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EXPLORING THE PREJUDICIAL EFFECT OF GANG EVIDENCE: UNDER WHAT CONDITIONS WILL JURORS IGNORE REASONABLE DOUBT

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Summary

This article focuses on a series of experiments that demonstrate how gang evidence can have a clear prejudicial effect on juror decision-making. Moreover, the data from these studies shows that when gang evidence is introduced, jurors will often ignore reasonable doubt and convict a defendant who has been depicted as a bad actor by virtue of his association with a gang. Eisen et al. refer to this effect as “reverse [jury] nullification.”1 Perhaps most concerning is that deliberations analyses shows that when gang evidence was introduced, verdicts were often based on the defendant’s apparent criminal history, despite the fact that no evidence of criminal history had been revealed at trial. Thus, the assumption of prior bad acts must have been inferred through the defendant’s association with a street gang, and the gang’s criminal activities as described by the gang expert. When a crime is indisputably gang-related and there is no doubt about the defendant’s gang affiliation, the presentation of gang evidence is often necessary to prove the government’s case. However, these issues are not always so clear. Based on this data, we argue that the inclusion of gang evidence at trial should face greater scrutiny by courts, and in cases where the charged offense is not indisputably gang related, the burden of proving the importance of presenting this class of prejudicial evidence to the triers of fact should be shifted to the prosecution.

Introduction

Gang enhancements are being used with increasing frequency around the United States. In one state, these enhancements can add up to ten years on sentencing for serious crimes.2 Many people agree that increased penalties for crimes committed in the service of a gang are necessary for punishment, protection of the public, and the potential for deterrence. However, the data from the experiments described in this paper demon-

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2 See, e.g., CAL. PENAL CODE § 186.21.
strates that when gang charges are presented to a jury, it not only increases the penalty for the crime, but also provides an unintended secondary effect of informing the jury that by virtue of the gang membership, the defendant is also involved in criminal conduct independent of the specific offense(s) being charged.3

In this article, we examine new data showing how the presentation of evidence related to the defendants’ gang affiliation can affect juror verdicts. We also explore some specific arguments about how gang evidence can be a potent extralegal factor that can have a significant prejudicial effect on jurors’ perceptions of a defendant’s culpability.7 Because there is a great deal of prosecutorial discretion in charging gang enhancements, as well as judicial discretion in allowing that evidence to be presented before a jury, it is important that all actors in the criminal justice system, including legal practitioners and judges, understand the potential prejudicial effect that gang evidence might have on the triers of fact.

**GUILTY VERDICTS IN THE GANG CONDITION WERE FAR GREATER THAN NOT-GUILTY VERDICTS BY NEARLY A THREE-TO-ONE MARGIN**

In many cases, the defendant’s involvement with gang activity is not in dispute and the gang evidence is central to the charges being prosecuted. This is unquestionably true in crimes where the perpetrators announce their affiliation as part of the criminal act, or in instances when the crime is being committed to fill the gang’s coffers. In many cases, the examination surrounding the alleged crime will start with the question, “Where are you from?” indicating that the acts that follow were clearly done either in service of, or for the benefit of the gang. In these types of cases, the jury must hear the gang evidence because it is necessary to establish motive and it is clearly material to the charges at hand. However, in other cases, the gang related nature of the charged offense may be in some dispute, and/or the defendant’s active gang status may be in question. In these cases, the prosecutor and the judge must carefully balance the potential probative value of the gang evidence against the prejudicial effect it may have on the triers of fact.

**I. The Probative Value of Gang Evidence: When is Such Evidence Actually Needed?**

There is a substantial body of research in social science literature demonstrating the biasing effects of defendant characteristics on juror decision-making. For example, studies have found that a defendant’s race,4 attractiveness,5 and even employment status6 can affect juror judgments. More recently, data has further indicated that gang affiliation

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3. Eisen et al., supra note 1.
fifteen mock jurors watched one of three versions of a simulated trial that included opening and closing arguments by the prosecution and defense, along with direct and cross examinations of the investigating officer and the victim/eyewitness. The fact pattern centered around an eyewitness case, where the evidence was designed to be weak and equivocal: there was an argument over a woman at a bar that resulted in the victim being stabbed. The three versions of the trial differed only in regard to the mention of the defendant’s gang association. Gang association was manipulated by having the defendant described as either having been seen hanging out with gang members on the night of the incident (gang affiliate), or being a documented gang member with a gang tattoo (gang member). In the Control Trial, there was no mention of any gang or gang affiliation.

**Results:** As predicted, when testimony on gang affiliation was introduced, guilty verdicts increased significantly. Specifically, when the prosecutor argued in the gang affiliation trial that the defendant had been seen hanging out with gang members on the night of the crime, convictions increased significantly from forty-four percent in the non-gang trial to fifty-nine percent when affiliation was discussed. It is important to note that there was no assertion of actual gang membership in the gang affiliation trial. Rather, the defendant’s mere association with gang members on the night of the incident was enough to drive up guilty verdicts by fifteen percent. When the defendant was described as a self-admitted member with a gang tattoo, guilty verdicts increased to sixty-three percent.

This first study showed that gang evidence had a prejudicial effect on juror decision-making; however, it was not clear how powerful this effect was or what actually caused the increase in guilty verdicts. It is possible that mentioning the gang evidence merely tainted the character of the defendant just enough to push the mock jurors over the edge in a close call. Alternatively, introducing the defendant’s gang association could have prejudiced the jurors to the point where they were ready to ignore reasonable doubt in order to convict a defendant who was perceived to be a bad actor by virtue of his gang affiliation. Unfortunately, the data from the initial study could not be used to test this latter hypothesis, because reasonable doubt was not clearly established. Rather, the evidence was designed to be equivocal to start with, resulting in over forty percent of the mock jurors voting guilty even when there was no mention of gangs.

Further, the simulation in this case lacked a few key elements that may have limited the study’s applied value. For instance, jurors did not deliberate in panels; thus, it is possible that deliberations may have washed out biases that some participants came to the table with. Also, jurors were not read standard jury instructions that would have directed them in how to weigh the evidence and arguments presented. Therefore, it is possible that

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9 Eisen, Study 1, supra n. 12.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Eisen, Study 1, supra n. 12.
16 Id.
properly instructing the jurors could have affected the way they voted. Moreover, in a typical gang trial, jurors hear extensive testimony from a gang expert who describes in great detail how the gang is a criminal organization whose main goal is to terrorize the community at large. Thus, given the results of the aforementioned study, simply hearing such testimony from a gang expert could have a potent effect on jurors’ perceptions of the defendant.

B. Study Two: Will jurors still convict a gang member when reasonable doubt is clear?

In the second study, Eisen, Dotson and Dohi17 designed an experiment to address the issues raised above. A new simulated trial was filmed for this study that involved an armed robbery of an intoxicated victim who had just left a bar at 1:00 a.m.18 In this trial, the defense attorney and prosecutor were played by superior court judges who had worked for many years as prosecutors in the hardcore gang unit before taking the bench. The victim/eyewitness was played by an actor, and the investigating officer who also testified as the government’s gang expert was played by a Sheriff’s deputy who frequently provided gang testimony for the District Attorney’s Office in Los Angeles County.19

The Evidence: This new trial was designed to establish clear reasonable doubt.20 The investigating officer testified that several days after the event occurred, he and his partner had located the car associated with the robbery and that the owner of the vehicle was caught having possession of the stolen property and the gun used during the commission of the crime.21 The jurors heard testimony that this man confessed to his involvement in the robbery and that his case was settled through a plea agreement prior to the current trial.22 The investigating officers testified that the defendant was one of several men seen hanging around the car listening to music when the police pulled up to make the arrest.23 The defendant became a suspect solely by virtue of his association with the actual culprit: hanging out and listening to music with the main suspect when the police arrived.24 Further, the defendant was a young Hispanic male wearing a sleeveless white undershirt similar to the one described by the victim.25

Based on these facts alone, the police decided to put his picture in a six-pack photo array to show the witness (despite the fact that the defendant did not match the victim’s description of the suspect).26 Most notably, the defendant was covered in tattoos on his arms, chest, and neck; and although the victim described the robber as wearing a sleeveless undershirt, he did not report seeing any tattoos.27 Jurors heard testimony that the witness studied the six-pack for some time and ultimately told the investigating officer that he believed the defendant’s face ‘looked similar’ to the second robber.28 There was no evidence of any sort linking the defendant to the crime itself aside from the very hesitant identification from a photo lineup and uncertain in-court identification by an eyewitness who admitted to

18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Eisen, Study 2, supra n. 18.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
drinking heavily on the night of the incident.  

Two-hundred-twelve undergraduate psychology students participated in this study and were randomly assigned to watch one of two trials, where they either saw a version of the trial with no mention of gang evidence, or they heard evidence of the defendant’s gang status.  The gang evidence was introduced through the investigating officer who also provided testimony as a gang expert. The officer testified that he knew the defendant to be a long time member of a well-known local criminal street gang that was known for terrorizing the community through intimidation, extortion, and murder.

Prior to viewing the trial, participants were told that they would see a video of a condensed trial and that they were being asked to act as a juror in this matter. The following pretrial instructions from the California Criminal Jury Instructions (CALCRIM) were used: no. 110 (trial process); no. 102 (note taking); no. 103 (reasonable doubt); and no. 104 (evidence).

Following the trial, jurors were read a set of CALCRIM post-trial instructions. As with the pretrial procedure, the instructions were played from an audio recording, while participants read along on printed copies. The following CALCRIM instructions were used: no. 300 (all available evidence); no. 301 (single witness’s testimony); no. 315 (eyewitness identification); no. 1600 (robbery defined); no. 1603 (intent of aider and abettor in a robbery case); no. 3500 (unanimity); and no. 3550 (pre-deliberation instructions). In addition, in the gang trial, CALCRIM instruction no. 1501 titled “Felony or Misdemeanor committed for the benefit of criminal street gang” was used.

After watching the trial, participants were asked to indicate how they would vote if they were asked to render a verdict “right now,” and to make sure they voted as if they were participating as an actual juror in a real case, assuming the defendant was from their own general urban community. After that, participants were assigned to groups ranging in size from four to seven, and listened to an audio recording of standard CALCRIM jury instructions for deliberation that asked them to deliberate and come to a unanimous verdict.

The Results: When participants were polled prior to deliberations, guilty verdicts in the gang condition were far greater than not-guilty verdicts by nearly a three-to-one margin, with thirty-three percent of the participants voting guilty when gang evidence was introduced compared with only twelve percent voting guilty when no gang evidence was presented. The twenty-one percent increase in guilty verdicts in the gang trial prior to deliberations is comparable to the nineteen percent boost found in Study One. After deliberations, none of the mock jurors voted guilty in the no gang trial. However, ten percent of the mock jurors voted guilty after deliberations in the gang trial. The fact that no one

29 Eisen, Study 2, supra n. 18.
30 Id.
31 Id.
32 Id.
33 Id.
35 Eisen, Study 2, supra note 18.
36 Id.
37 Id.
38 Eisen, Study 1, supra n. 12.
39 Eisen, Study 2, supra n. 18.
40 Id.
in the no gang trial voted guilty after deliberations provides strong support for the notion that this case was so weak that reasonable doubt had been clearly established. It appeared that the mock jurors who continued to vote guilty in the gang trial after deliberations ignored reasonable doubt and voted to convict the defendant based solely on the fact that he was a member of a criminal street gang. One hundred percent of the participants who voted guilty after deliberations reported that the gang issue played a role in their decision, and the defendant’s gang affiliation was discussed during the deliberations of each panel where any mock juror voted guilty.\(^4\)

This study clearly demonstrates that panels of mock jurors who considered gang evidence often continued to vote guilty despite the presence of clear reasonable doubt.\(^5\) Most of the college students at this urban institution in East Los Angeles who participated in this study grew up in neighborhoods where their classmates and neighbors either hung out with gang members or joined gangs themselves at a young age. In this respect, the sample used was likely not representative of typical jury panels, thus, we would expect the prejudicial effect of the gang evidence to be much stronger among individuals who come from areas where their exposure to gang culture is more limited. Moreover, many of the participants reported that they did not see the crime as being that serious, because no one was physically injured. To address this latter issue of violence, a new study was conducted that involved a far more serious offense.

C. Study Three: Are jurors more likely to ignore reasonable doubt and convict the defendant when a child is killed?

This third study was designed to determine if mock jurors would be more likely to convict a defendant in a case where a self-admitted gang member allegedly committed a violent act, but reasonable doubt was clearly established.\(^6\) To accomplish this task we filmed a new simulated trial using the same judges as attorneys and identical gang testimony.\(^7\) However, we changed the crime to where one of the combatants was shot to death and a stray bullet killed a twelve-year old child sleeping in her home.\(^8\)

Two-hundred-thirty-five undergraduate psychology students from a large state university located in Los Angeles, California participated in this study. The participants ranged in age from eighteen to thirty-five and varied in ethnicity, with the majority describing themselves as Latino.\(^9\) This distribution generally reflects the ethnic representation in the university as well as the surrounding geographic area.

The Evidence: The crime involved a fight over a girl at a party on the front lawn of a house party.\(^10\) An eyewitness testified that his friend was fighting over a girl with another attendee of the party.\(^11\) He stated that his friend was beating the other guy badly, and that at one point an unknown Hispanic male wearing a hoody fired several shots from the street nearby.\(^12\) His friend and girlfriend were both shot, and a stray bullet hit a twelve-year old girl who was sleeping in the house.\(^13\) Both his friend and the child died; his girlfriend was injured badly but survived the shooting.\(^14\) According to all accounts, the shooter fled in a white four-door Honda or Toyota.\(^15\) The investigating officer, who was played by a retired police chief, testified that while investigating the case, he discovered that the defendant


\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Dotson unpublished thesis, supra n. 43.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id.
was associated with a white car; however, it was a Mazda, not a Toyota or Honda. Also, the car was not a four-door, but rather a two-door. Additionally, although the defendant had access to the car, the car belonged to his girlfriend’s grandmother. There was no other direct or circumstantial evidence linking the defendant to the crime. Based on this weak investigative lead, the officer put the defendant’s picture in a six-pack photo array, but the victim was unable to identify him. According to testimony at a simulated trial, the defendant was then put into a live lineup, where the witness provided a tentative identification by noting that the defendant “looked familiar,” which changed when the witness as he would in an actual case. In addition, participants indicated how confident they were in their verdict on a scale of zero to 100, and were asked to provide the reasons for their verdict. They were then asked to place their responses in a cardboard box in the front of the room, and were reassured that all responses were anonymous. Participants were also given a second sheet of paper titled “Trial Questionnaire.” On this form, they provided their age, gender, race, and also answered four questions about the case as a manipulation check, to make sure that the participants were paying attention. One of the questions asked what the defendant was charged with. Seven participants could not answer this question correctly and were dropped from the sample.

The remaining participants were then assigned to jury panels ranging in size from four to seven members, and listened to an audio recording of standard CALCRIM jury instructions for deliberation that asked them to deliberate and come to a unanimous verdict. The following CALCRIM post-trial instructions were used: 3500 unanimity and 3550 pre-deliberation instructions.

After deliberations, each participant was given a form titled “Post-deliberation verdict form.” The instructions on the form read as follows: “Now that you have had the time to deliberate with your fellow jurors we

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53 Dotson unpublished thesis, supra n. 43.
54 Id.
55 Id.
56 Id.
57 Eisen, Study 2, supra n. 18.
58 Dotson unpublished thesis, supra n. 43.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Dotson unpublished thesis, supra n. 43.
would like you to vote one more time. It is assumed that you kept an open mind during the deliberations and considered your fellow jurors’ perspectives.” Participants were then asked to indicate how they voted and to rate their confidence in the verdict. The participants were also asked if they had reached a unanimous verdict, and if so, to indicate how long it took them to reach the verdict, and the reasons for that verdict. Finally, participants were asked if they had any prior knowledge of this study from discussions with other students. If they reported having prior knowledge of the study, their data were dropped from the sample. Thirteen students were dropped for this reason. After completing the questionnaire, the participants were debriefed as a group.

The Results: As hypothesized, increasing the severity of the offense from robbery to murder led to a corresponding increase in guilty verdicts in the gang condition from ten percent in Study Two, to nineteen percent in Study Three. Taken together, these studies show the prejudicial power of gang evidence in persuading jurors to vote guilty—even in cases where reasonable doubt was clearly established. The findings from Study Three are particularly interesting, since the charges involved were not gang related; rather, the shooting was motivated by a fight over a woman at a house party.

II. Why is gang evidence so prejudicial?

There are several potential explanations for the potent prejudicial effect of gang evidence on juror verdicts found across these three studies. Eisen et al., (2013) proposed that this effect is likely driven at least in part by a confirmation bias. According to this theory, once a negative stereotype is activated, people often seek information that is consistent with that stereotype. Simply notifying the jury that the defendant is a member of a criminal street gang involved in violent crime suggests to the jurors that the defendant is a danger to society, independent of the evidence offered. According to this model, once this bias is instilled, the jurors may then filter the evidence presented through the negative stereotype that has been activated, attending most closely to information that confirms the established bias activated by the label “gang member.”

III. Can charging the crime as gang related provide a back door method for admitting evidence of prior bad acts?

Confirmation bias is likely compounded by the fact that the introduction of gang evidence may convey to jurors that the defendant is likely involved in other criminal activity by virtue of his gang membership. Since gang experts often describe a gang’s primary activities as involving extortion, drug dealing, intimidation, and murder, the inference is made that the defendant is also likely engaged in at least some—if not all—of these activities given his gang involvement. In fact, in Study Two, all of the jurors who voted guilty in the gang condition indicated that their verdicts were based at least in part on the defendant’s prior criminal history or gang involvement. How-
ever, no prior criminal history was revealed at trial. Thus, the assumption of prior criminal acts must have been inferred through the defendant’s association with the gang and the gang’s criminal activities, as described by the gang expert.

This finding may have important legal implications for the admission of such evidence. In many states, prior criminal history of the defendant can be admitted into evidence, if and only if, the court determines that the prior conduct is consistent with the actions charged in that case.70 However, since the prejudicial value of this type of evidence is intuitively clear, the admission of such evidence must be vetted by the court through an evidentiary hearing to determine if the prior conduct shows a pattern of behavior consistent with the charged crime that can be considered by the jury. When the admission of this evidence is allowed, the court is essentially ruling that the prejudicial nature of the evidence is outweighed by its probative value of demonstrating the defendant’s propensity to take part in conduct similar to what is being charged in this particular case.71 Thus, the data from these studies show that the admission of gang evidence can serve as a back door for admitting evidence of prior criminal conduct without having to meet the standards designed to limit this evidence that would normally be vetted by the court hearing the case.

However, alerting jurors to the defendant’s previous criminal conduct even in concert with confirmation bias does not fully explain why jurors would vote to convict the defendant in a case where reasonable doubt has clearly been established. To explain this, the authors introduced the concept of reverse nullification.

IV. Reverse Nullification

Jury nullification occurs when jurors disregard the law and acquit legally guilty, but morally acceptable defendants.72 In nullification cases, jurors spend a significant portion of their time discussing the defendant’s moral characteristics.73 Although most research on jury nullification has dealt with acquitting legally guilty but perhaps morally innocent defendants,74 when jurors follow their conscience and personal sense of justice, it is also possible for jury nullification to occur in the reverse direction. In such instances, jurors would understand that reasonable doubt exists, but knowingly ignore this and nevertheless convict a defendant that they believe to be potentially innocent of the charged offense, but morally corrupt, dangerous to society, or otherwise deserving of punishment.

As noted earlier, an examination of the content of deliberations made by the groups who voted guilty in Studies Two and Three revealed that discussions of the defendants’ gang membership and inferred criminal history were prominent across panels and played a central role in their ultimate verdict. The idea is that if the defendant is portrayed as a dangerous member of a violent street gang, and is viewed as an obvious threat to the community, then many ordinary people would agree that locking him up is an action that has genuine merit and may be the morally correct choice, whereby the ends ultimately justify the means. This situation meets the conceptualization of nullification as an instance of common sense justice as described by Finkel; that is, “...what ordinary people think the law ought to be.”75

70 CAL. EVID. CODE, § 1101(b) (permitting evidence of prior bad acts in order to prove certain specified things, such as identity, motive, or lack of accident).
71 Id. § 1100 et seq.
Eisen et al. (2014) points out that applying the reverse nullification argument to explain these data meets the criteria for jury nullification laid out by Finkel. Most notably, reasonable doubt was clearly established and the correct verdict—acquittal—was an actual option for the jury. In Studies Two and Three, described above, an understanding of reasonable doubt was established the same way it is done in any actual trial, through reading legal instructions to jurors. Moreover, the fact that only one person out of almost three hundred participants voted guilty in the no-gang conditions across the two studies, indicates that reasonable doubt was clearly established, and the standard was understood by most all of the participants.

V. Conclusion

In conclusion, the data from this series of experiments clearly shows that gang evidence can have a significant prejudicial effect on jurors’ perceptions of the defendant, and ultimately on their decisions of guilt versus innocence. Most notably, the data from Studies Two and Three demonstrate that introducing gang evidence can lead jurors to vote guilty even when reasonable doubt has been clearly established. Moreover, Study Three showed that this effect is most potent when the crime is more serious (murder versus robbery).

In light of this new research, it may be worth reevaluating how gang evidence should be handled moving forward. As it stands, the decision to admit gang evidence is generally a matter of prosecutorial discretion. If the prosecutor decides to proffer a theory that the crime was committed in service of the gang, then they can unilaterally decide to include gang evidence as part of their case. This puts the burden of arguing to exclude this class of prejudicial evidence squarely on the shoulders of the defense. The defendant may seek to bifurcate the trial on the underlying charges or even move to exclude the gang evidence altogether. In either case, in order to successfully block the prosecution from presenting gang evidence to the jurors, the defense must prove the prejudicial nature of the evidence. However, the data from the studies reported here demonstrates that the prejudicial nature of gang evidence is clear in and of itself. If one were to accept the apriori prejudicial value of this evidence, then perhaps the burden of arguing for the inclusion or exclusion of gang class of evidence is misplaced, and should be shifted. Following this logic, if the prosecution wanted to introduce gang evidence at trial, they would need to argue that the probative value of the evidence outweighs its inherent prejudicial effect. Thus, gang evidence would be treated much like evidence of prior criminal conduct; with the understanding that it is likely to be prejudicial, but may also be probative for the jurors to understand the defendant’s predisposition towards the type of behavior charged in the crime.

As noted earlier, there is no doubt that gang evidence is often central to the crime, and necessary for the jurors to understand the motive involved. However, in other cases, the gang related elements of the case are more questionable, and may not be essential for the triers’ of fact to evaluate the defendant’s guilt. In these instances, it is important for the courts to understand that the prejudicial effect of gang related testimony might be much greater than previously believed.

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About the AUTHORS

Dr. Eisen is a professor of Psychology at California State University, Los Angeles where he serves as the Director of their graduate program in Forensic Psychology. In addition to his work on juror decision making, Dr. Eisen’s research also examines memory and suggestibility in children and eyewitness memory in adults. Dr. Eisen is called to serve as an expert in these areas quite often for both the defense and prosecution.

Brenna M. Dotson is a graduate of California State University, Los Angeles. She graduated with her M.S. in Psychology (emphasis in Forensics) in June 2014. She obtained her B.A. in Psychology with a minor in Criminal Justice from California State University, Sacramento. She intends to follow a career path that unites two of her passions, psychology and the law.
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