.2d 12, 13 (Ind. 1971); then citing Sims v. State, 499 S.W.2d 54, 55 (Ark. 1973); and then citing Commonwealth v. Leskovic, 307 A.2d 357, 358-59 (Pa. Super. Ct. 1973)).

[31] *See, e.g.*, California Street Terrorism Enforcement and Prevention Act, CAL. PENAL CODE §§ 186.20-186.36 (West 2021).

[32] National Gang Center, *Highlights of Gang-Related Legislation*, U.S. DEPT. OF JUSTICE, https://nationalgangcenter.ojp.gov/legislation/highlights [https://perma.cc/PSR3-M7GA] [hereinafter *Highlights of Gang-Related Legislation*] (last visited July 21, 2021).

substantive offense or carry a mandatory consecutive prison sentence upon conviction.[33]

In many cases, lawmakers acted hastily to get anti-gang laws on the books to allay constituents' fears about increased gang activity without first gaining a fundamental understanding of why people form, join, or participate in gangs.[34] According to one federal government study, young people reported self-protection as the top reason they joined a gang.[35] Gangs are also appealing to some because they can gain respect or due to the enjoyable social aspects they involve, including to join a friend who is already a member.[36] Notably, none of these motives involve a desire to engage in organized criminal activity or violence. With an earnest understanding of these dynamics, lawmakers would have been

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[33] For example, the Racketeer Influenced and Corrupt Organizations Act ("RICO") allows for a sentence up to twenty years in federal prison. 18 U.S.C. § 1963(a). In Minnesota, if a person is convicted of a felony committed "for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members," they must be sentenced to at least one year and a day in prison. MINN. STAT. § 609-229(3)(a), (4)(a) (2022). A person sentenced under that law is not eligible for release on parole or any other form of community-based supervision until they serve the full term of imprisonment. *Id.* at (4)(b). If a felony is committed under the circumstances described above, the maximum end of the presumptive sentencing range is increased by five years, and if the victim of that crime was under eighteen years old, the maximum presumptive penalty is increased by ten years. *Id.* According to California's Penal Code, under most circumstances, a person convicted of a felony offense deemed to have been committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall receive a sentence that is consecutive to the sentence imposed for the underlying felony and, depending on the seriousness of the felony, be sentenced to an additional two to life years in prison. CAL. PENAL CODE § 186.22(b)(1)(A)-(C), (b)(4) (West 2022).

[34] Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 319-20 (2012). Worse still, legislative history shows that racialized stereotypes were a key motivating factor in the federal government's enactment of the RICO. *See id.* at 307. RICO's primary aim was preventing non-white Mafia members from gaining economic and political power through lawful or unlawful business ventures. *Id.* at 319-20. The Ku Klux Klan, who operated in several ways that paralleled Mafia operations and differed in its targeting mob violence against African Americans, was not targeted by RICO or under any other federal law. *Id.* at 319.

[35] James C. Howell, U.S. DEP'T OF JUST., JUST. BULL. NCJ 231116, *Gang Prevention: An Overview of Research and Programs* 4 (2010), https://www.ojp.gov/pdffiles1/ojjdp/231116.pdf [https://perma.cc/9FF4-CX7Z].

[36] *Id.*

reasonable to conclude that social support programs or greater community protection and resources would be more socially productive and racially just than throwing the book at those convicted of gang-related crimes.[37]

Police and prosecutorial discretion reign supreme in determining who is arrested and prosecuted under anti-gang laws. These subjective decisions lead to disproportionate arrests and prosecutions of people of color, particularly those from Black and Hispanic communities. Because conviction rates are high in gang cases and sentences are lengthened for gang-related convictions, these cases provide an easy opportunity for police and prosecutors to send people from those communities to prison for many years.

Racial disparity in gang law enforcement goes back decades. Chicago's anti-gang loitering ordinance, which was declared unconstitutional in *Chicago v. Morales*,[38] and similar laws have been the subject of criticism by scholars like Professor Dorothy Roberts. She has persuasively argued that with no criminal conduct based upon which to effect an arrest, gang loitering laws give police officers license to use "race as a critical factor" in determining whether a person may be a gang member, thereby "identifying a class of citizens as 'lawless' apart from criminal conduct."[39]

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[37] A man who endeavored to leave his gang-affiliated past behind, found that the stigmatizing effects of being associated with a gang could be overwhelming, and that feeling like a failure in the eyes of society reinforces old criminal habits as a means of survival. Sou Lee & Bryan F. Bubolz, *The Gang Member Stands Out: Stigma as a Residual Consequence of Gang Involvement*, 45 CRIM. JUST. REV. 64, 73 (2020). *See also* Erin R. Yoshino, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. AND SOC. JUST. 117, 141 (2008) (discussing one public defender's observation that many who are charged with gang-related crimes in California are eighteen to twenty-five years old, and while people typically desist from gang involvement as they age into adulthood, gang sentence enhancements tend to prolong a person's gang involvement because time spent in jail necessitates their continued commitment to and involvement in the gang).

[38] City of Chicago v. Morales, 527 U.S. 41, 66 (1999) (holding Chicago's anti-gang loitering statute was unconstitutionally vague and gave law enforcement too much discretion to determine what constitutes loitering).

[39] Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1601 (2017); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806 (1999). Future scholarship could explore the efficacy of void-for-vagueness challenges to the definition of the word "gang", given the disproportionate rates at which communities of color are targeted and prosecuted under anti-gang laws.

A stark example of the racially uneven application of anti-gang laws comes from Mississippi, fifty-three percent of Mississippi's gang members were white.[40] However, of the ninety-seven people arrested and prosecuted under the state's gang laws from 2010-2017, one hundred percent were Black, thus, one hundred percent of those exposed to the mandatory consecutive prison sentences for which Mississippi gang laws allow were Black.[41] White criminal street gang activity was prolific in Mississippi during that time. For example, 413 Simon City Royals, whose members are predominantly white, were arrested in DeSoto County, Mississippi in 2017, and despite being the third largest street gang in Mississippi in 2017, prosecutors did not pursue gang-related charges against any of those members of that gang.[42]

A 2012 empirical study conducted by Jordan B. Woods found that eighty-six percent of prosecutions under RICO involved "gangs that were affiliated with at least one racial minority group."[43] Based on that study, he argued that the process by which the federal government labels a group as a criminal street or prison gang "may be driven by systemic racial biases that marginalize entire racial minority groups and privilege mainstream nonimmigrant [w]hite communities."[44]

Under most anti-gang laws, in addition to proving the elements of a substantive crime, the prosecution must prove that (1) the accused was in a criminal street gang at the time of the crime; (2) that the crime was committed for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang; and (3) that the crime was committed with the intent to promote, further, or assist in criminal conduct by gang

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[40] Donna Ladd, *Dangerous, growing yet unnoticed: the rise of America's white gangs*, THE GUARDIAN (Apr. 5, 2018), https://www.theguardian.com/society/2018/apr/05/white-gangs-rise-simon-city-royals-mississippi-chicago [https://perma.cc/EU96-NXTN]. *See also* Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, JACKSON FREE PRESS (Mar. 28, 2018, 1:32 PM), https://www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan/ [https://perma.cc/DB72-9245] [hereinafter ONLY BLACK PEOPLE].

[41] Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 995 (2018) (citing ONLY BLACK PEOPLE, *supra* note 40).

[42] ONLY BLACK PEOPLE, *supra* note 40. *See also* MISS. ANALYSIS & INFO. CTR., STATE GANG THREAT ASSESSMENT 2017 (Dec. 22, 2017).

[43] Woods, *supra* note 34, at 323.

[44] *Id.* at 307.

members.[45] Prosecutors argue that officer gang expert testimony is relevant to each of those issues. Particularly where a court puts few constraints on the scope of testimony admitted through officer gang experts, their opinions can be an extremely powerful tool for the government because those opinions afford a basis for the government to fill in gaps in their theory for which fact-based evidence affords no answer.

The Sixth Amendment to the U.S. Constitution guarantees all people accused of serious crimes the right to trial by an impartial jury.[46] In circumstances such as those described in Mr. Jones's case above, many criminally accused people do not enjoy that right.

In gang-related cases, when a trial court allows police officers to testify as gang expert witnesses, the accused often suffers significant unfair prejudice. This is so because officer gang expert opinions are often based on sweeping generalizations and stereotypes about gang members generally, unreliable methodology, and/or the officer's racial biases. Because most jurors seated in criminal cases do not have first-hand experience with gang involvement or behavioral dynamics, they tend to rely heavily on the testimony of officer gang experts to bolster their understanding. In addition to reliance on unreliable and biased officer gang expert testimony, jurors employ their own implicit stereotypes and biases to fill in gaps in their factfinding and in drawing ultimate conclusions in the case.

The next Part unpacks each of these problems with officer gang expert testimony in turn, beginning with a discussion of excessive judicial deference to officers as gang experts.

III. BASES FOR EXCLUSION OF OFFICER GANG EXPERT TESTIMONY

The first main problem with the admission of officer gang

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[45] *See, e.g.*, MINN. STAT. § 609-229(4)(a). The prosecution may choose to pursue an accused as a principle complicator or an accessory before or after-the-fact.

[46] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.")

expert testimony is that courts are excessively deferential to police presented as gang experts. This problem can be thought of as having two subparts. First, courts fail to carefully review whether officers possess the training and experience to be gang experts before qualifying them as such. The second sub-issue is that courts do not engage in adequate pretrial scrutiny of the substance of testimony to be offered through officer gang experts for relevance, reliability, or the prejudicial impact in relation to its probative value. Because the testimony offered through those experts is often irrelevant, unreliable, and excessively prejudicial in relation to its probative value, it fundamentally undermines the fairness of the trial.

A. Excessive Judicial Deference to Police as Gang Experts

Federal Rule of Evidence 702 and analogous state evidentiary rules govern the admissibility of scientific and non-scientific expert witness testimony.

Determinations about admissibility of expert testimony are made according to a two-step inquiry. First, the court determines whether a witness is sufficiently qualified to be an expert in the subject matter(s) in which they were endorsed.[47] If so, the court determines the scope of testimony that is admissible through that expert.[48]

1. Uncritical Judicial Assessment of Officer Qualifications

The bar for qualification as an expert witness is exceptionally low; that being so, many police are arguably unqualified to be gang experts. Under Rule 702, an expert must have specialized knowledge, skill, experience, training, or education beyond the ken of people of common intelligence and ordinary experience such that the witness's opinion "will have value in assisting the trier of fact in understanding the evidence or determining a fact in issue."[49]

While no formal training or degree in the relevant subject matter is a condition precedent to expert qualification, the degree

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[47] People v. Garcia, 64 Cal. Rptr. 3d 104, 114 (Cal. Ct. App. 2007).

[48] *See id.*

[49] McDaniel v. Commonwealth, 858 S.E.2d 828, 833 (Va. Ct. App. 2021); *see also* FED. R. EVID. 702.

of specialized knowledge required for officers to be qualified as gang experts is particularly lacking. In most cases, an officer with some gang-related training and gang-related knowledge gained in the field will get an officer past the expert qualification threshold.[50]

Like any organized human social structure, the behavioral dynamics of gangs and their individual members are complex matters involving considerations such as human development and social functioning through different life stages, intra and extra family relationships, and socio-economic factors.

Around the world, criminal street gangs are studied by those with specialized training in areas as ethnography, sociology, anthropology, and psychology.[51] In these fields, researchers are often subject to ethical standards that warn against manipulating data to advance their personal objectives and required to employ social science field research best practices in relation to data collection, analysis, and interpretation. Officers are not held to any such ethical standards and lack the foundational knowledge to conduct field research according to best practices in social science disciplines.

Field researchers are typically trained to immerse themselves into the setting in which the group of interest operates to best learn about the way the participants think and feel and act, and why.[52] Officers do not enmesh themselves in gangs as recommended when collecting data upon which their theories are based. The data upon which police base theories is collected during interrogations of recently arrested suspects and from police informants who may be motivated to give misinformation to serve their own interests.

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[50] *See, e.g.*, Jackson v. State, 197 S.W.3d 468, 472 (Ark. 2004) (asserting that in cases involving gang expert testimony, "if some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony"). *See also* People v. Olguin, 37 Cal. Rptr. 2d 596, 602 (Cal. Ct. App. 1994) (asserting that officers are qualified as gang experts when they "base[] the testimony on 'personal observations of and discussions with gang members as well as information from other officers and the department's files'").

[51] For example, in *State v. Torres*, 874 A.2d 1084, 1096 (N.J. 2005), the New Jersey Supreme Court acknowledged that dynamics of urban gang life are the subject of "a growing body of work that embraces various disciplines. Studies of juvenile gang subcultures have contributed to the creation of specialized fields of sociological and criminological inquiry."

[52] Robert J. Durán, *Ethnography and the Study of Gangs, in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1 (Henry N. Pontell ed., 2018).

Scholars have argued, and this Author agrees, that police should not be qualified as gang experts based on their on-the-job observations and training alone. "[A]t a very minimum, [gang expert witnesses should] have some sort of experience in the field about which he or she testifies to satisfy any admissibility regime."[53] In this case, officers should be required to demonstrate a basic understanding of the complicated dynamics at issue where gang membership and behavior are concerned beyond stereotypes and prototypes. Additionally, because the dynamics of a gang vary from location to location and gang to gang, officers should be required to demonstrate an understanding of the relevant topics in relation to the gang or gangs at issue in the case.

Particularly in cases in which an officer testifies as both a fact witness and an expert witness, courts should review officer qualifications with a finer toothed comb. In those cases, there is risk that the officer gang expert's testimony will hold an "aura of special reliability" and "unmerited credibility" with jurors, which is problematic particularly if the substance of the testimony offered is unreliable.

2. Unreliable, Overbroad, and Biased Opinions offered through Officer Gang Experts

Under F.R.E. 702, all expert testimony must be (1) based on sufficient facts or data (notably, the reliability of facts/data relied upon is not at issue in this analysis)[54]; (2) the product of reliable principles and methods; and, to the extent the expert is not blind, (3) the expert must have reliably applied the principles and methods to the facts of the case.[55]

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[53] Christopher McGinnis & Sarah Eisenhart, Note, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 156 (2010). Police-administered gang trainings often consist of other officers conveying their anecdotal experiences with investigation, arrest, and enforcement of gang-related laws to less experienced officers. *Id.* at 127. These scholars argue that information conveyed at police gang trainings should be considered hearsay and subject to a threshold reliability determination before the training is accepted in support of an officer's expert gang qualification. *Id*. at 137.

[54] Because unreliable data can lead to the development of unreliable theories and unreliable conclusions, courts should revisit the need to examine the reliability of the data upon which theories are developed and conclusions are based.

[55] FED. R. EVID. 702.

In the United States, courts employ one of two standards when making reliability determinations about expert testimony; these standards are set forth in *Frye v. United States*[56] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[57] respectively.

The *Frye* standard, or a modification thereof, is applied in nine states,[58] results of scientific experiments and theories are admissible only if the methods upon which results are based have gained general acceptance in the relevant field; *Frye* applies only to scientific expert testimony.[59] In this context, an experiment or theory is "generally accepted" only if it is deemed reliable (consistent and reproducible) and valid (measures what it purports to measure); accordingly, the relevant scientific field can be seen as the gatekeeper in *Frye* jurisdictions.[60]

By contrast, under *Daubert* and its progeny, the reliability of all expert testimony (scientific and nonscientific) is subject to judicial scrutiny – courts are the gatekeeper under this standard. In that role, courts are "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[61] *Daubert*, which provides a more flexible, factor-based standard than *Frye*, is controlling in most U.S. jurisdictions.[62] *Daubert* affords courts wide latitude to determine how to test the reliability

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[56] 293 F. 1013 (D.C. Cir. 1923).

[57] 509 U.S. 579 (1993).

[58] Christine Funk, Daubert *Versus* Frye*: A National Look at Expert Evidentiary Standards*, THE EXPERT INSTITUTE, https://www.expertinstitute.com/resources/insights/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards/ [https://perma.cc/2QU2-SLJK] (updated August 9, 2021). The nine states mentioned above includes Alabama, which applies both the *Daubert* and *Frye* standards, depending on the circumstances. *Id.*

[59] *See Frye*, 293 F. 1013.

[60] Fareed Nassor Hayat, *Preserving Due Process: Require the* Frye *and* Daubert *Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 206 (2021).

[61] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

[62] Under *Daubert*, the following factors may be considered in a determination of the reliability of expert testimony: whether (1) the theory or technique employed by the expert is generally accepted in the scientific community; (2) it has been subjected to peer review and publication; (3) it can be and has been tested; (4) it has a known error rate; and (5) the research was conducted independent of the litigation or dependent on an intention to provide the proposed testimony. *Daubert*, 509 U.S. at 592-95. In *Kumho Tire Co.*, the Court held that the *Daubert* standard applies to all expert testimony, not just those involving scientific expert testimony. 526 U.S. at 147.

of proffered expert testimony.[63] Courts may consider the *Daubert* factors to the extent relevant, which will depend upon "the nature of the issue, the expert's particular expertise, and the subject of his testimony."[64]

Officer gang expert testimony is "nonscientific" for purposes of *Daubert*. Because of perceived difficulty in applying the *Daubert/Frye* reliability standards to nonscientific testimony, courts often decline to employ those standards when considering the admissibility of officer gang expert testimony.[65] Troublingly, when courts fail to scrutinize the reliability of that testimony, they also fail to meaningfully vet the validity and reliability of the methodology upon which theories are based and the reliability of opinions based on those theories.

While the methodology underlying gang field research may not lend perfectly to analysis under the *Daubert* factors or the *Frye* test, courts can and should more carefully analyze the principles and methods used to collect data and develop theories prior to admitting officer gang expert testimony. Professor Fareed Nassor Hayat has argued, and this Author agrees, that because of the risk for unreliability in gang expert testimony, due process can only be served if admissibility determinations related to gang expert opinions are made according to the reliability standards applicable in the relevant jurisdiction.[66]

This section builds upon the scholarship by Professor Hayat and others by offering examples from topics often covered in officer gang expert testimony to demonstrate that much of the testimony regularly admitted through officer gang experts would be excluded as unreliable under Rule 702.

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[63] *Kumho Tire Co.*, 526 U.S. at 152-53 (asserting that courts must have wide latitude on how to test an expert's reliability). While the *Daubert* standard is more flexible, there is not agreement as to whether it is stricter than the *Frye* test. *Compare* Cavallo v. Star Enter., 892 F. Supp. 756, 774 (E.D. Va. 1995) (asserting that, "*Daubert* assigned district courts a more vigorous role to play in ferreting out expert opinion not based on the scientific method"), *with* MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, No. 09 Civ. 3255, 2012 WL 2568972, at *15 (S.D.N.Y. July 3, 2012) (citation omitted) (asserting that *Daubert* and the corresponding "Federal Rules of Evidence favor the admissibility of expert testimony and are applied with a 'liberal thrust'").

[64] *Kumho Tire Co.*, 526 U.S. at 150.

[65] *See, e.g.*, United States v. Hankey, 203 F.3d 1160, 1166-69 (9th Cir. 2000).

[66] Hayat, *supra* note 60, at 233.

When conducted pursuant to best practices, social science research is conducted according to a standardized process involving methodologically sound data collection, analysis, theory development, or testing.[67] Making inferences solely on observations without considering theory is not considered valid scientific research.[68]

If proper methodology is not employed, the social science research process is rife with possibility for errors that can lead to collection of unreliable data, development of unreliable theories, and unreliable conclusions.

Objectivity is of paramount importance when conducting social science field research. Disturbingly, information from various sources shows that racial bias is pervasive among police. For example, an FBI Intelligence Assessment released in 2006 warned of "white supremacist infiltration of law enforcement."[69] Statistics show that racial bias, particularly anti-Black animus, is a significant problem in the United States among both rank-and-file officers and police leadership.[70] In the last two decades, "law enforcement officials with alleged connections to white supremacist groups or far-right militant activities have been exposed in" at least fourteen states.[71] In Alabama, for example, two former police lieutenants were forced out of their jobs after the Southern Poverty Law Center revealed their membership in the League of the South, a white supremacist "neo-Confederate" group.[72] A statement by one of these former officers revealed the culture of racism in their

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[67] ANOL BHATTACHERJEE, SOCIAL SCIENCE RESEARCH: PRINCIPLES, METHODS, AND PRACTICES 5 (2d. ed. 2012).

[68] *Id.* at 3.

[69] FEDERAL BUREAU OF INVESTIGATION INTELLIGENCE ASSESSMENT, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 2 (2006), https://www.documentcloud.org/documents/3439212-FBI-White-Supremacist-Infiltration-of-Law [https://perma.cc/RMR2-EDWF].

[70] Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 210-11 (2019).

[71] Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law [https://perma.cc/4M5Z-CYSN].

[72] Asawin Suebsaeng, *Alabama Cops Fired for Palling Around with White Supremacists*, DAILY BEAST (Apr. 14, 2017, 10:33 AM), https://www.thedailybeast.com/alabama-cops-fired-for-palling-around-with-white-supremacists [https://perma.cc/2LBP-X7EU].

department, where their police chief once told them, "we [at this department] pretty much think like you do."[73] Hundreds of examples have been noted of officers sending racist messages via email, text, social media, and other platforms.[74] For example, one Michigan police officer flew a confederate flag from his truck at a "Love Trumps Hate" rally to protest former President Trump.[75] A former Minnesota officer sent "'racially charged' e-mails" that were "negative about [B]lack people" to a person accused of shooting at Black Lives Matter protesters.[76] In 2018, "[t]he Mississippi state flag with the Confederate battle emblem . . . fl[ew] . . . outside a police building in a predominantly [B]lack neighborhood."[77]

Explicitly racist acts by individual police and police departments do not exist in a vacuum; prevalent racism among officers manifests in day-to-day enforcement of anti-gang laws and skews the information collected about gangs by police. People of color are disproportionately arrested for gang-related crimes and constitute a disproportionate number of those on police gang lists. Because police surveillance is concentrated in certain neighborhoods, often neighborhoods of color, gang members who live in less-heavily policed neighborhoods are less likely to be included in the sample and less likely to have their behaviors considered by police in the development of gang-related theories.

Arrests lead to prosecutions, which in many gang-related cases lead to convictions and lengthy mandatory prison sentences.

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[73] *Id.*

[74] *See* Johnson, *supra* note 70, at 243-61.

[75] Lindsey Bever, *Police officer who drove with Confederate flag at 'Love Trumps Hate' rally resigns*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/14/michigan-cop-suspended-after-driving-with-confederate-flag-at-love-trump-hate-rally/ [https://perma.cc/T5GY-VK3S].

[76] Brandon Stahl, *Burnsville cop resigns after testifying that he exchanged 'racially charged' e-mails with protest shooter*, STARTRIBUNE (Jan. 27, 2017, 10:24 AM), https://www.startribune.com/burnsville-cop-resigns-after-testifying-that-he-exchanged-racially-charged-texts-with-protest-shooter/411926216/ [https://perma.cc/QS83-TPCT].

[77] *Mississippi Flag with Rebel Symbol Flies at Police Building*, MEMPHIS DAILY NEWS (Jan. 8, 2018), https://www.memphisdailynews.com/news/2018/jan/8/mississippi-flag-with-rebel-symbol-flies-at-police-building/ [https://perma.cc/5ZRQ-72GT].

up more than one-third of incarcerated people (nearly three times their representation in this country's population).[78]

Methodological errors in police research are also likely because officers have a vested interest in a certain outcome in relation to their "research," enforcement of the criminal law. That partial position may implicitly or explicitly affect the type of data collected; for example, police may fail to collect data that runs counter to their hypothesis.[79]

To ensure a representative sample of the group being studied, every criminal street gang member in that area must have the same probability of being selected for the sample.[80] Generally, police do not gather gang-related data according to that foundational best practice. If gang-related data collection only occurs when a person is arrested in relation to a gang-related crime and people of color are disproportionately arrested for those crimes, gang members who are not arrested do not have the same probability of inclusion in the sample as those who are arrested.

Methodological errors arise in theory development when a person infers causation from a data set when only correlation can be reasonably inferred.[81] This correlation/causation error has been shown to arise in police theory about gang membership. For example, the California Youth Gang Task Force ("CYGTF") produced a criteria for a finding of gang membership: (1) the arrestee/subject admitted to gang membership; (2) the arrestee/subject has tattoos, wears clothing or colors associated with a certain gang; (3) arrestee/subject has been arrested while participating in activities with a known gang member; (4) information about the arrestee's/subject's gang membership obtained from a reliable informant; and (5) arrestee/subject has been confirmed to be in close association with known gang members.[82] False positives are likely to arise under these criteria

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[78] *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/V8C7-7DUU].

[79] *See* Bhattacherjee, *supra* note 67, at 103-04.

[80] *Id.* at 65.

[81] *See id.* at 25.

[82] McGinnis & Eisenhart, *supra* note 53, at 132 (citations omitted). Another example comes from the Portland Police Department, where an officer must cite a reason before adding a person to the gang list. *Portland's gang list*, THE OREGONIAN,

because, while they may indicate a correlation with gang membership, they do not establish causation. Research shows that admitting or claiming gang membership is not a reliable measure of gang membership.[83] Moreover, a person could have a gang tattoo from prior gang involvement and have since desisted from the gang. One might wear gang-related colors like red or blue because they like those colors. A person arrested while participating in activities with a known gang member or in close connection with known gang members is not necessarily a gang member themselves; they could be the person's brother, neighbor or non-gang-involved friend. A non-gang member could be arrested with their older gang member sibling or neighbor. Finally, officer determinations of informant reliability are suspect for at least two reasons. First, reliability determinations made by arresting officers are likely tainted by the officers' conclusion that the arrestee is a gang member.[84] Additionally, informants may have reason to be dishonest with police about another person's gang involvement, for example, to implicate a rival member in criminal activity or to avail themselves of a legal benefit.[85] Because gang membership cannot be reliably inferred from the factors included in this theory, officers should not be allowed to opine about gang membership based on that theory.

In addition to issues with the reliability of testimony offered through officer gang experts, much of the testimony often offered through those witnesses is arguably irrelevant and/or subject to exclusion under F.R.E. 403 or its analog. For example, at Mr.

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https://projects.oregonlive.com/police/gang-list/ [https://perma.cc/L3VZ-UMXF] (last visited Sept. 30, 2022). A person who self-identifies as a gang member, has participated in gang initiation, or committed or conspired to commit a crime can be added to that list. *Id.* At least two of the following characteristics can also lead to being added to that list: (1) has a gang tattoo; (2) wears jewelry or clothing; (3) has knowledge of gang culture; (4) uses gang-related language; (5) announces allegiance to a gang; (6) appears in a gang-related photograph; or (7) is named in a gang document. *Id.*

[83] McGinnis & Eisenhart, *supra* note 53, at 133 (discussing "[o]ne study of 1,527 'at risk' youth in Denver," which "identified the tendency of self-reported gang affiliation to be an unreliable indicator of actual criminal street gang membership").

[84] This Author does not intend to imply that gang members' statements lack veracity because they are made by gang members. The assertions made here are common sensical reasons any person might have to be dishonest with police when faced with potential implication or heightened exposure to penalties in the criminal system. This Author notes, based on her observations in a public defense practice, that police coercion is likely in play in many cases where gang members implicate others in gang membership.

[85] *See* McGinnis & Eisenhart, *supra* note 53, at 136-37.

Jones's trial, Officer Katz testified that the gangs involved in that case share cars and guns within their respective gang members, and that those gangs have been known to commit crimes such as rape, murder, assault with firearms, car and narcotics thefts, and burglary. That testimony may have been offered to establish that West Mob is a "gang member or associate" within the meaning of California's sentence enhancement statute.[86] There are a number of reasons that this testimony is arguably irrelevant. For example, even if a group of which Mr. Jones was a part took part in some or all the crimes enumerated by Officer Katz, there was no evidence that Mr. Jones took part in them or willfully promoted, furthered, or assisted anyone in the commission of any of them. Even if there is some minimal probative value to this testimony, its presentation to the jury is extremely prejudicial to Mr. Jones. It invites jurors to conclude that gang members are violent criminals and that because Mr. Jones allegedly associates with those who committed those crimes, he is more likely to have committed the violent crime of which he was accused. On this ground, Officer Katz's testimony should be excluded under F.R.E 403 or its analog.[87]

Admitting testimony through officer gang experts is problematic because there is reason to doubt the reliability of the data and theories upon which that testimony is based. Moreover, some evidence offered through such witnesses should be excluded as irrelevant or because of its extreme prejudicial impact. These problems with the substance of officer gang expert testimony are only two of the main problems with admitting it. Jurors are allowed to employ implicit biases in favor of police and against people of color in their factfinding and in drawing legal conclusions, which further undermines the fairness of criminal trials in which officer gang expert testimony is admitted.

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[86] Under California law, a person may be deemed a gang member or associate if they are part of a group in which its members engage in, or have engaged in, a pattern of criminal gang activity, or the person willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang. *See* CAL. PENAL CODE § 186.22 (West 2022).

[87] FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

B. Implicit Bias in Jury Decision-Making

Criminal case outcomes are only as just as the evidence that informs them. Nowhere is this more apparent than in the context of cases involving officer gang expert testimony, in which juror decisions are often based on implicit biases and stereotypes. Courts' insensitivity to the operation of implicit biases in jury decision making along with courts' decisions about evidentiary admissibility in gang expert cases can and does skew the fairness of criminal trials against the accused, particularly those of color.[88] That argument is unpacked in this section.

Criminal jurors are instructed that their factual findings are to be based solely upon the examined evidence presented at trial. Only if they follow that command can they honor an accused's right to due process.

The Rules of Evidence, designed to prevent "the admission of unreliable or otherwise unfair evidence",[89] purport to serve as gatekeeper for all information that is [and is not] considered by criminal juries in their factfinding role. Social categories, such as one's race or status as a police officer, are not considered evidence and thus scrutinized under the Rules of Evidence prior to jury consideration of them. Nonetheless, biases and stereotypes related to those categories are considered in criminal juror decision-making and can significantly affect ultimate case outcomes.[90]

While there is no singular method by which individual jurors assess information presented at trial, the "story model," developed in the 1980s and 1990s by Pennington and Hastie, is one widely

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[88] *See, e.g.*, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 873 (2018); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2261 (2017).

[89] Capers, *supra* note 88, at 873 (quoting Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 725 (2013)). "Evidence" is defined as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter *Evidence*].

[90] A person's race or status as a police officer is not necessarily "evidence" of anything as a matter of law because it does not necessarily tend to prove or disprove the existence of an alleged fact. *See Evidence*, *supra* note 89. However, because these traits are considered by jurors in factfinding and drawing legal conclusions, it serves as evidence in jurors' minds. Scholars are increasingly discussing and examining the role of unexamined evidence in jury determinations. *See, e.g.*, Capers, *supra* note 88, at 874; Rose, *supra* note 88, at 2261.

accepted framework for understanding that process.[91] The story model provides a helpful framework to understand the pernicious effects of implicit bias on juror decision-making in criminal cases involving officer gang expert testimony.[92] Pursuant to the story model, jurors tend to organize evidence into stories that makes sense to them; accordingly, juror stories are formed by their attitudes, beliefs, biases, and what the juror understands about the world and how it works. Discussed below, juror story development also tends to involve rejection or distortion of information that is incongruent with their beliefs.[93]

Biases can be explicit or implicit. Explicit biases are those that one can call up in their mind upon introspection.[94] Implicit biases, by contrast, are the "automatic positive or negative preference for a group, based on one's subconscious thoughts."[95] They are held in the unconscious mind, meaning people have no direct introspective access to them, no matter the sincerity of their effort.[96]

Schemas and heuristics, upon which implicit biases are based, are related tools that help us organize information and guide quick decisions and judgments. Schemas can be thought of as mental frameworks that bundle information such as beliefs and

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[91] RYAN J. WINTER & EDITH GREENE, HANDBOOK OF APPLIED COGNITION 742 (Francis T. Durso et al. eds., 2d ed. 2008). The story model is only one of the explanation-based models of jury decision-making. There are also several mathematical models of juror decision-making. *Id.* at 741-42.

[92] *See id.* at 743. There are three steps in the story model. First, jurors evaluate evidence through story construction. Then, they learn about the verdict options available to them. Finally, jurors reach a decision by fitting the story they constructed to the most appropriate verdict option. *Id.*

[93] *See id.* at 743.

[94] *Understanding Bias: A Resource Guide*, CMTY. RELS. SERV., U.S. DEP'T OF JUST. 2 (2015), https://www.justice.gov/crs/file/836431/download [https://perma.cc/8X7L-YZN5] [hereinafter UNDERSTANDING BIAS]. Explicit biases are discussed more in the context of police racial bias. *See infra* Section III.B.

[95] Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 7 (May 2018) (quoting UNDERSTANDING BIAS, *supra* note 94, at 2), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/M7VJ-GZUQ].

[96] Bailey Maryfield, *Implicit Racial Bias*, JUST. RSCH. & STATS. ASS'N 5 (Dec. 2018), https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf [https://perma.cc/2N8S-PQ9U].

associations that are linked with a group or concept.[97] Heuristics can be thought of as rules of thumb.[98] Without these tools, we would have extreme difficulty efficiently navigating everyday situations, given the amount of information that comes at us like water from a firehose.[99]

For example, when forced to make a quick decision about what to order for lunch at a new restaurant, off a menu with many options, one might employ a heuristic that they enjoy Caesar salads, and order that dish. A person may have a positive association with wintertime because they have a schema related to that season involving holiday parties, cold weather, and time with family members. When making a quick decision about what to wear to work on a December day, that person might select two or three layers to keep them warm without taking the time to check the weather. The ramifications of an "incorrect" choice about what to order for lunch or how to dress one day are relatively minimal and can be easily corrected.

In contrast, a juror's incorrect decisions based on heuristics can be very consequential and harmfully affect the outcome of a case. For example, a juror may think of police officers as friendly, honest, and knowledgeable people; in line with that heuristic, that juror would tend to believe a police officer's testimony.

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[97] Schemas are pre-existing beliefs, accurate or not, about categories such as race, gender, or gang membership, that help shape one's attitudes and decisions. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 366-68 (Charles A. Kiesler ed., 1984).

[98] Kendra Cherry, *Heuristics and Cognitive Biases*, VERYWELL MIND (Apr. 11, 2021), https://www.verywellmind.com/what-is-a-heuristic-2795235 [https://perma.cc/U38J-MWW9] ("A heuristic is a mental shortcut that allows people to solve problems and make judgments quickly and efficiently. These rule-of-thumb strategies shorten decision-making time and allow people to function without constantly stopping to think about their next course of action. Heuristics are helpful in many situations, but they can also lead to cognitive biases.").

[99] *See* UCLA Office of Equity, Diversity and Inclusion, *Implicit Bias | Lesson 1: Schemas*, YOUTUBE (Sept. 9, 2016), https://www.youtube.com/watch?v=OQGIgohunVw&ab_channel=BruinX [https://perma.cc/9UTB-69H7] [hereinafter *Schemas*] ("Schemas are templates of knowledge that [help us] sort specific examples into broader categories."). Schemas can, however, "cause us to exclude pertinent information to focus instead only on things that confirm our pre-existing beliefs and ideas. Schemas can contribute to stereotypes and make it difficult to retain new information that does not conform to our established ideas about the world." Kendra Cherry, *The Role of a Schema in Psychology*, VERYWELL MIND (Sept. 23, 2019), https://www.verywellmind.com/what-is-a-schema-2795873 [https://perma.cc/8UWN-87TG].

But if an officer renders an opinion that is unreliable and informed by racial bias, faulty data, or methodology, a juror who holds that heuristic and employs it would likely believe the unreliable testimony and may be more likely to adopt the prosecution's theory and vote to convict.

Particularly in relation to "issues about which they have little expertise," a category in which gang membership and behavioral dynamics fall for many seated on criminal juries, jurors tend to rely on cognitive heuristics to make sense of evidence.[100] This type of blind faith in the accuracy of police testimony is extremely dangerous where officer gang expert testimony is admitted without a searching inquiry into its reliability.

Juror decisions based on schemas can have similarly problematic implications for trial outcomes. People use schemas to fill in gaps in their memory and predict a person's behavior, among other things. For example, a juror may have a schema of gang members of people of color who commit violent crimes, have many tattoos, and wear clothing in certain colors. If, during their deliberation, that juror cannot recall whether a witness testified to a certain fact related to the accused committing a violent crime, the juror might, based on that schema, conclude that the accused, a gang affiliated Black man with tattoos, likely committed the violent crime with which they stand charged.

Confirmation bias is another form of implicit cognition that prevents jurors from conducting a searching inquiry into the accuracy of their decisions. People are inclined to look for evidence that supports their existing beliefs and to believe evidence that supports those beliefs with little scrutiny.[101] On the other hand, people tend to dismiss, minimally scrutinize, or distort information that challenges an existing belief.[102] Confirmation bias causes

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[100] Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 CURRENT DIRECTIONS IN PSYCH. SCI. 63, 65 (2011).

[101] THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 50 (1991).

[102] Bill Kanasky Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, COURTROOM SCIENCES 1 (2015), https://www.courtroomsciences.com/slides/slide/juror-confirmation-bias-powerful-perilous-preventable-trial-advocate-quarterly-65 [https://perma.cc/8UWM-AZH8]. *See also* Uwe Peters, *What Is the Function of Confirmation Bias?*, ERKENNTNIS 1 (2020), https://doi.org/10.1007/s10670-020-00252-1 [https://perma.cc/HB9N-2PFD].

"overconfidence" about a conclusion that is in line with a preconceived belief.[103] Most people are susceptible to confirmation bias, independent of their intelligence, cognitive ability, or motivation to avoid the bias.[104] If jurors have, like many Americans, internalized a stereotype of gang members as violent criminals who look a certain way or a bias that people of color are more likely to commit crimes or be dishonest than white people, they may look for evidence that aligns with those preconceived notions when finding facts in a criminal case.

Affinity bias is also relevant to juror decision-making in cases involving officer gang expert testimony. It is the unconscious tendency to gravitate toward and advance the interests of people with whom we share backgrounds and interests and "are more like ourselves."[105] According to one study, the tendency of jurors to implicitly favor those in their racial in-group plays a "crucial" role in the likelihood of conviction of those in racial outgroups.[106]

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[103] *See* Peters, *supra* note 102, at 3.

[104] *See* Kanasky, *supra* note 102, at 2-3 (explaining "how easily intelligent people can see intricate connections and patterns that support their viewpoint and how easily they can see the faults in viewpoints contrary to their own").

[105] Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 COLO. LAW. 45, 46 (2016); *see also* Andie Kramer & Al Harris, *Overcoming gender and affinity biases in the medical profession*, DIVERSITY IN RSCH. JOBS (Aug. 17, 2020), https://www.diversityinresearch.careers/article/overcoming-gender-and-affinity-biases-in-the-medical-profession/#:~:text=In%20addition%20to%20individual%20efforts%20to%20overcome%20affinity,to%20female%20physicians%E2%80%99%20successful%20and%20satisfied%20professional%20lives [https://perma.cc/8926-95N9]. In one study conducted at the University of Virginia's Department of Psychology and Open Science, researchers found that Black, white, Asian, and Hispanic participants demonstrated an implicit preference for those in their own racial group. Jordan R. Axt, Charles R. Ebersole & Brian A. Nosek, *The Rules of Implicit Evaluation by Race, Religion, and Age*, 25 PSYCH. SCI. 1804, 1806 (2014). Participants in all racial groups except the Asian group implicitly evaluated people in those four racial groups as follows: White people first, followed by Asian, Black, and then Hispanic people (Asian people did not rank Black and Hispanic people in that order of preference). *Id.*

[106] Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. OF ECONS. 1017, 1045-47 (2012) (setting forth the first empirical evidence of the effects of jury composition on trial outcomes based on quasi-random variation in jury composition and data from real criminal trials). Implicit bias has become a widely discussed issue in the state and federal judiciary. Based on the plethora of evidence demonstrating that implicit racial bias plays a significant role in the outcomes of criminal jury trials, courts' failure to acknowledge, make jurors aware

Jurors tend to develop inferences or expectations about a person early in the information-gathering process, which guide their subsequent information processing.[107] This type of biased information processing easily leads to biased judgments and biased case outcomes.[108]

People will engage in cognitive shortcuts like those discussed above unless they are motivated not to do so; making jurors aware of potential biases can serve as that motivation.[109] When jurors are unaware of potential biases, studies show they are more likely to engage in "low-effort information processing," which means they are more likely to rely on stereotypes, schemas, and heuristics and to arrive at "more stereotype-consistent [conclusions] than when engaged in more deliberative, effortful [information] processing."[110] They tend to engage in more effortful processing when they are aware of the potential for bias to play a role in decision-making.[111]

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of, and take steps to mitigate the effects of juror decision-making based on implicit racial bias undermines the Sixth Amendment's guarantee of an impartial jury and undermines the integrity of jury trials. Suggestions for how courts can mitigate the effects of implicit racial bias are beyond the scope of this article. For scholarship on how courts can endeavor to mitigate those effects, see generally Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L. J. 1690, 1713-17 (2015). The weight of research shows the more blatant the racial issues in the case, the lower the risk of influence of implicit racial bias among jurors. Hinton, Henderson & Reed, *supra* note 95, at 9 ("In studies that used summaries of trials that were more 'racially charged,' like a summary of the O.J. Simpson case, white mock jurors appeared less likely to exhibit bias. When studies used trials that were not racially charged, racial biases were found, suggesting that the white mock jurors were motivated to appear less racist the more racially salient the case before them."). This phenomenon has been explained this way:

> When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a [w]hite victim, jurors are not especially vigilant about the possibility of racial bias influencing their decision[-]making.

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1143-44 (2012).

[107] *See* Pamela Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV.: THE J. OF THE AM. JUDGES ASS'N 64, 66 (2013).

[108] *See id.*

[109] *See* FISKE & TAYLOR, *supra* note 97, at 366-68. *See also* John M. Hagedorn & Bradley A. MacLean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases*, 42 U. MEM. L. REV. 1027, 1053 (2012).

[110] Casey et al., *supra* note 107, at 66.

[111] *See id.* at 69.

Especially when people are in stressful situations, experiencing anxiety, or don't have the cognitive ability to process information being evaluated, they tend to employ analogical reasoning, which causes them to convey information from a schema to the issue in the case before them.[112] One can imagine a juror experiencing stress or anxiety around their responsibilities and therefore being more likely to rely on schemas in their factfinding and legal determinations.

1. Implicit Juror Bias in Favor of Officer Credibility

Jurors are instructed by the court to scrutinize police officers' testimony for potential motive and bias, just as they would the testimony of any other witness.[113]

For middle- and upper-middle class white jurors, who are most frequently sworn to sit on criminal juries,[114] this instruction can be hard to follow. Whether consciously or not, that demographic tends to view police as honest people who take their work seriously, as venerated members of society and protectors of their communities.[115] In line with that prototype, most jurors expect

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[112] Hagedorn & MacLean, *supra* note 109, at 1051.

[113] For example, in Colorado state courts, juries are typically instructed to "[c]onsider each witness's knowledge, motive, state of mind, demeanor, and manner" while testifying. Colo. Pattern Jury Instructions, Crim. B:01 (2021) [hereinafter Colo. Jury Instructions]. Further, they are to "[c]onsider the witness's means of knowledge, ability to observe, and strength of [their] memory," as well as how their testimony is "supported or contradicted by other evidence." *Id.* Finally, jurors are typically instructed to "[c]onsider any relationship the witness may have to either side of the case, and how each witness might be affected by the verdict." *See id.* at E:05.

[114] Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 12 n.70 (2018).

[115] *See id.* at 2, 6, 12.

> A 2004 study found that diverse groups "deliberated longer and considered a wider range of information than did homogeneous groups." In fact, simply being part of a diverse group seems to make people better jurors; for example, when white people were members of racially mixed juries, they "raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues."

Ginger Jackson-Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records*, PRISON POL'Y INITIATIVE (Feb. 18, 2021) (citation omitted). "Another study found that people on racially mixed juries 'are more likely to respect different racial perspectives and to confront their own prejudice and stereotypes when such beliefs are recognized and addressed during deliberations.'" *Id.* (citation omitted).

officers to testify honestly and accurately.[116] When an officer is qualified by the court as a gang expert, jurors tend to assign more weight to their testimony in comparison to lay witnesses.[117]

When they retire to deliberate, jurors assume that police are disinterested witnesses without a stake in the outcome of the case. Jurors are typically unaware that police have several reasons to testify in support of the prosecution's theory. First, officers want to prove themselves through their trial testimony – to show the prosecutor and court that they made the right decision to arrest the accused instead of some other person. To that end, jurors are also unaware that officers often work closely with prosecutors to build cases and seek convictions against the criminally accused.[118] While recent high-profile cases involving acts of racially motivated police violence may be changing this, most jurors are unaware of the prevalence of racism among police ranks and therefore, do not consider how that bias could shade what they say on the witness stand.

Scholars have argued, and this Author agrees, that trial courts should be required to give jury instructions to dispel jurors implicit bias in favor of police credibility.[119] Because instructions tend to influence the way jurors consider evidence, this Author argues that instructions about officer credibility should be given before the presentation of evidence and in the closing instructions before jury deliberation.[120]

For example, courts could give a set of jury instructions that explain the prevalence of implicit bias in favor of police among white, upper- and middle-class jurors. Additionally, the instructions could also contain an explanation that police work closely with prosecutors and work under stressful conditions that

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[116] *See* Warren, *supra* note 114, at 12.

[117] Hagedorn & MacLean, *supra* note 109, at 1040-41.

[118] *See* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 246 (2017). Particularly in cases in which an officer serves a dual role as a fact and expert witness, officers have more of a stake in the outcome and therefore, an increased chance of shading their testimony to serve theirs and the state's interests of securing a conviction.

[119] Warren, *supra* note 114, at 21-27. This article argues that courts should be required to give this type of jury instruction in every case in which an officer's testimony comprises "a substantial portion of the prosecution's evidence." *Id.* at 21.

[120] *See id.* at 21.

can and sometimes affect their decision-making and judgment.[121] Additional instructions could be given as necessary, depending on the accused person's race and the racial composition of the jury.[122]

Giving these instructions may increase jurors' awareness of and reduce their reliance upon implicit bias in favor of police testimony during deliberations. But this would not solve the problems associated with officer gang expert testimony – it would only begin to level the playing field in terms of how jurors consider evidence presented in gang-related criminal trials. The next section discusses another bias often held by jurors that affects their perception of the credibility of perceived gang members and witnesses of color.

2. Negative Bias Towards Gang Members and Witnesses of Color

When they walk through the courthouse doors, many jurors, knowingly or unknowingly, hold negative biases towards gang members and people of color.

The media perpetuates inaccurate narratives of violence, criminality, and dishonesty among racial minorities that many unknowingly internalize. For example, Black men are overrepresented in the media as perpetrators of crime, and inaccurately presented as more dangerous than white suspects – they appear in custody more often and their mug shots appear more frequently than those of white suspects. Additionally, the media pays more attention to cases in which the victim is a stranger where a Black person is the suspect than those involving white suspects.[123]

Studies show how these negative biases manifest in the attitudes of average people. Men with stereotypically Black features such as "full lips, wide nose, dark eye color, coarse hair, and dark complexion" are more likely to be stereotyped as dishonest, aggressive, hostile, violent, or criminal as compared with

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[121] *Id.* at 25.

[122] *See id.*

[123] Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media*, CTR. FOR AM. PROGRESS (Aug. 29, 2018), https://www.americanprogress.org/issues/criminal-justice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/ [https://perma.cc/DC9T-F2LH].

people without stereotypically Black features.[124] The darker-skinned the person, the more negatively they are treated according to those stereotypes.[125]

A vignette from Mr. Jones's trial is illustrative of the operation of implicit racial bias at criminal trials. Mr. Washington, a dark-skinned Black man from Bayview in San Francisco, took the witness stand as an alibi witness for Mr. Jones. He was dressed in a well-worn but crisp pressed, blue button-up collared shirt, and faded navy-blue pants with a brown belt and matching brown shoes. Under oath, he testified clearly and unequivocally that he had seen Mr. Jones, a friend of his, at his home the day of the shooting around the time of the shooting. Mr. Washington remembered the day of the shooting well because it was his three-year-old son's birthday, and Mr. Jones brought his son a gift that was very well-received by the young party guests.

On cross-examination, the prosecution established that Mr. Washington had ties to West Mob, the gang with which Mr. Jones was affiliated. The prosecutor went through Mr. Washington's felony convictions one-by-one with the jury, most of which were drug-related. Mr. Washington had no criminal or other known history related to dishonesty while under oath. The prosecution's closing argument played on racialized stereotypes – that Mr. Washington's account of the day was inaccurate or dishonest because it was colored by his loyalty to Mr. Jones on account of their shared West Mob membership, and that he testified in support of Mr. Jones's alibi out of that loyalty. Jurors were effectively invited to doubt the veracity of Mr. Washington's testimony by the court in an instruction that they could consider felony convictions in relation to a person's credibility on the witness stand.

By objective standards, Mr. Washington's testimony was veracious. He dressed in well-fitting clothes traditionally seen as

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[124] Heather M. Kleider-Offutt, Alesha D. Bond & Shanna E. A. Hegerty, *Black Stereotypical Features: When a Face Type Can Get You in Trouble*, 26 CURRENT DIRECTIONS IN PSYCH. SCI. 28, 28-29 (2017) (discussing stereotyping of those with Afrocentric features as aggressive, violent, and criminal). Some research references this as "Black Face-Type Bias." *Id.* at 29*; see also* Irene V. Blair et al., *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSONALITY & SOC. PSYCH. 5, 20 (2002) ("Afrocentric features play a role in perceivers' judgment of whether a target is likely to have attributes that are stereotypic of African Americans.").

[125] Kleider-Offutt et al., *supra* note 124, at 28-29.

appropriate for a courtroom, which could reasonably convey that he takes pride in the way he looks and/or took his role and oath as a witness seriously. His testimony about Mr. Jones's whereabouts during the shooting was unequivocal and supported by detailed facts about his son's birthday party, which provided corroboration for him to have detailed memories about the day of the shooting.

For example, a juror who espouses implicit bias against Black people may stereotype Mr. Washington as dishonest and look for reasons to disbelieve his testimony. The court's instruction about the relationship between witness credibility and criminal history may serve as an invitation in that juror's mind to infer something about the truthfulness of Mr. Washington's testimony based on his criminal history. Based on Officer Katz's gang expert testimony, that juror may conclude that, through his testimony, Mr. Washington was acting in solidarity with Mr. Jones in accordance with a West Mob oath. This would also serve as corroboration of that jurors existing beliefs and support their finding him incredible.

To be liable for a crime, an actor must voluntarily engage in a criminally proscribed act at a time when they had the requisite mental state for that offense.[126] While prosecutors are not required to prove motive to secure a conviction, the "why" for a person's actions often serves as important circumstantial evidence of whether an accused had the requisite mental state at the relevant time. Attribution theory supposes that people attempt to understand the behavior of others by attributing feelings beliefs and intentions to them. Research employing that theory shows that people tend to attribute a person's bad acts to either external factors unique to that situation or to internal factors reflective of the person's attitude, character, or personality.[127] One study found that people tend to associate violent acts by Black people as motivated by internal factors and those by white people as motivated by external factors.[128] This has meaningful implications in criminal trials because people whose acts are viewed as stemming from

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[126] Criminal negligence, recklessness, knowledge, and intent are the four standard mental states at issue in most criminal cases.

[127] JODY ARMOUR, N*GGA THEORY: RACE, LANGUAGE, UNEQUAL JUSTICE, AND THE LAW 89 (2020).

[128] *Id.* at 90 (citing Birt Duncan's experiment).

internal factors are generally viewed as more culpable for those acts than those who are viewed as acting based on external factors.[129]

Courts have acknowledged that racial bias in jury decision-making fundamentally undermines the fairness of criminal trials. In his majority opinion in *Pena-Rodriguez v. Colorado,*[130] Justice Kennedy warned that racial discrimination in the jury system poses a particular threat to the promise of the Sixth Amendment and to the "integrity of the jury trial."[131] He asserted that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice,'" adding that "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[132]

Most criminal juries are not instructed about the existence or prevalence of implicit bias of any kind or how they can mitigate operation of such biases in the discharge of their duties as jurors.[133]

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[129] *Id.* Professor Armour explains that in situations where a reasonable person standard is at issue, such as cases involving a *mens rea* of criminal negligence or recklessness, or a defense such as heat of passion or self-defense, the decisive factor is how the reasonable person, or how most people, would react in a certain situation. *Id.* Situations involving the reasonable person standard invite jurors to attribute external or internal factors to the accused person's behavior. *Id.* In these situations, jurors are asked to attribute internal or external factors as the cause of behavior; if they attribute behavior to external factors, the accused is deemed less liable than if they attribute the behavior to internal factors. *Id.* at 90-91. Because jurors tend to attribute Black people's behavior to internal factors, Black people are constructed as more culpable than similarly situated white people on account of juror implicit racial bias. *Id.* at 91.

[130] 137 S. Ct. 855 (2017). In *Pena-Rodriguez*, a juror, H.C., asserted during deliberation that based on his experience as an ex-law enforcement officer, he suspected the accused was guilty because Mexican men "believe[d] they could do whatever they wanted with women," and that where he used to patrol, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.* at 862. Even though he had an alibi witness testify that he was a legal resident of the United States, H.C. was also quoted as saying that the alibi witness was not credible because, among other things, he was "an illegal." *Id.* Seventeen jurisdictions allow trial courts to inquire about jury deliberations to determine whether racial bias tainted the verdict. *See id.* at 870. According to the *Pena-Rodriguez* majority opinion, this has been the case in some places for half a century "with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations." *Id.*

[131] *Id.* at 867.

[132] *Id.* at 859, 868.

[133] For example, certain emotional states, such as anger and disgust, "can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the

Because most people hold implicit racial biases, serving as a fair and impartial juror may be impossible without education about their existence and how to mitigate their effects, even for those who earnestly endeavor to honor their oath as jurors.

The Western District of Washington agrees with this premise. It developed a bench-to-bar academic committee to look at the operation of implicit bias in jury decision-making and develop tools to address it.[134] Today, that jurisdiction is one of few that regularly instructs jurors in criminal cases about the definition and operation of implicit biases and how to avoid decision making based on it.[135] Judges in that district show prospective jurors a video in every case "with the intent of highlighting and combating the problems presented by unconscious bias."[136] Courts there also allow attorneys to ask questions about implicit bias during voir dire, instruct jurors that they may not make credibility determinations based on race, implicit bias or other enumerated classifications, and that they are to make decisions in the case only based on the evidence presented at trial, not on implicit bias.[137]

A significant body of social and neuroscience research shows that implicit bias often impacts juror decision making in criminal trials.[138] Because decisions made based on those biases undermine the fairness of criminal trials, more courts should follow the lead of the Western District of Washington and take proactive steps to educate jurors on the definition and implications of implicit bias on juror decision-making and how jurors can minimize the likelihood that it plays a role in the discharge of their duties as jurors.

Stereotypes, a subtype of implicit bias, can play a significant role in juror decision-making in gang-related criminal cases. The next section discusses stereotypes commonly associated with gang

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negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly." *Helping Courts Address Implicit Bias: Strategies to Reduce the Influence of Implicit Bias*, NAT'L CTR. FOR STATE CTS. 2 (2012).

[134] W.D. Wash. Pattern Crim. Jury Instructions, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf [https://perma.cc/SW8A-LCFS] [hereinafter W.D. Wash. Jury Instructions].

[135] *Id.*

[136] *Unconscious Bias Juror Video*, W.D. WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/7HXA-FCQ5].

[137] W.D. Wash. Jury Instructions, *supra* note 134.

[138] *Id.*

members, how they arise in officer gang expert testimony, and how they operate in juror decision-making.

A common definition of "stereotype" is "a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment[.]"[139] Gang members are regularly stereotyped and stigmatized by jurors in criminal cases; studies show that negative biases about gang members are deeply embedded in the public mind.[140]

The media, which has great influence on public perceptions, tends to sensationalize gang activity, particularly that related to crime.[141] Media portrayals of gang members and stereotypes associated with gang members often involve Black or Hispanic men from poor homes and neighborhoods, as tattooed super predators inexorably linked with drugs and violence, and gang-affiliated for life.[142]

Gang members are often perceived by jurors as "them," or "effectively separat[ed] . . . from the rest of society."[143] According to one expert who studies current and former gang members' experiences, "there can be a greater stigma attached to the gang label than criminal behavior itself."[144]

The simple mention of gang affiliation is enough to prejudice a criminally accused person at trial. This is because gangs are particularly susceptible to labeling as deviant, regardless of their

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[139] *Stereotype*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/stereotype [https://perma.cc/46LC-99UD] (last visited July 30, 2021).

[140] NICHOLAS J. G. WINTER, DANGEROUS FRAMES: HOW IDEAS ABOUT RACE AND GENDER SHAPE PUBLIC OPINION 152-53 (2008). Stigma is defined as an attribute that is "deeply discrediting". Lee & Bubolz, *supra* note 37, at 65. Stigma is a process that occurs when "elements of labeling, stereotyping, separation, status loss, and discrimination co-occur together in a power situation that allows the components of stigma to unfold". *Id.* at 66. Stigmatizing involves "deprivation of status [such as dehumanization] and discrimination." *Id.* at 72.

[141] *See* Naima Lakha, Straight Outta Films: A Qualitative Media Analysis of the Hyperrealities of Youth Gangs (2020) (M.A. thesis, Wilfrid Laurier University) (on file with the Scholars Commons at Laurier, Wilfrid Laurier University).

[142] *See* Lee & Bubolz, *supra* note 37, at 66-67. *See also* Finn-Aage Esbensen & Karin E. Tusinski, *Youth Gangs in the Print Media,* 14 J. OF CRIM. JUST. AND POPULAR CULTURE 21, 23-24 (2007).

[143] Lee & Bubolz, *supra* note 37, at 66.

[144] *Id.* at 67.

behavior.[145] Some courts share this concern. One court expressed hesitation in admitting gang expert testimony because jurors would find that the accused was prone to aggressive or violent behavior simply because of testimony about their alleged gang affiliation.[146] Because most jurors do not have first-hand experience with street gangs, they are likely to rely on their stereotypes about gangs or on gang-related trial testimony when filling in gaps in their memory and evaluating witness credibility. Those types of inferences are not allowed under the Rules of Evidence, but because jurors are typically not instructed on the definition or operation of stereotypes in their decision-making, they likely are not aware that they are running afoul of the court's instructions.

What's worse, officer gang expert testimony often encourages jurors to identify with and make decisions based on generalizations and gang-related stereotypes. For example, an officer gang expert might opine that "when a gang member is accused of a crime, the gang culture dictates that fellow members will come forward to assist him, even if it means providing perjurious testimony."[147] This improperly prejudices the accused in two ways. First, it invites jurors to assess witness credibility through the lens of this stereotype; doing so is not congruent with the typical witness credibility instruction. Additionally, through this testimony, the officer invades the province of the jury by commenting on the doubtful credibility of every alleged gang member affiliated with the gang of the accused.

Another topic on which gang experts often broadly opine is the "culture of respect" in criminal street gangs. An officer gang expert might testify that "respect is 'everything'" to a gang member, and "[g]angs gain respect by committing crimes."[148] If in that case the state can establish that the accused is gang-affiliated, this sweeping generalization by the officer affords the prosecution

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[145] *See id.* at 66-67.

[146] Utz v. Commonwealth, 505 S.E.2d 380, 384 (Va. Ct. App. 1998) (asserting that jurors "might associate a defendant with . . . [a gang] affiliation as a person of bad character or someone prone to aggressive or violent behavior").

[147] Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, THE PROSECUTOR 32, 36 (Apr.-June 2008), https://ndaa.org/wp-content/uploads/prosecut092008_feat_gang_needtoknow.pdf [https://perma.cc/RJ3E-E3EC].

[148] People v. Garcia, 64 Cal. Rptr. 3d 104, 108 (Cal. Ct. App. 2007).

grounds to argue that the accused had a motive to commit any crime under the sun and/or to argue that any crime committed was gang-related.

These are only a few of many examples of officer gang expert testimony that improperly invites juror decision-making based on stereotypes and sweeping generalizations. Officer testimony about stereotypes such as these should not be allowed because they are irrelevant, invite improper credibility and character determinations, and invade the province of the jury.

Moreover, because even absent officer gang expert testimony, juror bias is likely, courts should instruct jurors of the existence and operation of stereotypes and give them tools to mitigate the impacts of stereotypes in criminal trials.

Courts, like most jurors, tend to afford deference to police officers. When it comes to determining the scope and admissibility of officer gang expert testimony, courts often function as no more than a rubber stamp for admissibility. The extreme deference afforded officer gang experts blinds courts to racially motivated police behavior and invites juror decision-making based on improperly rendered expert opinions. The next section discusses this judicial deference and its implications for criminally accused people.

Most jurors are blind to the pervasiveness of racism among police and are not aware of how that bias may manifest in the data collected, theories developed, and theories drawn by police officer witnesses. Courts instruct jurors to determine credibility of a police officer's testimony through the same lens as any other witness, which involves consideration of their motives and biases.[149] However, courts fail to instruct jurors about police racial bias or other reasons police may shade their testimony to benefit the government. Omitting these instructions prevents jurors from properly evaluating the veracity and reliability of police testimony and therefore from upholding their oaths as fair and impartial.

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[149] For example, in Colorado state courts, juries are typically instructed to consider each witness's knowledge, motive, state of mind, demeanor, and manner while testifying. Colo. Jury Instructions, *supra* note 113, at B:01. They are to consider the witness's ability to observe, the strength of their memory, and how they obtained their knowledge, as well as how their testimony is supported or contradicted by other evidence. *Id.* Finally, jurors are typically instructed to consider what, if any, relationship the witness may have to either side of the case, and how that witness might be affected by the verdict. *Id.* at E:05.

CONCLUSION

Admission of officer gang expert testimony raises two main problems, the effects of which, when combined, create a perfect storm that fundamentally undermines the fairness of trials where that testimony is admitted. Moreover, courts' failure to instruct jurors about their implicit bias or police bias stymies their ability to uphold their oath to be fair and impartial. In gang-related criminal trials, honoring constitutional guarantees of fairness requires exclusion of officer gang expert testimony.