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NOTE

Deconstructing the Gang Menace: Gang Policing and Police “Expert” Testimony in New York City

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ABSTRACT

In New York City, the gang member is feared, vilified, and romanticized. The New York City Police Department (NYPD), the media, elected officials, and courts have all played a part in casting street gang members as some of the most dangerous people in society. But who exactly are these so-called gangsters? The answer is highly racialized: An overwhelming ninety-seven percent of the NYPD’s Criminal Group Database (CGD) are Black and Latino men. Although this disparity is harmful in itself, it represents only a part of the problem these men face. Alleged gang members who are arrested and wish to contest their criminality at trial are faced with an insidious prosecutorial practice—the admission of NYPD officers as gang “experts.” These experts infect the courtroom with racial bias, while judges are exceedingly deferential to them despite their problematic methods of policing and surveillance. Their testimony is both unfairly prejudicial and unreliable, as it feeds off implicit biases and couples gang member stigmatization with the overbroad and extremely suspect evidence encapsulated within the CGD. In exploring this issue, this Note will proceed in three Parts. Part I provides an overview of gang policing and prosecution in New York City, highlighting changes in policing tactics over time and the current law around police gang expert testimony. Part II outlines the racial implications of police gang expert testimony, focusing on prejudice and unreliability. Part III advocates for the admission of nonpolice gang experts to counteract these negative effects of police testimony.

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Introduction.....	1339
I. Policing and Prosecuting Gang Members in New York City	1346
A. History of Gang Policing in New York	1346
1. 20 th Century Gang Policing - Cycles of Violence and Differing Responses	1346
2. 21 st Century Gang Policing - Floyd v. City of New York to Operation Crew Cut	1350
3. The Criminal Group Database (CGD) and the 2023 Department of	
Investigations Report	1353
B. Gang Prosecutions and Police Expert Testimony	1357
1. Gang Evidence in Criminal Prosecutions	1357
2. The Admissibility and Scope of Police Officers as Gang “Experts”	1360
II. The Prejudicial Effect and Unreliability of Police Gang Expert Testimony	1362
C. Police Gang Expert Testimony is Unfairly Prejudicial.....	1364
1. Implicit Bias of Testifying Officers.....	1365
2. Implicit Bias of Jurors.....	1366
D. Police Expert Testimony is Unreliable	1369
1. Overbroad Gang Identifications.....	1370
2. Problematic Indicators of Gang Membership in the CGD.....	1371
3. Potential to Convict the Innocent Under the Gang Member Label	1372
III. An Effective Counterbalance: Nonpolice Gang Experts	1374
E. The Value of Nonpolice Gang Experts	1376
1. Police Gang Experts vs. Nonpolice Gang Experts.....	1376
2. Nonpolice Gang Expert Testimony Mitigates Prejudice	1377
3. Nonpolice Gang Experts Expose Unreliability.....	1378
F. Limitations of Nonpolice Expert Testimony	1379
1. Issues Finding and Funding Nonpolice Experts	1379
2. The Ineffectiveness of Nonpolice Experts in a Broader Context	1380
Conclusion	1380

INTRODUCTION

In New York City, the gang member is feared, vilified, and romanticized. The New York City Police Department (NYPD), the media, elected officials, and courts have all played a role in casting street gang members as some of the most dangerous people in society.² But who exactly are these so-called gangsters? The answer is highly racialized: An overwhelming ninety-seven percent of the NYPD's Criminal Group Database (CGD) are Black and Latino men.³ Young men, in particular, have been the primary subjects of police surveillance and criminal prosecution, as seventy-eight percent of the individuals included in the CGD were twenty-seven years old or younger at the time of their entry into the database.⁴ Recent gang-related indictments have included children as young as sixteen.⁵

The NYPD defines a gang as a criminal group with a common name or identifying symbol.⁶ Despite a clear criminality requirement, the NYPD adds individuals to the CGD without any evidence of criminal behavior.⁷ While many sociologists agree that criminal activity

² See *People v. E.S.B.*, 126 N.Y.S.3d 615, 618 (N.Y. Ct. Cl. 2020) (noting that gang violence is “an issue that is becoming increasingly worrisome within the community at large”); Lisa Evers, *NYC's New Gang Culture: 'The Body Count is Never Enough'*, FOX 5 NEW YORK (Apr. 21, 2023), <https://www.fox5ny.com/news/street-soldiers-the-new-gang-culture> [<https://perma.cc/3BRT-ZX6T>] (suggesting that New York City gang culture promotes a “shoot on site” attitude where “the body count is never enough”); *Fighting Gang Violence in NYC*, CITY OF NEW YORK, <https://www.nyc.gov/content/getstufdone/pages/fighting-gang-violence> [<https://perma.cc/CV4F-UPEM>] (last visited Jan. 5, 2024) (highlighting Mayor Eric Adams's pledge to “take down the criminal enterprises that are creating the violence and death in our community”).

³ N.Y.C. Dep't of Investigation, *An Investigation Into NYPD's Criminal Group Database* 34 (2023), <https://www.nyc.gov/assets/doi/reports/pdf/2023/16CGDRpt.Release04.18.2023.pdf> [<https://perma.cc/7PS5-ZTMD>].

⁴ *Id.* at 35.

⁵ See Samantha Max, *Bronx District Attorney Charges 12 People With Shootings, Carjackings, Armed Robberies*, GOTHAMIST (Sept. 21, 2023), <https://gothamist.com/news/bronx-district-attorney-charges-12-people-with-shootings-carjackings-armed-robberies> [<https://perma.cc/4JG2-MPNB>] (“A dozen people, ranging from 16 to 22 years old, have been indicted in the Bronx in connection with 23 violent incidents . . .”).

⁶ See N.Y.C. Police Dep't, *Patrol Guide Procedure Number 212-13: Reporting Gang-Related Criminal Activity* 1 (2019), https://www.nyc.gov/html/nypd/downloads/pdf/public_information/public-pguide2.pdf [<https://perma.cc/VXB3-KEW3>]. For the full definition, see *infra* text accompanying note 85.

⁷ See Jasmine Johnson, Note, *Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City*, 94 ST. JOHN'S L. REV. 1033, 1038 (2020) (“[T]he NYPD's definition of ‘gang’ has a requirement of criminal activity, but one can be included as a ‘gang member’ in the NYPD gang database without proof of any such criminality); *infra* text accompanying notes 85–86.

is the premier source of social cohesion for gangs,⁸ alternative gang definitions intentionally omit the criminality criterion.⁹ By decoupling gangs and criminality, this conception allows gangs to be viewed through a social constructionist framework.¹⁰ From this perspective, gangs are better understood as a form of safety and a form of resistance deployed by marginalized youth to combat their social disempowerment.¹¹ Rather than being defined by criminal behavior, gangs offer youth a sense of belonging and opportunity that impoverished families and underfunded schools do not.¹² This gang conceptualization recognizes how oppressive social structures create the conditions for gang association, and it also avoids further criminalizing minority and disadvantaged youth who are perceived, whether accurately or not, to be gang members.¹³

A 2022 study conducted by Rachel Swaner sheds light on the social constructionist theory of gangs and the role of gang membership in New York City.¹⁴ Interviews with 287 young New York City gang members revealed that the participants used gangs as a means of survival,

⁸ See Caylin Louis Moore & Forrest Stuart, *Gang Research in the Twenty-First Century*, 5 ANN. REV. CRIMINOLOGY 299, 303 (2022) (noting that most scholars define gangs in relation to their criminality). Malcolm Klein and Cheryl Maxson, for example, define street gangs “as any durable, street-oriented youth group whose involvement in illegal activity is part of its group identity.” STREET GANG PATTERNS AND POLICIES 4 (2006).

⁹ See, e.g., JAMES F. SHORT, Jr., GANGS AND ADOLESCENT VIOLENCE 3 (1996), https://www.researchgate.net/publication/246286976_Gangs_and_Adolescent_Violence [<https://perma.cc/P5SM-TXUX>] (defining gangs as “non-adult-sponsored, self-determining groups that demonstrate continuity over time”).

¹⁰ See Moore & Stuart, *supra* note 7, at 304 (observing that the noncriminal gang conceptualization “facilitates novel explanations of gang formation and behavior, particularly those rooted in social constructionist and interactionist frameworks”).

¹¹ See *id.* (citing ROBERT GAROT, WHO YOU CLAIM: PERFORMING IDENTITY IN SCHOOLS AND ON THE STREETS 2 (2010)) (“[G]ang association is a form of performance deployed by marginalized youth to resist the social statuses imposed upon them by dominant social institutions.”).

¹² See ROBERT GAROT, WHO YOU CLAIM: PERFORMING IDENTITY IN SCHOOLS AND ON THE STREETS 2 (2010) (“[G]angs offer youth a street family, a sense of belonging, even hope and opportunities for ‘decisive risk-taking’ that impoverished families struggling with addictions and under-funded schools may not.”).

¹³ See Moore & Stuart, *supra* note 7, at 305 (“[C]ritics warn that definitions based on delinquency risk further net-widening and criminalization of minority and disadvantaged youth perceived . . . as gang members.”) (citing G. David Curry, The Logic of Defining Gangs Revisited, in THE HANDBOOK OF GANGS 7, 14 (Scott H. Decker & David C. Pyrooz eds., 2015)).

¹⁴ See Rachel Swaner, ‘We Can’t Get No Nine-to-Five’: New York City Gang Membership as a Response to the Structural Violence of Everyday Life, 30 CRITICAL CRIMINOLOGY 95 (2022).

not strictly as a means of engaging in criminal activity.¹⁵ Their decision to join a gang “was largely a reaction to the inequities and humiliations they face on a daily basis from the police, unemployment, and poverty.”¹⁶ Although joining a gang was an effort “to survive in the face of these daily injustices and threats to their existence,” doing so only compounded “their vulnerability to being discriminated against, getting caught up in the criminal legal system, and experiencing interpersonal violence.”¹⁷ While some of the participants did resort to selling drugs and carrying weapons, many of them also sought “better lives, lives without guns, lives where they can get jobs that allow them to support their families, and lives where they reside in safe communities.”¹⁸ Swaner’s study illustrates how one could seek out gang membership for protection, opportunity, and belonging without necessarily engaging in criminal activity.¹⁹ The criminal justice system, however, continues to reinforce a hostile and punitive world for gang members.²⁰

The NYPD would benefit from a more nuanced understanding of gangs if it wanted to address the root cause of any real or perceived gang problem. But it is unclear whether the NYPD’s goal is crime prevention or merely intelligence gathering.²¹ There is no question that gang violence devastates the communities where it takes place.²² However, the NYPD’s response

¹⁵ See *id.* at 103 (finding that the participants joined gangs for physical protection and the fulfillment of economic and emotional needs).

¹⁶ *Id.* at 107.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.* at 104 (highlighting a participant’s statement that he “love[s] the brotherhood of being in a gang” because they “actually look out for each other” and “try to find support systems for each other outside of just the violence”).

²⁰ *Id.* at 107.

²¹ See ERIK NELSON, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 145 (2019) (“Both research and case studies reveal that gang units are primarily focused on intelligence gathering rather than say, prevention.”).

²² See Ashley Southall, *As Shootings Increased, N.Y.C Returned to Disputed Tactic: Gang Takedowns*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/26/nyregion/nypd-shootings-gang-arrests.html> (on file with the *Columbia Law Review*) (noting that many of the shootings committed during the pandemic crime spike were linked to gangs, and that these shootings sometimes resulted in the deaths of innocent bystanders). Despite a significant decline in shootings in the first half of 2023, a recent state-wide (yet very small sample-sized) poll found that seventy

to this devastation is equally destructive, as it upholds longstanding practices of racial surveillance and criminalization. Not only that, but the NYPD's flawed conception of gang membership and activity is given "expert" authority in the courtroom, and the wealth of gang intelligence that the NYPD gathers is weaponized against criminal defendants without constraint. While the admission of police officers as gang experts is a powerful prosecutorial tool, it is tainted by prejudice and unreliability. It is but another way racism makes a home within the criminal justice system, and another tactic used to criminalize Black and Latino men by virtue of their identity and associations.

As suggested previously, surveillance is the foundation of the NYPD's gang policing model.²³ Although the NYPD touts itself as a pioneer of "precision policing,"²⁴ its gang surveillance methods are far from precise. The identification of an individual as a gang member is facilitated by racial profiling akin to stop-and-frisk,²⁵ and underlying gang investigations are corrupted by problematic tools, such as the CGD. After audits of similar gang databases in Los

percent of New York City residents were concerned about becoming the victim of a crime. *See NYPD Announces Citywide Crime Statistics for July 2023*, NYPD (Aug. 3, 2023), <https://www.nyc.gov/site/nypd/news/p00088/nypd-citywide-crime-statistics-july-2023> [<https://perma.cc/XV72-28UH>] (stating that there has been a "26.5% decrease in shooting incidents citywide through the first seven months of calendar 2023 compared to the same period a year ago"); SIENA COLLEGE RESEARCH INSTITUTE, *Siena College Poll Conducted by the Siena College Research Institute June 4 - 12, 2023*, <https://scri.siena.edu/wp-content/uploads/2023/07/ICS0623-Crosstabs.pdf> [<https://perma.cc/7P68-VTZL>] (last visited Jan. 6, 2024) (noting that seventy percent of the polled New York City residents were concerned about becoming the victim of a crime). But *see* Ginia Bellafante, *Crime is Down. Why Don't New Yorkers Feel Safe?*, N.Y. TIMES (Aug. 5, 2023), <https://www.nytimes.com/2023/08/04/nyregion/new-york-crime-bernhard-goetz.html> (on file with the *Columbia Law Review*) (suggesting that "the question of how bad crime actually is versus how bad it is perceived to be is complicated by the occurrence of rare but terrifying incidents").

²³ *See* K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile Based- Policing*, 5. U. DENV. CRIM. L. REV. 1, 2 (observing that the NYPD has adopted a surveillance-based policing model in regard to suspect populations since 2001).

²⁴ N.Y.C. Police Dep't, *The Way Forward* 9, <https://www.nyc.gov/assets/nypd/downloads/pdf/publications/nypd-the-way-forward.pdf> [<https://perma.cc/5W5M-HP57>] [hereinafter N.Y. Police Dep't, *The Way Forward*] (last visited Jan. 6, 2024) (stating that the NYPD has pioneered precision policing since 2014).

²⁵ *See* Dorothy E. Roberts, *Foreward: Race, Vagueness, and Social Meaning of Order-Maintenance Policing*, 49 J. CRIM L. & CRIMINOLOGY 775, 786 ("(Identification of someone as a gang member is highly associated with his race."); Johnson, *supra* note 6, at 1047–48 (highlighting the similarities between the NYPD's stop and frisk practices and their use of gang databasing). For a discussion on gang databasing's outgrowth from stop and frisk, *see infra* section I.A.2.

Angeles and Chicago revealed a myriad of fundamental deficiencies, including racial bias, falsified data, and a lack of procedural mechanisms to challenge one's identification in the database, numerous groups called for an audit of the CGD.²⁶ The New York City Department of Investigation (DOI) agreed to conduct an audit in 2018.²⁷ After months of delay,²⁸ the DOI released its report in April 2023.²⁹ The report identifies a number of dangerous and alarming practices around the NYPD's use and operation of the database, and it makes seventeen recommendations that address problems related to public transparency, criteria for inclusion, the inclusion of minors, and more.³⁰ Although the report implicitly recognizes the ways in which the CGD facilitates the racialized surveillance and oppression of New Yorkers, it concludes that the CGD is not a source of harm.³¹ Its critics, however, argue that this conclusion is utterly false—"The truth is simple: the NYPD must abolish this database."³²

As flawed as the CGD may be, the database is only part of the larger problem that targeted Black and Latino men of New York City face. Alleged gang members who are arrested and wish to contest their criminality at trial are faced with an insidious prosecutorial practice—the admission of NYPD officers as “gang experts.” Under New York evidence law, gang evidence can be admitted for a wide variety of reasons and with few restrictions.³³ As for the scope of a police officer's testimonial evidence on gangs, officers can speak to anything beyond

²⁶ *Groups Urge Groups Urge NYPD Inspector General to Audit the NYPD “Gang Database.”*, HUMAN RIGHTS WATCH (Sept. 22, 2020), <https://www.hrw.org/news/2020/09/22/groups-urge-nypd-inspector-general-audit-nypd-gang-database> [<https://perma.cc/497Z-XMLL>].

²⁷ Arya Sundaram, *Report on NYPD's Gang Database, Promised for Months, Has Been Delayed*, GOTHAMIST (Jan. 9, 2023), <https://gothamist.com/news/report-on-nypds-gang-database-promised-for-months-has-been-delayed> [<https://perma.cc/CV5B-GFQ4>].

²⁸ *Id.*

²⁹ N.Y.C. Dep't of Investigation, *supra* note 2.

³⁰ *Id.* at 8–10.

³¹ *Id.* at 3.

³² *LDF Responds to Department of Investigation's Findings Regarding the NYPD's Criminal Group Database*, NAACP LEGAL DEFENSE FUND (Apr. 18, 2023), <https://www.naacpldf.org/press-release/ldf-responds-to-department-of-investigations-findings-regarding-the-nypds-criminal-group-database/> [<https://perma.cc/5X9T-P6JP>].

³³ See *infra* section I.B.1.

the knowledge of the ordinary juror.³⁴ This generous standard is even more alarming considering these officers rely on the suspect information contained within the CGD,³⁵ and approximately 10,000 officers have access to the CGD's activation data.³⁶

Overall, the NYPD's use and operation of the CGD combined with the courtroom practice of admitting police officers as gang experts has created serious criminalization concerns, particularly for Black and Latino men. With the pretext of widespread gang crime and a public misconception that gang membership alone is indicative of violent criminality, the NYPD has utilized a policing tactic that is race-based in practice, yet race-neutral on its face.³⁷ Even further, this same racial bias is then translated into the courtroom via the use of police expert witnesses. Judges are exceedingly deferential to these experts despite their inherently suspect methods of policing and surveillance, and their testimony which can cover an exceedingly wide scope of information.³⁸ This creates two major problems. First, this testimony is unfairly prejudicial, as it allows prosecutors to capitalize on the implicit biases of both testifying officers and jurors, and further fuel the racialized stigma surrounding gang membership and activity. Second, this testimony is unreliable, as it risks supporting the conviction of potentially innocent, non-gang-

³⁴ See *People v. Inoa*, 34 N.E.3d 839, 845 (holding that a police officer's expert testimony on the meaning of uncoded language was within the knowledge of ordinary jurors and thus amounted to a usurpation of the jury's fact-finding role); *infra* section I.B.2.

³⁵ See Joshua D. Wright, *The Constitutional Failures of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115, 117 (2005) ("At trial, expert testimony from peace officers testifying the defendant is documented is typically sufficient to establish membership. Prosecutors, expert witnesses, judges, and juries rely heavily on the accuracy of the information in gang databases.").

³⁶ N.Y.C. Dep't of Investigation, *supra* note 2, at 4.

³⁷ See Johnson, *supra* note 6, at 1042 (noting how the façade of racial neutrality shields the NYPD's gang policing tactics from public and judicial scrutiny) (citing K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 4 (2015)).

³⁸ See Sara Hildebrand, *Racialized Implications of Officer Gang Expert Testimony*, 92 MISS. L. J. 155, 168–78 (2022) (arguing that judges are excessively deferent to police gang experts and that these experts frequently provide overbroad opinions); Anne Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2001 (2017) (suggesting that judge's broad embrace of police expertise is a reflection of structural biases).

affiliated individuals by coupling the same stigmatization tactics with the overbroad and extremely suspect evidence included within the CGD.

The obvious solutions to these problems are to abolish the CGD and prohibit police officers from testifying as gang experts. However, these solutions may not be feasible. The NYPD has a history of opposing and obstructing any meaningful reform,³⁹ and the DOI's "no harm" conclusion regarding the CGD likely protects it from further government scrutiny.⁴⁰ Additionally, the admission of police officers as expert witnesses is a deeply rooted practice that judges will likely be unwilling to change given the professional status of the police force and structural biases within the criminal justice system.⁴¹ There is, however, a solution that mitigates the prejudicial effect of police gang expert testimony and exposes its unreliability, which is the introduction of nonpolice gang experts by the defense.

This Note will proceed in three Parts. Part I provides an overview of gang policing and prosecution in New York City, highlighting changes in policing tactics over time and the current law on police gang expert testimony. Part II outlines the racial implications of police gang expert testimony, focusing on prejudice and unreliability. Part III advocates for the admission of nonpolice gang experts to counteract the prejudicial effect and unreliability of police testimony.

³⁹ Victor Dempsey & Alex S. Vitale, *Why We Should Abolish the NYPD's Gang Database, Not Reform It*, GOTHAM GAZETTE (May 2, 2023), <https://www.gothamgazette.com/130-opinion/11976-abolish-nypd-gang-database-reform> [<https://perma.cc/PS85-BXZA>].

⁴⁰ See N.Y.C. Dep't of Investigation, *supra* note 2, at 3, 56–7 (finding no evidence of harm stemming from the CGD and explicitly refuting the contention that the CGD targets categories of individuals rather than the perpetrators of specific crimes).

⁴¹ See Lvovsky, *supra* note 37, at 1999–2001 (observing that judicial deference to police expertise expanded significantly in the twentieth century as the police force professionalized, which bolstered police discretion, widened the scope of criminal law, and reinforced structural biases).

I. POLICING AND PROSECUTING GANG MEMBERS IN NEW YORK CITY

As noted by leading gang scholar K. Babe Howell, “New York City has always had gangs and will likely always have gangs.”⁴² Yet, even though the NYPD claims that gun crime is driven by gangs and street crews,⁴³ New York City’s gang problem is minimal in comparison to other large cities.⁴⁴ Scholars have noted that the city’s lack of organized gangs and minimal gang violence may be the result of non-law enforcement responses to gang activity in the past, such as social worker intervention and mediation.⁴⁵ Nevertheless, gang policing in New York City has evolved into a system of surveillance-based oppression. Extending from this system is the practice of admitting police officers as gang experts in criminal prosecutions. Through this “expertise”, the NYPD’s flawed conceptions of gang membership and gang life are weaponized against criminal defendants. Section I.A outlines the history of gang policing in New York City beginning in the postwar era. Section I.B explains the role and scope of police gang expert testimony in criminal prosecutions.

A. History of Gang Policing in New York

1. 20th Century Gang Policing - Cycles of Violence and Differing Responses

Over the last century, New York City has experienced successive and pronounced cycles of gang violence.⁴⁶ With each cycle, law enforcement’s response has varied significantly. One such cycle occurred from the mid-1940s through the mid-1960s, as racial segregation and the

⁴² Howell, *supra* note 22, at 5.

⁴³ See NYPD Announces Citywide Crime Statistics for March 2023, N.Y.C. POLICE DEP’T (Apr. 6, 2023), <https://www.nyc.gov/site/nypd/news/p00077/nypd-citywide-crime-statistics-march-2023> [<https://perma.cc/5LXW-JP2L>] (stating that “[d]ata shows that gun crime in New York City has been driven by gangs and street crews”).

⁴⁴ See Howell, *supra* note 22, at 5 (observing that “New York City has a far smaller gang problem than other large cities” based on gang offense data).

⁴⁵ *Id.* See also *infra* text accompanying notes 50–52.

⁴⁶ Judith Green & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* 15 (2007), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf [<https://perma.cc/2X6P-89JG>].

city's postwar economic transformation contributed to widespread youth gang violence.⁴⁷ Similar to social circumstances contributing to gang membership today, many minority families were excluded from well-paying jobs and forced into the poorest neighborhoods.⁴⁸ This oppression created "competing groups of cynical youngsters of color who were well aware of the class, racial, and ethnic barriers that stood between them and opportunities for good jobs in the future."⁴⁹ The rate of youth-on-youth killings increased remarkably, and in response, the city turned to social work and street-level gang intervention rather than harsh law enforcement tactics.⁵⁰ Not only did social workers conduct mediation sessions between rival gangs, but they also organized athletic programs, provided resources for neighborhood social events, and even located job opportunities for individual gang members.⁵¹ These strategies were successful; by 1966, serious gang violence had largely abated, and the city's gang intervention programs had proven effective in keeping violence at a minimum and diverting youth away from gang membership.⁵²

The 1970s saw a revival in gang activity, particularly in the South Bronx.⁵³ The intractable poverty and segregation of the South Bronx made it a breeding ground for gang violence, drug use, and overall community decay.⁵⁴ While law enforcement proponents believe that a return to "quality of life" policing restored peace within the South Bronx, former gang

⁴⁷ *Id.* For a more in-depth exploration of youth gangs in postwar New York City, *see generally* ERIC C. SCHNEIDER, *VAMPIRES, DRAGONS, AND EGYPTIANS KINGS: YOUTH GANGS IN POSTWAR NEW YORK* (1999).

⁴⁸ *See* Green & Pranis, *supra* note 45, at 15; Swaner, *supra* note 13, at 107 (noting that unemployment and poverty contribute to gang membership in modern New York City).

⁴⁹ Green & Pranis, *supra* note 45, at 15.

⁵⁰ *Id.* at 15–17.

⁵¹ *Id.*

⁵² *Id.* at 17.

⁵³ *Id.* at 18.

⁵⁴ *Id.* *See also* John Surico, *How the Gangs of the 1970s Came Together to End Their Wars*, VICE (June 18, 2015), <https://www.vice.com/en/article/kwxwzv/how-the-gangs-of-1970s-new-york-came-together-to-end-their-wars-618> [<https://perma.cc/FG8E-98EL>] (suggesting that the NYPD seemed "too scared to go to [the South Bronx] . . . [I]f someone died, the police would show up in riot gear to haul the body off").

members believe peace resulted from internal cooperation rather than external force.⁵⁵ The police were not present to prevent frequent clashes between gangs, nor could they address the underlying social conditions that allowed gang violence to flourish. Instead, the gangs themselves filled the void that resulted from the lack of law enforcement by organizing against the drug trade and responding to the issues raised by community members.⁵⁶

Eager to put an end to the violence, one of the larger gangs, the Ghetto Brothers, began a free breakfast program, which they modeled after the Black Panther Party; organized clothing drives; cleaned apartment buildings; and advocated for youth employment and better healthcare.⁵⁷ They also recruited a peace counselor, Black Benjie, to interrupt impending violence between gangs.⁵⁸ Tragically, in late 1971, Black Benjie was murdered while attempting to stop a brawl. His death led to a lasting peace treaty between gangs in the South Bronx, as many faded going into the 1980s.⁵⁹ This decline reflects how the gang members recognized they were “all brothers living in the same neighborhoods and having the same problems,”⁶⁰ a sentiment of shared experience and community that remains relevant today.

⁵⁵ See Surico, *supra* note 53 (“When you hear the pro-cop crowd talk about the bad old days, they tend to say it was broken windows that saved everything—it was this “quality of life” policing that restored law and order. . . . [But] it was an internal peace, not an external force.”).

⁵⁶ See *id.* (“They kicked out the junkies, and most people, if they had a problem, would go to the gang leaders and say . . . whatever the issues was.”); Green & Pranis, *supra* note 45, at 18 (“Youth gangs carried on the customary battles over turf, of course, but they also organized against the drug trade, mounting aggressive campaigns to drive heroin dealers and junkies out of their neighborhoods.”).

⁵⁷ See Jonathan Custodio, *The ‘Black Benjie Way’: Bronx Peacemaker Whose Killing Led To Gang Truce Honored With Street Naming*, THE CITY (June 3, 2023), <https://www.thecity.nyc/2023/06/03/black-benjie-ghetto-brothers-gangs-hoe-avenue-peace-treaty-south-bronx-longwood/> [<https://perma.cc/R7CP-S458>] (last updated Oct. 12, 2023).

⁵⁸ *Id.*

⁵⁹ *Id.* For a compelling documentary on Black Benjie’s legacy, the Hoe Avenue peace treaty, and New York City gang culture in the 1970s, see RUBBLE KINGS (Michael Aguilar, Jim Carrey, Cristina Esteras, Dito Montiel, Shan Nicholson, & Ben Velez 2015).

⁶⁰ The Hoe Avenue peace treaty stated: “We realize that we are all brothers living in the same neighborhoods and having the same problems. We also realize that fighting amongst ourselves will not solve our common problems . . . PEACE BETWEEN ALL GANGS AND A POWERFUL UNITY.” JEFF CHANG, CAN’T STOP WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION 60–61 (2005).

In the early 1980s, it appeared that the sustained gang violence which plagued the city since the end of World War II would begin to subside.⁶¹ But, poverty, lack of employment opportunities, and racial stratification, all forces that drew young people to gangs, were largely unchanged,⁶² and deadly gun violence reached epidemic levels among New York City youth in the late 1980s.⁶³ This upsurge in violence, however, was not entirely gang-related—scholars have suggested that it was fueled by the widespread availability of guns and the development of dangerous behavioral norms around them.⁶⁴ Nevertheless, media coverage of nationally renowned “supergangs” such as the Crips, Bloods, and Latin Kings, exploded during the last decade of the 20th century, leading to a wave of moral panic.⁶⁵

During this time, the NYPD adopted community policing as its guiding law enforcement model.⁶⁶ Community policing emphasizes problem solving, police-community relationship

⁶¹ See Green & Pranis, *supra* note 45, at 18 (“Those who expected that the problem of youth violence would subside as street gangs lost their widespread appeal . . . were sorely disappointed . . .”).

⁶² See August Benzow and Kenan Fikri, *The Persistence of Neighborhood Poverty: Examining the Power of Inertia and the Rarity of Neighborhood Turnaround Across U.S. Cities* 13 (2020), <https://eig.org/wp-content/uploads/2020/04/Persistence-of-Neighborhood-Poverty.pdf> [<https://perma.cc/BTB3-MJRX>] (“New York started down a path of urban decline beginning in the 1960s. By 1980, one-quarter of the city’s population lived in a high-poverty neighborhood.”); Mark K. Levitan & Susan S. Wieler, *Poverty in New York City, 1969-99: The Influence of Demographic Change, Income Growth, and Income Inequality* 22 (2008), <https://www.newyorkfed.org/medialibrary/media/research/epr/08v14n1/0807levi.pdf> [<https://perma.cc/K7FC-FY8Y>] (noting a sharp rise in poverty rates for Black and Latino communities in the 1970s); Richard B. Freeman, *Cutting Black Youth Unemployment; Create Jobs That Pay as Well As Crime*, N.Y. TIMES (July 20, 1986), <https://www.nytimes.com/1986/07/20/business/cutting-black-youth-unemployment-create-jobs-that-pay-as-well-as-crime.html> (on file with the *Columbia Law Review*) (observing that Black youth unemployment was at “disastrous levels,” with forty percent of those aged twenty to twenty-four were unemployed in 1985).

⁶³ Green & Pranis, *supra* note 45, at 18.

⁶⁴ See, e.g., Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, 24 CRIME AND JUST. 105, 107 (1998) (suggesting that the widespread availability of firearms led to a pervasive “ecology of violence” in which beliefs about guns being protection from the dangers of everyday life were internalized in early childhood).

⁶⁵ See Green & Pranis, *supra* note 45, at 18– 9 (“Newspaper references to [supergangs] surged . . . raising fears about an impending gang-related crime wave. Yet police reports . . . indicate that serious violent crime was on the decline in the city well before, and long after, media reports of the emergence of a new generation of violent gangs.”).

⁶⁶ N.Y.C. Police Dep’t, *The History of the New York City Police Department* 10 (1993), <https://www.ojp.gov/pdffiles1/Digitization/145539NCJRS.pdf> [<https://perma.cc/KY4E-SGYD>].

building, and organizational management designed to support neighborhood partnerships.⁶⁷ The NYPD's adoption of community policing led to organizational ambiguity about the objectives and functions of specifically tasked gang units, and raised questions around whether such a model could adequately combat the perceived rise in the number of gangs within the city.⁶⁸ Despite the success of community-based approaches to gangs, in 2000, the NYPD separated its gang units from the community policing program and consolidated its anti-gang efforts into a single division.⁶⁹ This shift laid the groundwork for the massive transformation in gang policing that would take place only a decade later.

2. 21st Century Gang Policing - *Floyd v. City of New York* to *Operation Crew Cut*

Although the NYPD continues to tout community policing as the “cornerstone” of the Department,⁷⁰ much of its work in the twenty-first century has been surveillance-based rather than community-based.⁷¹ Prior to 2012, this surveillance was conducted through stop-and-frisk, a practice that allowed the NYPD to surveil high crime areas, and stop, detain, and pat down individuals they deemed “suspicious.”⁷² The NYPD developed an addiction to profile-based policing, and Black and Latino residents of low-income areas frequently fit the criminal

⁶⁷ U.S. Dep’t of Justice Community Oriented Policing Services, *Community Policing Defined* 1 (2012), <https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p157-pub.pdf> [<https://perma.cc/4YX9-2EYN>].

⁶⁸ See Deborah Lamm Weisel & Tara O’Connor Shelley, *Specialized Gang Units: Form and Function in Community Policing* 2 (2004), <https://www.ojp.gov/pdffiles1/nij/grants/207204.pdf> [<https://perma.cc/H9RY-F5DE>] (“The convergence of these divergent movements during the 1990s – the explosive growth of community policing and the dramatic rise in the number of gangs – contributed to an organizational ambiguity about the objectives, structure and functions of gang units in police agencies.”).

⁶⁹ *Id.* at 12

⁷⁰ The community policing model is now referred to as “Neighborhood Policing.” See *Neighborhood Policing*, N.Y.C. POLICE DEP’T, <https://www.nyc.gov/site/nypd/bureaus/patrol/neighborhood-coordination-officers.page> [<https://perma.cc/7U5H-84CG>] (“The cornerstone of today’s NYPD is Neighborhood Policing, a comprehensive crime-fighting strategy built on improved communication and collaboration between local police officers and community residents.”).

⁷¹ See Howell, *supra* note 22, at 2 (noting that “[s]ince 2001, the NYPD has adopted a surveillance-based policing model”).

⁷² *Id.* See also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (“Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.”). *Terry* stops are named after the case *Terry v. Ohio*, which held stop and frisks to be constitutional. *Id.* at 558, 565.

profile.⁷³ In 2008, this blatant practice of racial profiling was challenged before the Southern District of New York.⁷⁴ In *Floyd v. City of New York*, the court ultimately found that the NYPD deliberately targeted young men of color without any objective suspicion of criminal behavior, and thus violated the plaintiffs' Fourth⁷⁵ and Fourteenth⁷⁶ Amendment rights. The 2013 decision effectively changed the stop-and-frisk tactics employed by the NYPD, as the court ordered “immediate changes to the NYPD’s policies, a joint remedial process to consider further reforms, and the appointment of an independent monitor to oversee compliance with the remedies ordered in this case.”⁷⁷

During the time the court in *Floyd* analyzed the NYPD’s use of stop-and-frisk, gang violence represented an extremely small percentage of crime in New York City.⁷⁸ As such, gang policing was not a priority for the NYPD, but it became one when stop-and-frisk came under attack. In 2012, just ten months before the *Floyd* decision, Police Commissioner Raymond Kelly announced Operation Crew Cut, which quadrupled the number of officers assigned to the gang

⁷³ See Howell, *supra* note 22, at 2 (“The NYPD is driven by crime statistics and believes that aggressively policing a particular suspect class, which happens to be defined by race and class, is the reason for crime decline.”). See also *Floyd*, 959 F. Supp. 2d at 559 (noting that eighty-three percent of people stopped and frisked were either Black or Latino, despite New York City’s population only being fifty-two percent Black or Latino at the time).

⁷⁴ See *Floyd, et al. v. City of New York, et al.*, CNTR. CONST. RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al> [<https://perma.cc/57YL-4JF8>] (last visited Jan. 8, 2024).

⁷⁵ *Floyd*, 959 F. Supp. 2d at 658 (“Plaintiffs established the City’s liability for the NYPD’s violation of their Fourth Amendment rights . . . [S]enior officials in the City and at the NYPD were deliberately indifferent to officers conducting unconstitutional stops and frisks . . . [U]nconstitutional stops and frisks were sufficiently widespread that they had the force of law.”).

⁷⁶ *Id.* at 661 (“Plaintiffs have established . . . that the City, through the NYPD, has a *policy* of indirect racial profiling based on local criminal suspect data . . . [P]laintiffs showed that senior officials . . . have been *deliberately indifferent* to the intentionally discriminatory application of stop and frisk . . .”).

⁷⁷ *Id.* at 667.

⁷⁸ See Howell, *supra* note 22, at 8 (noting that the NYPD attributed less than 1% of major categories of felony crimes in New York City to gang members through 2012). Of note, factors that influence gang activity, like youth unemployment, were even higher during that period than they have been in recent years. See *Youth Unemployment (20 to 24 Years), Keeping Track Online: The Status of New York City Children*, <https://data.cccnewyork.org/data/map/1180/youth-unemployment-20-to-24-years#1180/a/3/1312/127/a/a> (last visited Jan. 14, 2024) (comparing New York City youth unemployment in 2021 and 2012, which was 14.9 percent and 20.5 percent, respectively).

division.⁷⁹ Kelly told newspapers that thirty percent of shootings in recent years were related to youth “crews.”⁸⁰ But, this is an utterly false claim if one considers the NYPD’s own reports from 2005 through 2012.⁸¹

Operation Crew Cut created more than an expansion of gang policing. It laid the foundation for an alternative racial profiling practice under the guise of a new menace to society—the violent youth gang member. This created a moral panic “where the public, the media, and politicians reinforce[d] each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals.”⁸² This, however, was not the first time that misplaced fear of gang violence was used to justify intensive profile-based policing. This tactic proved successful in obscuring the discriminatory effect of youth offender legislation in California a decade earlier.⁸³ The guise of the gang menace proved similarly effective in New York City, as even the most outspoken critics of stop-and-frisk

⁷⁹ *Id.* at 2.

⁸⁰ See Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. TIMES (Sept. 18, 2023), <https://www.nytimes.com/2013/09/19/nyregion/frisking-tactic-yields-to-a-focus-on-youth-gangs.html> (on file with the *Columbia Law Review*). Kelly stated that the problem stemmed not from “large, established gangs such as the Bloods and Crips, but . . . the looser associations of younger men who identify themselves by the block they live on, or on which side of a housing development they reside.” Rocco Parascandola, *NYPD to Double Gang Division to Combat Street Violence: Commissioner Kelly*, N.Y. DAILY NEWS (Oct. 1, 2012), <http://www.nydailynews.com/new-york/nypd-double-gang-division-article1.1172347> (on file with the *Columbia Law Review*). It is worth noting that feuding crews were already being surveilled by police and prosecutors when Operation Crew Cut was announced, so the increase in resources allowed for the intensive policing of individuals in the areas beyond the existing conflicts. See Howell, *supra* note 18, at 12.

⁸¹ Professor Howell obtained these reports from NYPD legal after submitting a Freedom of Information Law request, but it took three years and a lawsuit to do so. See Howell, *supra* note 22, at 2 n. 2. The reports indicated that less than six percent of shootings and homicides during the seven year period were gang-motivated. *Id.* at 9. The NYPD categorizes a higher percentage of shootings and homicides as “gang related,” which captures all incidents involving actual or suspected gang members even if the violence is attributable to a non-gang motive. *Id.* Even using this broader category, only fifteen to twenty percent of shootings and homicides were gang-related. *Id.* Beyond low levels of gang-related crime, violent crime in New York City also reached the lowest level in recorded history. *Id.* at 2 (questioning why the NYPD would quadruple its gang division in the two years during which violent crimes reached the lowest level in recorded history).

⁸² See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 108–12 (2008) (linking moral panic over youth crime to the adoption of California’s Proposition 21 which required many juveniles to be tried as adults, barred sealing of juvenile records, and extended prison terms for gang-related crimes).

⁸³ See *id.* (observing how the gang menace was used to justify profile-based policing in California following the passage of Proposition 21).

expressed approval for increased policing to combat the perceived threat of trigger-happy street crews in low-income Black and Latino neighborhoods.⁸⁴ So, even after *Floyd*, the NYPD continued its regime of racial profiling—it just took a new form.

3. *The Criminal Group Database (CGD) and the 2023 Department of Investigations Report*

In 2013, shortly after the announcement of Operation Crew Cut, the CGD became operational.⁸⁵ The NYPD Patrol Guide defines a “gang” as:

Any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities, the commission of one or more criminal acts (including drug dealing), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁸⁶

This definition requires that members of the gang participate in a pattern of criminal activity. The NYPD Patrol Guide does not define a “gang member” but individuals can be designated as gang members within the CGD without any proof of criminality.⁸⁷ There are two pathways for inclusion in the CGD: “Option A” and “Option B.”⁸⁸ Option A requires that either the individual self-admit membership “during debriefing or post[ing] on their personal social media site information such as language, symbols, picture, colors, etc. that are affiliated with a criminal group,” or that “[t]hrough the course of an investigation an individual is believed to

⁸⁴ Stephon Johnson, *Stop-and-Frisk Makes Way for Operation Crew Cut*, N.Y. AMSTERDAM NEWS (Sept. 26, 2013), <http://amsterdamnews.com/news/2013/sep/26/stop-and-frisk-makes-way-operation-crew-cut/> [https://perma.cc/M57A-FBAQ] (noting that Operation Crew Cut received backing from stop-and-frisk critics like former Mayor Bill de Blasio and former Council Member Jumaane Williams).

⁸⁵ See N.Y.C. Dep’t of Investigation, *supra* note 2, at 2.

⁸⁶ N.Y.C. Police Dep’t, *supra* note 5, at 1.

⁸⁷ Johnson, *supra* at note 6, at 1038. It is worth noting that gang membership in itself is not a crime. See *Lanzetta v. New Jersey*, 306 U.S. 451, 457–58 (1939) (holding that a New Jersey statute that criminalized gang membership was unconstitutional).

⁸⁸ N.Y.C. Dep’t of Investigation, *supra* note 2, at 2.

belong to a criminal group and is identified as such by [two] independent sources” such as a school safety officer or a correctional officer.⁸⁹ Option B requires two of the following:

- 1) frequent presence at a known criminal group location; 2) possession of criminal group-related documents; 3) association with known criminal group members; 4) social media posts with known criminal group members while possessing known criminal group paraphernalia; 5) scars and tattoos associated with a particular criminal group; or 6) frequent wearing of the colors and the use of hand signs that are associated with a particular criminal group.⁹⁰

None of the criteria, for Option A or Option B, require criminal conduct. So, even though the NYPD’s definition of a gang requires criminal activity, one can be included in the CGD without committing a crime.

For most of its existence, the CGD has been shrouded in secrecy.⁹¹ But, this secrecy has not shielded it from public scrutiny. In 2018 and 2019, the Grassroots Advocates for Neighborhood Groups & Solutions Coalition (GANGS) testified before the City Council about numerous concerns related to the database.⁹² The coalition insisted that “the database uses overly vague criteria for inclusion, lacks oversight, includes juveniles without notifying their parents, does not inform people if they are on the database, and offers no mechanisms for disputing inclusion.”⁹³ In response, the DOI agreed to launch a report on the NYPD’s use and operation of the CGD. The report, which was released in 2023, confirmed all of the concerns.⁹⁴

⁸⁹ Babe Howell, *Gang Narratives and Race-Based Policing and Prosecution in New York City*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL GANG STUDIES 177, 179 (David C. Brotherton & Rafael Jose Gude eds., 2022) [hereinafter Howell, *Gang Narratives*].

⁹⁰ N.Y.C. Dep’t of Investigation, *supra* note 2, at 2.

⁹¹ *Id.* at 12 (noting that the NYPD has not provided clear responses to the questions and concerns raised by community members about the CGD). *See also* NAACP Legal Defense Fund, *supra* note 31 (“The NYPD has wielded this secretive gang database against New Yorkers for years, while simultaneously denying them the right to even know if they are included in it.”).

⁹² Dempsey & Vitale, *supra* note 38.

⁹³ *Id.*

⁹⁴ *See* N.Y.C. Dep’t of Investigation, *supra* note 2, at 3–8 (outlining various issues with the CGD).

The report notes that as of December 2022, there were over 16,000 individuals included in the CGD.⁹⁵ Ninety-nine percent of these individuals were nonwhite.⁹⁶ This statistic alone is alarming given that criminal groups exist in a wide variety of neighborhoods throughout New York City, not solely within nonwhite communities.⁹⁷ But beyond the clear racial profiling, the report highlights a number of dangerous NYPD practices and failures.

Notably, the report found that the most common reason cited to support entry into the database was self-admission of gang membership through police debriefings or social media posts.⁹⁸ Per NYPD policy, the self-admission must be “clearly articulated,”⁹⁹ however the NYPD does not define what qualifies as a self-admission in the social media context,¹⁰⁰ nor is there written guidance about the level of detail and documentation required to establish self-admission.¹⁰¹ The second most common reason cited to support entry into the database was associations with known gang members combined with the presence of the individual at locations deemed to be gang-related.¹⁰² Individuals have been added to the database as known associates merely due to being friends with an alleged gang member on social media or wishing them “Happy Birthday” on Facebook.¹⁰³ Similarly, the NYPD treats being present at a known gang location as a criterion for entry even when the location was merely a person’s home in a public housing complex.¹⁰⁴ When a public housing complex is deemed a known criminal group

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 34.

⁹⁷ See Dempsey & Vitale, *supra* note 38 (noting that “violence, drug dealing, and other collective criminal behavior occurs in a wide variety of neighborhoods”). See also Howell, *supra* note 22, at 16 (“[C]riminologist and youth gang researchers find that gang membership is rare among all races but substantially more common among white youth than law enforcement statistics estimates, with white gang members accounting for 25% or more of all gang members.”).

⁹⁸ N.Y.C. Dep’t of Investigation, *supra* note 2, at 36.

⁹⁹ *Id.* at 25.

¹⁰⁰ *Id.* at 26.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 36.

¹⁰³ *Id.* at 48.

¹⁰⁴ NAACP Legal Defense Fund, *supra* note 31.

location, then those who live there, whether involved in gang activity or not, are at risk of being classified as gang members by virtue of their socioeconomic status. This practice exemplifies how the database criminalizes not only race but also class.

Furthermore, contrary to the CGD's governing policies, the report found instances where a single NYPD staff person served as the reporting officer, reviewing supervisor, and endorser of an individual's activation into the database—an egregious lack of oversight.¹⁰⁵ When reviewing the CGD's active profiles, the DOI also found instances where individuals were reviewed and approved for continued inclusion in the database based on sealed arrest records, which is prohibited by state law.¹⁰⁶ Despite this legal violation, the report does not mention any consequences the NYPD may face.¹⁰⁷ Moreover, the report claims that “[e]vidence of harm from the CGD was not found,”¹⁰⁸ which is a questionable assertion considering the clear racial disparity in who is included in the database and the numerous problems identified in the report.¹⁰⁹ This claim is all the more questionable given that prosecutors, police witnesses, judges, and juries rely heavily on the accuracy of the information in gang databases.¹¹⁰ Due to the decisions

¹⁰⁵ N.Y.C. Dep't of Investigation, *supra* note 2, at 5. The NYPD requires four levels of approval to include an individual in the CGD: a proposal from a reporting officer (Level One), the endorsement of a senior supervisor (Level Two), and review from the activating detective (Level Three) and detective's supervisor (Level Four). *Id.* The same individuals served in multiple roles in approximately ten percent of entries. *Id.*

¹⁰⁶ *Id.* at 41.

¹⁰⁷ Although not discussed in the report, this illegal use of the CGD may expose the NYPD to civil liability. *See Lino v. N.Y.C.*, 958 N.Y.S.2d 11, 15 (N.Y. App. Div. 2012) (finding NYPD's inclusion of sealed records in the “stop and frisk” database was sufficient harm to confer standing to sue).

¹⁰⁸ N.Y.C. Dep't of Investigation, *supra* note 2, at 3.

¹⁰⁹ *See supra* text accompanying notes 96–106. The “no harm” conclusion also flies in the face of Chicago's audit of its gang database, which identified multiple concrete harms like “misidentifications, harassment, obstacles to immigration, and racial profiling, all of which . . . furthered the historical divide between the community and the police and contributed to inequities, especially in communities of color.” Dempsey & Vitale, *supra* note 38.

¹¹⁰ Wright, *supra* note 34, at 117.

of these actors, inclusion can lead to false identification as a gang member,¹¹¹ inexplicably harsh criminal charges or excessive bond,¹¹² and even the risk of deportation.¹¹³

B. Gang Prosecutions and Police Expert Testimony

Targeting gang activity in New York City does not end with CGD. Alleged gang members who are charged with crimes face the possibility of a police officer testifying on behalf of the state as a “gang expert.”¹¹⁴ Prior to explaining the role and scope of this form of testimonial evidence, it is important to note the function of gang evidence more broadly.

1. Gang Evidence in Criminal Prosecutions

Contrary to more nuanced gang definitions, the New York Court of Appeals has recognized the connection between evidence of a defendant’s membership in a gang and the commission of crimes.¹¹⁵ Accordingly, evidence of gang activity and a defendant’s membership in a gang are frequently admissible in criminal prosecutions.¹¹⁶ There are three requirements for admissibility.

¹¹¹ See Vaidya Gullapalli, Spotlight: *The Dangers of Gang Databasing and Gang Policing*, THE APPEAL (July 3, 2019), <https://theappeal.org/spotlight-the-dangers-of-gang-databases-and-gang-policing/> [https://perma.cc/ZM6C-HVZM] (telling the story of Bronx native Kraig Lewis, who was falsely identified as a gang member and arrested on conspiracy charges due to childhood interactions captured on Facebook).

¹¹² See Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons*, THE INTERCEPT (Dec. 5, 2018), <https://theintercept.com/2018/12/05/nypd-gang-database/> [https://perma.cc/N64D-L34G] (describing how Harlem resident Keith Shenry’s false identification as a “known” gang member led to an unusually severe felony charge and a whopping \$10,000 bond for possession of a small bag of marijuana and a folding knife).

¹¹³ Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 1025–26 (2018) (noting that “[o]nce detained for alleged gang membership, immigrants can be deported on this allegation alone”).

¹¹⁴ See Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 201 (2021) (observing that police officers are commonly offered and admitted as experts in state gang prosecutions despite admissibility standards).

¹¹⁵ See *People v. Kims*, 24 N.E.3d 573, 585 (N.Y. 2014) (“Evidence regarding gang activity can be admitted to provide necessary background, or when it is ‘inextricably interwoven’ with the charged crimes, or to explain the relationships of the individuals involved.”). See also *Guide to N.Y. Evidence Rule 4.34. Gang Membership and Activity*, N.Y. State Unified Ct. Sys., https://www.nycourts.gov/judges/evidence/4-RELEVANCE/4.34_Gang_Membership_and_Activity.pdf [https://perma.cc/JZE7-DHJJ] (last visited Jan. 9, 2024) (noting that “[e]vidence of gang activity and a defendant’s membership in a gang normally will reveal, directly or indirectly, the commission of crimes or bad acts”).

¹¹⁶ See, e.g., *People v. Benjamin*, 162 N.Y.S.3d 726, 726 (N.Y. App. Div. 2022) (upholding the trial court’s ruling which admitted evidence of gang activity, specifically police expert testimony and photos of the defendant making gang signs with known gang members); *People v. Hilts*, 134 N.Y.S.3d 563, 568 (N.Y. App. Div. 2020)

First, the evidence must connect to a specific material issue in the case.¹¹⁷ The Court of Appeals has stated that gang evidence “can be admitted to provide necessary background, or when it is ‘inextricably interwoven’ with the charged crimes, or to explain the relationships of the individuals involved.”¹¹⁸ Gang evidence may also be admitted when it provides a motive for the crime charged.¹¹⁹

Second, the gang evidence cannot solely demonstrate the defendant’s propensity to commit the crime charged.¹²⁰ Although New York’s evidence rules are uncoded,¹²¹ this requirement is similar to Rule 404 of the Federal Rules of Evidence (FRE), which states that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion, the person acted in accordance with the character or trait.”¹²² In the context of gang evidence under New York state law, evidence of the defendant’s gang membership or activity must not be offered solely to show their propensity or predisposition to commit the crimes charged.¹²³ Rather, the prosecution must offer a different theory for why the evidence is relevant, such as motive or necessary background.¹²⁴ Additionally, while there is still danger that

(holding that the trial court did not err in permitting evidence of the gang affiliations of the defendant and other participants in a gun sale); *People v. McCommons*, 40 N.Y.S.3d 578, 583 (N.Y. App. Div. 2016) (holding that the trial court did not err in permitting People to establish that defendant was a gang member in a prosecution for murder and other crimes).

¹¹⁷ *Kims*, 24 N.E.3d at 585.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *People v. Moore*, 366 N.E.2d 1330, 1337 (N.Y. 1977) (“[E]vidence of the defendant’s relationship with [The Black Liberation Army] and their stated hostility to the police was properly admitted at trial to show the motive for the crime.”); *Benjamin*, N.Y.S.3d at 726 (holding that evidence of the defendant’s gang membership was probative of motive and thus admissible as his confession made no sense except in the context of a gang rivalry).

¹²⁰ *Kims*, 24 N.E.3d at 585.

¹²¹ David Paul Horowitz & Katryna L. Kristoferson, *Burden of Proof: Evidence is Hard*, *New York State Bar Association* (July 6, 2023), <https://nysba.org/burden-of-proof-evidence-is-hard/> [<https://perma.cc/2FXP-AASZ>] (noting that New York is one of the few states without a statutory code of evidence).

¹²² FED. R. EVID. 404(A)(1).

¹²³ See *Kims*, 24 N.E.3d at 585 (stating that references to the defendant’s alleged gang membership and gang affiliation were improperly admitted as they did not connect to the various drug related charged and thus only tended to show the defendant’s predisposition to commit the crimes).

¹²⁴ See *People v. Faccio*, 822 N.Y.S.2d 329, 330 (N.Y. App. Div. 2006) (holding that the trial court did not err in permitting proof of the defendant’s gang membership as the prosecution offered multiple alternative theories of

jurors can make an improper propensity inference when presented with gang evidence, judges can mitigate this danger by instructing juries to avoid making such an inference.¹²⁵

Lastly, the probative value of the evidence must outweigh its prejudicial effect.¹²⁶

Probative value refers to the strength of the explanation that the evidence provides,¹²⁷ while prejudice refers to its tendency to suggest a factual finding on an improper basis, like emotion or bias.¹²⁸ While gang evidence may trigger the emotions and biases of jurors,¹²⁹ the many reasons gang evidence may support a prosecutor's case frequently tip the scale in favor of admissibility.¹³⁰ Judges may also minimize the prejudicial effect of the evidence by instructing the jury to avoid prejudicial inferences.¹³¹

relevance, including necessary background and motive of the conspirators). Considering that the non-propensity theory is often what connects the gang evidence to a material issue in the case, the material issue requirement is rather superfluous. *See* *People v. Bailey*, 110 N.E.3d 489, 498 (N.Y. 2018) (holding that testimony about the defendant's gang membership was not improper propensity evidence, as it was probative of his motive to join a prison assault and provided necessary background on the relationship between codefendants).

¹²⁵ *See id.* (stating that the trial court delivered adequate instructions to the jury regarding the proper use of the gang evidence).

¹²⁶ *See* *People v. Bailey*, 110 N.E.3d 489, 498 (N.Y. 2018) (stating that where there is a proper nonpropensity purpose for gang evidence, the decision to admit the evidence rests upon the trial court's discretionary balancing of probative value and unfair prejudice).

¹²⁷ *See* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHILOSOPHY 223, 242 (2008) ("Probative value refers to the strength of the explanation; the more the evidence is explained by, and hence justifies, the party's explanation of the evidence, the greater the probative value and hence the stronger the inference to the truth of that explanation.").

¹²⁸ *See* FED. R. EVID. 403 Adv. Comm. Notes (stating that unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

¹²⁹ *See*, K. Babe Howell, *Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements*, 123 DICK. L. REV. 691, 700 (2019) [hereinafter Howell, *Prosecutorial Misconduct*] ("[G]ang allegations evoke prejudice even when conspiracies are not alleged and multiple defendants are not charged.").

¹³⁰ *See*, e.g., *People v. Argueta*, 149 N.Y.S.3d 104, 104 (N.Y. App. Div. 2021) (holding that testimony regarding the defendant's membership in a gang was properly admitted to establish motive and intent, and thus the prejudicial effect of that testimony did not outweigh its probative value).

¹³¹ *See* *People v. Benjamin*, 162 N.Y.S.3d 726, 726 (N.Y. App. Div. 2022) ("The probative value of defendant's gang affiliation outweighed any prejudice, which was minimized by the court's limiting instructions."). One may question the curative value of these instructions. Jurors are not able to simply forget what they hear, and judges may even be drawing attention to prejudicial inferences they seek to abate.

2. *The Admissibility and Scope of Police Officers as Gang “Experts”*

Beyond the minimal requirements for the admission of gang evidence, there are a variety of forms this evidence may take.¹³² One of the most powerful, and most common, is the testimony of a police expert witness.¹³³ In New York state courts, the testimony of expert witnesses must satisfy the requirements established in *Frye v. United States*.¹³⁴ The *Frye* test asks “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.”¹³⁵ In short, the only inquiry for the court is whether other scientists generally accept the techniques used in forming the expert’s opinion as reliable.

Given that a police officer’s expertise on gang-related matters does not stem from generally accepted scientific techniques,¹³⁶ their testimony is inadmissible under *Frye*.¹³⁷ But, the Court of Appeals has held that the *Frye* rule does not apply where experts base their testimony

¹³² See e.g., *id.* (photographs evincing the defendant’s affiliation with a gang); *People v. Hiltz*, 134 N.Y.S.3d 563, 568 (N.Y. App. Div. 2020) (the testimony of a confidential informant); *Doyle v. Prack*, 982 N.Y.S.2d 203, 204 (N.Y. App. Div. 2014) (a wristband with gang insignia); *Matter of Donovan B.*, 717 N.Y.S.2d 180, 180 (N.Y. App. Div. 2000) (lay witness testimony about the color of the defendant’s clothing). The use of rap music as gang evidence is a particularly controversial topic. See Kate Brumback, *Judge Rules Rap Lyrics Can Be Used as Evidence in Young Thug’s Trial*, TIME (Nov. 9, 2023), <https://time.com/6333558/young-thug-trial-rap-lyrics/> [<https://perma.cc/H87G-7QUR>] (discussing the contested admission of rapper Young Thug’s lyrics as gang evidence in his Georgia racketeering trial). For a captivating exposé about the use of rap lyrics to convict and incarcerate young men of color, see generally Nelson, *supra* note 20.

¹³³ See Hayat, *supra* note 113, at 200 (recognizing the weight and import of police gang expert testimony); Victor M. Rios & Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, 18 CRITICAL CRIMINOLOGY 21, 24 (2010) (“The legal framework in gang cases is unique to other crime cases because of the heavy reliance on police gang experts.”).

¹³⁴ See 293 F. 1013 (D.C. Cir. 1923). See also *People v. Brooks*, 96 N.E.3d 206, 206 (N.Y. 2018) (showing New York’s continued adherence to *Frye*); *People v. Wesley*, 633 N.E.2d 451, 454 (N.Y. 1994) (applying the *Frye* standard to DNA profiling evidence).

¹³⁵ See *Wesley*, 633 N.E.2d at 454.

¹³⁶ The Supreme Court has stated that science is defined by the use of the scientific method, which involves generating hypotheses and testing them empirically to see if they can be falsified. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). Although it may be argued that “[p]olice officer experts use certain criteria to determine whether a person is in a gang, and these criteria can be falsified depending on whether people who meet these criteria are always gang members,” these methods are not generally accepted by social scientists who have studied gangs objectively for decades. Hayat *supra* note 113, at 209–10.

¹³⁷ See Hayat, *supra* note 113, at 203 (arguing that police gang expert testimony amounts to pseudo-science that lacks acceptance in the relevant scientific community).

on personal training or experience.¹³⁸ This loophole allows police officers to be certified as criminal “experts” by virtue of their occupation, and the same logic applies to gang unit officers (or detectives who investigate gang activity) and gang expertise.¹³⁹

There are, however, limitations on the testimony of these “experts.” The issues on which they testify must be “beyond the ken of ordinary jurors” so that they “may be aided, but not displaced” by the expert’s opinion.¹⁴⁰ A primary concern to courts is an officer “giv[ing] seemingly authoritative testimony directly instructive of what facts the jury should find.”¹⁴¹ These limitations are outlined in *People v. Inoa*, where the Court of Appeals held that it was an error to permit a police officer to give expert testimony on the meaning of uncoded phone conversations between gang members.¹⁴² While it was permissible for the officer to testify as to the meaning of coded language between the gang members, testimony about uncoded language was within the knowledge of average jurors and thus amounted to a usurpation of the jury’s fact-finding role.¹⁴³

Despite concerns that the extent of permissible evidence is excessive under *Inoa*,¹⁴⁴ the court’s reasoning has been extended to permit police expert testimony on a wealth of gang-

¹³⁸ See *People v. Oddone*, 3 N.E.3d 1160, 1163–64 (N.Y. 2013) (holding that an expert who bases their opinion on personal training or experience is not subject to a *Frye* analysis).

¹³⁹ See *People v. Inoa*, 34 N.E.3d 839, 842 (N.Y. 2016) (noting that an NYPD detective who had previously participated in a takedown of the defendant’s gang was qualified as an expert in decoding code conversations between gang members).

¹⁴⁰ See *id.* at 842–44. See also *People v. Cronin*, 458 N.E.2d 351, 352 (N.Y. 1983) (noting that the scope of expert testimony turns on whether or not “the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon”).

¹⁴¹ See *Inoa*, 34 N.E.3d at 844.

¹⁴² See *id.* at 845.

¹⁴³ See *id.* It is worth noting that the court does not discuss if there is a difference between coded language and slang language. But if one compares the examples provided in the case to popular music, where artists speak in slang rather than intentional code, it is clear that coded language was interpreted to include slang language. See *id.* at 842 (stating that “onion” was a coded term for marijuana package); T.I., 24’s (Cinq Recordings 2003) (expressing the artist’s desire to “buy an onion of good,” referring to marijuana). See also *People v. Goldman*, 139 N.Y.S.3d 48, 49 (N.Y. App. Div. 2020) (permitting a police expert to testify as to the meaning of a “slang” expression uttered by the defendant).

¹⁴⁴ See *Goldman*, 139 N.Y.S.3d at 49 (noting the defendant’s argument that police expert testimony admitted under *Inoa* deprived him of his constitutional right to a fair trial).

related matters, including gang culture, customs, hierarchies, and past violent practices.¹⁴⁵ Given the wide scope of information permitted under police gang expert testimony, databases like the CGD are all the more relevant. Not only can the CGD be used to support the finding that an individual is a gang member,¹⁴⁶ but it can also provide the basis by which officers develop a broader understanding of gangs and gang-related behavior.¹⁴⁷ Police gang expert testimony also evades a reliability inquiry, allowing the CGD's suspect data to undergird police "expert" authority within the courtroom.¹⁴⁸ With these factors and the broader history of New York City gang policing in mind, this Note will now turn to a discussion of the prejudicial effect and unreliability of police gang expert testimony.

II. THE PREJUDICIAL EFFECT AND UNRELIABILITY OF POLICE GANG EXPERT TESTIMONY

When examining the connection between the CGD and the admission of NYPD officers as gang "experts" in criminal prosecutions, it is apparent that Black and Latino men face a unique and compounding form of oppression. The NYPD's own data supports the notion that gang crime is not a salient issue.¹⁴⁹ Yet, gang crime is sensationalized in the media and the

¹⁴⁵ See *People v. Bailey*, 50 N.Y.S.3d 53, 54 (N.Y. App. Div. 2017) (holding that the trial court providently exercised its discretion in admitting police expert testimony "concerning the customs, hierarchies and violent practices of the Bloods").

¹⁴⁶ See N.Y.C. Dep't of Investigations, *supra* note 2, at 23–4 (outlining the process for entry into the CGD and thus the gang member designation); Speri, *supra* note 111 (describing how prosecutors based their courtroom accusation of gang membership on a defendant's inclusion in CGD).

¹⁴⁷ See N.Y.C. Dept's of Investigations, *supra* note 2, at 38 (describing how officers support an individual's activation in the CGD with narrative accounts of the individual's gang activity). Although the Department of Investigation found that many activations contained insufficient narrative support, those with sufficient support contained information about known gang locations, colors associated with the gang, hand signs, social media posts, and other investigatory observations. *Id.*

¹⁴⁸ *Frye* provides the reliability inquiry for expert evidence, and police expert testimony evades this inquiry due to its grounding in personal knowledge and experience. See *supra* text accompanying notes 135–36. In limiting the scope of police expert testimony, *Inoa* also makes no mention of reliability. See *Inoa*, 34 N.E.3d at 842–44 (stating that the court's chief concern in limiting the scope of police expert testimony is whether the subject matter is beyond the knowledge of the ordinary juror).

¹⁴⁹ See Howell, *supra* note 22, at 2 ("[G]ang-motivated [do not] crimes account for even one percent of the crimes that take place in New York City each year.").

NYPD has invested tremendous resources into the suppression of gang activity.¹⁵⁰ Widespread gang crime is thus pretextual, and the public's association of gang membership with violent criminality covers the NYPD's racial profiling practices under a façade of racial neutrality.¹⁵¹ As exemplified by the CGD, racial bias is clearly embedded within the NYPD's methods of gang policing.¹⁵² That same racial bias is given immense evidentiary weight within the courtroom through the admission of NYPD officers as gang experts.¹⁵³ This creates two major issues. First, the expert testimony is unfairly prejudicial to individuals with alleged gang ties. Second, the expert testimony may be wholly unreliable and support the wrongful convictions of individuals who are not gang-affiliated. These issues come together to create a powerful form of criminal legal oppression that is seemingly inescapable for the targeted Black and Latino New Yorkers.

This Part explores the prejudice and unreliability concerns with police gang expert testimony. Section II.A analyzes the prejudicial effect of police gang expert testimony, taking into account the implicit biases of testifying officers and jurors. Section II.B examines the unreliability of police gang expert testimony, highlighting how overbroad gang definitions and harmful indicators of gang membership risk the conviction of innocent, non-gang-affiliated individuals.

¹⁵⁰ See N.Y.C. Police Dep't, *supra* note 42 (describing the NYPD's major case operations conducted against gangs in the first three months of 2023, which resulted in over 200 arrests); Tina Moore & Sofia Barnett, *Gangs of NY: NYPD Bronx Unit Targets Killer, Crime-Happy Crews*, NEW YORK POST (July 22, 2023), <https://nypost.com/2023/07/22/nypd-bronx-unit-targets-killer-crime-happy-gangs-in-nyc/> [<https://perma.cc/ZP5K-P5ZG>] (describing youth gangs as “drivers of violence” and everyday people as “collateral damage in gang warfare raging across the city”).

¹⁵¹ See Howell, *supra* note 22, at 5–6 (arguing that rampant gang crime is pretext to justify broad law enforcement-based suppression strategies); Johnson, *supra* note 6, at 1042 (arguing that NYPD gang policing is race-based in practice but race-neutral on its face).

¹⁵² Non-white individuals are ninety-nine percent of the database, yet white people account for twenty-five percent or more of gang members. Johnson, *supra* note 6, at 1041.

¹⁵³ See Hayat, *supra* note 113, at 200 (recognizing the power of police gang expert testimony).

C. Police Gang Expert Testimony is Unfairly Prejudicial

As discussed in section I.B, evidence regarding gang activity and a criminal defendant's gang affiliation is generally deemed more probative than prejudicial.¹⁵⁴ But, when this evidence is presented through the testimony of a police expert witness, there is a particular capacity for prejudice that courts have yet to recognize.¹⁵⁵

During trials where gang membership or gang activity is relevant, prosecutors employ inflammatory and often inaccurate narratives that highlight the violence and moral turpitude of gang life.¹⁵⁶ While claiming to protect the community from threats posed by gangs, these stories exaggerate the conduct of Black and Latino individuals, and feed society's overt racism and implicit biases.¹⁵⁷ Testifying police officers play a critical role in supporting these stories, as they provide "expert" authority on gang activity and membership,¹⁵⁸ and judges are exceedingly deferential to their expertise.¹⁵⁹

¹⁵⁴ See, e.g., *People v. Angulo*, 159 N.Y.S.3d 427, 429 (N.Y. App. Div. 2022) (holding that the trial court did not abuse its discretion in finding gang evidence more probative than prejudicial); *People v. Hiltz*, 134 N.Y.S.3d 563, 568 (N.Y. App. Div. 2020) (same); *People v. Davis*, 41 N.Y.S.3d 160, 160 (N.Y. App. Div. 2016) (same); *People v. Wilson*, 788 N.Y.S.2d 383, 383 (N.Y. App. Div. 2005) (same); *supra* text accompanying notes 123–24 (explaining that the many ways gang evidence can be probative and the use of limiting instructions tips the scales in favor of admissibility).

¹⁵⁵ See Hildebrand, *supra* note 37, at 158–59 (noting that "broad judicial deference is afforded to police officers endorsed as expert witnesses" despite defendants being unfairly prejudiced).

¹⁵⁶ See Howell, Prosecutorial Misconduct, *supra* note 128, at 704–06 (outlining the inflammatory statements made by New York County District Attorneys in the trials following a Harlem housing project gang takedown).

¹⁵⁷ See *id.* at 708.

¹⁵⁸ For an example of what this testimony may look like and how it may support a prosecutor's narrative, see Hildebrand, *supra* note 37, at 156–58. In this example, the officer told the jury his belief the defendant was a gang member, and that he shot the victim out of revenge for the shooting of a fellow gang member, as was customary gang practice. *Id.* at 157. He went on to explain the dynamics of the gang in question, and how they "commit crimes such as rape, murder, assault with firearms, car and narcotics thefts, and burglary, all to enhance their gang's reputation and to profit financially." *Id.* at 157. Despite a credible alibi, the defendant, a Black man, was charged with murder by an all-white jury after an unusually short deliberation. *Id.* at 158.

¹⁵⁹ See Lvovsky, *supra* note 37, at 5 (suggesting "that courts came to recognize police work as a matter of professional expertise in large part through the interconnections and, often, structural biases of the criminal justice system").

By virtue of its subconscious grounding, implicit bias is particularly dangerous in its influence over gang expert evidence and jury decision making.¹⁶⁰ Courts' insensitivity to the operation of implicit bias within these scenarios skews the fairness of criminal trials against alleged gang members, particularly those of color.¹⁶¹ Despite any probative value police expert testimony may provide, criminal case outcomes are only as just as the evidence that informs them.¹⁶² Therefore, when biased evidence leads to biased outcomes, it is impossible for the probative value of the evidence to outweigh its prejudicial effect.

1. Implicit Bias of Testifying Officers

Given that the expertise of testifying officers is based on their personal knowledge and experience, police expert testimony in gang prosecutions is typically given by a gang unit officer or a detective familiar with the gang or similar gangs.¹⁶³ There is, however, a high risk that the testimony of these officers is tainted by racial and anti-gang bias.¹⁶⁴ Although young men join gangs for safety and the fulfillment of basic human needs,¹⁶⁵ "[g]ang units in police departments show high levels of implicit bias not seen in other police departments and are prone to think of

¹⁶⁰ See Hildebrand, *supra* 37, at 190 ("A significant body of social and neuroscience research shows that implicit bias often impacts juror decision making in criminal trials."); Kathryn Yetter & Brian M. Lee, *Judging the Book by More Than Its Cover: A Symposium on Juries, Implicit Bias, and the Justice System's Response* 2 (2021), https://www.judges.org/wp-content/uploads/2021/04/NJC_WHITE-paper_web_singlepages-1.pdf [<https://perma.cc/PH8P-4U6A>] ("[Implicit biases] can affect a juror's understanding of the facts, decision-making, and behavior without them even realizing it, and can lead to unfair or unjust results.").

¹⁶¹ See Hildebrand, *supra* note 37, at 178.

¹⁶² See *Id.*

¹⁶³ See, e.g., *People v. Inoa*, 34 N.E.3d 839, 842 (N.Y. 2016) (noting that the expert was a detective who previously participated in a takedown of the defendant's gang); *People v. Goldman*, 139 N.Y.S.3d 48, 49 (N.Y. App. Div. 2020) (holding that a police detective was properly permitted to testify as an expert on gang language).

¹⁶⁴ See Hildebrand, *supra* note 37, at 173 (noting that information from various sources, including the Federal Bureau of Investigation, shows that racial bias is pervasive among police); Rios & Navarro, *supra* note 132, at 34 ("[G]ang detectives often see themselves as enemies of gangs and gang members.").

¹⁶⁵ See Swaner, *supra* note 13, at 97 (arguing that gang membership is "for ensuring safety and survival in the face of weak social and economic supports and state violence"). See also Laina Sonterblum, *Gang Involvement as a Means to Basic Safety Needs*, NEW YORK UNIVERSITY APPLIED PSYCHOLOGY OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/gang-involvement-as-a-means-to-satisfy-basic-needs/ [<https://perma.cc/QB62-UBXA>] (last visited Jan. 11, 2024) (reviewing literature on factors for gang involvement through a hierarchy of needs framework).

and characterize alleged gang members as less-than human.”¹⁶⁶ This collective dehumanization of gang members extends to more than just prejudicial testimony—there have been multiple instances of NYPD gang experts being named defendants in lawsuits alleging violations of civil rights, including wrongful arrest, false prosecution, and unlawful use of force.¹⁶⁷ As such, their biases are both pervasive and powerful, and these officers are immersed in an environment where negative stereotypes reinforce their work.¹⁶⁸ In providing “expert” testimony on gangs, these officers immerse jurors in that very same environment, imparting upon them the very same biases that they follow.¹⁶⁹

2. *Implicit Bias of Jurors*

Jurors are susceptible to multi-layered implicit bias when confronted with police gang expert testimony. Not only are jurors biased in favor of officer credibility but they also hold negative bias toward gang members and people of color.¹⁷⁰

Although judges instruct jurors to scrutinize expert testimony just as they would the testimony of other witnesses,¹⁷¹ many jurors may find this instruction difficult to follow with police experts. For example, white people are overrepresented in New York City jury pools,¹⁷²

¹⁶⁶ See Howell, Prosecutorial Misconduct, *supra* note 128 at 122, at 709.

¹⁶⁷ See *id.*

¹⁶⁸ See Jessica J. Sim, Joshua Correll, & Melody S. Sadler, *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 PERSONALITY & SOC. PSYCH. BULL. 291, 298 (2013) (“If stereotypes continually provide a valuable heuristic [mental short cut] in a training environment, then even trained individuals may use them. . . . [T]his latter form of ‘training’ may exacerbate, not attenuate bias.”).

¹⁶⁹ See Hildebrand, *supra* 37, at 177 (noting the extreme prejudicial impact of police gang expert testimony).

¹⁷⁰ See *id.* at 184–94. (discussing implicit bias in favor of officer credibility and negative bias toward gang members and witnesses of color).

¹⁷¹ See *Expert Witness Criminal Jury Instruction*, N.Y. State Unified Ct. Sys., https://www.nycourts.gov/judges/cji/1-General/CJ12d.Expert_In_General.pdf [https://perma.cc/WP7T-KHZA] (last visited Jan. 11, 2024) (“You should evaluate the testimony of any [expert] witness just as you would the testimony of any other witness.”).

¹⁷² See New York State Justice Task Force, *Recommendations Regarding Reforms to Jury Selection in New York* 3 (2022) <http://www.nyjusticetaskforce.com/pdfs/Report-on-Recommendations-Regarding-Reforms-to-Jury-Selection-in-New-York.pdf> [https://perma.cc/FN4K-JZX7] (“[A]lthough 46% of the population of New York County identify as white, 60% of those who appear for jury service identify as white.”). See also Bob Cohen & Janet Rosales,

and this demographic tends to hold a more favorable view of police officers and their credibility.¹⁷³ Specifically, this demographic both consciously and unconsciously views police “as honest people who take their work seriously, as venerated members of society and protectors of their communities.”¹⁷⁴ So, even with jury instructions that advise against giving undue weight to expert testimony, jurors cannot be expected to sufficiently identify and grapple with the unconscious favor they may give to police.¹⁷⁵ As such, jurors assign more weight to police gang experts in comparison to lay witnesses.¹⁷⁶ Additionally, police testimony habitually presents gangs as criminal and violent,¹⁷⁷ a representation that reinforces jurors’ positive views of police as community protectors and simplifies the complexities underlying gang cases.¹⁷⁸

In addition to bias in favor of police credibility, many jurors hold negative biases towards gang members and people of color.¹⁷⁹ Although gang membership can include positive aspects for its members and even community,¹⁸⁰ as discussed earlier, gangs are stigmatized and particularly susceptible to deviant labeling.¹⁸¹ Some scholars have even noted that there can be a

Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform 6 (2007), <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf> [<https://perma.cc/VT6M-ZYYW>] (finding that in criminal court juries, “[w]hites were overrepresented by 43%, Blacks were underrepresented by 43%, and Hispanics were underrepresented by 78%”).

¹⁷³ See Hildebrand, *supra* note 37, at 184 (describing the positive view of police officers by the white demographic).

¹⁷⁴ Hildebrand, *supra* note 37, at 184 (citing Jonathan M. Warren, *Hidden in Plain View: Juries and The Implicit Credibility Given To Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 2, 6, 12 (2018)).

¹⁷⁵ See Jonathan M. Warren, *Hidden in Plain View: Juries and The Implicit Credibility Given To Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 2, (2018) (“In the face of the strong favorable bias currently attached to police testimony by certain juror demographics, such a blasé attempt to convince a jury to treat these judicially proclaimed heroes as merely any other witnesses is not an effective solution.”).

¹⁷⁶ See Hildebrand, *supra* note 37, at 185.

¹⁷⁷ See John M. Hagedorn & Bradely A. Maclean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases*, 42 U. MEM. L. REV. 1027, 1040 (2012).

¹⁷⁸ See *id.* (“Police expert testimony seizes on society’s predisposition to simplify complex matters and reinforce beliefs consistent with popular stereotypes.”).

¹⁷⁹ Hildebrand, *supra* note 37, at 186.

¹⁸⁰ See Swaner, *supra* note 13, at 104 (finding that “gangs provided a well of support, positivity, and protection for their members and the larger community.”).

¹⁸¹ See Sou Lee & Bryan F. Bubolz, *The Gang Member Stands Out: Stigma as a Residual Consequence of Gang Involvement*, 45 CRIM. JUST. REV. 64, 66–7 (arguing that “[g]ang membership itself is often perceived to be deeply discrediting given several myths attached to the label”).

greater stigma attached to gang membership than criminal behavior itself.¹⁸² This stigmatization is evidenced in court through jurors' view of gang members as individuals effectively separated from the rest of society.¹⁸³ Most jurors do not have first-hand experience with gangs, and thus improperly rely on this "othering" of gang members when making decisions.¹⁸⁴ Even worse, police expert testimony often encourages jurors to identify with and draw conclusions based on gang stereotypes that depict gang members as predators linked to drugs and violence.¹⁸⁵ This label carries profound stigma, and when this stigma is coupled with the testimony of police gang experts, it is difficult for jurors to look beyond their biases and decide a case based on the facts before them.¹⁸⁶

In conjunction with negative bias towards gang members, racial bias among jurors also injects gang prosecutions with unfair prejudice. It is well established that people of color—particularly Black and Latino people—are disproportionately criminalized, prosecuted, and incarcerated.¹⁸⁷ This is especially true in New York City.¹⁸⁸ But, rather than highlight the inequities of the criminal legal system, the mainstream media "perpetuates inaccurate narratives

¹⁸² See Karen Bullock & Nick Tilley, *Understanding and Tackling Gang Violence*, 10 CRIME PREVENTION & CMTY. SAFETY 36, 43 (2008) (stating that some believe "[t]here is greater stigma attached to gang membership than crime").

¹⁸³ See Lee & Bubolz, *supra* note 180, at 66 ("[D]eviant groups are relegated into a 'them' category, effectively separating the dangerous classes from the rest of society.").

¹⁸⁴ See Hildebrand, *supra* note 37, at 192 (arguing that because "most jurors do not have first-hand experience with street gangs, they are likely to rely on their stereotypes about gangs or on gang-related trial testimony").

¹⁸⁵ See *id.* ("[O]fficer gang expert testimony often encourages jurors to identify with and make decisions based on generalizations and gang-related stereotypes."); Lee & Bubolz, *supra* note 181, at 66 (describing myths attached to the gang label, "including the assumption that gangs are inexorably linked with drugs and violence, they are resilient to any and all prevention/intervention efforts, and members are super predators").

¹⁸⁶ See Hildebrand, *supra* 37, at 193 (noting that there are many ways police gang expert testimony improperly invites juror decision-making based on stereotypes and sweeping generalizations).

¹⁸⁷ See MICHELLE ALEXANDER, *THE NEW JIM CROW 2* (2010) (arguing that a racial caste system continues to exist in America through the criminal justice system).

¹⁸⁸ See Jesse Barber & Simon McCormack, *A Racial Disparity Across New York That is Truly Jarring*, ACLU OF NEW YORK (Dec. 16, 2022), <https://www.nyclu.org/en/news/racial-disparity-across-new-york-truly-jarring> [<https://perma.cc/X3TC-XDA3>] (observing that Black people are arrested and prosecuted more frequently than white people for the same crimes, resulting in Black people being convicted of felonies at a rate over twenty greater than white people in Manhattan).

of violence, criminality, and dishonesty among racial minorities that many unknowingly internalize.”¹⁸⁹ These negative biases manifest in the attitudes of average people, so much so that a person’s features can influence someone’s perception of their character.¹⁹⁰ Thus, alleged gang members, who are overwhelmingly Black and Latino,¹⁹¹ face compounding bias, and jurors’ perceptions of their criminality as gang members are reinforced by their racial identities.¹⁹²

D. Police Expert Testimony is Unreliable

While unfair prejudice stemming from implicit bias is a serious issue surrounding the testimony of police experts in gang prosecutions, it is only part of the problem. Police gang expert testimony is also unreliable, and this unreliability undermines the integrity of gang prosecutions and may support the conviction of innocent defendants.

As the testimony of police experts is based on personal knowledge or experience, it evades *Frye*’s reliability inquiry when judges rule on its admissibility.¹⁹³ In limiting the scope of police expert testimony, *Inoa* also does not mandate an inquiry into reliability.¹⁹⁴ Police officers are not disinterested parties and they often work closely with prosecutors to build cases and seek convictions against the criminally accused.¹⁹⁵ As such, in cases where gang membership and activity are intertwined with the prosecution’s narrative, police officers are incentivized to

¹⁸⁹ See Hildebrand, *supra* note 37, at 186.

¹⁹⁰ See Heather M. Kleider-Offutt, Alesha D. Bond, & Shanna E. A. Hegerty, *Black Stereotypical Features: When a Face Type Can Get You in Trouble*, 26 CURRENT DIRECTIONS IN PSYCH. SCI. 28, 28–9 (2017) (discussing “Black Face-Type Bias,” where people stereotype those with Afrocentric features as aggressive, violent, and criminal).

¹⁹¹ See N.Y.C. Dep’t of Investigation, *supra* note 2, at 34 (finding that ninety-nine percent of the NYPD’s gang database is Black or Latino).

¹⁹² See Hildebrand, *supra* note 37, at 186–93 (explaining how juror’s negative bias towards gang members and people of color both impact decision-making in criminal trials).

¹⁹³ See *People v. Oddone*, 3 N.E.3d 1160, 1163 (N.Y. 2013) (holding that an expert opinion based on personal knowledge and experience is not based subject to a *Frye* analysis).

¹⁹⁴ See *People v. Inoa*, 34 N.E.3d 839, 842–44 (N.Y. 2016) (making no mention of reliability in holding that the subject matter of police expert testimony must be beyond the knowledge of the ordinary juror).

¹⁹⁵ See Hildebrand, *supra* note 37, at 185 (noting that jurors are usually unaware of police expert’s collaboration with the prosecution).

present evidence that aligns with this narrative.¹⁹⁶ This evidence, however, is notoriously unreliable due to the NYPD's overbroad gang identifications and its problematic indicators of gang membership. Given the collaboration between the NYPD and prosecutors, it is understandable why the NYPD would want to apply the gang label to as many groups as possible; gang evidence explains the inexplicable, and "gives rich color to an otherwise pale fact pattern."¹⁹⁷ But, the unreliability of police gang expert evidence creates a massive risk: convicting innocent, non-gang-affiliated individuals.

1. *Overbroad Gang Identifications*

Police officers are given expert authority on gangs,¹⁹⁸ but their gang identifications are overbroad. The gangs that are targeted by the NYPD today are not the organized, hierarchical, and nationally-renowned gangs of the past.¹⁹⁹ Instead, they are groups of kids and young adults who live in the same housing project or neighborhood.²⁰⁰ While this difference does not

¹⁹⁶ See *id.* ("[O]fficers want to prove themselves through their trial testimony—to show the prosecutor and court that they made the right decision to arrest the accused instead of some other person.").

¹⁹⁷ See Hagedorn & Maclean, *supra* note 176, at 1040–41 (characterizing trials as competing stories, and highlighting the explanatory and narrative value of police gang expert testimony).

¹⁹⁸ See *People v. Bailey*, 50 N.Y.S.3d 53, 54 (N.Y. App. Div. 2017) (affirming that police experts may opine on the customs and practices of gangs).

¹⁹⁹ See Evers, *supra* note 1 (noting an NYPD lieutenant's view that today's gang culture is different from the past, and how today there is less hierarchy stability among gangs); Green & Pranis, *supra* note 45, at 18 (noting that nationally renowned gangs like the Bloods, Crips, and Latin Kings were prevalent in New York City in the late 1990s); Seth Ferranti, *How New York Gang Culture is Changing*, VICE (Aug. 18, 2015), <https://www.vice.com/en/article/5gj9kb/how-new-york-citys-gang-culture-is-changing-818> [<https://perma.cc/7M5C-96JU>] (interviewing a gang prevention specialist, who explains his view that there is a rise in gangs that are not connected to traditional "supergangs" like the Bloods, Crips, and Latin Kings).

²⁰⁰ See Lisa Evers, *Inside the NYPD's Dismantling, Takedown of Violent Bronx Gang*, FOX 5 NEW YORK (Sept. 22, 2023), <https://www.fox5ny.com/news/bronx-gang-takedown-nypd> [<https://perma.cc/FA62-274S>] [hereinafter Evers, *Gang Dismantling*] (describing the mass arrest of a gang known as "5zzly," a name that reflects their location near 175th Street in the Bronx); Ferranti, *supra* note 198 (noting the rise is "hybrid gangs" which represent "local housing projects, parks, city blocks, and streets"). See also The Brian Lehrer Show, *"We Asked the City for Help and We Got a Raid"*, NEW YORK PUBLIC RADIO (Jul. 10, 2014), <https://www.wnyc.org/story/we-asked-city-help-and-we-got-raid/> [<https://perma.cc/2NCB-2X6U>] (detailing the NYPD raid of two Harlem housing projects which resulted in the arrest of forty teenagers and young adults). The 2014 raid of the Manhattanville and Grant houses was designed to prevent violence between feuding gangs, but community members believe the raid only worsened their problems. See *id.* ("But at the end of the day, the way they put together this investigation . . . to come up in these homes, trash them, be very unprofessional, break furniture . . . it was all just very uncalled for."). One community member detailed how her three-year-old niece was traumatized after the raid: "If you can't trust the police, who can you trust?" *Id.*

minimize the violence that some of these groups perpetrate, it reflects how the NYPD designates groups that are less clearly defined and less criminally-aligned as gangs of the past.²⁰¹

The NYPD's gang definition requires that one of the primary activities of the group is the commission of crimes.²⁰² However, the definition does not require that officers observe any crimes or make any arrests before applying the gang designation.²⁰³ As such, the NYPD has unchecked discretion to designate any group as a gang based on mere suspicion.²⁰⁴ This allows race and class to become defining elements of a gang, as groups of troubled youths become more likely to be categorized as gang members if they are low-income and nonwhite.²⁰⁵ Additionally, the NYPD surveils low-income, non-white neighborhoods at a much higher rate, leading to a continuing cycle of overbroad and erroneous gang identifications within these communities.²⁰⁶

2. *Problematic Indicators of Gang Membership in the CGD*

Beyond identifying groups they consider gangs, police officers are also given expert authority over asserting who is an individual gang member.²⁰⁷ But, their methods for determining membership are also dubious and rooted in racism. The CGD's two options for activation, as discussed in section I.A., require no criminal behavior and allow officers to designate an

²⁰¹ See Sonja Sharp, *Why Does the NYPD Think Dance Teams are Street Gangs?*, VICE (Feb. 19, 2015), <https://www.vice.com/en/article/qbe737/why-does-the-nypd-think-dance-teams-are-street-gangs-219> [<https://perma.cc/AL5K-5CUT>] (describing how the NYPD is lumping dance crews together with actual street gangs, and noting how the NYPD has shifted its attention smaller, younger, and more casually associated groups).

²⁰² N.Y.C. Police Dep't, *supra* note 5, at 1.

²⁰³ *Id.*

²⁰⁴ See Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 MARQ. L. REV. 979, 991 (2014) (arguing that one of the most frequently cited gang definitions gives law enforcement the freedom to deem any group criminal through their suspicions).

²⁰⁵ *Id.* at 991.

²⁰⁶ See Tate Ryan-Mosely, *A New Map of NYC's Cameras Shows More Surveillance in Black and Brown Neighborhoods*, MIT TECHNOLOGY REVIEW (Feb. 14, 2022), <https://www.technologyreview.com/2022/02/14/1045333/map-nyc-cameras-surveillance-bias-facial-recognition/> [<https://perma.cc/F6EM-NGQM>] (observing that stop and frisk searches and publicly owned cameras are concentrated in communities of color).

²⁰⁷ See Hildebrand, *supra* note 37, at 157 (“[A police officer] also testified as a gang expert witness. In that capacity, based on a police-developed theory for gang member identification, he told the jury about his belief that [the defendant] was a [gang] member.”).

individual as a gang member based on factors like where they live, who they interact with, and how they dress.²⁰⁸ Officers are also able to interpret trivial information from social media posts as an individual's "self-admission" of gang membership with minimal oversight.²⁰⁹

As hostile outsiders, police do not accurately understand the language and culture of young people residing in under-resourced and impoverished communities.²¹⁰ Police gang experts mistake signs of their culture for gang membership and criminal conspiracy, as things like "clothing, acquaintanceship, and other outward symbols of urban youth culture are often unrelated to criminal purpose."²¹¹ For example, "minority youth who grow up in areas with heavy gang activity often wear gang paraphernalia to blend in, intimidate others for self-protection, or because it is fashionable among their peers."²¹² This lack of cultural awareness among police gang experts not only perpetuates the perception that race and criminal gang activity are interchangeable, but it risks giving false gang member designations "expert" backing in the courtroom.²¹³

3. *Potential to Convict the Innocent Under the Gang Member Label*

Both overbroad gang identifications and problematic indicators of gang membership infect police gang expert testimony with a high degree of unreliability. Given the truth-seeking function of the criminal process, this unreliability is dangerous in and of itself.²¹⁴ But when

²⁰⁸ See N.Y.C. Dep't of Investigation, *supra* note 2, at 2 (outlining the options for CGD activation).

²⁰⁹ See *id.* at 8, 25–6 (explaining the lack of guidance and oversight surrounding social media self-admissions); *supra* text accompanying notes 99–101, 105.

²¹⁰ See Rios & Navarro, *supra* note 132, at 34–5 (noting how gang detectives often see themselves as enemies of gangs, and how they lack an in-depth understanding of the culture and community).

²¹¹ *Id.* at 35.

²¹² *Id.*

²¹³ See *id.* at 34–5 (arguing that police conflate urban youth culture with gang membership and criminal activity, and noting how they are "the ultimate source of knowledge for judges and juries").

²¹⁴ See Thomas Weigend, *Should We Search for the Truth, and Who Should Do It*, N.C. J. INT'L L. 389, 389 (2010) ("The criminal process . . . is about truth.").

considering how gang evidence can be used to fill the holes in a prosecutor's case and thus turn an innocent defendant into a guilty one, this unreliability becomes all the more alarming.

As discussed in section I.B, gang evidence can serve a variety of purposes in criminal prosecutions.²¹⁵ Police gang expert testimony is especially useful for prosecutors due to its explanatory and persuasive value.²¹⁶ But the power and utility of police gang expert testimony can also bear profound injustice. Consider how police expert testimony is regularly relied on to prove motive.²¹⁷ In cases where motive is lacking in other evidence, police gang expert testimony can fill in those crucial details.²¹⁸ Inexplicable homicides can be “transformed into a gang initiation ritual or a way to gain status in the gang by expert testimony, even when no evidence exists of the defendant being initiated or rising in rank.”²¹⁹ The same problem applies to police gang expert testimony that contextualizes the crime or explains the relationships among individuals; false gang member designations and extremely unreliable gang evidence could be used to explain inexplicable factual circumstances, and thus erase the reasonable doubts that would force a jury to find a defendant not guilty.²²⁰

²¹⁵ See *supra* text accompanying notes 117–118 (describing how gang evidence can provide necessary background, explain the defendant's motive, or explain the relationships of the individuals involved).

²¹⁶ See Hagedorn & Maclean, *supra* note 176, at 1040 (noting how police gang expert testimony can “explain the inexplicable” and “give rich color to an otherwise pale fact pattern”).

²¹⁷ See *People v. Bailey*, 110 N.E.3d 489, 498 (N.Y. 2018) (upholding the admission of gang evidence to prove motive); *People v. Moore*, 366 N.E.2d 1330, 1337 (N.Y. 1977) (same); *People v. Benjamin*, 162 N.Y.S.3d 726, 726 (N.Y. App. Div. 2022) (same); *People v. Argueta*, 149 N.Y.S.3d 104, 104 (N.Y. App. Div. 2021) (same); *People v. Faccio*, 822 N.Y.S.2d 329, 330 (N.Y. App. Div. 2006) (same).

²¹⁸ See Hagedorn & Maclean, *supra* note 176, at 1041 (“[P]olice expert testimony is regularly relied on to provide motive where one is lacking in other evidence.”).

²¹⁹ *Id.*

²²⁰ See Mitchell Eisen, Brenna Dotson, & Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISC. 2 (2014) (studying the potential biasing effect of gang evidence on jury verdicts, and finding that potent gang testimony led jurors to disregard reasonable doubt and vote to convict the defendant despite a lack of evidence related to the charge at hand); Hagedorn & Maclean, *supra* note 176, at 1040 (explaining the ability of gang evidence to “explain the inexplicable”); Howell, *Prosecutorial Misconduct*, *supra* note 128, at 710 (arguing that the gang narrative increases the likelihood of wrongful conviction in conspiracy cases); Rios & Navarro, *supra* note 132, at 34–5 (describing police gang expert's flawed perceptions of urban youth culture and the potential for abuse in designating individuals as gang members).

The prejudicial effect and unreliability of police gang expert testimony is a major cause for concern. Fortunately, criminal defendants are not helpless in the face of this injustice. This Note will now turn to the use of nonpolice gang expert testimony to combat the issues with police gang expertise.

III. AN EFFECTIVE COUNTERBALANCE: NONPOLICE GANG EXPERTS

Thanks to the CGD and the prosecutorial tool of police gang experts, Black and Latino men in New York City face a particularly powerful form of criminal legal oppression. Labeling groups of these men as gangs is reflective of law enforcement's tendency to criminalize people based on race and class. But, the gang member label involves racial profiling that goes far beyond its stop-and-frisk predecessor.²²¹ Suspected gang members and their associates are subject to intensive police surveillance. Additionally, police officer's flawed perceptions of gang life and erroneous gang member designations are given immense evidentiary weight within the courtroom.²²² This creates two issues. First, police gang expert evidence leads to unfair prejudice against alleged gang members.²²³ Second, this evidence is unreliable, and it risks punishing innocent individuals who are not gang-affiliated.²²⁴

Eliminating these issues entirely would require a massive shift in the status quo. Not only would the NYPD need to abolish the CGD and substantially reform their methods of gang policing,²²⁵ but trial judges would need to prohibit NYPD officers from testifying as gang

²²¹ See Johnson, *supra* note 6, at 1042 (characterizing the NYPD's gang policing expansion as an outgrowth of stop and frisk that avoids public and judicial scrutiny due to its apparent racial neutrality).

²²² See Hayat, *supra* note 113, at 200 (recognizing the weight police gang expert testimony); NAACP Legal Defense Fund, *supra* note 31 (calling the NYPD's gang surveillance practices "overreaching and dystopian");

²²³ See *supra* section II.A.

²²⁴ See *supra* section II.B.

²²⁵ See NAACP Legal Defense Fund, *supra* note 31 ("[T]he NYPD must abolish this database. This heightened, racialized surveillance breeds significant distrust in Black and Brown communities and is antithetical to true public safety.").

experts.²²⁶ While these solutions would completely remedy the injustice that targeted groups face, they may not be feasible. The NYPD consistently opposes any meaningful reforms and has a history of obstructing them.²²⁷ Additionally, the admission of police officers as expert witnesses in criminal trials is a firmly rooted practice that courts are likely unwilling to change.²²⁸

Nonetheless, there is a solution that mitigates the prejudicial force and exposes the unreliability of police gang expert testimony: the testimony of nonpolice experts. The defense can introduce these experts,²²⁹ and in doing so, juries will be exposed to a more comprehensive and accurate portrayal of gang membership and the nuances of gang life.²³⁰

This Part will discuss the use of nonpolice gang experts as a solution to the problems identified in Part II. Beginning with a discussion of the value of nonpolice gang experts, this Part will highlight who these experts could be and how their perspectives provide a counterbalance against the prejudicial force and unreliability of police gang expertise. This Part will conclude with a discussion on the limitations of nonpolice expert testimony as a solution.

²²⁶ See Hildebrand, *supra* note 37, at 159 (arguing that structural unfairness warrants the exclusion of police gang expert testimony in criminal trials).

²²⁷ Dempsey & Vitale, *supra* note 38. See also Joel Berger, *Reforming the NYPD And Its Enablers Who Thwart Reform*, 55 NEW ENG. L. REV. 1, 2 (2020) (expressing the author's view that they have never encountered a government agency "more resistant to reform" and "more determined to hide its infirmities from the public" than the NYPD). The DOI's report on the CGD also does not encourage reform. See N.Y.C Dep't of Investigation, *supra* note 2, at 3 ("Evidence of harm from the CGD was not found.").

²²⁸ See Lvovsky, *supra* note 37 (arguing that judicial deference to police experts stems from the twentieth-century professionalization of the police force and reflects structural biases within the criminal justice system).

²²⁹ Both parties in a criminal prosecution can offer expert witnesses. See *People v. Collins*, 811 N.Y.S.2d 122, 123 (N.Y. App. Div. 2006) (holding that a finding of guilt was not against the weight of the evidence despite conflicting testimony from the defendant's and the prosecution's respective expert witnesses).

²³⁰ See Rios & Navarro, *supra* note 132, at 38 (stating that nonpolice gang experts provide "an in-depth understanding of the gang world" and can show the courtroom the contested nature of what constitutes a gang member and gang").

E. The Value of Nonpolice Gang Experts

Although police officers hold a virtual monopoly in the courtroom when it comes to testifying as gang experts,²³¹ they are not the only ones with gang expertise. Gang expertise can come from many people and places within the community,²³² and the testimony of nonpolice gang experts is an effective counterbalance against the prejudicial effect and unreliability of police gang expert testimony.²³³

1. *Police Gang Experts vs. Nonpolice Gang Experts*

Police officers are qualified as gang experts due to their specialized knowledge, skills, training, or experience.²³⁴ However, under this same legal standard, many others are also qualified to be experts on gangs, including community workers, former gang members, friends or family of gang members, and even gang members themselves.²³⁵ Not only do these individuals meet the requisite legal standard for expertise, but they can also provide unique and more reliable testimony about gangs and gang members than police gang experts.²³⁶

Unlike police officers, these nonpolice experts understand gangs from the inside. They live and work amongst gang members, and truly understand the culture and community.²³⁷ Police officers, on the other hand, approach gangs as hostile outsiders,²³⁸ and their perspectives are

²³¹ *See id.* at 22 (noting that “over 95% of gang experts hired by prosecutors are police”).

²³² *See id.* at 2.

²³³ *See id.* at 38 (arguing that nonpolice gang experts “balance the scale” against police gang experts).

²³⁴ *See* *People v. Inoa*, 34 N.E.3d 839, 842 (N.Y. 2016) (qualifying a detective as an expert in decoding gang phone conversations due to his experience with the gang). *See also* *Guide to N.Y. Evidence Rule 7.01 Opinion of Expert Witness*, N.Y. State Unified Ct. Sys., https://www.nycourts.gov/JUDGES/evidence/7-OPINION/7.01_OPINION%20OF%20EXPERT%20WITNESS.pdf [<https://perma.cc/49GV-DUX6>] (stating that a person may be qualified as an expert by “knowledge, skill, experience, training, or education”).

²³⁵ *See* Rios & Navarro, *supra* note 132, at 25–26 (identifying these types of gang experts in accordance with the legal definition: “special knowledge, skill, experience, training, or education that will assist the jury to understand gangs and reach a decision in the case”).

²³⁶ *See* Rios & Navarro, *supra* note 132, at 26.

²³⁷ *See id.* at 35

²³⁸ *See* Hildebrand, *supra* note 37, at 161 (describing how concentrated surveillance and enforcement is viewed as hostile and heightens distrust between targeted communities and police); Rios & Navarro *supra* note 132, at 34 (“[G]ang detectives often see themselves as enemies of gangs and gang members.”).

often tainted by political and stereotypical biases.²³⁹ For example, the public and political demand for crime control might make officers prone to a “protect and serve” mentality, whereby they describe and treat defendants as predators in need of containment.²⁴⁰ As such, police gang experts and nonpolice gang experts will likely disagree with each other about what constitutes gang activity and gang membership.²⁴¹ This disagreement, however, can be a vital source of adversarial fairness, as nonpolice expert testimony can mitigate the prejudicial effect and expose the unreliability of police gang expert testimony.

2. *Nonpolice Gang Expert Testimony Mitigates Prejudice*

As discussed in section II.A, police gang expert testimony unfairly prejudices alleged gang members by promoting inflammatory gang narratives that capitalize off of multidimensional biases.²⁴² Although nonpolice experts cannot change the biases of testifying police officers, they can change how alleged gang members are perceived by the jury. In providing a perspective that comes from inside targeted communities,²⁴³ these experts can deconstruct the stigma surrounding gang membership by highlighting the oppressive social structures that breed gang association, as well as discussing how gangs provide individuals with protection, stability, and a sense of belonging.²⁴⁴ While police experts dehumanize alleged gang members and invariably connect gang membership with violent criminality,²⁴⁵ nonpolice experts

²³⁹ See Rios & Navarro, *supra* note 132, at 34.

²⁴⁰ See *id.*

²⁴¹ See *id.* at 27–34 (outlining survey results in which all of the nonpolice expert respondents overwhelmingly disagreed with police gang expert testimony given in California cases).

²⁴² See section II.A (discussing the implicit biases of testifying officers and jurors).

²⁴³ See Rios & Navarro, *supra* note 132, at 38 (advocating for the insider knowledge of nonpolice gang experts).

²⁴⁴ See Garot, *supra* note 11, at 2 (defining gangs in relation to their oppression by dominant social institutions); Swaner, *supra* note 13, at 104–05 (highlighting how gang members sought physical protection, economic opportunity, and love and emotional support).

²⁴⁵ See Hagedorn & Maclean, *supra* note 176, at 1040 (stating that police gang expert testimony invariably presents gangs as criminal and violent); Howell, Prosecutorial Misconduct, *supra* note 128, at 709 (describing how police officers dehumanize gang members).

humanize alleged gang members and address how police are “ideologues dedicated to the ‘convict the defendant’ attitude.”²⁴⁶ Regardless of the facts of a given case, an insider’s understanding of gangs would help juries dispel misconceptions that gang membership is indicative of violent criminality, and thus promote unbiased decision-making.²⁴⁷

3. *Nonpolice Gang Experts Expose Unreliability*

As discussed in section II.B, police gang expert testimony is notoriously unreliable due to overbroad gang identifications and problematic indicators of gang membership.²⁴⁸ This unreliability rests on police officer’s lack of cultural understanding and their tendency to conflate youth culture in low-income Black and Latino neighborhoods with gang membership and criminal activity.²⁴⁹ This is dangerous given the possibility of convicting innocent, non-gang-affiliated individuals. However, this unreliability can be exposed by nonpolice gang expert testimony. Not only can nonpolice experts show the courtroom the contested nature of what constitutes a gang, but they can also provide an insider explanation of why police indicators of gang membership are flawed.²⁵⁰ Nonpolice expertise is thus a control for police expertise—should a police expert provide inaccurate information, the nonpolice expert may provide the missing link for jurors to understand the difference between the criminal gang world and low-income youth culture.²⁵¹ Highlighting this difference for the jury has a two-fold effect. At a high level, it counters social perceptions that view gang membership and racial membership

²⁴⁶ See Rios & Navarro, *supra* note 132, at 38.

²⁴⁷ See *id.* (“[I]ncluding the opinions of people who understand the gang experience from the inside is a way to create equality in the courtroom.”).

²⁴⁸ See *supra* section II.B.

²⁴⁹ See Rios & Navarro, *supra* note 132, at 34.

²⁵⁰ See *id.* at 38 (“[N]on-police gang experts can show the courtroom the contested nature of what constitutes a gang member and gang . . .”).

²⁵¹ See *id.*

interchangeably.²⁵² But as a practical matter within the courtroom, it exposes the unreliability of police expertise, lessening the danger of unjust outcomes and furthering the truth-seeking function of the criminal process.²⁵³

F. Limitations of Nonpolice Expert Testimony

While nonpolice gang expert testimony is a powerful tool for criminal defendants who are alleged gang members, this solution nonetheless has its limitations. This section will discuss potential problems with finding and funding nonpolice experts, as well as the inability of nonpolice expert testimony to address the broader issues facing gang members in New York City.

1. *Issues Finding and Funding Nonpolice Experts*

While the defense may introduce a nonpolice expert,²⁵⁴ several factors make doing so difficult. First, even if these experts offer opinions that are sympathetic to gang life and supportive of alleged gang members, hostile and intimidating courtroom environments may discourage them from testifying.²⁵⁵ For those who are gang members or former gang members, the idea of testifying in open court may seem unfathomable given the traditional code of silence that governs most gangs and the threat of violence that comes with breaking it.²⁵⁶

²⁵² See *id.* at 34 (“Police testimony also reinforces the perception that race—as understood by skin color and ethnic and sub-cultural symbols—and criminal gang activity are interchangeable.”).

²⁵³ See Weigend, *supra* note 214, at 339 (arguing that the criminal process is about truth-seeking).

²⁵⁴ See *People v. Collins*, 811 N.Y.S.2d 122, 123 (N.Y. App. Div. 2006) (noting conflicting testimony from the expert witnesses of the defendant and the prosecution).

²⁵⁵ See Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know* 5 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [<https://perma.cc/8JYT-JSNH>] (noting that hostile and intimidating courtroom environments are one of the many problems that arise in gang trials).

²⁵⁶ See John Anderson, *Gang-Related Witness Intimidation*, 1 NAT. GANG CTR. BULL. 1, 1 (2007) (“[G]ang members so frequently engage in witness intimidation that it is considered part of normal gang behavioral dynamics.”); Gregg W. Etter, *Common Characteristics of Gangs: Examining the Cultures of the New Urban Tribes*, 5 J. OF GANG RSCH. 19, 20 (1998) (discussing how the “Omerta” code of silence from the Italian Mafia has influenced the customs of modern street gangs).

There are, however, many nonpolice gang experts who offer their testimonial services for hire.²⁵⁷ While these former gang members and community workers offer an extremely valuable perspective, inadequate funding may prevent indigent defendants represented by public defense offices from obtaining their services.²⁵⁸ New York defense attorneys, however, may receive expert funds from the court provided they make an adequate showing of the expert's necessity.²⁵⁹

2. *The Ineffectiveness of Nonpolice Experts in a Broader Context*

In addition to problems with finding and funding nonpolice gang experts, their testimony only extends to combatting the broader criminal legal issues outlined in this Note. Over ninety percent of convictions in New York state are the result of guilty pleas,²⁶⁰ so it is exceptionally rare that nonpolice experts will find their use at trial. While this does not discount their value in deconstructing the gang menace reinforced by police and prosecutors, truly eliminating the oppression that alleged gang members face requires deconstructing the gang menace on a much larger scale.

CONCLUSION

Gang violence is a serious issue, but so is justice and ending oppression. Black and Latino men in New York City are currently at the center of a fallacious gang menace constructed by the courts, the NYPD, the media, and elected officials. To make matters worse, when alleged

²⁵⁷ See, e.g., Gang Expert Witness, TAYLOR AUSTIN GROUP, <https://gangcolors.com/gang-expert/> [<https://perma.cc/2ZVQ-VC9S>] (last visited Jan. 14, 2024); Legal Gang Expert, THE HOMIE HANGOUT, <https://thehomiehangout.com/about/> [<https://perma.cc/XK65-TWXQ>] (last visited Jan. 14, 2024).

²⁵⁸ See NYC Council Members Demand Funding for Public Defense, *Right to Counsel*, THE LEGAL AID SOCIETY (June 20, 2023), <https://legalaidnyc.org/news/nyc-council-members-increased-funding-public-defense-right-to-counsel/> [<https://perma.cc/NB6P-B2XF>] (calling on Mayor Eric Adams to support a budget increase for underfunded public defender offices to ensure the adequate representation of indigent defendants).

²⁵⁹ See N.Y. County Law § 722-c (McKinney 2023).

²⁶⁰ The New York State Association of Criminal Defense Lawyers, *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack* 3 (2021) <https://www.nacdl.org/Document/NewYorkStateTrialPenaltyRighttoTrialUnderAttack> [<https://perma.cc/4AX8-C7SY>]

gang members are arrested and choose to contest their criminality at trial, this gang menace is given immense evidentiary power through the prejudicial and unreliable testimony of police “gang experts.”

To truly deconstruct the gang menace, every actor must play their part. The courts must refuse to give police officers expert authority on gangs. The NYPD must abolish the CGD and end its racial profiling practices for good. The media must stop presenting young Black and Latino men as senseless super predators. But most importantly, New York City’s elected officials must invest in marginalized communities and address the structural failures that are the root causes and main drivers of gang violence. Only then will the gang menace lose its power and cease to justify the oppression of New York City’s Black and Latino men.

Unfortunately, such a radical deconstruction of the gang menace is idealistic. While this deconstruction may not be feasible on a broad scale, it may nonetheless be feasible within the courtroom. Nonpolice gang experts can mitigate the prejudicial effect and expose the unreliability of the dominant police narrative. Not only can these experts promote greater truth-seeking within the criminal process, but they can shed light on the gang menace and its problematic implications. Gang members, after all, are human beings. The least the criminal legal system can do is afford them the fairness that every human deserves.