Comments

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Beyond an Unreasonable Inference: Introduction of Gang Evidence and Implicit Bias in Oregon Criminal Courts

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INTRODUCTION

What is the first image that comes to mind when I ask you to imagine a typical gang member? Instantly, without rationalizing your conception, what visual did your psyche create? If you pictured "a dangerous-looking dark-skinned thug,"[1] then you are guilty of stereotyping. If you did, you certainly are not alone. This is the stereotypical image American society has created for gang members generally.[2] These racial stereotypes existing among Americans, depicting minorities as dangerous criminals, are perpetuated by the media we consume.[3] For example, "Google an image search for 'gang member,'" and you will see various images of dark-skinned men with tattoos.[4] Politicians, across diametrically opposed party lines, exacerbate these misconceptions through harmful rhetoric, while lacking the evidence to support their claims.[5] These "metaphors in the journalistic and political field (where mentions of 'superpredators,'

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1 JOHN M. HAGEDORN, GANGS ON TRIAL: CHALLENGING STEREOTYPES AND DEMONIZATION IN THE COURTS 4 (2022).

2 *See id.*; *see also* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 120 (2001) (describing "the dangerous street 'gang banger' on the male side—by definition dark-skinned, urban, and undeserving").

3 *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 (2005).

4 HAGEDORN, *supra* note 1, at 4–5.

5 Former President Donald Trump referred to MS-13 gang members as "animals" and stated that they "aren't people" to justify their deportations. *President Trump Calls Gang Members "Animals," Clip of Roundtable on Sanctuary Cities and Immigration Laws*, C-SPAN (May 16, 2018), https://www.c-span.org/video/?c4729714/president-trump-calls-gang-members-animals [https://perma.cc/5JHY-M2AJ]. Hillary Clinton has also received backlash from supporters of the Black Lives Matter movement for her rhetoric in a 1996 speech calling young gang members "superpredators"—a term known for its racist connotations. Allison Graves, *Did Hillary Clinton Call African-American Youth 'Superpredators?*,' POLITIFACT: THE POYNTER INST. (Aug. 28, 2016), https://www.politifact.com/factchecks/2016/aug/28/reince-priebus/did-hillary-clinton-call-african-american-youth-su/ [https://perma.cc/HG6N-4E2D]; *1996: Hillary Clinton on "Superpredators" (C-SPAN)*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=j0uCrA7ePno [https://perma.cc/G4AP-4ESZ]. Joe Biden received similar criticism during his presidential campaign. Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/4CVB-YZNV].

'wolfpacks,' 'animals' and the like are common-place)" coupled with the mass incarceration of Black Americans have "supplied a powerful common-sense warrant for 'using color as a proxy for dangerousness.'"[6]

Stereotypes and negative attitudes toward certain social groups are particularly distressing in the context of criminal jury trials. The United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."[7] This right to a fair trial by an impartial jury is a primary protection owed to a defendant under the Sixth Amendment. To determine if a juror is truly impartial, "the relevant question is 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'"[8] When jurors choose to employ their implicit biases in the jury room, they compromise the defendant's right to a fair trial. While society may generally acknowledge that stereotypes are problematic ways of labeling people based on preconceived notions about a particular social group, these negative conceptions still run rampant throughout the collective conscience of American society.

This Comment's purpose is to analyze the bias exhibited against gang members and suggest solutions for what Oregon can do to prevent juror bias against gang members from corrupting the integrity of jury verdicts. Part I of this Comment will (1) discuss some of the history of racial bias in the United States' criminal justice system—including the various forms of systemic racism employed throughout the nation, (2) discuss how those laws were based on public opinion fueled by negative racial stereotypes and attitudes, and (3) examine the modern public's bias toward gang members and how that bias derives from racial animus. Part II will use a behavioral realism framework to discuss how implicit bias against gang members negatively influences decisions in the jury room. Finally, Part III will discuss two possible alternatives for rectifying this issue in Oregon: a revision to the Oregon Evidence Code or an Oregon Supreme Court rule that would limit the admissibility of gang evidence as character evidence under the prior bad acts rule.

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6 Wacquant, *supra* note 2, at 117 (quoting RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136–67 (1997)).

7 U.S. CONST. amend. VI.

8 Dennis v. Mitchell, 354 F.3d 511, 520 (6th Cir. 2003) (quoting Patton v. Yount, 467 U.S. 1025, 1036 (1984)).

I
THE LINK BETWEEN RACIAL STEREOTYPING AND GANG BIAS

A. Historical Context: Race-Based Prejudice Across American Legislatures

Throughout the United States, many state governments have a long, dark history of passing laws that target marginalized groups. Various laws began with facially discriminatory purposes to target minority groups—e.g., laws permitting slavery and later, once slavery was abolished, the Black Codes "[d]esigned to force the freed slaves to work for their former masters."[9] These laws "imposed severe legal restrictions just short of formal slavery."[10] The laws were particularly distinct from the systemic racism we see today because they were discriminatory on their face. Black Codes "clearly established a separate class of citizenship for blacks making them inferior to whites."[11] Black Codes made "raping a white female" a crime and denied Black people "the right to carry firearms, bowie knives, dirks, or swords without a license."[12]

These facially discriminatory laws were not limited to the American South. In Oregon, "[t]he first Black exclusion law . . . mandated that Blacks attempting to settle in Oregon would be publicly whipped . . . until they departed."[13] The original Oregon Constitution explicitly made it illegal for Black people to reside within the state.[14] In addition to excluding Black people from legal residence, the Oregon Constitution "made it illegal for Blacks to be in Oregon or to own real estate, make contracts, vote, or use the legal system."[15] One of the most harmful facially discriminatory laws in Oregon's history was the Donation Land Act of 1850, which barred everyone except white male settlers from owning land.[16] This blatant discrimination continued during the Civil War era with Black poll taxes and laws banning

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9 Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2259 (1998).

10 NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 890 (21st ed. 2022).

11 Jerrell H. Shofner, *Custom, Law, and History: The Enduring Influence of Florida's "Black Code*,*"* 55 FLA. HIST. Q. 277, 279 (1977).

12 *Id.* at 279–80.

13 Darrell Millner, *Blacks in Oregon*, THE OR. ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/blacks_in_oregon/ [https://perma.cc/RV5B-6UN7] (Apr. 7, 2023).

14 *Id.*

15 *Id.*

16 *Id.*

interracial marriages.[17] These are just a few examples of the facially discriminatory laws Oregon enacted prior to the federal prohibition of such statutes.

Once facially discriminatory laws with race-based classifications were barred by the Fourteenth Amendment, legislatures across the country attempted to enact facially neutral laws with disparate impacts on minority groups through covert forms of racial selection.[18] If a court found that the legislature created laws with a discriminatory purpose, the Equal Protection Clause also barred such laws.[19] That said, if a court could not identify the legislature's use of a "criterion of selection that is the functional equivalent of race,"[20] then the law did not violate the Equal Protection Clause—even if it created a disproportionate impact on racial minorities.[21] This interpretation is significant because disproportionate impact theory would apply to cases where a discriminatory purpose, "even if present, is not inferrable [sic] from the administration or operation of a law and thus is not visible to the reviewing court."[22]

Vagrancy laws are a common example of facially neutral laws with a disproportionate impact on minority groups. Vagrancy laws forced poor individuals into indentured servitude, and this practice continued throughout the nation's history.[23] These statutes made it lawful for the police to arrest anyone who could not prove that they were "gainfully employed."[24] Marginalized groups "have always been [the] primary victim[s] of such statutes and ordinances."[25] Such laws acted to control minority groups and confine them within strict boundaries constructed by the majority population based on privileged expectations of what

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17 *Id.*

18 *See* Michael J. Perry, *Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 551–53 (1977). A prime example of covert racial selection was states' adoption of literacy tests as a voting requirement. *Id.* at 551–52. For another example, see, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (gerrymandering).

19 Perry, *supra* note 18, at 541.

20 *Id.* at 554.

21 Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

22 Perry, *supra* note 18, at 554.

23 Brent Tarter, *Vagrancy Act of 1866*, ENCYCLOPEDIA VA., https://encyclopediavirginia.org/entries/vagrancy-act-of-1866 [https://perma.cc/J52N-974R] (Feb. 13, 2023).

24 Shofner, *supra* note 11, at 280.

25 Stewart, *supra* note 9, at 2258.

makes behavior "acceptable."[26] While seen as deplorable today, vagrancy laws were generally accepted by the citizens of the states that maintained them at the time of their adoption.[27] This acceptance was based on common misconceptions that Black people were "naturally servile" and "naturally lazy," thereby legitimizing the laws as necessary to preserve the economic values of society.[28] Rather than overturning these laws as an Equal Protection Clause violation, the U.S. Supreme Court invalidated such ordinances as being void for vagueness.[29]

Without disproportionate impact theory, laws with a discriminatory purpose that are not readily observable to a reviewing court can still pass constitutional muster in practice, even if they would fail this analysis in theory. Michelle Alexander discusses this practice—as it applies to political disenfranchisement—in her best-selling book *The New Jim Crow*: "Formally race-neutral devices were adopted to achieve the goal of an all-white electorate without violating the terms of the Fifteenth Amendment. . . . All of the race-neutral devices for excluding blacks from the electorate were eliminated . . . except felon disenfranchisement laws."[30] Due to the systemic racism that has led to the mass incarceration of young Black men, denying felons the right to vote is—as she articulates—an example of the new Jim Crow.[31] While her analysis focuses primarily on the War on Drugs, this Comment argues that the same can be said about convictions obtained based on gang status.

B. Problems with Gang Bias Generally

Concerningly, gang affiliation also carries negative stereotypes that demonstrate biases against affiliates based on the majority population's established social norms. These stereotypes include that gang members are violent and attack innocent people, that all members are bad people and all are the same, and that gangs are defined as disciplined criminal

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26 *Id.*

27 *Id.* at 2258–59.

28 *Id.* at 2259–60.

29 *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

30 MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 239 (2020) (explaining that these laws were upheld because they either "lost their discriminatory taint" or there was no overt racial bias documented in the law's legislative history).

31 *See id.* at 238–40.

enterprises—implying that mere involvement with a gang is a crime.[32] These misconceptions lead people to conclude that even though the gang member may not have committed the particular crime that they are accused of in a case, they are at the very least guilty of something.[33]

The grave misunderstanding is that not all gangs are founded with a criminal purpose. Social gangs are those established and maintained to provide a stable, communal network where members feel a sense of belonging in their communities.[34] Despite retaining the traditional "gang" label, "[t]his type of gang seldom participate[s] in delinquent behavior, gang warfare, or petty thievery."[35] These groups may occasionally experience minor disputes with other neighborhood gangs, "but only under great pressure."[36] A social gang's defining feature is their group affiliation in a particular location within the neighborhood—occasionally accompanied by an outward expression of their group affiliation through identifying insignia.[37] Although this distinction between violent gangs and social gangs is legally significant, the term "gang" alone in a trial is enough for the average juror to associate the accused with crime and violence. As John Hagedorn puts it, "The demonization of gangs is an example of what psychology calls the fundamental attribution error, a wide-spread belief that crime is more the result of the offender's 'evil' character than the circumstances of the criminal event."[38]

This point is further illustrated by the fact that gangs in particular are treated differently in society than other organized social groups. For

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32 Dirk Kinsey, Out in "The Numbers": Youth and Gang Violence Initiatives and Uneven Development in Portland's Periphery 1, 11 (Jan. 4, 2017) (M.A. thesis, Portland State University) (PDXScholar).

33 *See, e.g.*, HAGEDORN, *supra* note 1, at 9–10 (explaining a case where a police officer referred to an inmate awaiting trial by stating, "Well, if he ain't guilty of that, he's guilty of somethin'."); *see also* William A. Smith, Walter R. Allen & Lynette L. Danley, *"Assume the Position . . . You Fit the Description": Psychosocial Experiences and Racial Battle Fatigue Among African American Male College Students*, 51 AM. BEHAV. SCIENTIST 551, 569, 571 (2007) (arguing that Black male students in academia are "treated as criminals and gangbangers" existing "in a society that holds premeditated Black misandric beliefs that [they] must be guilty of something"); Julio Falcon, *My Greatest Fear*, in *Voices: Incarcerated Youths*, 3 WHITTIER J. CHILD & FAM. ADVOC. 285, 291 (2004) ("I'm just another statistic 'just another poor Mexican gangmember [sic] from the ghetto who in everybody's eyes is guilty of *something*.'").

34 LEWIS YABLONSKY, GANGS IN COURT 29 (2005).

35 *Id.*

36 *Id.*

37 *See id.*

38 HAGEDORN, *supra* note 1, at 5.

instance, social gangs and fraternities share the same goal of providing support for individuals who seek social acceptance.[39] Youth will often join gangs because that is the "primary social institution of the neighborhood"[40]—mirroring the function fraternities pose on college campuses. Some scholars argue that the main distinguishing factor between these two organizations "is that fraternities occupy designated housing, while street gangs perform these functions in public space."[41] This Comment acknowledges that there is a distinct difference in targeting people for who they are (i.e., a member of a fraternity) rather than what they do (i.e., committing crimes).[42] But, as discussed above, social gangs are not criminal enterprises. After all, "[t]he clothes one wears and the groups with which one associates are non-criminal behaviors."[43] Targeting gang members based on their outward expression of affiliation on the streets—due to a lack of designated housing—is remarkably similar to the use of vagrancy laws to force conformity upon minority populations.[44]

C. Gang Bias's Link to Racial Bias

Systemically, the criminal justice system has used gang affiliation as a vehicle to target particular subjects in both police investigations and criminal prosecutions. Since the 1990s, police departments have used gang databases to track individuals who officers believe may be involved in a gang—supposedly with the purpose of investigating gang-related crimes within their jurisdiction.[45] The problem is that "gang databases contain many innocent young minority males, who pose no serious threat to society"[46] because the criteria for being placed on this list are fairly arbitrary and carry little probative value.[47] For

39 Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 487 (1994).

40 *Id.* at 488.

41 *Id.*

42 *Id.* at 489.

43 Robert J. Durán, *Racism, Resistance, and Repression: The Creation of Denver Gangs, 1924–1950*, *in* ENDURING LEGACIES: ETHNIC HISTORIES AND CULTURES OF COLORADO 113, 123 (Arturo Aldama et al. eds., 2011).

44 While lack of designated housing is one potential explanation for the difference in treatment between gangs and fraternities, a simpler explanation is racial disparity. For more on this topic, see *infra* Section I.C.

45 Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 759–62 (2001).

46 *Id.* at 762–63.

47 *Id.* at 761–63 ("One set of guidelines, for example, provides that names should be added to the list only if two or more of the following gang criteria are met: professes to being

example, the criterion that one "hangs around with gang members" is practically unavoidable for many young minority males due to the communities in which they live.[48] Additionally, several of the criteria include a "reliability" or "corroboration" element; however, no independent check exists to ensure police officers apply "the criteria correctly when adding an individual to the database."[49] Demonstrating these databases' arbitrary nature, LAPD, in the 1990s, documented 7,600 gang crimes in Los Angeles County.[50] Comparatively, the gang database listed 112,000 people as either gang members or associates.[51] Based on these figures, "only one crime [was] committed each year for every fifteen gang members or, put differently, the average gang member commit[ted] one crime every fifteen years."[52] Researchers suggest this means that either "gang members are a surprisingly law abiding group" or "the gang database include[d] many individuals who have ended their gang involvement or who never were gang members in the first place."[53] Although another possible explanation exists—that the department did not have an accurate list of all gang crimes committed—this explanation would suggest that the gang databases were unsuccessful in investigating substantially more gang-related crimes. The databases' "vague criteria, secrecy of the process, and lack of judicial review . . . create a danger that police officers add many young, minority males to the database simply because they wear hip-hop clothing and live in poverty-stricken, high-crime areas."[54] These concerns, together with the unsuccessfulness of gang database use in gang-crime investigations, outweigh any police department's interest in investigating crime.

More recently, in Portland, Oregon, the local police bureau promised to stop labeling suspects as gang members "in response to strong community concerns about the labels that have disproportionately

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a gang member; is deemed a gang member by a reliable source, such as a trusted informant, teacher, or parent; is called a gang member by an untested informant with corroboration; has gang graffiti on his personal property or clothing; is observed, by an officer, using gang hand signs; hangs around with gang members; is arrested with gang members; identifies his gang affiliation when brought to county jail.").

48 *Id.* at 761.

49 *Id.*

50 *Id.* at 762.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 761.

affected minorities."[55] Despite said promise, a city audit conducted in 2018 revealed that the bureau maintained "an informal list of active gang members."[56] As recently as 2020, "the Police Bureau discovered nearly 100 reports that still contained alleged gang designation of people in its electronic system."[57] Thus, the concerns arising from studies of the LAPD gang databases in the nineties are still applicable today within Oregon's jurisdiction. This follows because many of the arbitrary factors employed by the LAPD are comparable to strategies used by the police in Portland. For example, "[w]hen officials released a lengthy study into Multnomah County's gang activity in early 2014, the report noted, 'law enforcement agencies in Multnomah County do not have an accurate method of identifying gang-involved people.'"[58] These agencies "frequently designate[] crimes such as shootings, even those without a clear perpetrator or victim, as gang related."[59] Despite the public's explicit concern with these arbitrary and potentially racist practices, the bureau still appears to employ gang databases in criminal investigations.

As just discussed, Oregon residents have expressed concerns about targeting gangs because of their apprehensiveness about the concealed use of racial animus in such approaches. It is essential to discuss how these concerns arose and how bias against gang membership appears to be strongly correlated with race-based prejudice. For starters, a common stereotype is that gangs are composed entirely of Black or Hispanic men.[60] As an initial example, in Colorado, gangs developed along racial lines—particularly distinguishing white gangs from Latinx gangs based on their cultural divides.[61] This "connection to culture and ethnicity" among the Latinx gangs "incited widespread fear among the general public" that was unique to the Latinx gangs when compared to similarly situated white gangs.[62] The public's fear stemmed

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55 Maxine Bernstein, *Gang Violence Drives Surging Portland Homicide Rate from Early 2019 to Mid-2021, Study Finds*, OREGONIAN (July 16, 2022, 6:00 AM), https://www.oregonlive.com/crime/2022/07/gang-violence-drives-surging-portland-homicide-rate-from-early-2019-to-mid-2021-study-finds.html [https://perma.cc/BF39-JVAA].

56 *Id.*

57 *Id.*

58 Dirk Vanderhart, *Searching for Gang Signs: Gang Attack Numbers Are Up—but Are They Accurate?*, PORTLAND MERCURY (June 24, 2015, 4:20 PM), https://www.portlandmercury.com/news/2015/06/24/15924388/searching-for-gang-signs [https://perma.cc/Q5P2-Z2JX].

59 Kinsey, *supra* note 32, at 12.

60 *Id.* at 11.

61 Durán, *supra* note 43, at 115.

62 *Id.*

from "increased U.S. patriotism as well as hostility toward perceived foreigners"—heightened by the political climate of World War II.[63] Due to this widespread fear at the time, city officials started to label anyone who was Latinx as a gang member.[64] Despite the fact that "white gangs are known to exist and to engage in violent and deviant acts, they are often not viewed as a problem."[65]

Another example of this bias is shown by society's promulgating the stereotype that gang members are dangerous Black men. According to John Hagedorn, an expert in gang research, "A gang member is the 'prototype' of the deep-seated fears white people cultivate of a 'violent, criminal, and hostile' Black male: a fear of 'the other.'"[66] As the NAACP Portland Chapter President put it: "'[G]ang' [is] a catch-all for any shooting where you think the suspect is black . . . . What you're saying is every black kid who dresses weird is in a gang."[67] The way that various police departments across the Western United States define "what constitutes a criminal gang is itself racially biased and contributes to the disproportionate number of minorities defined as gang members."[68] On college campuses, this has been particularly true with respect to Black fraternities: "For some on campus, and for too many police officers, a group of Black male students is a sign of gang activity and potential violence."[69] In the same study, one student reported that Black students lacked the ability to safely connect on campus due to their being "treated as criminals and gangbangers."[70] Black students were systemically denied access to the benefits of fraternity life on campus due to the stereotype that a group of minorities organizing constituted a criminal gang.[71]

Racial stereotyping itself has been shown to stimulate gang development,[72] which then leads to further race-based targeting in a vicious cycle of "us" versus "them." In Colorado, "Latino/a gangs

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63 *Id.*

64 *Id.* at 123.

65 Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 169 (2001).

66 HAGEDORN, *supra* note 1.

67 Vanderhart, *supra* note 58.

68 Bass, *supra* note 65.

69 Smith et al., *supra* note 33, at 567.

70 *Id.* at 569.

71 *Id.* at 566–67.

72 Durán, *supra* note 43, at 115 ("The growth of the Latino population was intertwined with city neglect, racism, and urban decay, creating ripe conditions for gang development.").

originated in the face of racial hostility, police neglect, police abuse, and victimization."[73] As one Chicago gang member expressed, "'It's the gang versus the racism.'"[74] Hagedorn explains this is because "[t]he history of gangs in Chicago is fundamentally a history of race, or more precisely racism, though also inextricably tied to class and space."[75] Chicago gangs have historically been shaped by "deep-seated racism, racial politics, . . . segregation, police brutality, and white supremacist terrorism."[76] Many gang members felt forced into their membership for the economic benefits that they were otherwise unable to access without becoming dependent on social welfare programs.[77] The vast stigma surrounding people within the welfare system has led some individuals to relinquish the welfare option altogether.[78] In some ways, gang affiliation allowed young men to "maintain their racial and ethnic dignity" in the face of these economic and social pressures.[79]

Former President Trump used the transnational gang MS-13 as a motivator to increase enforcement of immigration policy, but "experts say using MS-13 to justify cracking down on undocumented immigrants could actually make the gang stronger."[80] Because undocumented immigrants are reluctant to reach out to authorities for help out of fear of being deported, they are especially vulnerable to begin with.[81] MS-13 leaders would "prey[] on that vulnerability" specifically to "manipulat[e] minors into joining their ranks."[82] By inflaming the vulnerability of an already highly persecuted group, Trump essentially gave current gang leaders more power to influence vulnerable young men due to their need for protection and support. With this increased strength has come the stereotype that "every Salvadoran must be an MS-13 gang member, just as Russian or Italian immigrants in New York [were] at one time considered . . . violent

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73 *Id.* at 123.

74 John M. Hagedorn, *Race Not Space: A Revisionist History of Gangs in Chicago*, 91 J. AFR. AM. HIST. 194, 205 (2006).

75 *Id.*

76 *Id.* at 194.

77 *Id.* at 205.

78 Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 39 (1990).

79 Hagedorn, *supra* note 74, at 205.

80 Tal Kopan, *MS-13 Is Trump's Public Enemy No.1, but Should It Be?*, CNN POL. (Apr. 29, 2017, 1:47 PM), https://www.cnn.com/2017/04/28/politics/ms13-explained-immigration-sessions/index.html [https://perma.cc/9XMT-JC97].

81 *Id.*

82 *Id.*

anarchist[s]."[83] This demonstrates the way that racial animus serves as a basis for gang formation, while the public continues using those same biases to attack a gang's very existence. It is a vicious cycle of "us" versus "them" from a gang's initial formation throughout its continuation.

II
BEHAVIORAL REALISM: UNCONSCIOUS BIAS INFECTS JURORS' PERSPECTIVES

A. Behavioral Realism Framework: The Method

The United States' rules on the secrecy of jury deliberations make it nearly impossible to empirically study the nature of jury decisions. Writing for the majority in *United States v. Thomas*, Judge Cabranes of the Second Circuit states that secretive jury deliberation is "fundamental to the effective operation of the jury system."[84] He goes on to write that "[i]t is the historic duty of a trial judge to safeguard the secrecy of the deliberative process that lies at the heart of our system of justice."[85] Although it is difficult to obtain exact scientific research on real jurors' psychological processes, "given that implicit biases generally influence decisionmaking [sic], there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors."[86] This is the crux of the behavioral realism framework. This method "asks the law to account for more accurate models of human cognition and behavior."[87] Put differently, behavioral realism suggests that courts and legislatures look to "the best available evidence about people's actual behavior" when creating and interpreting the law.[88] Because evidence of jurors' mental impressions is difficult to come by, these bodies should look to evidence of peoples' behavior in the real world and apply those principles when working to

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83 Lourdes Gouveia, *Immigrant Nebraska – Because We Forget, We Must Tell the Story All Over Again*, OFF. LATINO/LATIN AM. STUD. (Mar. 8, 2018), https://www.unomaha.edu/college-of-arts-and-sciences/ollas/research/immigrant-nebraska.php [https://perma.cc/NB3V-VTME].

84 United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997).

85 *Id.*

86 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1144 (2012).

87 *Id.* at 1126 n.2.

88 Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 972 (2006).

increase fairness in the legal system. To conduct said analysis properly, social science researchers have created a specific procedure:

> [Applying the behavioral realism framework involves] a three step process:
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> First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.
>
> Second, compare that new model with latent theories of human behavior and decision-making embedded within the law. . . .
>
> Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity.[89]

The third step requires lawmakers to either change the law to reflect the new model of thinking or to provide a justifiable reason for sustaining the outdated practice.[90]

B. The Current Law: The Status Quo Targets Only Explicit Racial Bias

The United States' criminal justice system has many different safeguards in place to attempt to minimize *explicit* bias in the courtroom. For instance, in *Batson v. Kentucky*, the Supreme Court held that "[*p*]*urposeful* racial discrimination in selection of the venire violates a defendant's right to equal protection."[91] In *Peña-Rodriguez v. Colorado*, the Court ruled that an exception exists to the no-impeachment rule of jury verdicts "where a juror makes a *clear statement* that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[92] The Court clarified that "[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*."[93] Although these procedural safeguards are relatively successful at thwarting *explicit* bias, they do little to prevent *implicit* bias from entering the jury room.

Implicit bias comes in a variety of forms. Aversive racism is one such form that is more difficult to detect in screening the venire. The aversive racism theory suggests that certain individuals are averse not

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89 Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 490 (2010).

90 *Id.*

91 Batson v. Kentucky, 476 U.S. 79, 86 (1986) (emphasis added).

92 Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017) (emphasis added).

93 *Id.* at 223.

only to Black people but also suggestions that they are prejudiced.[94] They internally experience negative racial attitudes while outwardly denying such feelings and maintaining the public's perception of being a nonracist liberal.[95] Unlike the Black Codes, systems-based aversive racism is less obviously prejudiced because the aversive racist actively attempts to reflect a nondiscriminatory persona while secretly harboring anxiety and fear surrounding people of color.[96] This model "predicts that arguments about minority communities will be framed in nonracial terms (e.g., innocent crime victims versus malevolent gang members) rather than in explicitly racial terms."[97] Gang membership is one label aversive racists can use to mask their prejudice toward minority groups and allow racist viewpoints to enter the jury room undetected. Because these statements lack a "clear statement" of racial animus, as required by the Court in *Peña-Rodriguez*, this form of bias cannot be used to impeach a verdict.

An even more difficult form of bias to detect is implicit bias involving attitudes and stereotypes that are "not consciously accessible through introspection."[98] Researchers have created new methods for studying bias "that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported."[99] One such method social science researchers use is the Implicit Association Test (IAT), which measures the reaction time difference between two tasks where one task involves what typically would lead to bias and another which would generally not involve bias.[100] By using the IAT, "social psychologists from hundreds of laboratories have collected enormous amounts of data."[101] The data show that "implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behavior."[102] Implicit bias is distinct from explicit bias and foretells

94 Stewart, *supra* note 9, at 2269.
95 *Id.*
96 *Id.* at 2268–70.
97 *Id.* at 2271.
98 Kang et al., *supra* note 86, at 1129.
99 *Id.*
100 *Id.*
101 *Id.* at 1130.
102 *Id.* at 1130–31.

real-world behavior; thus, legal institutions must respond to implicit bias differently than they would ordinarily respond to explicit bias.

C. The Current Law Fails Under a Behavioral Realism Framework

A more challenging aspect of applying a behavioral realism framework is determining what is a more accurate model of human behavior.[103] For the purposes of this Comment, identifying the more accurate model involves analysis regarding implicit bias—as opposed to explicit bias—and the effect it has on jury verdicts. Although implicit bias can be difficult to detect within the real-life jury room, several simulation studies show that bias against gang members does affect jury verdicts. In one study, mock jurors watched one of three versions of the same trial: one where the prosecution did not introduce any gang evidence, one where the prosecution suggested that the defendant merely affiliated with gang members during the time of the crime, and one where the prosecution produced evidence of the defendant's gang membership, including his gang tattoo.[104] Researchers made the evidence in the fact pattern deliberately equivocal to demonstrate how gang evidence would sway jurors in each of the trials.[105] In this study, when mere gang affiliation was introduced "convictions increased significantly from forty-four percent in the non-gang trial to fifty-nine percent when affiliation was discussed."[106] Even without evidence of the defendant's actual gang membership, "mere association with gang members on the night of the incident was enough to drive up guilty verdicts by fifteen percent."[107] Evidence of the defendant's actual gang membership and introduction of his gang tattoo increased guilty verdicts by sixty-three percent.[108]

One aspect notably absent from the study is evidence specifically confirming that gang evidence caused jurors to ignore the reasonable doubt standard entirely rather than merely pushing weary jurors over the edge to convict.[109] For this reason, researchers recreated the study to make reasonable doubt clear:

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103 Kang & Lane, *supra* note 89, at 490.

104 Mitchell L. Eisen et al., *Practitioner: Exploring the Prejudicial Effect of Gang Evidence: Under What Conditions Will Jurors Ignore Reasonable Doubt*, 2 CRIM. L. PRAC., Fall 2014, at 43.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

> The defendant became a suspect solely by virtue of his association with the actual culprit: hanging out and listening to music with the main suspect when the police arrived. Further, the defendant was a young Hispanic male wearing a sleeveless white undershirt similar to the one described by the victim.
>
> Based on these facts alone, the police decided to put his picture in a six-pack photo array to show the witness (despite the fact that the defendant did not match the victim's description of the suspect). Most notably, the defendant was covered in tattoos on his arms, chest, and neck; and although the victim described the robber as wearing a sleeveless under shirt, he did not report seeing any tattoos. . . . There was no evidence of any sort linking the defendant to the crime itself aside from the very hesitant identification from a photo lineup and uncertain in-court identification by an eyewitness who admitted to drinking heavily on the night of the incident.[110]

This time there were two trials: one where no gang evidence was admitted and one where the defendant's gang status was admitted.[111] Prior to jury deliberation, "guilty verdicts in the gang condition were far greater than not-guilty verdicts by nearly a three-to-one margin, with thirty-three percent of the participants voting guilty when gang evidence was introduced compared with only twelve percent voting guilty when no gang evidence was presented."[112] After deliberating, no jurors voted to convict the defendant in the trial where gang evidence was not admitted.[113] But in the gang trial, "ten percent of the mock jurors voted guilty after deliberations."[114] The fact that no jurors voted to convict the defendant in the trial without gang evidence provides strong support for the assertion that the jurors in the gang trial ignored reasonable doubt and convicted the defendant based purely on his gang status.[115] Gang affiliation was a definite motivator in the decision to convict because "[o]ne hundred percent of the participants who voted guilty after deliberations reported that the gang issue played a role in their decision."[116]

This outcome demonstrates a severely adverse phenomenon called "jury nullification in the reverse."[117] Traditionally, jury nullification

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110 *Id.* at 44–45.

111 *Id.* at 45.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 45–46.

116 *Id.* at 46.

117 Mitchell Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 14 (2014).

occurs when jury members acquit a legally guilty defendant for moral justifications.[118] This is a form of jurors "tak[ing] the law into their own hands in order to administer their own version of commonsense justice."[119] While this practice may be beneficial in that it allows jurors to stand up against government overreach, jury nullification in the reverse is illegal. Ignoring the elements of the charged crime and voting to convict solely based on the defendant's prior bad acts would "make the criminal jury trial so fundamentally unfair that the accused loses the constitutionally guaranteed protection of a trial on the merits of guilt."[120]

The next step in the behavioral realism analysis is "identifying what folk psychology is embedded within the status quo."[121] The status quo currently entails two problematic theories: (1) that explicit bias is the only form of bias the Court must address, and (2) that the focus must be on racial bias, not bias toward gang members. First, judiciaries and legislatures historically targeted only explicit bias in the courtroom. In *Peña-Rodriguez*, as discussed above, the Court limited its holding to cases of a "clear statement" of bias specifically pertaining to racial bias on the part of the juror.[122] Similarly, in *Batson*, the holding was limited to cases of "purposeful discrimination" and applied only when the challenge involved cases of "intentional racial discrimination" by the opposing party.[123] The status quo does account for explicit bias in selecting the jury and challenging jury verdicts, but it does not account for the entirely different phenomenon of implicit bias in these scenarios.

Second, courts do not find bias against gang membership to be a form of bias worth addressing. At the federal level, the United States Constitution does not protect gang members because they are not a protected class. As discussed prior, despite gang evidence's disproportionate racial impact, the Court has held that this is not enough for an equal protection claim.[124] Gang evidence tends to fall

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118 *Id.*

119 *Id.*

120 *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 244 (2005).

121 Kang & Lane, *supra* note 89, at 491.

122 Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017).

123 *Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU WASH. (Apr. 9, 2018), https://www.aclu-wa.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection [https://perma.cc/TL48-W8VE].

124 Washington v. Davis, 426 U.S. 229, 239 (1976).

under the prior bad acts rule of the Federal Rules of Evidence.[125] Although this will be discussed in more detail in Part III, it is important to acknowledge how courts currently admit gang evidence in criminal trials because gang evidence is considered relevant to the prosecutor's case-in-chief. Under the current standard, prior bad acts are inadmissible to prove a person's immoral character, but they could be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[126] When admitting character evidence for this purpose, the standard Rule 403 balancing test applies, which allows exclusion of this otherwise relevant evidence if "the downside risk of the evidence is much greater than its utility to the case."[127] In other words, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."[128] This is a high burden for the defendant to meet, and it typically does not bar the admission of most evidence.

One of the key cases demonstrating the Oregon judiciary's disregard for the prejudicial nature of gang evidence admission is *State v. Haugen*.[129] In that case, the Court of Appeals "conclude[d] that the [Vagos gang] evidence was relevant 'other act' evidence under OEC 404(3) and 404(4)" to "establish[] defendant's motive for the assault, and that the trial court did not abuse its discretion under OEC 403 in admitting that evidence."[130] Although the Oregon Supreme Court ended up reversing and remanding the case, it did not do so based on improper admission of the gang evidence.[131] The Oregon Supreme Court reversed because the Court of Appeals applied the incorrect standard for evaluating the admissibility of eyewitness identification testimony.[132] The Court of Appeals's ruling on the gang evidence is

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125 *See infra* Part III.

126 FED. R. EVID. 404(b)(1)–(2).

127 Reed, *supra* note 120, at 214.

128 FED. R. EVID. 403.

129 State v. Haugen, 274 Or. App. 127, 360 P.3d 560 (2015), *rev'd on other grounds*, 361 Or. 284, 392 P.3d 306 (2017). Gang evidence admissibility as character evidence is an issue currently being litigated at the Oregon Court of Appeals. At my summer externship with the Oregon Office of Public Defense Services Appellate Division, one of my supervisors argued that admission of gang evidence was improper use of character evidence as propensity reasoning. Oral argument in that case was held in July 2022. The Court of Appeals has yet to issue an opinion on that matter.

130 *Id.* at 151, 360 P.3d at 575.

131 *See* State v. Haugen, 361 Or. 284, 392 P.3d 306 (2017).

132 *Id.* at 303, 360 P.3d at 316.

still good law and exemplifies the problem with maintaining a Rule 403 balancing test for this category of evidence. The judiciary's leniency in admitting gang evidence under this combination of rules has led to the current system's failure to account for how prejudicial this evidence is against criminal defendants.

Knowing that implicit bias can be just as harmful as explicit bias, why do courts and state legislatures tend to focus particularly on explicit bias in interpreting and creating the law? The likely reason is that these entities assume that explicit bias is generally easier to detect than implicit bias. The judiciary and legislature are concerned with efficiency and articulating rules that are clear and easily implementable by trial-level courts. However, even rules aimed at targeting explicit bias have proven difficult for courts to implement: "Courts nonetheless have struggled in interpreting what constitutes a 'clear statement of racial bias' and whether such bias constituted a 'significant motivating factor' in the jury's verdict."[133] This demonstrates the difficulties that courts face in regulating explicit bias in jury decisions.

That being said, courts consistently reason that implicit bias is more difficult to regulate than explicit bias due to its unconscious nature. Implicit bias "is present in almost every person but is entirely undetectable"; thus, attempting to correct all instances of implicit bias "would be too great an undertaking by the court."[134] Even assuming arguendo that this is the case,[135] such difficulty does not detract from the Constitution's demand that jury verdicts be fair and based only on whether the prosecution's evidence proves, beyond a reasonable doubt, the defendant's guilt of the crime actually charged. Jurors must reach their verdict without allowing prejudicial inferences to infect its impartiality—i.e., "the *accused* should be convicted based on what they did, on the evidence, not on inflammatory labels of who they are said to be or because they are members of a despised group."[136] The legal system's "[f]ailure to acknowledge and account for implicit racial bias has led the Court to expand the discretion of criminal justice actors over

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133 Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 310 (2019).

134 Asha Amin, Note, *Implicit Bias in the Courtroom and the Need for Reform*, 30 GEO. J. LEGAL ETHICS 575, 582 (2017).

135 Evidence exists suggesting that "implicit-bias measures do a significantly better job than explicit-bias measures in predicting behavioral indicators of discrimination." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 966 (2006). This suggests that detecting implicit bias may actually be the method that more easily predicts discriminatory behavior than the status quo presumes.

136 HAGEDORN, *supra* note 1, at 11.

the past half century, vastly widening the array of opportunities for implicit racial bias to influence their decisions."[137]

Despite the difficulty in regulating implicit bias in the courtroom, some jurisdictions have taken strides to combat instances of implicit bias in the jury context—a step the Supreme Court has yet to take. In April 2018, the Washington Supreme Court "became the first court in the nation to adopt a court rule aimed at eliminating both implicit and intentional racial bias in jury selection."[138] The text of the rule states that "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied."[139] The rule clarifies that "[f]or purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors."[140] More discussion of this court-created rule will appear in Part III. Although Washington's rule demonstrates that regulation of implicit bias itself is possible, there are more manageable ways to combat this phenomenon by avoiding the instigation of implicit juror bias from the introduction of potential gang membership in the first place.

III
SOLUTIONS

Pertaining to juror bias against gang members, the best way to avoid the taint of bias is to exclude gang evidence wherever possible to avoid undue prejudice. To be clear, this does not suggest that all gang evidence should always be excluded in criminal trials. It is clear that "in some cases, as in retaliation shootings, the gang allegation is central to the prosecution's case in chief."[141] When gang activity is included in the *actus reus* of the offense, said evidence of gang membership is undoubtedly admissible, such as when "the defendant's involvement with gang activity is not in dispute and the gang evidence is central to

137 John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 690 (2014).

138 ACLU WASH., *supra* note 123.

139 WASH. GEN. R. 37(e) (2023).

140 *Id.* at (f).

141 Eisen et al., *supra* note 117, at 16.

the charges being prosecuted."[142] This Comment proposes that gang evidence introduced as character evidence under the prior bad acts rule should be presumptively inadmissible, unless the prosecution shows that said evidence is more probative than it is prejudicial. When the state presents gang evidence under this rule, "the prosecutor and the judge must carefully balance the potential probative value of the gang evidence against the prejudicial effect it may have on the triers of fact."[143]

By altering the way this evidence is admitted, courts can prevent the triggering of implicit bias in the minds of jurors without probing into the mental impressions of said jurors. This form of policing implicit bias within the courtroom appears in a variety of forms across various jurisdictions. For instance, Washington has a rule that "presumptively excludes evidence of a person's immigration status unless required for a legitimate and relevant reason."[144] This rule—along with Washington's General Rule 37 discussed below—is an example of a state supreme court "actively engag[ing] in promoting justice through the promulgation of court rules."[145] A more common example, seen in various states, is rape shield laws, where evidence of an accuser's sexual history is presumptively inadmissible for use by the defendant to impeach for bias because that information "is not relevant to the defendant's guilt or innocence."[146] These examples relate to introduction of gang membership under the prior bad acts rule because a defendant's gang association alone is not sufficiently relevant to determining guilt or innocence in the specific crime charged. Just as rape shield laws have exceptions,[147] there should be exceptions allowing gang evidence to be admissible with the default rule being presumptive inadmissibility.

There are two ways Oregon can implement such a rule to heighten admissibility standards for gang evidence in criminal trials: (1) Oregon legislators can supplement the Oregon Evidence Code with a new rule regarding evidence of gang membership or affiliation within the rules involving character evidence, or (2) the Oregon Supreme Court could

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142 Eisen et al., *supra* note 104, at 42.

143 *Id.*

144 Mary I. Yu, *How Injustice and Inequality Have Been Addressed (and Sometimes Ignored) by the Washington Supreme Court*, 54 GONZ. L. REV. 155, 164 (2018).

145 *Id.*

146 *Rape Shield Law*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/rape-shield-law [https://perma.cc/B2ED-S3U8] (Feb. 23, 2023).

147 *See* Rudolph Alexander, Jr. & Jacquelyn Monroe, *Exceptions to Rape Shield Laws*, 32 FREE INQUIRY CREATIVE SOCIO. 129 (2004).

create a court rule mandating the heightened requirement for admission of this evidence.

A. Revision of the Oregon Evidence Code

1. Background on OEC 404(b)

The Oregon Evidence Code is "based substantially on the Federal Rules of Evidence," and "[i]n some respects, it is an improvement over [those rules]."[148] The Federal Rules of Evidence, from which most states have adopted their own rules of evidence,[149] includes a rule that is a "principle of exclusion" prohibiting the prosecution from "introduce[ing] evidence of a defendant's unsavory character merely to show that he or she is a bad person and thus more likely to have committed the crime."[150] FRE 404(a) states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[151] The legislature created FRE 404(b) to "permit admission in the prosecution's case-in-chief [] the accused's other bad acts in order to prove any relevant intermediate issue in the case," so long as "the probative value of evidence of other bad acts is not substantially outweighed by unfair prejudice to the accused, confusion of the issues, or waste of precious judicial trial time."[152] While FRE 404 generally serves as a prohibition on the introduction of prior bad acts to prove a defendant's bad moral character, it includes broad exceptions that allow admission of prior bad acts evidence to prove a defendant's "motive, intent, or identity."[153]

FRE 404(b) is the most contentious rule in the Federal Rules of Evidence, and it has been for the last half century.[154] Such evidence allows jurors to implicitly determine that a person committed the crime in question today because of unrelated behavior they exhibited in the past. To demonstrate, "[a] person's prior burglary may be marginally probative of something other than bad character, but the jury that has

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148 Robert E. Jones, *An Overview of the Oregon Evidence Code*, 19 WILLAMETTE L. REV. 343, 344–45 (1983).

149 Reed, *supra* note 120, at 212.

150 Jeffrey Cole, *Bad Acts Evidence Under Rule 404(b)*, 14 LITIG. 8, 8 (1988).

151 FED. R. EVID. 404(a)(1).

152 Reed, *supra* note 120, at 201.

153 Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1467 (1985).

154 Reed, *supra* note 120, at 211.

heard the juicy news is likely to fall back on the verboten axiom 'once a burglar, always a burglar' and convict thereon."[155] The reason this rule is severely criticized is because of its prejudicial nature. Using evidence of prior unconvicted conduct "to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial."[156] Character evidence "deflects the jury's attention from the immediate charges and causes it to prejudice a person with a disreputable past, thereby denying that defendant a fair opportunity to defend against the offense that is charged."[157]

Oregon's rule against using character evidence to support propensity reasoning, OEC 404, is identical to FRE 404.[158] Just as with the Federal Rules, in Oregon "evidence of a defendant's other . . . bad acts is not admissible in a criminal case to prove the defendant's antisocial or criminal propensities."[159] Oregon's rule, like the Federal Rules, allows admission of such evidence to prove other relevant facts "as long as the chain of logical relevance connecting the evidence to the 'other' fact or facts does not ultimately rely on an inference relating to the defendant's character or propensities."[160] The other purposes prosecutors can use to admit this evidence includes "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,"[161] but this list is not exhaustive.[162] Propensity is key to Oregon's rule because "even if evidence is offered for one of the listed purposes, it is barred by OEC 404(3) if the proof depends upon propensity reasoning."[163]

2. Proposed Revision

The first solution to this problem is that the Oregon legislature could revise the Oregon Evidence Code to include a new rule, OEC 416, creating what would essentially be a reverse OEC 403 balancing test for admitting gang evidence under an OEC 404 framework. This

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155 Teresa S. Ozias, *Bad Acts in Oregon: OEC 404(3)*, 25 WILLAMETTE L. REV. 829, 830 (1989).

156 Cole, *supra* note 150.

157 *Id.*

158 Kobin Patterson, *OEC 404(4): Your Past Will Come Back to Haunt You*, 52 WILLAMETTE L. REV. 291, 292 (2016).

159 State v. Johnson, 340 Or. 319, 338, 131 P.3d 173, 185 (2006).

160 *Id.*

161 OR. EVID. CODE Rule 404(3) (codified at OR. REV. STAT. § 40.170 (2022)).

162 *Johnson*, 340 Or. at 338, 131 P.3d at 185.

163 State v. Skillicorn, 367 Or. 464, 484, 479 P.3d 254, 267 (2021).

reverse OEC 403 balancing test "would require that the proponent of the evidence must show that probative value exceeds prejudicial effect—a balancing test that is stricter than the default test under Rule 403, but less exacting than some tests used elsewhere" in the rules.[164] In order to admit evidence under this test, "[t]he proponent would need to offer specific facts and circumstances supporting admissibility."[165] Rather than simply stating a nonpropensity purpose and defending against an OEC 403 challenge, this rule would require the proponent to specifically articulate why the evidence is more probative than it is prejudicial.

This reverse Rule 403 balancing test would work to reduce the risk of bias because it would require the prosecutor to provide those facts and circumstances that link this evidence to the specific crime committed. Additionally, she must argue how those facts are more probative than the gang evidence's prejudicial effect on the jury. Rule 403 is much harder for opponents to use to challenge evidence admission because application of the rule depends primarily on judicial discretion and, therefore, "its application is difficult to predict."[166] As discussed in Part II, the Oregon Court of Appeals in *Haugen* demonstrated the appellate courts' deference toward trial court decisions by applying an abuse of discretion standard for evaluating OEC 403 rulings.[167]

The new standard would place a higher burden on the proponent of the gang evidence to show how said evidence has a specific link to the crime charged and that its probative value overcomes the severe prejudice that the defendant faces when gang evidence is admitted to the jury. By excluding gang evidence unless its probative value outweighs its prejudicial effect, it will prevent stereotypes from manifesting in cases where said evidence is minimally probative of guilt, thereby avoiding the damaging effect the evidence has on jurors' psyches. A routine jury instruction, for example, would not be enough to avoid this taint of bias because "once a negative stereotype is activated, people often seek information that is consistent with that

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164 Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1626 (2008). For example, FRE 609(b) and FRE 703 both consist of tests requiring that the probative value of the evidence *substantially* outweighs its prejudicial effect. *Id.* at 1626 n.343. This test is harsher than simply requiring probative value to outweigh prejudice.

165 *Id.* at 1626.

166 *Id.* at 1589.

167 State v. Haugen, 274 Or. App. 127, 151, 360 P.3d 560, 575 (2015), *rev'd on other grounds*, 361 Or. 284, 392 P.3d 306 (2017).

stereotype"[168] rather than listening to the evidence objectively as a whole.

B. Oregon Supreme Court Rule

The second alternative the legal system could employ to rectify this issue is for the Oregon Supreme Court to create a court rule that prescribes higher standards for admission of gang evidence. This court-created rule could be the exact same rule as suggested in the immediately preceding section, but instead of the legislature enacting the rule, the Oregon Supreme Court would implement it. As discussed briefly in Part II, the Washington Supreme Court created its own rules to combat implicit bias in Washington courts.[169] General Rule 37 expanded upon the holding in *Batson* and extended the ban on peremptory strikes from covering only explicit racial bias to include implicit bias as well.[170] While Washington does have a "somewhat unusual rulemaking process,"[171] this would not be an impractical measure for the Oregon Supreme Court to take. That is because "[e]ven in jurisdictions that have adopted rule 404(b), some courts adhere to the common-law view and continue to insist that the prosecutor has the burden of showing that the probative value of the evidence outweighs its dangerous tendencies."[172]

This new rule would be more in line with Oregon's current stance on character evidence by highlighting that propensity reasoning is inadmissible and criminal defendants should not be convicted based on evidence that tends to show their propensity to commit crimes. The Oregon Supreme Court recently acknowledged major concerns with admitting character evidence under OEC 404. Specifically, the court articulated four negative consequences of propensity evidence: that it would "(1) impair the opposing party's ability to present its case; (2) distract and confuse the factfinder; (3) prejudice the factfinder against a person; and (4) result in verdicts based on erroneous assumptions."[173] The court emphasized that "propensity evidence can give rise to prejudice, which can detract from the factfinder's ability to

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168 Eisen et al., *supra* note 104, at 48.

169 *See* Yu, *supra* note 144.

170 ACLU WASH., *supra* note 123.

171 Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 233, 247 (2020).

172 Imwinkelried, *supra* note 153, at 1470.

173 State v. Skillicorn, 367 Or. 464, 478, 479 P.3d 254, 264 (2021).

neutrally and thoroughly assess the evidence in the case."[174] Further, the court reasoned that "[u]ncharged misconduct evidence may cause a factfinder to shift the burden of proof to the defendant" and that "[a] juror may not believe that a defendant who has engaged in other misconduct should be presumed innocent of the charged misconduct."[175] A court rule demanding that gang evidence be more probative to the crime charged could mitigate these concerns. This rule would do so by allowing incredibly prejudicial evidence to be admissible only if the prosecution demonstrates a sufficient level of probity.

In other kinds of cases, the Oregon Supreme Court has exercised its authority to create new evidentiary procedures that are more in line with the Oregon Evidence Code. For example, in *State v. Lawson*, the Oregon Supreme Court overruled prior caselaw to heighten the standard for admitting eyewitness identification testimony to become more consistent with the Oregon Evidence Code.[176] The court's purpose was "to strike a proper balance between the utility of that evidence in convicting the guilty and its proclivity, on occasion, to inculpate the innocent."[177] This ruling "fundamentally altered the standard for eyewitness testimony at trial" by "establish[ing] a new procedure that shifts the burden of proof to prosecutors to show that an eyewitness's identification is sufficiently reliable."[178] The court overruled prior precedent because it was "at odds with . . . current Oregon evidence law."[179] If the court created a new procedure that shifted the burden on prosecutors when admitting gang evidence as prior bad acts, the procedure would align with the Oregon Evidence Code's bar on evidence employed as propensity reasoning. Prosecutors would have to show that the evidence they seek to admit is sufficiently

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174 *Id.*

175 *Id.*

176 State v. Lawson, 352 Or. 724, 746, 291 P.3d 673, 688 (2012).

177 *Id.* at 749, 291 P.3d at 690.

178 Daniel C. Re, *Oregon Supreme Court Shifts Burden of Proof for Eyewitness Testimony*, THE FEDERALIST SOC'Y (Apr. 24, 2013), https://fedsoc.org/commentary/publications/oregon-supreme-court-shifts-burden-of-proof-for-eyewitness-testimony [https://perma.cc/SC4H-YE4U]; *see also* Editorial, *A Check on Bad Eyewitness Identifications*, N.Y. TIMES (Dec. 5, 2012), https://www.nytimes.com/2012/12/06/opinion/a-check-on-bad-eyewitness-identifications.html [https://perma.cc/MR4T-WQWJ] ("The landmark ruling shifts the burden of proof to prosecutors to show that such identification is sufficiently reliable to be admissible as evidence at trial.").

179 *Lawson*, 352 Or. at 746, 291 P.3d at 688; *see also* Re, *supra* note 178 (explaining that the new standard is "more consistent with the Oregon Evidence Code").

probative to meet one of the prior bad acts exceptions and demonstrate that their purpose overcomes the bar against propensity evidence.

CONCLUSION

This Comment acknowledges that crimes committed in furtherance of gang membership are not trivial matters. The recent surge in Portland's homicide rate in the past four years is unarguably alarming. The problem is how this matter is handled. Increasing incarceration rates for anyone affiliated with a group labeled as a "gang" is not the solution to preventing this violence. If anything, that would increase the violence. One Portland-based study discussed that "[m]ost of the homicides resulted from ongoing personal disputes, followed closely by ongoing gang or group conflicts."[180] "Gang or group" affiliation is actually a risk factor for being a *victim* of nonfatal shootings or homicides.[181] By changing the community's framework to perceive people affiliated with gangs as potential victims—rather than falsely assuming that they are criminals—our society can work toward ending the cycle of violence. As the California Partnership for Safe Communities stated in their Portland report, "If the goal of public safety strategies is to reduce gun violence in the near term, invest in and focus on the people that are at the highest risk now."[182]

The United States' criminal justice system is intended to focus primarily on two values: justice and fairness. Unfortunately, the current system fails in both regards. How can there be justice when a jury votes to convict a person of a crime she did not in fact commit? How can there be fairness when jurors ignore reasonable doubt to imprison a person purely for associating with a particular social group? State courts and legislatures are obligated to uphold both the United States' and their own constitutions at all costs to protect the liberty of the nation's citizens. Oregon has a duty to rectify the injustices of reverse jury nullification and must ensure that the probative value of gang evidence admitted under the prior bad acts rule outweighs its substantial prejudice. If the Oregon legislature will not act, the Oregon Supreme Court has an obligation to do so in the interest of justice.

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180 Bernstein, *supra* note 55.

181 *Id.*

182 *Id.*