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PRESERVING DUE PROCESS: APPLYING *MONELL* BIFURCATION TO STATE GANG CASES

*Fareed Nassor Hayat**

ABSTRACT

State gang statutes deprive criminal Defendants of their 5th and 14th Amendment due process rights by creating a mechanism by which prosecutors admit irrelevant, otherwise inadmissible, hearsay and unduly prejudicial character evidence in criminal trials. This Article asserts that both well-established evidentiary standards and our commitment to fundamental due process protections are jeopardized by state gang statutes. Moreover, state gang statutes were created, and have operated, to incarcerate poor, young men of color—including seasoned gang members, novice gang members, and simply accused gang members—under a peculiar set of legal standards that violate the plain language of the United States Constitution. This Article proposes the use of the Monell bifurcation standard to address this problem. Specifically, separating gang allegations from substantive criminal acts in the prosecution’s case in chief will ensure criminal Defendants, including gang members, due process of law.

This Article proceeds in three parts. Part I provides an overview of state gang statutes by challenging their common justifications, broad reach, and application. Part II explores the effects of state gang statutes upon evidentiary standards and describes how the admission of unduly prejudicial character evidence amounts to a due process violation. Part III proposes the use of something akin to Monell bifurcation to state gang prosecutions to preserve criminal Defendants’ fundamental right to a fair trial. A Monell bifurcation requirement would compel state prosecutors to prove, beyond a reasonable doubt, the substantive criminal offense, prior to the admission of any gang evidence in the criminal trial. This application of the Monell bifurcation standard in State gang cases would serve to minimize the insurmountable prejudice of gang related evidence.

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I. INTRODUCTION

In November 2013, the Baltimore City Police Department (“BPD”), the Federal Bureau of Investigation (“FBI”), and the Drug Enforcement Agency (“DEA”), armed with assault rifles, military armor, and tear gas, kicked in doors, smashed windows, and entered the homes of mothers, fathers, grandmothers, grandfathers, girlfriends, cousins, and neighbors in the economically depressed, drug-inflicted, and spiritually-defeated area of Greenmount, Baltimore City, Maryland.¹ As a result of the raid, nearly fifty African American men were arrested. They were charged with gang conspiracy, gang entrenchment in the Black Guerrilla Family (“BGF”),² murder, drug distribution, witness intimidation, robbery, and an assortment of violent crimes. This raid would later prove to be the largest gang indictment in Baltimore City history. One of those young men was my client, KJ.³ The United States Attorney for the District of Maryland, the State’s Attorney of Baltimore City, the Baltimore City Police Commissioner, and the Baltimore City Mayor all heralded the invasion, capture, and detention of these “gang members” as a great success, insisting that the streets of Baltimore would be safer and that life would be easier to bear with the removal of these so-called predators.^{4,5}

1. Greenmount has a 37.7% poverty rate compared to the overall 15.2% poverty rate in Baltimore City; a homicide rate of almost double the overall city at 39.9 homicides per 10,000 residents, compared to 20.9 homicides per 10,000 residents in Baltimore City overall. Further, the Greenmount area has a life expectancy of 65.9 years, compared to a life expectancy of 71.8 years in Baltimore City overall. *2011 Health Profile Greenmount East*, Baltimore City Health Department (2011), <https://health.baltimorecity.gov/sites/default/files/24%20Greenmount.pdf>.

2. The Black Guerilla Family originally began as a political organization that “grew out of increasing inmate interest and concern about prison conditions in California and across the country and with the patterns of brutal repression and abuse on the inside . . . The Black Guerrilla Family was created to raise awareness, concern, and unity among inmates and the American public about both the harsh conditions that Black people faced as a whole, and the intense repression that Black inmates, especially those with unpopular political beliefs, faced inside California’s prisons.” Azadeh Zohrabi, *Resistance and Repression: The Black Guerrilla Family in Context*, 9 HASTINGS RACE & POVERTY L.J. 167, 178 (2012). To this date, notwithstanding criminal gang activity, there exists an emphasis in BGF to fight against racial injustice. *Id.*

3. KJ’s full name will be omitted from this article. All sources relating to KJ’s case are on file with the author and available upon request.

4. Justin George, *Baltimore Police Raid East Baltimore Homes*, BALTIMORE SUN, (Nov. 12, 2013), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-bgf-raid-20131112-story.html>.

5. Notwithstanding the declaration of improved living conditions for the community, none of the law enforcement agents or elected officials addressed the catalyst for such “predators” existence or a tangible plan to ensure that new generations of inner-city youth, would not follow the same blueprint of the “Underdeveloped Black America.” “The oppressed Black majority is generally more subject to the

Prior to the 2013 BGF gang indictment, law enforcement arrested KJ nearly twenty-five separate times, alleging crimes of theft, carjacking, robbery, assault, and murder. These arrests resulted in only one conviction for a charge of handgun possession.⁶ Despite his lone criminal conviction, KJ spent almost 75% of his adult life behind bars or on pretrial detention.⁷ In the 2013 BGF gang indictment, KJ was charged with gang conspiracy, first-degree murder, and four attempted murders, each as substantive criminal charges and predicate acts⁸ to the gang conspiracy charge. He was also charged with use of a firearm in a crime of violence and thirteen other felonies. KJ had already previously been charged with or suspected of every substantive allegation in the 2013 BGF gang indictment.⁹ After being detained for years awaiting trial on these prior

violence of American capitalism than whites because (1) it is concentrated in the lowest paid, blue collar, unskilled and service sectors of the labor force; (2) it comprises a substantial portion of the total U.S. reserve army of labor, the last hired and the first fired during periodic recessions; and (3) it is the historic target of brutality within a racist culture and society, occupying an inferior racial position which has remained unaffected since the demise of slavery. America is not simply a capitalist state, but a racist state, a governmental apparatus which usually denies access and power to most Blacks solely on the basis of racial background.” MANNING MARABLE, *HOW CAPITALISM UNDER DEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY*, 107-108 (South End Press 1983).

6. In 2011, KJ was charged with attempted murder. The State alleged that KJ shot the complaining witness in the eye as an enforcer for the BGF. *Jones v. State of Maryland*, No. 113310058, 2019 WL 2929034, at *1 (Md. Ct. Spec. App. 2019). The complaining witness refused to testify in the trial. KJ was eventually offered and accepted a plea agreement to the handgun that was found in his possession just minutes after the shooting. “In 2013, Mr. Jones had plead guilty to the possession of a handgun charge in exchange for the State’s agreement to nolle-pross, what is the act at issued in this case, the attempted murder of Perry Johnson.” Brief of Appellant-Defendant at 7, *Jones v. State of Maryland*, No. 113310058, 2019 WL 2929034, (Md. Ct. Spec. App.). While such a favorable plea would seem to support the need for the Maryland gang statute to hold dangerous criminal Defendant’s accountable, the reality, was that the complaining witness was the aggressor in the shooting, went back into a house, retrieved a gun and began firing at KJ where no firearms had been previously displayed. His unwillingness to testify was not due to fear of retribution from the BGF as prosecutors and supporters of gang statutes purport, rather fear of incriminating himself in the attempted murder that he committed.

7. According to KJ’s criminal history report, he had been arrested twenty-three prior times before the gang indictment. Of these arrests, thirteen were as a juvenile. The earliest date occurred on September 21, 2000. In addition, there are two events without dates showing KJ in police custody. These two incidents labelled KJ as a gang member at age thirteen based on the Lotus notes gang database indicated in the report and used by Baltimore City police. BALTIMORE POLICE DEP’T, Person Report (Oct. 18, 2013).

8. A predicate offense is the criminal act that is “committed for the benefit of, at the direction of, or in association with a criminal gang.” MD. CODE ANN., CRIM. LAW § 9-804 (a)(2) (2017).

9. KJ was arrested on Jan. 12, 2007 for attempted first degree murder, attempted second degree murder, assault in the first degree, assault in the second degree, attempted armed robbery, illegal possession of a handgun and discharge of a firearm. All of the charges were dropped in Circuit Court on Nov. 6, 2007. Docket, *State v. K.J.*, No. 107024028 (Md. Cir. Ct. Nov. 6, 2007). KJ was charged on Jul. 11, 2008 with attempted first degree murder, attempted second degree murder, armed carjacking, armed robbery, assault, and theft. All charges were dropped on Aug. 3, 2009. Docket, *State v. KJ*, No. 108193011 (Md. Cir. Ct. Aug. 3, 2009). On Nov. 10, 2008 KJ was charged with first degree murder, first degree assault, use of a handgun while committing a crime, and possession of a handgun. All charges were dropped on Aug. 8, 2010, but during this time KJ remained incarcerated in case Docket, *State v. KJ*, No. 108315058 (Md. Cir. Ct. Aug. 8, 2010). On May 6, 2011, KJ was charged with attempted first degree

criminal allegations, each case was independently dismissed.¹⁰ The State was unable to produce credible evidence to satisfy the very high burden of proof beyond a reasonable doubt.¹¹

To illustrate how gang statutes violate criminal Defendant's due process rights, it is helpful to highlight one of KJ's charges—murder. It is important to note that what is demonstrated through this example also occurred in the prosecution of each of the other substantive charges against KJ. KJ was accused of being the perpetrator of a 2007 murder in the hallway of a Baltimore City apartment building. However, the State initially lacked enough evidence to bring charges because there were no eyewitnesses, DNA, other physical evidence, credible motive, or circumstantial evidence connecting KJ to the murder. Indeed, the only evidence that detectives were able to gather were the statements of a self-admitted member of the BGF, whom the prosecutors acknowledged was a felon, addict, thief, and liar.¹² This specific witness was held on unrelated gun charges in Baltimore City and faced up to twenty-five years in prison.¹³ The witness claimed that KJ admitted to committing the

murder, attempted second degree murder, first degree assault, second degree assault, use of a handgun in committing a crime, possession of a handgun, reckless endangerment, and discharge of a firearm. All charges, except the handgun possession charge were dismissed. Docket, *State v. K.J.*, No. 111126014 (Md. Cir. Ct. May 6, 2011).

10. All but the handgun charge that KJ plead guilty to in 2011 were dismissed. *See* Docket, *K.J.*, No. 111126014 (Md. Cir. Ct. May 6, 2011).

11. Prosecutors claim that due to witness intimidation cases involving alleged gang members are difficult to successfully prosecute. ALAN JACKSON, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 5 (American Prosecutors Research Institute 2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf (“Indeed, the trademark characteristic of a gang case is the difficult witness.”). While witness intimidation does occur, an equal challenge to successfully prosecuting cases against alleged gang member is that prosecutors charge crimes that either did not happen, are over charged from their inception or based on officer fabrication or incredible witnesses. *See* H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PA. J.L. & SOC. CHANGE 341, 363 (2015); *see, e.g.*, *People v. Ellis*, 735 N.E.2d 736, 741-42 (Ill. App. Ct. 2000) (finding prosecutorial misconduct in a gang case where the state used perjured testimony of a witness).

12. Self-admitted gang members, or equally culpable Defendants, are often used as witnesses against Defendants in gang cases. Prosecutors effectively convince jurors that gang identity is deplorable for the Defendant being prosecuted. *See Ellis*, 735 N.E.2d at 746. Yet, prosecutors compel jurors to find the same type of individuals credible in their testimony against the Defendant. In KJ's case, the prosecutor argued, in both the opening and closing statements, that the witnesses in the case against KJ were horrible people. *See* Tr., *State v. KJ*, No. 113310058, 68 (Md. Cir. Ct. May 19, 2016). In short, Prosecutors argue that gang members lie, cheat, commit crimes and exist in the muck and the mire of criminal gang activity. The prosecutor went on to argue that those government witnesses, who admit to being gang members, should be believed in their testimony against KJ, because in order to catch someone, like KJ, those who exists in the same places, someone covered in the same muck, can tell you what goes on down there. *See id.*

13. CM was charged in Baltimore City Circuit Court for firearm possession with felony conviction, maximum sentence of 15 years. *See* Docket, *State v. CM*, No. 107178031 (Md. Cir. Ct. Oct. 17, 2007). CM was also charged with handgun possession, maximum sentence of 3 years, probation violation with five years' incarceration suspended. *See* Docket, *State v. CM*, No. 105293022 (Md. Cir. Ct. Oct. 20, 2005). He was also charged in case number 104280055 with 15 years incarceration suspended

murder even though he did not see the crime, nor did he have any distinctive knowledge of the crime.¹⁴ After a year of investigation, multiple witness interviews, an autopsy, and firearm examination and recovery, the state prosecutor declined to bring criminal charges against KJ. The prosecutor believed that the word of the self-admitted gang member, as the only evidence available, was insufficient to charge KJ with first degree murder.¹⁵

Nevertheless, in 2013 KJ was once again charged with the 2007 unsolved murder.¹⁶ The factor that made the difference between 2007, when there was insufficient evidence to charge KJ with murder, and 2013, when KJ was arrested, indicted, and detained, was the passage of the Maryland gang statute, Maryland Code § 9-804.¹⁷ Maryland Code § 9-804 defines a criminal gang as:

a group or association of three or more persons whose members: [] individually or collectively engage in a pattern of criminal gang activity; [] have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and [] have in common an overt or covert organizational or command structure.¹⁸

In 2013, a new prosecutor, one armed with a new legislative tool designed to prosecute suspected and actual gang members, charged KJ with the 2007 murder both substantively and as a predicate act for the 2013 gang case. When KJ's trial finally occurred in May of 2015, the detective who investigated the case in 2007 and 2013, was asked, under

at the time of naming KJ as the murderer in the 2007 allegation. *See* Docket, State v. CM, No. 104280055 (Md. Cir. Ct. Oct 10, 2004).

14. KJ was found not guilty of use of a handgun while in the commission of the murder, but in contradiction to the evidence presented at trial, found guilty of the substantive charge of murder. In addition, Christopher Meadows claimed that the shooting was because the decedent had told on other individuals, not KJ, or BGF members, but unrelated members of a rival crew. *Tr.*, State v. KJ, No. 113310058, at 21 (Md. Cir. Ct. June 10, 2016); *see also id.* at 74 (Md. Cir. Ct. May 27, 2016).

15. Detective Lloyd, *Progress Report*, BALTIMORE POLICE DEP'T (May 19, 2009) (“[S]uspect [KJ], according to ASA D. Giblin, [in] the matter of the Homicide of Gregory Rochester, authorization for an arrest warrant for KJ was not approved.”).

16. *See Indictment*, State v. KJ, No. 113310058 (Md. Cir. Ct. 2013).

17. First introduced in 2007, Maryland Code Criminal Law § 9-804 allows prosecutors to now introduce evidence that would normally be inadmissible hearsay to show a “pattern of criminal gang activity.” MD. CODE ANN., CRIM. LAW § 9-804 (2007). After its ratification in 2010, subsequent amendments to the language of the statute have imposed harsher and harsher punishments where consecutive sentencing to the substantive offenses is now mandatory if the Defendant is found guilty on §9-804 for 2 or more offenses. MD. CODE ANN., CRIM. LAW § 9-804 (a)(c)(ii)(2) (2010). Most recently in 2017, the punishments were made even harsher. They now read: “Except as provided in subparagraph (ii) of this paragraph, a person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 15 years or a fine not exceeding \$ 1,000,000 or both.” CRIM. LAW. § 9-804 (f)(i)(1) (2017).

18. CRIM. LAW § 9-804.

oath, what *new* evidence had been acquired between the determination made in 2007 that there was not enough evidence to charge KJ and the 2013 trial involving the gang allegation. His answer was that “*no new evidence*” had been acquired.¹⁹ The following exchange can be found in the trial transcript:

COUNSEL: You located more information to prove that KJ actually committed this murder, right?...

DETECTIVE: . . . No, sir

COUNSEL: So, no new forensic evidence?

DETECTIVE: . . . No, sir.

COUNSEL: No new witnesses?

DETECTIVE: . . . No, sir.

COUNSEL: [How about] KJ's DNA?

DETECTIVE: No, sir, there wasn't DNA.

COUNSEL: [How about] eyewitnesses who saw KJ do [the murder]?

DETECTIVE: . . . No, sir . . .

COUNSEL: [How about] the recovery of the gun from KJ?

DETECTIVE: No, sir²⁰

To satisfy Maryland Code § 9-804, prosecutors must prove that the individual was part of a gang by proving that the particular organization has customs and hierarchies. Prosecutors must also prove that three or more individuals entered into an agreement to commit a crime in furtherance of that organization or “gang.”²¹ Importantly, the statute permits prosecutors to use hearsay, evidence that is otherwise impermissible, and acts of other members of the conspiracy, to prove the gang’s existence.²²

In their attempt to prove the murder, prosecutors alleged that the 2007 killing was committed in furtherance of the BGF, a “gang.”²³ Thanks to this allegation, prosecutors were able to use Maryland Code § 9-804 to discuss multiple crimes in the Greenmount neighborhood purportedly committed by BGF members, to prove that KJ committed the 2007

19. Tr., State v. KJ, No. 113310058, 18-20 (Md. Cir. Ct. June 1, 2016).

20. *Id.*

21. MD. CODE ANN., CRIM. LAW § 9-804; MD. CODE ANN., CRIM. LAW § 9-801 (defining “criminal gang” as “a group or association of three or more persons whose members: [] individually or collectively engage in a pattern of criminal gang activity; [] have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and [] have in common an overt or covert organizational or command structure.”).

22. For example, in KJ’s trial, the state, over defense counsel’s objection, introduced the names of alleged BGF members allegedly associated with KJ. Tr., State v. KJ, No. 113310058, 38-39 (Md. Cir. Ct. June 6, 2016). The Court also allowed the statements of non-testifying alleged gang members to be admitted into evidence notwithstanding that KJ was unable to confront those witnesses. Tr., State v. KJ, 30 (Md. Cir. Ct. May 27, 2016); Tr., State v. KJ, No. 113310058, 30 (Md. Cir. Ct. May 27, 2016).

23. Tr., State v. KJ, No. 113310058, 64-67 (Md. Cir. Ct. May 19, 2016).

murder—something that a prosecutor in ordinary circumstances would not be permitted to do.²⁴ The State’s ability to simultaneously charge KJ with gang conspiracy and substantive murder helped the State secure a guilty verdict for murder with evidence that was insufficient to support an indictment in 2007.

Gang evidence, generally, and the Maryland gang statute, specifically, permits, requires, and intends to deprive criminal Defendants of their fundamental right to a fair trial through the use of unduly prejudicial character evidence.²⁵ The admissibility of gang evidence through similar statutes across the country forces poor, young men of color, seasoned gang members, novice gang members, or simply accused gang members to defend themselves under a different set of legal standards than what the Constitution mandates.²⁶ Gang evidence creates a peculiar system of justice by unjust means. This different set of legal standards should be concerning for all criminal Defendants and those who seek justice. Believers in constitutional principles of fundamental fairness, equal protection, and due process must resist the slippery slope of permitting trampling of the detested “gang member” from becoming the trampling of us all. The solution to ensure criminal Defendants’ fundamental right to a fair trial is applying the *Monell* bifurcation standard to state gang prosecutions.

This Article proceeds in three parts. Part II provides an overview of state gang statutes by challenging their common justifications, broad reach, and application. Part III explores the effects of state gang statutes upon evidentiary standards and explains how admitting unduly prejudicial character evidence amounts to a due process violation because it denies the criminal Defendant his constitutional right to a fair trial. Finally, Part

24. For example, the court admitted a witness’s testimony concerning what he “heard” someone say about BGF violence. Tr., State v. KJ, No. 113310058, 22-23 (Md. Cir. Ct. June 3, 2016). The witness stated, “this gang I was a part of, I know how violent they are. I mean I’ve seen and heard what could happen.” *Id.* at 17-19. The defense objected to what he “heard,” but was overruled. *Id.* at 20-25. The witness then testified that “death” happens to those who testify, without clarifying whether the basis of knowledge was what he “heard” or what he “seen.” *Id.* at 6-12.

25. A Defendant’s right to a fair trial is applicable to the states under the Due Process Clause of the Fourteenth amendment, stating: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const., amend. XIV, §1. A Defendant’s constitutional right to fair trial is violated where the introduction of the [gang] evidence is so prejudicial as to render the trial fundamentally unfair. See *People v. Albarran*, 149 Cal.App.4th 214, 217 (2007).

26. State gang statutes permit trials based on criminal allegations that have been previously tried, plead, or dismissed with prejudice, in contradiction to the limitation of the Fifth Amendment of the U.S. Constitution. See David R. Truman, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U.L.Q. 683, 720-721 (1995) (exploring the rise of anti-gang legislation and how California’s STEP act and those statutes modeled after it are modeled under federal racketeering law); Linda Koenig and Doris Godinez-Taylor, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CALIF. L. REV. 724, 729-30 (1982) (setting forth three situations in which a defendant faces double jeopardy for underlying predicate offenses).

IV proposes a solution to ensure criminal Defendants' fundamental right to a fair trial the *Monell* bifurcation. A bifurcation requirement would compel state prosecutors to prove a substantive criminal offense beyond a reasonable doubt before the admission of any gang evidence, thus minimizing the risk of insurmountable prejudice and ensuring due process.

Bifurcation begins a process of demystification of criminal Defendants in state gang cases. Criminal Defendants in state gang cases are not "all powerful," well-equipped members of a group who can avoid or overcome prosecution. These Defendants are undereducated, under resourced, descendants of the oppressed, sometimes dangerous and violent, but almost always poor and minority, that police and legislators disproportionately degrade, disregard and hold to a completely different standard under the law.

II. JUSTIFYING THE EXISTENCE AND REACH OF STATE GANG STATUTES

A. *The Racialized Gang Myth*

There is an ongoing national narrative suggesting that gang violence is on the rise.²⁷ Research has shown, however, that concerns over gang violence are exaggerated.²⁸ Indeed, there are fewer gang members today than there were a decade ago.²⁹ Today, gang violence accounts for a smaller proportion of crime in relation to other causes,³⁰ and the vast majority of gang members do not commit violent crimes.³¹ This Article

27. NAT'L GANG CTR., *Measuring the Extent of Gang Problems* (Aug. 12, 2019), <https://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems> ("The most recent estimate of more than 30,000 gangs represents a 15 percent increase from 2006 and is the highest annual estimate since 1996.").

28. K. Babe Howell, *Gang Policing: The Post Stop-And-Frisk Justification For Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 7 (2015) ("The notion that gangs are growing exponentially in number and membership and are responsible for the majority of violent crime is nearly impossible to reconcile with the fact that violent crime, and indeed all crime, is down throughout the country.").

29. Judith Greene & Kevin Pranis, JUSTICE POLICY INST., *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, 3 (2007), http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf ("All of the available evidence indicates that gang members play a relatively small role in the crime problem despite their propensity toward criminal activity. Gang members appear to be responsible for fewer than one in four drug sales; fewer than one in 10 homicides; fewer than one in 16 violent offenses; and fewer than one in 20 index crimes.").

30. *Id.*

31. Greene & Pranis, *supra* note 29, at 4 ("National estimates and local research findings suggest that gang members may be responsible for fewer than one in 10 homicides; fewer than one in 16 violent offenses; and fewer than one in 20 serious [] crimes."). Although 1 in 10 homicide being committed by a small portion of the population may seem of great concern, this Article argues that the perceived impact of gang violence, murders included, is much larger than reality supports. Another example comes from a report from the Durham County Criminal Justice Resource Center in North Carolina revealing that each

does not argue that gang violence does not exist; instead this Article argues that public perception of gang violence is disproportionate to reality.³² Police generated estimations identify a disproportionate number of young Black and Latino men as gang members, while other estimates suggest that white men make up 40% of gang membership.³³ Police agencies' definitions of gangs and gang members are not uniform; rather, police agencies are given discretion in defining gangs and identify their members.³⁴ Police agencies routinely "rely on criteria that are predominantly non-criminal and relate to how a person looks, acts, who s/he is seen with, and what s/he wears to determine if one is a gang member."³⁵ When law enforcement estimates of racial makeup of gang membership were compared to surveys conducted through The National Longitudinal Survey of Youth, "African Americans and Latinos were roughly 15 times more likely than non-Hispanic Whites to be identified by the police as gang members."³⁶ These biased, police generated

year an average of only 19.6% of the crimes committed in Durham County by "validated gang members" between 2009 and 2017 were violent crimes. Jim Stuit, DURHAM CTY. CRIMINAL JUSTICE RESOURCE CTR., *Gang Crime Report, 2009-2017 Durham, NC* (June 13, 2018), <https://www.dconc.gov/home/showdocument?id=25155>. Also, we are heavily misled about the prevalence of gangs among young people. According to the latest National Crime Victimization survey, of the sample group of students age 12-18, only 10.7% reported gangs present at their schools. Christina Yanez & Deborah Lessne, *Student Victimization in U.S. Schools: Results From the 2015 School Crime Supplement to the National Crime Victimization Survey*, U.S. Dep't of Educ., at 5 (Dec. 2018), <https://nces.ed.gov/pubs2018/2018106REV.pdf>; see also *Understanding Youth Gangs: Resources for Schools*, TEX. SCHOOL SAFETY CTR. (Aug. 2015), <https://txssc.txstate.edu/topics/school-violence/articles/understanding-youth-gangs> ("Researchers caution against labeling all youth gang members as violent given that gang members do not necessarily specialize in violence, but rather spend the majority of their time 'hanging out' with friends as most youth do.").

32. Howell, *supra* note 28, at 1.

33. See Greene & Pranis, *supra* note 29, at 3 ("Law enforcement sources report that over 90 percent of gang members are nonwhite, but youth survey data show that whites account for 40 percent of adolescent gang members. White gang youth closely resemble Black and Latino counterparts on measures of delinquency and gang involvement, yet they are virtually absent from most law enforcement and media accounts of the gang problem. The disparity raises troubling questions about how gang members are identified by police").

34. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 645-49 (2011) (Law enforcement agencies are given substantial discretion to identify and define gangs in their own way, thus some may include white supremacists, or bikers, or adopt other definitions. Law enforcement agencies determine criteria as well as create, maintain, and share gang databases for intelligence purpose. Most gang units rely on criteria that are predominantly non-criminal and relate to how a person looks, acts, who he is seen with, and what he wears); Greene & Pranis, *supra* note 29, at 27 (listing criteria for gang database in California where only "two of the ten criteria" must be met. Two of those criteria include "associate[ion] with a known gang member on a regular basis" and "wears gang clothing, symbols . . .").

35. Howell, *supra* note 34, at 649.

36. Greene & Pranis, *supra* note 29, at 27 (comparing law enforcement surveys conducted through National Youth Gang Survey ("NYGS") and youth surveys conducted through "[t]he National Longitudinal Survey of Youth, which was sponsored by the U.S. Bureau of Labor Statistics, is the only source of survey data on youth gang membership in the United States that is based on a nationally representative household sample").

estimations lead to a disproportionate number of young Black and Latino men being charged with gang related crimes in comparison to their white male counterparts.³⁷ Biased perceptions of criminality begets disproportionate estimations of Black and Latino gang involvement. In turn, these over-estimations lead to unequal enforcement upon the bodies and souls of Blacks and Latino men. Legal scholars have proven, through empirical data, that the use of gang affiliation as a basis of enforcement is not only unduly prejudicial,³⁸ but also inherently racist.³⁹ When faced with the evidence that we should be no more worried about gang members than any other alleged criminal or group, a Defendant, no matter his gang affiliation, should be provided the same rights the Constitution guarantees to all.

B. The Rise of State Gang Statutes

The Racketeer Influence and Corruption Act (“RICO”) has been cited as the basis for the proliferation of State gang statutes.⁴⁰ RICO’s

37. Howell, *supra* note 34, at 636. In this article, the author distributed surveys to defense attorneys nationwide inquiring, among other things, the race of the client. The findings were illuminating: “Most of the respondents had represented Black (86.8%) and Latino (86.8%) clients accused of having gang affiliations. Only 24.5% percent indicated that they had represented White clients with alleged gang affiliations. Finally, 13.2% of respondents reported representing Asian clients who were alleged to have gang affiliation. Despite the fact that nearly a quarter of respondents reported representing White clients with alleged gang affiliation, the comments indicated that Black and Latino clients were far more likely to face these allegations.”

38. Mitchell Eisen, Brenna Dotson, Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE DISC. 2 (2014).

39. Sara Lynn Van Hofwegen, Note: *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. Cal. Interdis. L.J. 679, 683 (2009). Despite researchers finding white youth comprise the most prominent racial group in all gangs formed after 1991, anti-gang legislation has led to the mass incarceration of minority racial groups because law enforcement agencies like California’s annual reports from the attorney general, “consistently focus on Black, Hispanic, and Asian gangs and make only passing reference to white street gang members.” See also Class Action Complaint, *Chicagoans for an End to the Gang Database v. City of Chicago*, No. 1:18-cv-04242 (N.D. Ill. June 19, 2018) (lawsuit including both Fourteenth Amendment due process and equal protection claims), https://www.macarthurjustice.org/wp-content/uploads/2018/06/cpd_gang_database_class_action_complaint.pdf; IN THIS LAWSUIT INCLUDES BOTH A 14TH AMENDMENT DUE PROCESS COMPLAINT AND A 14TH AMENDMENT EQUAL PROTECTION CLAIM. ALEXANDER, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*. (New York: [Jackson, Tenn.]: New Press; Distributed by Perseus Distribution, 2010). Jeffrey J. Mayer, *Individual Moral Responsibility And The Criminalization Of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 958 (1993) (“The fight against street gangs is a fight against African-American, Hispanic, and, to a lesser degree, Asian youth violence and not against the general plague of American violence.”).

40. Kim Strosnider, *Anti-Gang Ordinances After City Of Chicago v. Morales: The Intersection Of Race, Vagueness Doctrine, And Equal Protection In The Criminal Law*, 39 AM. CRIM. L. REV. 101, 107 (2002) (“Ten states have comprehensive or omnibus statutory schemes dealing with gangs, many of them patterned after California’s STEP Act or federal racketeering law.”); David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L. Q. 683, 686 (1995) (“California, home of the ‘street gang capital of the United States,’ took the lead in this

purported legislative intent was to target sophisticated criminal enterprises.⁴¹ Similarly, state gang statutes purportedly target those with knowledge that “[the gang’s] members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.”⁴² Illinois has also codified a similar statute.⁴³

Similar to these states, twenty-six other states and the District of Columbia have gang prevention laws that criminalize participation in a criminal gang organization and acting in furtherance of the organization.^{44,45}

The purported purpose of these State gang statutes is to provide prosecutors with a new set of tools to successfully prosecute and hold accountable criminal gang members and the organizations that supported them.⁴⁶ Notwithstanding gang members’ minimal educational and

statutory fight against gangs by passing the Street Terrorism Enforcement and Protection Act (STEP Act) in 1988. Similar in structure to the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the STEP Act creates a new substantive crime of participation in criminal street gang activity.”).

41. *United States v. Turkette*, 452 U.S. 576, 588–89 (1981) (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922–923 (1970)) (noting the following as the purpose of RICO: “(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.”).

42. CAL. PENAL CODE § 186.22(a).

43. 720 ILL. COMP. STAT. ANN. 5/25-5.

44. *Highlights of Gang-Related Legislation*, NAT’L GANG CTR. (Dec. 31, 2018), www.nationalgangcenter.gov/Legislation/Highlights.

45. Specifically, § 9-804(a)(1) prohibits “participat[ing] in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity.” MD. CODE ANN., CRIM. LAW § 9-804(a)(1). § 9-801 defines “criminal gang” as “a group or association of three or more persons whose members: [] individually or collectively engage in a pattern of criminal gang activity; [] have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and [] have in common an overt or covert organizational or command structure.” *Id.* at § 9-801. A pattern of activity is defined as “the commission of, attempted commission of, conspiracy to commit, or solicitation of two or more underlying crimes or acts by a juvenile that would be an underlying crime if committed by an adult, provided the crimes or acts were not part of the same incident.” *Id.*

46. For example, in passing California gang state, the legislature explicitly noted that “the Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected . . . It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by

economic resources,⁴⁷ state officials argue that gang members successfully surmounted prosecution under the old laws. Since their passing, state gang statutes have been used to arrest, convict, incarcerate, and over-prosecute individuals that could have been, if guilty, successfully held accountable using traditional methods.⁴⁸ Rather than investigate cases, develop credible evidence, and abide by constitutional constraints, prosecutors use gang statutes to skirt legal requirements and garner convictions where evidence may not support a guilty verdict. No empirical studies have been found supporting the policy position that “gang members” cannot be successfully prosecuted without a gang statute.⁴⁹ Nonetheless, using gang statutes, prosecutors can “almost guarantee that the jury will hear gang evidence,”⁵⁰ ensuring conviction where it may otherwise be unjustified because the statutes eviscerate evidentiary standards, allowing the prosecutor to use unduly prejudicial character evidence.⁵¹

The Supreme Court has consistently urged that no matter the notoriety or horrendousness of the crime, the Defendant’s due process rights may

focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.” CAL. PENAL CODE § 186.21 (2019).

47. Research has shown that gang members are more likely to come from poor neighborhoods and have low academic achievement. Karl G. Hill et al., *Childhood Risk Factors for Adolescent Gang Membership: Results from the Seattle Social Development Project*, 36 J. RES. CRIME 300, 322 (1999) (“Family composition (one parent in the home versus two) and poor family management significantly predicted gang membership . . . Poor school achievement, attachment, commitment, and aspirations at ages 10 to 12 all predicted later gang membership, as did being identified as learning disabled in elementary school.”).

48. See, e.g., *Burris v. State*, 78 A.3d 371, 383–84 (2013). In *Burris*, the Defendant, a gang member, was charged with murder but not the substantive gang statute. *Id.* (“he was not charged with a gang-related crime, such as participation in a ‘criminal gang’ under Sections 9–804(a) or (b) of the Criminal Law Article, Maryland Code or conspiracy to commit a crime with another gang member.”). The Defendant was found guilty, but the conviction was reversed because the appellate Court found that that the State had failed to prove a nexus between the crime and the alleged gang membership. *Id.* And although, the gang evidence was admitted in the trial, even without the gang statute, the point is that the State does not need gang statutes to admit in gang evidence nor does the State need a gang statute to prove guilt of the Defendant – apparent from the initial guilty finding. The State can go through traditional character exception such as proving identity, motive, or common scheme or plan. See, e.g., MD. R. EVID. 5-404 (allowing evidence of other crimes to prove identity, motive, or common scheme). But, gang statutes have the ability to not even require the State to prove an exception, where the gang statutes themselves make gang membership a required element. *Gonzalez v. State*, 366 P.3d 680, 687 (Nev. 2015) (noting that gang evidence is “generally not” admissible, but for, the gang enhancement in Nevada).

49. For example, there is no data supporting the idea that that gang members escape prosecution or conviction at a lower rate than non-gang member Defendants. Rather what is shown is that violent crime–gang related or not–is on decline. Howell, *supra* note 28, at 7 (citing studies that “confirm that crime has decreased by nearly 80% in the past two decades.”). To prove the necessity for gang statute would be a study looking at criminal acts (i.e. robbery, murder or otherwise) that are gang related and those that are not. To be empirical, studies should show that gang members are found not guilty, or cases are dismissed at a higher rate.

50. Eisen, *supra* note 38, at 2.

51. See *infra* Part II (2).

not be compromised.⁵² State gang statutes, however, have left clients like KJ with limited protection. Specifically, the statutes, although not explicitly stated, deprive the Defendants of their due process rights and already few due process protections.⁵³

III. STATE GANG STATUTES VIOLATE CRIMINAL DEFENDANTS' CONSTITUTIONAL RIGHTS

This Part outlines how the constitutional rights of criminal Defendants are violated and diminished when prosecutors charge Defendants under state gang statutes. This Part proceeds in three parts. First, it summarizes the general rules regarding character evidence in a criminal trial. Next, this Part analyzes character evidence in the context of gang statutes in comparison to the prescribed rules of evidence for ordinary criminal trials. Finally, the last section of this Part analyzes the California Supreme Court case *People v. Albarran* in order to demonstrate how state gang statutes violate criminal Defendant's constitutional rights by permitting prosecutors to rely on character evidence that would otherwise be impermissible—a clear due process violation.

A. Defining Character Evidence

Character evidence is a term of art defined as evidence of a person's general disposition or pertinent traits.⁵⁴ Character evidence is “a synonym

52. Two examples of this are in *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) and *Davis v. Washington*, 547 U.S. 813, 832–33, 224 (2006). In *Miranda*, the Defendant was found “guilty of kidnapping and rape,” but the Court still found, despite the crime alleged, that Defendants’ have a right against self-incrimination. In dissent, Judge Clark argued that the horrendousness of the allegations alone outweighed the due process concerns, stating that “Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law . . . it may make the analysis more graphic to consider the actual facts . . . [o]n March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona . . . Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own fine-spun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.” *Miranda v. Arizona*, 384 U.S. 436 at 517–21 (1966) (Clark, J. dissenting). Secondly, in *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court expressly rejected a relaxation of a Defendant's confrontation clause rights, stating that “Respondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.” *Id.* at 833.

53. See *infra* Part II (2).

54. “Evidentiary character refers to a person's general disposition or a general trait, such as honesty, chastity, violent temperament, or peacefulness.” Michael D. Claus, Note, *Profiles, Syndromes, and the Rule 405 Problem: Addressing A Form of Disguised Character Under the Federal Rules of Evidence*, 88 NOTRE DAME L. REV. 973, 983 (2012). The term “character evidence” refers to proof either

for ‘reputation’” of the Defendant and is generally inadmissible under the common law.⁵⁵ The Defendant’s reputation refers not to “specific acts” of the Defendant, but rather to a summary of opinions held within the Defendant’s community about the Defendant.⁵⁶ Character evidence is largely found to be inadmissible to prove propensity.⁵⁷ Propensity evidence is a type of character evidence which is commonly regarded as unfairly prejudicial, and thus, inadmissible.⁵⁸ Such evidence refers to a Defendant’s character trait, which is then used to argue that the Defendant acted in conformity with that trait.⁵⁹

The ability to introduce character evidence depends greatly on which party, the State or the defense, is attempting to introduce the evidence and

of a person's general moral character: good or bad, lawful or unlawful—moral or immoral—or of a specific character trait, such as honesty, courage, carefulness, generosity, violence, sobriety, or truthfulness. *See* MD. R. EVID. 5-404(1). “[C]haracter’ has been described as “the tendency to act in a certain manner under given circumstances.” *People v. Callahan*, 74 Cal. App. 4th 356, 375 (Cal. Ct. App. 1999); *Williams v. State*, 179 A.3d 1006, 1014 (2018) (explaining that to provide character evidence “the Defendant may call a witness to testify regarding the witness’ personal opinion of the Defendant’s pertinent trait, or about the Defendant’s reputation for that pertinent trait.”). “The term ‘character’ refers to a generalized description of a person’s disposition or a general trait of that person’s disposition, such as for peacefulness, chastity or truthfulness.” Judge Liam C. Brennan, *Admissibility of Character Evidence in Illinois Criminal Case*, 22 DCBA BRIEF 38, 38 (2010).

55. *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

56. *Id.* at 477 (“The witness may not testify about Defendant’s specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of Defendant leads to his own independent opinion that Defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of Defendant but only as to the shadow his daily life has cast in his neighborhood.”).

57. For example, Maryland Rule of Evidence 5-404 provides that character evidence “is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion,” and Maryland Rule of Evidence 5-403 prohibits evidence that is substantially outweighed by the danger of unfair prejudice.” *See also* CAL. EVID. CODE § 1101 (1997) (“evidence of a person’s character or a trait of his or her character . . . [is] inadmissible when offered to prove his or her conduct on a specified occasion.”); CAL. EVID. CODE § 352 (1997) (“the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability of undue prejudice.”). The New York Rules of Evidence are a mix of statutory and case law, but case law holds that character evidence is inadmissible for the propensity inference. *See People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901). New York also requires that the evidence not only be probative of the crime charged, but also that the “probative value outweighs its potential for prejudice” *People v. Ely*, 503 N.E.2d 88, 94 (N.Y. 1986). In Illinois, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ILL. R. EVID. 404 (2011). Further, Illinois requires a balancing test: “relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ILL. R. EVID. 403 (2011).

58. *People v. Falsetta*, 986 P.2d 182, 186 (Cal. 1999) (“propensity” evidence is per se unduly prejudicial to the defense”); *People v. Walston*, 900 N.E.2d 267, 287 (Ill. App. Ct. 2008) (“It is not the timing but the nature and quantity of the propensity evidence that can render it unfairly prejudicial.”).

59. *Falsetta*, 986 P.2d at 186; *Walston*, 900 N.E.2d at 287.

the relevance to the type of crime charged.⁶⁰ The Defendant is generally allowed to introduce relevant character evidence.⁶¹ Relevance is dependent on whether the evidence makes it more or less likely that the Defendant committed the crime charged.⁶²

The State, however, is generally prohibited from introducing character evidence, except to rebut the Defendant's introduction.⁶³ Courts'

60. Brennan, *supra* note 54, at 38 (“Only when a criminal Defendant volunteers his own reputation for a character trait will the prosecution be able to introduce contrary reputation evidence in rebuttal Pertinent character traits are dictated by the underlying criminal charge. For example, in a trial for murder or any crime of violence, the Defendant may introduce evidence of his own peaceable character, but should not be allowed to introduce evidence of his honesty or chastity”); *see also* MD. R. EVID. 5-404 (“An *accused* may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the *prosecution* may offer evidence to rebut it.”) (emphasis added); MD. R. EVID. 5-404(2) (“The accused may offer evidence as to his good character with regard to the character trait relevant to the commission or noncommission of the crime charged, for the purpose of showing that he did not commit the offense.”); 21 CAL. JUR. 3D Criminal Law: Trial § 517 (2019) (“[I]n criminal cases, the prosecution is prohibited from introducing evidence of a Defendant's bad character or reputation in order to prove the Defendant acted in conformity with that character in committing the charged offense.”).

61. Sahin v. State, 653 A.2d 452, 455 (1995) (noting that “[the Defendant's] first contention is based on the well-established doctrine that a criminal Defendant may always offer evidence of his or her good character for a trait relevant to the crime charged as circumstantial evidence of innocence.”); Braxton v. State, 274 A.2d 647, 649 (1971) (“a Defendant may always offer evidence of his good character and to prove that his character was such as to make it unlikely that he would have committed the act charged against him.”); People v. Singmouangthong, 778 N.E.2d 390, 395 (Ill. App. Ct. 2002) (“Generally, a Defendant may introduce evidence of his or her good character insofar as it relates to a particular character trait pertinent to the charged offense.”); CAL. EVID. CODE § 1102 (2019) (allows for the Defendant to introduce character evidence “to prove his conduct in conformity with such character or trait of character.”).

62. Braxton, 274 A.2d at 650 (“To be relevant, it is necessary that the character be confined to an attribute or trait the existence or nonexistence of which would be involved in the noncommission or commission of the particular crime charged. This, of course, depends upon the moral wrong involved in the commission of the crime charged.”). Common examples are the Defendant's introduction of the character trait of “peacefulness” or non-violence is relevant to making it less or more likely that the Defendant acted in self-defense, and thus, relevant to the Defendant's guilt of the crime. *See* Williams v. State, 179 A.3d 1006, 1010 (2018) (involving an assault case where the Defendant called a character witness who testified to him being “a peaceful person, and that she had never seen him become violent or with a firearm,” thus, allowing the State to introduce evidence of a prior assault to rebut the evidence). In theft cases, the character trait of “veracity” or “truthfulness” are considered relevant. *See* People v. Huffman, No. C053739, 2008 WL 762263, at *4 (Cal. Ct. App. Mar. 24, 2008) (“Moreover, his convictions-for forgery, perjury, and grand theft-were all extremely relevant to truthfulness, where Defendant testified.”).

63. 21 CAL. JUR. 3D Criminal Law: Trial § 517 (2019) (“in criminal cases, the prosecution is prohibited from introducing evidence of a Defendant's bad character or reputation in order to prove the Defendant acted in conformity with that character in committing the charged offense.”); *see also* People v. Randle, 498 N.E.2d 732, 736 (Ill. App. Ct. 1986) (“character evidence offered by the prosecution to show the accused's propensity to violence is generally inadmissible because the danger of unfair prejudice to the Defendant in being portrayed as a “bad man” substantially outweighs the probative value of the evidence.”); People v. Megown, 238 Cal. Rptr. 3d 911, 921 (Cal. Ct. App. 2018), *as modified* (Oct. 12, 2018) (“Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion.”); People v. Villatoro, 281 P.3d 390, 394 (Cal. 2012) (“Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion.”).

reluctance to allow the State to introduce character evidence stems from three primary concerns. First, there is the concern that the jury will convict the Defendant, not for the crime charged, but simply because the jurors believe the Defendant is a bad person.⁶⁴ Second, jurors have a tendency to give character evidence excessive weight and infer that the Defendant committed the crime due to a criminal propensity, rather than the evidence presented.⁶⁵ Third, character evidence can confuse or distract the jury.⁶⁶

In cases brought under state gang statutes, the Defendant does not have to affirmatively present any character evidence for the State to “rebut”; rather the State can introduce character evidence *sua sponte*. The introduction of the evidence is done, as in KJ’s case, under the guise that the State must prove that the Defendant is a gang member for the jury to find the Defendant guilty of gang conspiracy.⁶⁷

The introduction of character evidence disturbs constitutional principles when it violates a Defendant’s due process right to a fair trial. A Defendant’s right to a fair trial is made applicable to the State through the Fourteenth Amendment to the United States Constitution.⁶⁸ A trial is fundamentally unfair where the introduction of the evidence “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁶⁹ The right to a fair trial invokes

64. *People v. Lindgren*, 402 N.E.2d 238, 242 (Ill. 1980) (“Such evidence over persuades the jury, which might convict the Defendant only because it feels he or she is a bad person deserving punishment.”); *Randle*, 498 N.E.2d at 736 (“character evidence offered by the prosecution to show the accused’s propensity to violence is generally inadmissible because the danger of unfair prejudice to the Defendant in being portrayed as a ‘bad man’ substantially outweighs the probative value of the evidence.”); *Megown*, 238 Cal. Rptr. 3d at 921 (“Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person’s conduct on a specified occasion.”); *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (“the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.”).

65. *People v. Williams*, 232 Cal. Rptr. 3d 671, 688 (Cal. Ct. App. 2018) (“*It is objectionable, not because it has no appreciable probative value, but because it has too much.* The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.”) (internal citations and quotations omitted).

66. *Id.* (“may result in confusion of issues and require extended collateral inquiry.”).

67. *See, e.g., Gonzalez v. State*, 366 P.3d 680, 687 (Nev. 2015) (noting that gang evidence is “generally not” admissible but for the gang enhancement statute); MD. CODE. ANN. CRIM. LAW § 9-804(a)(1) (2019) (requiring the Defendant to participate in a criminal gang for the statute to be applicable).

68. *Crawford v. State*, 404 A.2d 244, 254 (Md. 1979) (“A fair trial in a fair tribunal is a basic requirement of due process [guaranteed by the Fourteenth Amendment to the federal Constitution]”) (quoting *In re Murchison*, 349 U.S. 133, 136, (1955)); *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (“The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . A fair trial in a fair tribunal is a basic requirement of due process.”) (internal quotations omitted).

69. *Medina v. California*, 505 U.S. 437, 445 (1992).

both procedural and substantive due process concerns.⁷⁰

For character evidence to render a trial “fundamentally unfair,” the evidence must both be of “such quality as necessarily prevents a fair trial”⁷¹ and offer the fact finder “no permissible inferences.”⁷² A Defendant’s right to a fair trial is absolute.⁷³ A Defendant is constitutionally entitled to a fact finder’s finding of guilt – not on character – but on the admissible evidence.⁷⁴ A Defendant, “[n]o matter how vile or despicable [] [they] may appear to be” has a right to “a fair trial.”⁷⁵ A fair trial means “that individuals may only be convicted for the crimes with which they are charged and proven; they may not be subject to criminal conviction merely because they have a detestable or abhorrent background.”⁷⁶

Consequently, the rationale that supports the general inadmissibility of propensity evidence is simple—character evidence that might be “logically persuasive,”⁷⁷ as is the case where an individual is charged with a crime and has a lengthy criminal history, has the ability to “over persuade”⁷⁸ the jury. Evidence leading the jury to find guilt not based on the evidence of the alleged crime, but on the belief that the Defendant committed the crime simply because of past behavior,⁷⁹ is correctly impermissible in court proceedings. Because a Defendant has a

70. Procedural due process refers to the “procedure” the State uses to “execute, imprison, or fine a Defendant” and must entail “appropriate procedural safeguards.” *Daniels v. Williams*, 474 U.S. 327, 338 (1986). Substantive due process refers to constitutional rights the Defendant maintains, related to life, liberty and property, that the State may not deprive, regardless of the procedure used. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (“Our prior cases have held the provision that ‘[n]o State shall ... deprive any person of life, liberty, or property, without due process of law,’ to ‘guarante[e] more than fair process . . . as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”) (quoting U.S. Const. amend. XIV).

71. Despite the right to a fair trial, there is “no specific decision [that] defines fairness.” Sarah Bernstein, *Fourteenth Amendment—Police Failure to Preserve Evidence and Erosion Of The Due Process Right To A Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256, 1266 (1989-90).

72. *People v. Albarran*, 149 Cal.App.4th 214, 230 (Cal. Ct. App. 2007).

73. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (“The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . [a] fair trial in a fair tribunal is a basic requirement of due process.”) (internal quotations omitted).

74. *State v. Moeller*, 548 N.W.2d 465, 468 (S.D. 1996) (finding reversible error where Defendant charged with sexual assault had three prior incidents of sexual assault introduced).

75. *Id.*

76. *Id.*

77. *Michelson v. United States*, 335 U.S. 469, 475–76 (1948). In *Michelson* the Defendant was charged with bribery of a federal agent and presented five witnesses to attest to his reputation for truthfulness. The Court explained that even though character evidence may go to identity of the client in stating that “such facts might logically be persuasive that [the Defendant] is by propensity a probable perpetrator of the crime,” character evidence has the ability to “weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Id.*

78. *Id.*

79. *Id.*

constitutional right to a fair trial, a jury verdict based on perceived character rather than admissible evidence violates the constitutional guarantee “that a Defendant is tried upon the crime charged and is not tried upon an antisocial history.”⁸⁰ Consequently, the fact that state gang statutes permit prosecutors to enter character evidence when otherwise not permitted by the evidentiary rules is a direct contradiction of the Fourteenth Amendment’s Due Process guarantees to criminal Defendants.

B. Gang Evidence As Character Evidence

“Black Guerilla Family has its own leadership, its own rules, its own structure. Its purpose is control over its community. How it achieves that goal -- how the Black Guerilla Family or BGF, as it's referred to, achieve[s] that goal is through violence, through intimidation, through drug sales. Now, this action in that community is like a cancer affecting all the residents in that vicinity around the Greenmount cemetery . . . If the Black Guerilla Family members . . . , feel that you are cooperating with the police, if they feel that you' re speaking out against them, if they have any riff within their own organization, their solution is simple. Their solution is a bullet. The result is death, disfigurement, and injury.”⁸¹

The prosecutor’s words in KJ’s case exemplify the intended purpose of prosecuting criminal Defendants using gang statutes while simultaneously combining substantive criminal charges with the gang allegation in one trial. Prosecutors essentially intertwine the character of the gang into the character of the criminal Defendant. This section explores the use of character evidence in the context of gang statutes and more specifically, the character traits of the organization imputed on the Defendant when gang evidence is introduced. This section argues that gang evidence is unduly prejudicial and bad character evidence of not only the Defendant, but the organization and all of the racist lore of gangs.

The prosecutor’s words in KJ’s trial linked KJ’s character with the character, nature, and history of the BGF. The prosecutor argues that “The Black Guerilla Family . . . achieve[s] [its] goal . . . through violence, through intimidation, through drug sales,” but the BGF was not on trial for charges of robbery, drug dealing and murder—KJ was the criminal Defendant. State gang statutes thus, serve as an impermissible conduit for gang evidence: “In general, where a gang enhancement is alleged, []

80. *Id.*; see also *People v. Nicolas*, 214 Cal. Rptr. 3d 467, 476 (Cal. Ct. App. 2017), *review denied* 2017 Cal. LEXIS 4377 (Cal. June 14, 2017) (“The purpose of this evidentiary rule “is to assure that a Defendant is tried upon the crime charged and is not tried upon an antisocial history.”).

81. *Tr.*, *State of Maryland v. KJ*, No. 113310058, 65 (Md. Cir. Ct. May 19, 2016).

the culture, habits, and psychology of gangs [] [becomes] permissible”⁸² to prove the existence of the organization.

Courts have unequivocally found that gang evidence is prejudicial character evidence⁸³ but routinely admit the use of this prejudicial character evidence either for motive⁸⁴ or because of the relevance to State gang statutes’ requirement to prove the Defendant was an actual member.⁸⁵

C. Societal Views of Gangs

Despite research showing a reduction in gang violence,⁸⁶ legislators, prosecutors, juries, and the general public have an intense fear of gangs.⁸⁷ This fear is relevant in discussing and understanding the undue prejudicial effect of gang evidence. Former Attorney General Jeff Sessions prioritized the prosecution of gangs and increased funding for gang prosecution⁸⁸ with no empirical support that such focus and funding was necessary.⁸⁹ While the priorities of Former Attorney General Sessions are not necessarily representative of public opinion, his message, along with the rhetoric of President Trump, reached a broad audience. Media coverage also contributes to this anti-gang narrative. In the media, gangs are presented “as an alien presence or an invading force” and this perception “dominates high profile news accounts even in the face of

82. Eisen, *supra* note 38, at 2 (quoting *People v. Valdez*, 58 Cal. App. 4th 494, 506 (Cal. Ct. App. 1997)).

83. See, e.g., *Gutierrez v. State*, 32 A.3d 2, 13 (Md. 2011) (holding that “we remain ever-cognizant of the highly incendiary nature of gang evidence and the possibility that a jury may determine guilt by association rather than by its belief that the Defendant committed the criminal acts,” but that the Defendant’s membership in MS-13 was more relevant to the motive of the murder than prejudicial); *State v. Torrez*, 210 P.3d 228, 235 (N.M. 2009) (stating that “to be sure, evidence of gang affiliation could be used improperly as a backdoor means of introducing character evidence by associating the Defendant with the gang and describing the gang’s bad act” but concluding that “Defendant does not dispute that the expert’s testimony was offered to rebut his claim of self-defense, and therefore went to his motive for shooting at the house” and thus, the “expert’s testimony was not impermissible”); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 601 (Cal. Ct. App. 1994) (finding that while Defendants’ gang membership and their gang activities was prejudicial to a certain degree, the evidence was highly relevant to the prosecution’s theory of how and why the victim was killed).

84. See *Gutierrez*, 32 A.3d at 13; *Torrez*, 210 P.3d at 235; *Olguin*, 37 Cal. Rptr. 2d at 601.

85. *Gonzalez v. State*, 366 P.3d 680, 687 (Nev. 2015) (noting that gang evidence is “generally not” admissible, but for, the gang enhancement in Nevada).

86. See *supra* Section II (A).

87. *Supra* Section II (A).

88. Andrea Noble, *Sessions Unleashed Organized Crime Task Force On MS-13*, WASHINGTON TIMES, Oct. 23, 2017, <https://www.washingtontimes.com/news/2017/oct/23/ms-13-doj-organized-crime-task-force-target/> (“Attorney General Jeff Sessions announced Monday that he’s designated the MS-13 street gang as a priority for the Justice Department’s Organized Crime Drug Enforcement Task Forces — enabling authorities to target the gang with broader array of federal resources.”).

89. *Supra* Section II (A) (discussing decrease in crime rate).

contradictory evidence.”⁹⁰

In KJ’s case, prosecutors referred to the gang as a “cancer” that used “violence” to engulf the Greenmount area and used his alleged gang name “Slay” to invoke an image of KJ as a dangerous menace to society.⁹¹ “Once a negative stereotype like gang member is activated, people often seek information that further supports the instilled perspective.”⁹² It worked in KJ’s case and it works in courtrooms across the country. Jurors are more likely to find a Defendant guilty because of the overwhelming effect of gang membership, which leads jurors to convict criminal Defendant’s not due to the facts of the case, but rather because of bad character traits attributed to the gang and its members.⁹³

D. Propensity Evidence is Substantially Prejudicial

This Article does not call for the complete exclusion of gang evidence, where relevant and admissible, but rather a separation of gang evidence that is substantially prejudicial and prevents fair criminal trials. Despite the disproportionate fear of gangs, courts have recognized⁹⁴ the immense and sincere fear held by the public of gangs⁹⁵ to be real. Using this

90. Mayer, *supra* note 39, at 954 (“the media treats gangs and their presence or absence in a community as a fact apart from the people of the local community, something akin to a disease or a military attack. This perception of gangs as an alien presence or an invading force dominates high profile news accounts even in the face of contradictory evidence.”).

91. Kevin Rector, *BGF Gang Hitman Sentenced to Life Behind Bars in 2013 Killing, Conspiracy*, BALTIMORE SUN, Aug. 23, 2016, <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-kj-sentence-20160823-story.html>.

92. Eisen, *supra* note 38, at 2 (quoting *People v. Valdez*, 58 Cal. App. 4th 494, 506 (1997)).

93. See Eisen, *supra* note 38, at 2 (finding that the introduction of gang evidence increases the likelihood of jurors finding Defendants guilty).

94. That societal reactions can influence court perceptions, findings, and holdings is not unusual or unique to gangs but is rather a recognized phenomenon; court decisions do not happen in a vacuum and are directly impacted by societal reactions. See Alana Miles, *Overrepresentation in Special Education: Does the Idea Violate the Equal Protection Clause?*, 17 RUTGERS RACE & L. REV. 245, 265 n. 99 (2016) (discussing the “doll test,” where a majority of African American children in a study preferred the white doll). Justice Scalia specifically addressed the societal concerns of domestic violence but ultimately rejected the application. *Washington v. Davis*, 547 U.S. 813, 832–33 (2006) (“Respondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”).

95. For example, in *Dawson v. Delaware*, the Supreme Court addressed the use gang membership as character evidence when the Defendant’s gang membership to the Aryan nation was used during sentencing. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). The State and Defense stipulated to the terms that “[t]he Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.” *Id.* On appeal, the Supreme Court found that State used the evidence of the gang membership “simply because the jury would find these beliefs morally reprehensible.” *Id.*; see also *Gonzalez v. State*, 366 P.3d 680, 687 (Nev. 2015) (“This, among other highly prejudicial evidence used to prove the existence of a criminal gang evidence, is a type of evidence that

reasoning, courts have acknowledged that gang evidence can lead to improper propensity reasoning.⁹⁶ Merely mentioning a gang association operates similar to Rule 404(b) evidence, which allows evidence of prior bad acts to be admitted for any purpose other than propensity.⁹⁷ Admitting this evidence using Rule 404(b), however, “imply[s] the Defendant [has] a history of criminal behavior, leading the jurors to think it more likely that the Defendant committed the act in question.”⁹⁸

Propensity reasoning in gang cases is an effective method used by prosecutors to secure a guilty verdict. There are various ways in which prosecutors use propensity reasoning.

First, the State is allowed to admit evidence of the gang’s criminal activity, activity which might not even overlap with the Defendant’s substantive offense, in order to prove that the Defendant belongs to a statutorily defined criminal gang.⁹⁹ In KJ’s case, the State was permitted to admit evidence of BGF’s illegal activities to prove that BGF was a “gang” under the State statute’s definition.¹⁰⁰ Notwithstanding the fact that KJ was never alleged to have engaged in drug selling, was never alleged to hold a position within the gang that involved the facilitation of weapons to gang members,¹⁰¹ and was not alleged to have been involved in the multiple unrelated murders alleged to have been carried out by BGF, the prosecutor was able to introduce unrelated evidence to lead the jury to a guilty verdict. When this unrelated evidence is introduced, it “overwhelms” juries with traits such as criminality, dangerousness, and

would generally not be admissible during a guilt phase of a trial but is statutorily admissible in order to prove a gang enhancement.”).

96. *United States v. Archuleta*, 737 F.3d 1287, 1292-93 (10th Cir. 2013).

97. *United States v. Hamilton*, 723 F.3d 542 (5th Cir. 2013) (Trial court abused its discretion under FRE 404(b) by admitting evidence of Defendant’s gang affiliation as “other act” because it was considered extrinsic testimony unrelated to fact for a felon in possession of a firearm). However, “Trial courts must treat evidence of gang affiliation with care since most jurors are likely to look unfavorably upon a Defendant’s membership in a street gang.” *United States v. Tolbert*, 8 F. App’x. 372, 378 (6th Cir. 2001).

98. Eisen, *supra* note 38, at 2.

99. *Gonzalez*, 366 P.3d at 687 (“*This, among other highly prejudicial evidence used to prove the existence of a criminal gang* evidence, is a type of evidence that would generally not be admissible during a guilt phase of a trial but is statutorily admissible in order to prove a gang enhancement.”); *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004) (“In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs.”).

100. Md. Criminal Law Section 9-804 criminalizes participation in gangs that engage in a “pattern of criminal activity.” Such an element allows the State to introduce evidence of the gang’s general criminal activity. *See also* *Burris v. State*, 78 A.3d 371, 373–74 (Md. Ct. App. 2013) (allowing the State to introduce evidence of unrelated murders through a “Sergeant Dennis Workley of the Baltimore City Police Department, proffered as a gang expert, who [] identif[ied] Burris as a member of BGF, and testify that BGF was a ‘violent’ gang that would commit murder on the basis of a debt owed to one of its members.”).

101. BGF was alleged to have a “sergeant in arms” who facilitated the movement of weapons. KJ was never alleged to hold this position. *Tr., State of Maryland v. KJ*, No. 113310058, 38 (Md. Cir. Ct. June 3, 2016).

deviance that is attributed to the gang and, vicariously, the Defendant, often leading to a guilty verdict.

Second, the evidence of the gang activity forces the jury to view the Defendant “only as a dangerous member of a dangerous group, one who is certainly capable (and quite possibly guilty) of committing any of the criminal activities and antisocial behaviors ascribed to the organization—not least of all the particular crime[s] charged.”¹⁰² In other words, once labeled as a “gang member,” the Defendant is no longer seen as the “individual Defendant” but rather as mere conduit or proxy of the gang’s criminal activity. After evidence of the gang’s criminal activity is introduced, the jury is left to believe that the Defendant comports with that behavior.¹⁰³

KJ was found not guilty of the substantive criminal charge of firearm use in a crime of violence, but was convicted of the underlying crime of violence, the murder.¹⁰⁴ Unduly prejudicial gang evidence gave the jury a means of finding KJ guilty of the murder, but not guilty for the firearm that was used to commit that murder.

Third, once this unduly prejudicial gang evidence is successfully presented to the jury, the State is no longer required to prosecute the “individual Defendant” but is allowed to use the Defendant as proxy of the gang’s bad character traits. By allowing the Defendant and the gang to become one in the same, the State is relieved of the burden of proving the substantive offense and are able to rest their conviction on the propensity reasoning created.¹⁰⁵

E. Gang Evidence as a Violation of Due Process: People v. Albarran

In *People v. Albarran*, the California Court of Appeals held that the

102. *United States v. Archuleta*, 737 F.3d 1287, 1300 (10th Cir. 2013) (Holloway, J., dissenting) (finding a violation of Federal Rule of Evidence 403 because of the unduly prejudicial nature of the admission of a police officer referred to as a “gang expert”).

103. *Id.*

104. After the juror’s verdict, defense objected. The trial court ruled that the finding was merely factually inconsistent, and that the conviction stood. *Tr., State of Maryland v. KJ*, No. 113310058, 22-23 (Md. Cir. Ct. June 10, 2016). *See also* *Teixeira v. State of Maryland*, 75 A.3d 371 (Md. Ct. Spec. App. 2013) (explaining that factually inconsistent verdicts are permissible but not legally inconsistent). Specifically, the court stated it was possible that the jury thought K.J. “was a participant [in the murder], but not convinced that he actually fired the handgun,” notwithstanding the only testimony was the KJ was the actual shooter. *Tr., State of Maryland v. KJ*, No. 113310058, 1-9 (Md. Cir. Ct. June 10, 2016).

105. *See Eisen, supra* note 38, at 17 (finding “that introducing gang evidence at trial can have a significant prejudicial effect on juror decisions as to the Defendant’s guilt or innocence. Taken together, [] data show that informing a jury that the Defendant is a gang member significantly increases the likelihood of a guilty verdict. Further . . . , when a gang expert is called to inform the jury that the Defendant is a member of a dangerous criminal street gang . . . , a significant minority of jurors will vote to convict even when reasonable doubt has been clearly established.”).

introduction of gang evidence rendered the case fundamentally unfair and reversed the Defendant's conviction.¹⁰⁶ *Albarran*, is instructive in showing: (a) how gang evidence can serve as character evidence, (b) how fact finders prejudicially interpret the character evidence, and (c) how the prejudicial effect then results in a deprivation of fundamental fairness and a violation of due process.

1. *Albarran*: The Facts

In *Albarran*, the Defendant was accused of shooting a firearm at an occupied home.¹⁰⁷ When the homeowner looked out of the window, he saw what he described as two Hispanic males with guns.¹⁰⁸ One of those men was later identified as Albarran, a suspected member of the 13 Kings gang.¹⁰⁹ Despite the fact that the suspect never self-identified as a gang member,¹¹⁰ the prosecutor charged the Defendant with the California gang enhancement statute. The prosecutor argued that the crime “presented a ‘classic’ gang shooting and that the entire purpose of the shooting was to gain respect and enhance the shooters' reputations within the gang community, and to intimidate the neighborhood.”¹¹¹

During trial, the People¹¹² called a Sheriff's Deputy as a gang expert. The Deputy testified about the Defendant's alleged¹¹³ gang tattoos, alleged gang graffiti around the Defendant's home that “contained a specific threat to murder police officers,”¹¹⁴ and the alleged criminal activity in which the gang engaged.¹¹⁵ In regards to the gang's criminal activity, the Deputy testified that the gang engaged in “criminal offenses, including robberies, drive-by shootings, carjacking, and felony vandalism.” Lastly, the Deputy testified that gang members “gain respect by committing crimes and intimidating people.”¹¹⁶

106. *People v. Albarran*, 149 Cal.App.4th 214, 217 (Cal. Ct. App. 2007).

107. *Id.*

108. *Id.*

109. *Id.* at 217-20.

110. *Id.* at 221 (“there was no evidence in this case that any of the shooters had made themselves known—the shooters made no announcements, did not throw any gang signs and there was no graffiti referring to the crime.”).

111. *Id.* at 219.

112. In California, the State prosecutes cases as “The People.”

113. The Sheriff Deputy's testimony is framed as alleged gang tattoos, graffiti and crimes, because the gang statute does not require that the allegation of gang involvement be previously proven beyond a reasonable doubt, or test in an unbiased way in order to be admissible in court.

114. *Id.*

115. *Id.* at 230.

116. *Id.* at 227 (“Yet this shooting presented no signs of gang member's efforts in that regard — there was no evidence the shooters announced their presence or purpose—before, during or after the

The Defendant was found guilty.¹¹⁷ On appeal, the Defendant argued that the gang evidence was inadmissible, and its admission had rendered his trial fundamentally unfair.¹¹⁸

2. *Albarran*: Gang Evidence as a Proxy of Defendant's Character

In *Albarran*, the prosecutor meticulously used the previously described gang evidence to construct a proxy for the Defendant's character by using it as character evidence, thereby allowing the jury to engage in a series of otherwise impermissible "inferences."¹¹⁹ The inferences included that the Defendant was "dangerous," just as the gang was; that the Defendant had a "motive," just as the gang had; and ultimately that the Defendant had a general disposition towards crime, just as the gang did. It is worthwhile to discuss each inference and why each one violated *Albarran*'s constitutional rights.

First, the prosecutor was able to define the Defendant as "dangerous" because the gang was dangerous. Specifically, the prosecutor referred to the gang as "dangerous" and told the jurors "not to be fooled" by the Defendant's "altar boy" appearance, because he was "an active member of the 13 Kings with gang tattoos."¹²⁰ Moreover, the prosecutor was allowed to illustrate how dangerous the gang was by presenting evidence of gang graffiti that surrounded the Defendant's house, graffiti that "contained a specific threat to murder police officers."¹²¹ The prosecutor also argued that the Defendant's tattoos showed an allegiance to the Mexican Mafia, "a violent prison street gang."¹²² Basically, the prosecutor used the gang's "dangerous[ness]" to argue an inference to the jury that because the gang was dangerous—so dangerous that it threatened to kill police and was connected to the "violent" Mexican Mafia—the Defendant was therefore also a danger to the community.

Second, the prosecutor used the gang's motive of "gain[ing] respect by committing crimes and intimidating people" as defining the Defendant's

shooting. There was no evidence presented that any gang members had 'bragged' about their involvement or created graffiti and took credit for it.").

117. *Id.* at 222.

118. *Id.*

119. *Id.* at 232.

120. *Id.*; *Id.* at 231, n. 17 (discussing the standard applied to determining the prejudicial nature of the evidence stating, "the admission of the evidence was so prejudicial as to render the Defendant's trial fundamentally unfair.").

121. *Id.* at 220.

122. *Id.* at 228 ("[the prosecutor] described a specific threat 13 Kings had made in their graffiti to kill police officers. The jury heard references to the Mexican Mafia both during the prosecutor's opening argument and in Deputy Gillis's testimony. All of this evidence was irrelevant to the underlying charges and obviously prejudicial.").

motive.¹²³ The fact that “there was no evidence the shooters announced their presence or purpose—before, during or after the shooting” did not matter according to the prosecutor because the Defendant shared the gang’s the need for respect.¹²⁴ According to the prosecutor, “the motive for the shooting was to gain respect and enhance the shooter's reputation—essentially to “earn one's bones” within the gang (*i.e.*, the “respect” motive).¹²⁵ Just like the use of the “dangerous[ness]” of the gang, the prosecutor likewise urged the inference that because the gang wanted to “gain respect” through the commission of crimes, the Defendant shared a motive of “gain[ing] respect” through the commission of the alleged crime.

Ultimately, the prosecutor’s use of these inferences made the Defendant’s actions inseparable from those of the gang. The sum of these inferences was the Defendant as a member, shared the bad character of the gang. As the appellate court concluded,

The paramount function of [the] evidence was to show Albarran's criminal disposition—a fact emphasized in the prosecutor's closing argument when he argued: “[Albarran] is all about being a gang member day in and day out, every day, every night, despite efforts of the deputies . . . He's all about it.”¹²⁶

Because the Defendant was “all about being a gang member day in and day out, every day, every night,” the following inferences became logical: if the gang had a criminal disposition, so too did the Defendant; if the gang had a motive of gaining respect, so too did the Defendant; and if the gang was dangerous, so too was the Defendant. After all, if the Defendant is “all about it,” as a member, then he is “all about” the bad character of the gang. This series of inferences is the bedrock of the due process violations committed against Albarran, KJ, and countless other criminal Defendants charged under state gang statutes.

3. *Albarran*: From Impermissible Inference to Due Process Violation

The appellate court’s analysis in *Albarran* illustrates how gang evidence becomes the Defendant’s character evidence through the fact finder’s use of a series of inferences that the Defendant, as a gang member, shares the same bad attributes as the gang itself. Using the reasons described in this section, the Appellate Court in *Albarran* held that these inferences rendered the trial “fundamentally unfair” because the

123. *Id.* at 221.

124. *Id.* at 227.

125. *Id.* at 227.

126. *Id.* at 228.

evidence was unduly prejudicial.¹²⁷

First, the Appellate Court in *Albarran* found that there were no permissible inferences that gang evidence could serve in the trial and therefore the gang evidence was inadmissible.¹²⁸ The court rationalized this conclusion, stating that “[o]nly if there are no permissible inferences the jury may draw from the evidence can [the] admission violate due process.”¹²⁹ The prosecutor in *Albarran* argued, as many prosecutors around the country do, that the gang evidence was relevant for motive and intent.¹³⁰ The court rejected the People’s position because there was no evidence that the shooting was gang motivated¹³¹ and therefore there were no permissible inferences for the jury to draw.¹³²

The *Albarran* court held that the evidence was “so prejudicial” because the inferences allowed the jury to find the Defendant guilty using his perceived character rather than real evidence.¹³³ A Defendant’s right to a fair trial includes the right to have guilt determined and premised on the commission of the crime, not his character.¹³⁴ Thus, to allow the jury to find a Defendant guilty because of his character rather than the actual commission of the crime deprives the Defendant of a fair trial.¹³⁵

In reaching its conclusion, the *Albarran* court’s rationale was twofold. First, the court believed that gang evidence, even if it is the sole evidence, is prejudicial to the Defendant because society views gangs as dangerous—“the word ‘gang’ . . . connotes *opprobrious* implications . . . [T]he word ‘gang’ takes on a *sinister meaning* when it is associated with activities.”¹³⁶ Second, the court noted that such “sinister” evidence and resulting use of inferences is so prejudicial that the inferences can “cloud” the jury’s judgment of the Defendant. As the court in *Albarran* noted, this presents “a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the

127. *Id.* at 232.

128. *Id.* at 217.

129. *Id.* at 229.

130. *Id.* at 232.

131. *Id.* at 227 (“Yet this shooting presented no signs of gang member’s efforts in that regard — there was no evidence the shooters announced their presence or purpose—before, during or after the shooting. There was no evidence presented that any gang members had ‘bragged’ about their involvement or created graffiti and took credit for it.”).

132. *Id.* at 230.

133. *Id.* at 236.

134. *Id.* at 230 (“there was a real danger that the jury would improperly infer that *whether or not Albarran was involved in these shootings*, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished.”) (emphasis added).

135. *Id.* at 232.

136. *Id.* at 223 (internal citation omitted) (emphasis added).

police and society in general and thus he should be punished.”¹³⁷

Similar to the court in *Albarran*, several courts have agreed that gang evidence, alone, is prejudicial because of the societal beliefs and feelings that gangs are inherently criminal.¹³⁸ Thus, when gang evidence is admitted, it renders the trial fundamentally unfair because the gang evidence creates impermissible inferences that allow the jurors to find the Defendant guilty because his perceived character flaws highlighted by the gang evidence.¹³⁹ Using this reasoning, the *Albarran* court found that the Defendant’s trial was “fundamentally unfair.”¹⁴⁰

People v. Albarran is not the only case that has discussed the ability for gang evidence to be used as a proxy to impute character evidence onto a criminal Defendant, thus violating a Defendant’s due process rights. In some respects, the fact pattern in *Albarran* makes the idea of undue prejudice easy to follow where the underlying crime in *Albarran* was not factually proven to be gang related. But, in other cases such as *United States v. Archuleta* and *Dawson v. Delaware*, courts have discussed the ability for gang evidence to become unduly prejudicial evidence, even where the Defendant alleged crime may be motivated by gang membership.

In *Archuleta*,¹⁴¹ the Defendant was charged with conspiracy after participating in drug smuggling with one other alleged gang member and two non-gang members.¹⁴² As part of the State’s case, the State called a gang expert to testify to the practices of the gang and argued that the testimony established the conspiracy.¹⁴³ The dissent in *Archuleta*, however, argued that the gang evidence was unduly prejudicial and “had much to do with creating an aura of fear and mistrust around Mr. Archuleta—not Mr. Archuleta the individual Defendant, but Mr. Archuleta the [gang member]. A police officer, in effect, told the jury over and over that the [gang] w[as] evil men who did evil things.”¹⁴⁴ Such testimony, the dissent argued, would cause the fact-finder to engage in propensity reasoning. In rejecting that the introduction of gang evidence was appropriate in this case, the dissent argued that “the great risk of such testimony is that, in the eyes of the jurors, Mr. Archuleta . . . would be viewed only as a dangerous member of a dangerous group, one who is certainly capable (and quite possibly guilty) of committing *any* of the

137. *Id.* at 230.

138. *Id.* at 231.

139. *Id.* at 232.

140. *Id.* at 230-32.

141. *United States v. Archuleta*, 737 F.3d 1287, 1300 (10th Cir. 2013).

142. *Id.* at 1291-92.

143. *Id.*

144. *Id.* at 1300 (Holloway, J. dissenting).

criminal activities and antisocial behaviors ascribed to the organization—not least of all the particular crime charged.”¹⁴⁵

Even the Supreme Court also considers the use of gang membership to constitute propensity evidence.¹⁴⁶ In *Dawson*, the Defendant’s gang membership to the Aryan Brotherhood was used during sentencing as a sentence-increasing factor.¹⁴⁷ The State and defense stipulated¹⁴⁸ that “[t]he Aryan Brotherhood refers to a white racist prison gang that began in the 1960’s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.”¹⁴⁹ The Supreme Court found that the State used the evidence of the Defendant’s gang membership “simply because the jury would find these beliefs morally reprehensible.”¹⁵⁰ The Supreme Court’s *Dawson* ruling is notable in that the “morally reprehensible” stigma stemmed from the practices and beliefs of the gang—*i.e.* the Defendant’s personal beliefs and feelings were considered to be the same as those held by the Aryan Brotherhood. But, like the gang evidence in *Archuleta* and *Albarran*, the gang evidence introduced in *Dawson* lead the jury to impute the “morally reprehensible” beliefs of the *gang* onto the Defendant. According to the United States Supreme Court, the “morally reprehensible” character the gang placed onto to the Defendant was prejudicial enough to violate the Defendant’s due process rights.¹⁵¹

F. Due Process

The concern of over-persuading the jury with bad character evidence is precisely why propensity evidence is generally inadmissible and why such evidence should not be admitted in gang cases. The Supreme Court explained in *Michelson* that character evidence is inadmissible due to its ability to “over-persuade the jury,” and thus, deprive the Defendant of a fair trial.¹⁵² In *Michelson* the Defendant was charged with bribery of a

145. *Id.*

146. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). Interestingly enough, several cases, including *Dawson*, have shown a greater concern for the constitutional rights of white Defendants in ensuring to preserve the rights of Defendants belonging to predominately white gangs. *See, e.g., Gonzalez v. State*, 366 P.3d 680, 688 (Nev. 2015).

147. *Dawson*, 503 U.S. at 167 (1992).

148. *Id.* at 161-62 (“During sentencing of the Defendant the State intended to introduce ‘expert testimony regarding origin and nature of the Aryan Brotherhood’ and ‘photographs of multiple swastika tattoos on Dawson’s back and a picture of a swastika he had painted on the wall of his prison cell.’”).

149. *Id.* at 162 (internal citation omitted).

150. *Id.* at 167.

151. *Id.* at 159.

152. *Michelson v. United States*, 335 U.S. 469, 476 (1948).

federal agent and presented five witnesses to attest to the Defendant's reputation for truthfulness.¹⁵³ Michelson argued that when character evidence is introduced, "such facts might logically be persuasive that [the Defendant] is by propensity a probable perpetrator of the crime." Character evidence, Michelson continues, has the ability to "weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."¹⁵⁴

Michelson's concerns of overwhelming the jury is even more important in the context of gang evidence, where the evidence lends itself to propensity reasoning as discussed in *Archuleta*, *Dawson* and demonstrated in KJ's case. In all of these cases, the jury seemed to conclude that because the gang is criminal, the Defendant, a member of the gang, is a criminal as well. Like in *Archuleta*, *Albarran*, and *Dawson*, in KJ's case, the gang evidence created in the eyes of the jurors not KJ, the "individual Defendant," but instead KJ, the BGF member. Because BGF was notoriously violent, dangerous, and criminal, then KJ must have possessed the same traits. Because BGF was engaged in murder and the sale of drug and weapons, then KJ must have been too. After these inferences are created, the Defendant is no longer the "individual Defendant" charged with defending himself on a particularized indictment, but is instead a proxy for the purported criminal character of the entire gang, and juries have no problem with finding gangs guilty.

IV. *MONELL* BIFURCATION: A SOLUTION TO PREJUDICIAL GANG ALLEGATIONS

This Part argues that a bifurcation standard, similar to that used in *Monell v. Dep't of Soc. Services of City of New York*, is the appropriate standard to apply to state gang cases to resolve the issues discussed previously in this Article, including violations of character evidence rules and due process violations. This Part will begin with a traditional example of bifurcation/ severance in a criminal context. It will then provide an overview of what *Monell* bifurcation means, how it has been used in subsequent cases such as *Heller*, and how case law supports the application of the *Monell* bifurcation standard in state gang cases.

A. Bifurcation and/or Severance in Criminal Cases

California, Maryland, and Illinois all have evidentiary rules requiring

153. *Id.* at 471.

154. *Id.* at 475-76.

that the nature of prior convictions not be admitted into evidence in criminal trials for defendants charged with felony possession of a firearm.¹⁵⁵ The policy rationale for this rule is that it protects the due process rights of criminal defendants and ensures the traditional rules of evidence are followed.¹⁵⁶ On a similar note, all fifty states allow severance of offenses or co-defendants if a joint trial would result in a violation of the defendant's right to a fair trial.¹⁵⁷ In fact, severance is mandated when the prejudicial effect of other offenses outweighs their probative value.¹⁵⁸ Whether the probative value outweighs the prejudicial effect is tested by balancing whether, when a defendant is charged with similar but unrelated crimes, the evidence to every offense "would not be mutually admissible at separate trials."¹⁵⁹ For example, in California, a Defendant may request a bifurcated proceeding whenever a felony conviction is an element of an offense. For example, when a prosecutor seeks to charge a criminal Defendant with felony possession of a firearm, proving a substantive prior conviction is element of the offense.¹⁶⁰ Because the prior conviction is an element of the offense, the criminal Defendant may request a bifurcated trial in order to prevent the jury from being potentially influenced by the nature or even the specific details of the prior felony conviction. If a Defendant will be unduly prejudiced by the prior felony

155. California Penal Code §1025(e) states: "If the Defendant pleads not guilty, and answers that he or she has suffered the prior conviction, the charge of the prior conviction shall neither be read to the jury nor alluded to during trial, except as otherwise provided by law." CAL. PENAL CODE § 1025(e) (2019). Illinois has adopted a similar rule through case law whereby, if a Defendant stipulates their status as a felon, the prosecution is barred from introducing evidence of the nature of the prior conviction because of its unduly prejudicial value. *People v. Walker*, 812 N.E.2d 339, 350-51 (Ill. 2004); *see also* *People v. Clark*, 542 N.E.2d 138 (Ill. 1989) (reversing Defendant's conviction because of the effect of prosecutor's comments about the Defendant's prior conviction in conjunction with other prejudicial comments denied the Defendant the right to a fair trial). Maryland too has adopted a similar rule. *See Carter v. State*, 824 A.2d 123 (Md. Ct. App. 2003). In *Carter*, the state's highest court held that the trial court was not permitted to admit evidence of the nature of the Defendant's prior felony conviction because he had stipulated to the prior conviction making the substance of the crime irrelevant. *Id.*

156. *Walker*, 812 N.E.2d at 351 (reasoning that any stipulation to the prior conviction offered the same probative value as if established by the prosecution, meaning that any admission of evidence regarding the nature of the prior conviction would be more prejudicial than probative and violate the Defendant's right to a fair trial).

157. Severance is used for severing trials for separate trials and for separating co-Defendants. For example, Maryland Rule 4-253(c) allows for a severance motion when charges or Defendants have been prejudicially joined, stating: "If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or Defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or Defendants, or grant any other relief as justice requires." MD.R.EVID. 4-253(c). Illinois shares this rule. 725 ILL. COMP. STAT. ANN. 5/114-8 (LexisNexis 2019). California also has a rule for severance. *See* CAL. PENAL CODE § 954 (Procedures governing charging more than one count or offense).

158. *See* CAL. PENAL CODE § 954.

159. *Ellerba v. State*, 398 A.2d 1250, 1259-60 (Md. Ct. Spec. App. 1979) (quoting *McKnight v. State*, 375 A.2d 551, 556 (Md. Ct. App. 1977)).

160. *People v. Calderon*, 885 P.2d 83 (Cal. 1994).

being tried in a unitary trial, the count will be severed or bifurcated.¹⁶¹ These concepts—bifurcation and severance—are deeply rooted in our traditions of providing a defendant with full due process rights under the constitution.

B. Bifurcation in Civil Rights Cases

Bifurcation is a method used where the Plaintiff in a constitutional civil rights matter must first prove that a State violated their constitutional rights before being able to proceed against the municipality on a *Monell* claim.¹⁶² A *Monell* claim refers to a lawsuit against a State entity (*i.e.* a police department, municipal entities, government agency, etc.) that claims that the State's use of custom¹⁶³ or policies violate the constitutional rights of an individual. More simply, when a court applies bifurcation to *Monell* claims, it requires that the Plaintiff first prove that a constitutional violation occurred before moving on to proving that the State's customs or policies caused violation.¹⁶⁴

Bifurcation is considered standard across several circuits and is applied widely, regardless of the facts underlying the case.¹⁶⁵ For example, in

161. *Id.* This is embedded in California Penal Code § 1044, where the trial judge is granted discretion to decide a motion for bifurcated proceedings under California Penal Code § 1025(b). See CAL. PENAL CODE § 1044 (2019). California Penal Code § 1025(b) provides: "[e]xcept as provided in subdivision (c), the question of whether or not the Defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived." *Id.* at § 1025(b).

162. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 503 (1993) (require the plaintiff to prove that individual officers violated her rights before she can produce evidence that the municipality policies are the cause of the violation). While this Article does not accept the reasoning of limiting civil litigants from addressing pattern or practice evidence prior to a finding of liability, it is accepted that bifurcation is the current state of the law.

163. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) (explaining that custom entailed "practices of state officials could well... so permanent and well settled as to constitute a 'custom or usage' with the force of law.>").

164. For example, in *Belcher*, Plaintiff, the estate of the decedent, sued because the decedent had committed suicide while in the state's custody, after the officers had failed to remove the Plaintiff's shoelaces. *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990). Plaintiff was unable to prove that the individual officers were deliberately indifferent, and therefore, "because it [was] clear that there was no constitutional violation, we need not reach the question of whether a municipal policy was responsible for the officers' actions." *Id.* In *Apodaca*, Plaintiff, the estate of decedent, sued the State because a police officer responding to a car collided with decedent's car, killing the decedent. *Apodaca v. Rio Arriba Cty. Sheriff's Dep't*, 905 F.2d 1445, 1447 (10th Cir. 1990). Plaintiff was unable to prove that the police had acted intentionally. Thus, the court concluded that "because plaintiffs have alleged no federal constitutional violations, we need not address the plaintiffs' claims against the sheriff's department, county, and other officers in their official capacities." *Id.*

165. See *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 320 (2d Cir. 1999) (affirming lower court's application of bifurcation where police allegedly choked and threw Plaintiff on the wall stating "[o]ur holding today is informed, in part, by the frequent bifurcation of proceedings where a plaintiff has initiated a § 1983 action against individual officials and municipal entities."); *Wilson v.*

Quintanilla, Defendant officers released police dogs that attacked Plaintiff, causing severe injuries.¹⁶⁶ Plaintiff brought excessive force claims against the Defendant police officers and a *Monell* claim against the City and police department for maintaining unconstitutional policies and customs pertaining to the use of police dogs.¹⁶⁷ The trial court bifurcated the claims, requiring Plaintiff to first prove that the officers used excessive force. After proving excessive force, Plaintiff then proceeds to present evidence that the policies used caused the injury, thus proving the *Monell* claim.¹⁶⁸ When Plaintiff attempted to submit evidence concerning the customs of the police departments through the use of “photographs and medical records of other persons similarly mutilated by identically trained dogs, the videotapes showing the training of police dogs, and the testimony of Mr. Quintanilla's police practices expert[,]”¹⁶⁹ the trial court denied the Plaintiff's request, requiring bifurcation.¹⁷⁰

The appellate court affirmed the trial court's bifurcation and denial to admit Plaintiff's evidence of additional dog mutilations and policy evidence in the case. The court specifically upheld that, in finding that Plaintiff's evidence was intended to overwhelm the jury in stating, “plaintiff's strategy was to convince the jury to award him damages on the strength of evidence concerning police dog attacks on others.”¹⁷¹ Similar to *Quintanilla*, Courts have upheld bifurcation to avoid overwhelming the

Morgan, 477 F.3d 326, 340 (6th Cir. 2007) (affirming lower court's application of bifurcation where “plaintiffs were arrested, detained for about three hours, and then released without any charges being filed against them” and stating “[i]t was not an abuse of discretion to bifurcate individual liability from municipal liability, and it would be illogical to try the municipality first since its liability under § 1983 could not be determined without a determination of the lawfulness of the individuals' actions.”); *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th Cir. 1996) (affirming lower court's application of bifurcation where police dogs injured Plaintiff requiring medical attention and stating “under *Heller* and general principles of § 1983 liability, an individual may recover only when that individual's federal rights have been violated. The district court correctly entered judgment for the Chief and city based on the jury's special verdict that plaintiff's rights were not violated.”).

166. *Quintanilla*, 84 F.3d at 354.

167. *Id.* at 354 (“*Quintanilla* sued Wells and the two assisting line officers, Keith Biarnesen and John Hoekter, on various federal and state grounds, including the asserted use of excessive force through the deployment of a police dog in violation of *Quintanilla*'s right to be free from unreasonable searches and seizures under the Fourth Amendment. *Quintanilla* also sued the city of Downey and its Police Chief, Clayton Mayes, alleging their maintenance of an unconstitutional custom or policy involving police dogs.”).

168. *Id.*

169. Brief of Appellant-Defendant, *Quintanilla v. City of Downey*, No. 94-56550, 1995 WL 17134222, at *13 (Cal. Ct. App. May 22, 1996). The trial court described the evidence as “graphic photographs, from unrelated cases, of police dog bite victims; medical summaries, prepared for an unrelated case, of persons bitten by police dogs; a videotape of a police dog attack in a different case, and a police dog training videotape.” *Quintanilla*, 84 F.3d at 355.

170. *Quintanilla*, 84 F.3d at 354.

171. *Id.*

jury with what courts consider prejudicial evidence.¹⁷²

Like the Court's reasoning in *Quantilla*, this Article asserts that, given the due process implications discussed herein, it is impermissible to allow the State to rely on gang evidence as a "strategy [] to convince the jury" to find the Defendant guilty based on the "strength of" the inherent prejudicial nature of gang evidence. Rather, like *Quantilla* and a litany of cases applying bifurcation, courts should apply bifurcation to gang cases to safeguard the Defendant's due process rights.

1. Gang Cases That Bifurcate

In order to protect a criminal Defendant's right to a fair trial, three courts have discussed applying a bifurcation standard, similar to *Monell*, in gang cases. These courts have reasoned that the prejudicial nature of gang evidence requires bifurcation.¹⁷³ Similar to the reasoning in these cases, this Article argues¹⁷⁴ that the state must first prove the underlying offense, and only if the Defendant is found guilty can the State introduce gang evidence. In essence, this Article argues that a State's ability to introduce gang evidence should function similar to Plaintiff's ability to prove custom and policies in a *Monell* claim.¹⁷⁵

For example, Nevada charges gang crimes as enhancement penalties to an offense, rather than as a substantive charge.¹⁷⁶ By doing so, Nevada restricts the introduction of gang evidence in sentencing hearings which bifurcates the evidence from the trial.¹⁷⁷ In *Gonzales*,¹⁷⁸ the Court

172. *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 316 (2nd Cir. 1999) (noting "that the plaintiff wished to introduce evidence . . . consisted in part of the personnel records of police officers, including the individual Defendants, as well as a history of all claims of excessive force brought against the entire Police Department" which were considered "prejudicial" to the Defendant officers).

173. *State v. Galtney*, No. A07-1631, 2008 WL 5135647, at *4, n.1 (Minn. Ct. App. Dec. 9, 2008); *Gonzalez v. State*, 366 P.3d 680, 688 (Nev. 2015); *State v. Jackson*, 714 N.W.2d 681 (Minn. 2006).

174. While bifurcation is the accepted standard in *Monell*, claims against government entities, neither this paper, nor does this author, accepts that section 1983 Civil Rights Claims should be in fact bifurcated. Rather, this paper concedes that law, as it stands now, requires bifurcation because of the unduly prejudicial nature of pattern and practice evidence, so by way of extension, gang evidence, should be excluded using the same standard.

175. *See Gonzalez*, 366 P.3d at 688 (reversing conviction after evidence of gang membership was admitted before underlying murder charge resulted in a guilty finding).

176. *Id.* at 687-88 ("evidence used to prove the existence of a criminal gang, is a type of evidence that would generally not be admissible during a guilt phase of a trial but is statutorily admissible in order to prove a gang enhancement.").

177. *Id.* This is not to say that gang evidence is *never* admissible during trial but rather that the court does not allow the introduction of the evidence "solely for the purpose of proving a gang enhancement."

178. *Id.* at 682. *Gonzalez* involved a "brawl between members of two motorcycle gangs, the Vagos and the Hell's Angels . . . the fight was instigated by Stuart Rudnick, a member of the Vagos. During the fight, another member of the Vagos, appellant Ernesto Manuel Gonzalez, shot and killed Jethro Pettigrew, a member of the Hell's Angels. At trial, Rudnick testified that he and Gonzalez had a meeting prior to the

likened gang evidence to “introducing evidence of prior convictions in order to establish that the Defendant is an ex-felon,” stating:

Is evidence of a prior conviction more prejudicial than the evidence presented here by a gang expert—namely, that [the Defendant] was a member of a criminal gang whose members in Arizona commonly sell narcotics, possess stolen property, and commit assault and homicide? Is it more prejudicial than the evidence presented by another gang expert that [the Defendant] is a member of a criminal gang that moves firearms, tries to set up robberies of dope dealers, tries to extort motorcycles from people, traffics in narcotics, and commits rape? This, among other highly prejudicial evidence used to prove the existence of a criminal gang evidence, is a type of evidence that would generally not be admissible during a guilt phase of a trial.¹⁷⁹

Gonzalez makes clear that the unduly prejudicial impact of gang evidence is just as significant as prior conviction evidence.¹⁸⁰ Thus, gang evidence, like prior conviction evidence, is prejudicial. Being that gang evidence is clearly prejudicial, *Gonzales* concludes, much like this Article does, that the law must safeguard the criminal Defendant through bifurcation.

In *State v. Jackson*, the concurring opinion for the Court of Appeals of Minnesota similarly expressed concern over the introduction of gang evidence. Specifically, the dissent noted that gang expert testimony should be limited “to prevent the unfair prejudice that the character and other crime aspects of gang evidence may have on the jury's evaluation of the evidence concerning a Defendant's guilt for the underlying crimes.” The dissent went on to write that the trial court should “bifurcate ... for trial” the underlying offense from the gang evidence.¹⁸¹

Jackson was later adopted by the majority in *Galtney*,¹⁸² where the

fight with the president of the international chapter of the Vagos. Rudnick further testified that the president put out a ‘green light’ on Pettigrew, meaning that Pettigrew was to be killed.” *Id.*

179. *Id.* at 687.

180. In *Old Chief*, the Supreme Court squarely addressed the use of prior convictions, stating that “there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the Defendant.” *Old Chief v. United States*, 519 U.S. 172, 185 (1997).

181. *State v. Jackson*, 714 N.W.2d 681, 701 (Minn. 2006) (Hanson, J. dissenting). In *Jackson*, the Defendant an alleged gang member, shot and killed an individual. *Id.* at 687 (majority opinion). A gang expert witness was permitted to testify that “[t]he gang world operates under a whole different set of rules” that encourage killing non-gang members who are on gang territory. The majority found that while the gang expert testimony was admissible to “assist[] the jury in deciding whether the commission of crimes is one of the primary activities of the Bloods gang, a prerequisite for proving that the Bloods gang meets the statutory definition of a “criminal gang.” *Id.* at 692.

182. In *Galtney*, the trial court allowed the admission of gang expert testimony despite first hand witnesses who testified to the Defendant’s gang membership. Because Minnesota law cautioned against the introduction of gang experts, where such as evidence is cumulative, the appellate court found the trial court’s introduction of such evidence was in error, stating “Considering the cautionary instruction given by the supreme court in *Jackson*, this expert witness testimony should not have been used here because it

court noted that “undue prejudice could have been avoided by bifurcating the underlying charge, with the consent of the Defendant, for trial from the charge of being committed for the benefit of a gang.”¹⁸³

As these cases show, courts have begun applying bifurcation in the context of gang cases because of the prejudicial nature of gang evidence.¹⁸⁴ Bifurcation provides a way to minimize the prejudicial nature of gang evidence by limiting the ability for gang evidence to overwhelm or taint the jury into “view[ing] [the Defendant] only as a dangerous member of a dangerous group, one who is certainly capable (and quite possibly guilty) of committing any of the criminal activities and antisocial behaviors ascribed to the organization—not least of all the particular crime charged.”¹⁸⁵ While it is true that a finding of guilt on the substantive offense may prejudice the Defendant during the bifurcated gang proceeding, this prejudice is not the undue prejudice that occurs when the gang evidence is admitted without bifurcation.¹⁸⁶ Thus, bifurcation within the context of gangs will provide the Defendant with a fairer trial, free from the possibility the Defendant will be convicted simply due to propensity reasoning based on character evidence admitted through gang evidence statutes.

was cumulative in light of testimony from the victim and the other three officers regarding the prior statements of appellant and Anthony admitting they were members of a gang.” *State v. Galtney*, No. A07-1631, 2008 WL 5135647, at *4 (Minn. Ct. App. Dec. 9, 2008).

183. *Galtney*, 2008 WL 5135647, at *1, n.1 (citing *Jackson*, 714 N.W.2d at 701 (Hanson, J. dissenting)).

184. For example, in *Gutierrez v. State*, 32 A.3d 2, 13 (Md. Ct. App. 2011), the Maryland Court of Appeals stated that “we remain ever-cognizant of the highly incendiary nature of gang evidence and the possibility that a jury may determine guilt by association rather than by its belief that the Defendant committed the criminal acts,” but found that the Defendant’s membership in MS-13 was more relevant to the motive of the murder than prejudicial. *Gutierrez v. State*, 32 A.3d 2, 13 (Md. Ct. App. 2011); *see also State v. Torrez*, 210 P.3d 228, 235 (N.M. 2009) (stating that “evidence of gang affiliation could be used improperly as a backdoor means of introducing character evidence by associating the Defendant with the gang and describing the gang’s bad act,” but concluding that the evidence could be admitted to the extent that it spoke to Defendant’s motive); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 601 (Cal. Ct. App. 1994) (reasoning that evidence of gang membership and activities was relevant to prove Defendant’s intent and motive).

185. *United States v. Archuleta*, 737 F.3d 1287, 1300 (10th Cir. 2013) (Holloway, J., dissenting).

186. For example, it is possible that a finding of guilt of the substantive offense may disentangle the gang evidence from the substantive offense so as to find the Defendant guilty of the substantive offense but not the gang statute. In *Burris*, the State failed to build a nexus between the Defendant and the gang evidence. *Burris v. State*, 78 A.3d 371, 387 (Md. Ct. App. 2013) (“With respect to the issue of admissibility of Sergeant Workley’s testimony relative to witness recantation, Sergeant Workley said absolutely nothing to connect Burris’s BGF membership to the reasons for several witnesses recanting in Burris’s case.”). Although *Burris* was not charged with the gang statute, if had he been, the appellate court’s finding of the lack of nexus is precisely what the jurors can do in finding that the substantive offense may be proven, but that the substantive offense lacks a nexus to gang activity. This allows the jurors to find the Defendant guilty of the substantive offense and not of violating gang statutes.

C. *City of Los Angeles v. Heller*

The use of bifurcation in gang cases is consistent with the original rationale of *City of Los Angeles v. Heller*—the Supreme Court case credited with the initial requirement of bifurcation in *Monell* claims.¹⁸⁷ In *Heller*, Plaintiff sued the officers and the city of Los Angeles after sustaining injuries during the course of an arrest, alleging that department policies encouraged the use of excessive force.¹⁸⁸ The trial court bifurcated the claim, first requiring that the Plaintiff prove the officers committed a constitutional violation. Then, only if a constitutional violation was found could the Plaintiff then argue that the police customs or policies were responsible for his injuries.¹⁸⁹

The Supreme Court agreed with the trial court, reasoning that because the State was only liable by being “legally responsible” for the police officer’s actions, “if the [officer] inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to the respondent.”¹⁹⁰ The Supreme Court thus found bifurcation logical where liability of the State was contingent on a finding that the State agent committed a constitutional violation.¹⁹¹ The Court further reasoned that where there is no constitutional injury, “If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.”¹⁹²

D. Illustrations of the Use of Bifurcation in Gang Cases

In the context of gang cases, the reasoning of *Heller* equally applies. Just as a *Monell* claim cannot occur unless there is a constitutional violation, the conviction of a criminal Defendant under the aforementioned gang statutes is dependent on whether an underlying crime occurred.¹⁹³ Gang membership alone is not a crime¹⁹⁴ because

187. Colbert, *supra* note 162, at 503.

188. *City of Los Angeles v. Heller*, 475 U.S. 796, 797–98 (1986).

189. *Id.* Ultimately during trial, the jury returned a verdict for the Defendant officers and the trial court then dismissed the *Monell* claims against the State, reasoning that if the officers had “been exonerated by the jury [of excessive force] there could be no basis for assertion of liability against the city.”

190. *Id.*

191. *Id.*

192. *Id.* at 797.

193. MD. CODE ANN., CRIM. LAW § 9-804(a)(1). (requiring the Defendant to participate in a criminal gang for the statute to be applicable and have as one of their primary objectives or activities the commission of one or more underlying crimes).

194. *Dawson v. Delaware*, 503 U.S. 159, 168 (1992) (finding that gang membership alone was a First Amendment right); see also *Cross v. Baltimore City Police Dep't*, 73 A.3d 1186, 1195-96 (Md. Ct.

freedom to associate with whomever you please is a protected First Amendment right.¹⁹⁵ In *Dawson*, the Supreme Court squarely addressed this issue, noting that the Defendant's membership in the Aryan Nation invoked the "the First Amendment protect[ion] [of] an individual's right to join groups and associate with others holding similar beliefs."¹⁹⁶ Thus, just like the State's liability in a *Monell* claim will only attach if a constitutional violation occurs, a Defendant is only guilty of violating state gang statutes once the State proves beyond a reasonable doubt that a substantive crime, separate and apart from being a gang member, occurred.

In the words of *Heller*, "[i]f a person has suffered no constitutional injury at the hands of the individual police officer," then, "the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."¹⁹⁷ Even under *Quantilla*, discussed *supra*, which adopts the *Heller* bifurcation standard, the fact that Plaintiff had evidence of other identical dogs attacking arrestees was "quite beside the point" of whether the Plaintiff proved that the officers in the particular case acted unreasonably in using the dog. Then in a gang case, likewise, if a person has suffered no violation of criminal law at the hands of the individual Defendant, the Court should conclude that the fact that the gang's propensities, structure or representation might have motivated the violation of criminal law is quite beside the point. Accordingly, even the reasoning underlying bifurcation in *Heller* supports an application of bifurcation in this state gang case.

E. Heller Supports Application of a Bifurcation in Gang Cases

One implicit and subtle basis for bifurcation that courts and scholars have recognized is the need to protect police officers and the State from liability.¹⁹⁸ Taxpayers generally, and municipalities specifically, are responsible for paying judgements for police brutality claims that arise out of civil rights violations. This being the case, courts have provided a means to limit liability of government agencies, even if it is the policies

Spec. App. 2013) (finding that appellant, a Baltimore City Police Officer, had a right to associate with her husband, a gang member).

195. *Dawson*, 503 U.S. at 168.

196. *Id.*; see also *Cross*, 73 A.3d at 1195-96.

197. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

198. *Colbert*, *supra* note 162, at 548 ("juror sympathy for individual officers is often decisive when civil rights claims are bifurcated. First, jurors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee. Second, most jurors are predisposed to credit police officers' testimony. They see the officer's job as difficult and dangerous; police officers protect them and other law-abiding citizens from dangerous people. Jurors are receptive to suggestions that the officer had insufficient time to reflect or deliberate in the face of a life-threatening situation.").

and practices of that particular agency that cause harm to the citizenry.¹⁹⁹ To save public dollars and preserve the sanity of police officers, courts bifurcate the substantive claim from the pattern or practice claim. Because jurors are often sympathetic to officers, jurors are likely to find that officers did not violate the constitutional rights of Defendants, thus relieving the officer and State of any liability.²⁰⁰

On the surface, these things may seem like an incongruent reason to apply bifurcation to state gang cases and criminal Defendants. Yet, this Article encourages the reclaiming the Bill of Rights and its protections from the very system and agents that oppress the alleged or actual gang members. The Supreme Court has created precedent affirming fundamental rights, such as the Sixth Amendment right to Confront and the Fifth Amendment Right to remain silent, regardless of a case's allegedly horrendous nature. This precedent has allowed Defendants to reclaim their constitutionally guaranteed rights.²⁰¹

This Article advocates for the principles set forth by the Supreme Court in *Miranda* and *Davis*—that Defendants, no matter how horrendous the crime is perceived, are entitled to their constitutional rights. Accordingly, reclaiming Constitutional rights through the tools from the system that oppresses Defendants in gang cases, is in tandem with the reasoning in this article.

VI. CONCLUSION

This Article ends with the same story with which it started: the story of

199. "It is clear from conversations with municipal defense attorneys and plaintiffs' attorneys that municipalities have a strong policy in favor of settling Monell claims in order to avoid the potential damage, both economic and political, that would result if a jury held them liable for a section 1983 violation." Colbert, *supra* note 162, at 504.

200. Colbert, *supra* note 162, at 548.

201. For example, *Miranda*, the namesake for *Miranda v. Arizona*, 384 U.S. 436, 492 (1966), was found "guilty of kidnapping and rape." The Court in *Miranda* set the precedent for what is now commonly referred to as "Miranda Warnings," and related Fifth amendment due process rights. *Id.* In dissent, Judge Clark argued that the horrendousness of the allegations alone outweighed the due process concerns in stating "Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law . . . it may make the analysis more graphic to consider the actual facts of . . . [o]n March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. . . . Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country." *Id.* at 517–21 (Clark, J., dissenting). In *Davis v. Washington*, 547 U.S. 813, 832–33, 224 (2006), the Supreme Court expressly rejected a relaxation of a Defendant's confrontation clause rights, stating that "[r]espondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." *Id.*

KJ. KJ was sentenced to two life sentences plus 15 years in prison. KJ was federally indicted under RICO and sentenced to an additional life sentence, based on the same allegation he had just been found guilty of in state court. He filed in the Court of Special Appeals of Maryland, raising 10 separate issues, many deriving from the same arguments posed here. The appeal was denied, and he currently awaits certification to the Court of Appeals of Maryland.

State gang case bifurcation is not a wholesale solution to the issue of unduly prejudicial character evidence and due process violations of criminal Defendants who are defined as gang members. State gang bifurcation can only provide legal relief to Defendants, like KJ, whose due process rights concerning inadmissible character evidence are diminished due to the State's and legislatures' ability to diminish these rights under the guise of fighting exaggerated gang rates through gang statutes.²⁰²

Bifurcation of state gang allegation in KJ's criminal trial would have prevented the jury from hearing evidence from a previously dismissed case. Had the proposed bifurcation method been enacted, a former plea deal,²⁰³ whereby KJ was originally charged for attempted murder, would not have been admissible unless the State had shown that an attempted murder had been committed and proven beyond a reasonable doubt.²⁰⁴ Accordingly, bifurcation would have restrained the State's ability to violate KJ's double jeopardy rights by introducing previously adjudicated crimes; the State would have been required to prove the underlying cause of action before being able to use the previously adjudicated crime as a basis for the gang statute violation.

Bifurcation for KJ would have meant that a "gang expert," who was neither a psychologist, sociologist or possessed any formalized training to formalize opinions of psychology or sociology of gangs or member, nor published or written scholarly articles on gangs, and who testified to a rubric which was not provided nor written,²⁰⁵ would likely not withstand an application of *Frye*. Even if this "gang expert" had withstood the *Frye* standard, the State could not introduce such prejudicial evidence from an alleged "gang expert" until the underlying offenses were proven. Thus, bifurcation would diminish the State's ability to violate KJ's constitutional right to a fair trial.

Bifurcation for KJ would also have meant that the jury would not have heard prejudicial character evidence until after the jury first, after finding

202. Discussed *supra* in Section II.

203. In Maryland, a dismissal based on a plea agreement invokes double jeopardy. *Mason v. State*, 488 A.2d 955 (Md. Ct. App. 1985).

204. Tr., *State of Maryland v. KJ*, No. 113310058, 172-95 (Md. Cir. Ct. Dec. 8, 2015).

205. Tr., *State of Maryland v. KJ*, No. 113310058, 40-44 (Md. Cir. Ct. June 7, 2016).

sufficient evidence, found KJ guilty of the substantive offense. The State would have had to prove the case without overwhelming the jury with bad character evidence and propensity reasoning, thereby preserving KJ's constitutional right to a fair trial.

It is important to note, however, that while bifurcation would limit the introduction of prejudicial evidence, bifurcation would not exclude the State's ability to capitalize on bad character evidence during the gang penalty stage of the trial and during sentencing.

Bifurcation for KJ and Defendants like KJ, would not mean a change or a solution to the over-incarceration of young Black and Latino men from marginalized and oppressed communities. Bifurcation of state gang cases would not mean a halt to mass incarceration or a means for young Black and Latino men to escape the reach of systematic racism. Bifurcation in state gang cases does not mean an end to the criminal justice system's ability to criminalize young Black and Latino men, while claiming the law is meant to bring peace and stability to the very community it intends to destroy through over policing. Only fundamental restructuring of the criminal justice system, abolition, can end mass incarceration. An application of bifurcation standards to state gang cases will only offer small concessions of fairness in a fundamentally unfair system.