Breaking the Frame:
Responding to Gang Stereotyping
in Capital Cases

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I. INTRODUCTION

In violent felony cases, and especially in capital murder cases, prosecutors often attempt to demonize the defendant and evoke fear in the minds of jurors. When the defendant is identified with a gang, prosecutors use misleading and widely held stereotypes to great advantage. Professor Craig Haney, in his seminal article on mitigation in capital cases, points out that the demonization of perpetrators of violence depends on “misleading stereotypes” and “partial truths that distort the painful realities that plague the lives of capital defendants.”¹ Professor Haney explains,

Indeed, as one gang researcher has noted, the media has reinforced a “folkloric myth” concerning gangs in our society, one in which gangs themselves have been given: “demonic qualities. For gangs ultimately are depicted as not only physically threatening average, law-abiding citizens, but also as undermining the morals and values of the society as a

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whole. They are carriers of moral disease within the social body.”

Ordinarily, preconceived notions about a member of a certain population can be challenged with a counter-narrative. For instance, often during the sentencing phase of a capital case, lawyers can effectively argue that the defendant is not the cold-blooded killer portrayed by the prosecution, but rather a tragic product of a toxic environment. Seen in this light, jurors may be willing to consider a penalty other than death, based upon a counter-narrative about the defendant’s life that challenges the prosecution’s narrative and evokes empathy for the defendant.

With cases involving gang members, however, jurors may seem immune to a compelling counter-narrative. Their personal framework for evaluating a defendant’s culpability can be almost impermeable. Any counter-narrative about the defendant that challenges their preconceived ideas about gangs may simply be disregarded or misinterpreted by the jurors without affecting their symp-
thies.

A revealing monograph on prosecuting “gang cases,” published by the American Prosecutors Research Institute (“APRI”) for use by prosecutors, details how prosecutors reinforce the folkloric myth of gangs in the minds of jurors:

Few things evoke fear in a community like the incursion of gang activity. . . . Gangs are spreading; they are on your doorstep even if you don’t realize it. . . . Faced with the prospect of defending a case involving gang evidence, defense attorneys cower. Understanding the power of such evidence, the defense bar will try almost anything to prevent a prosecutor from admitting gang evidence against their client. The first and most clamorous cry is always the same: “Objection! Gang evidence is prejudi-

2. Id. at 588 (quoting MARTIN S. JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 308 (1991)).
cial.” The prosecutor’s response should be equally strident: “Of course it is! That’s the point!”

On the other hand, the *Tennessee Death Penalty Mitigation Manual* explains:

The allegation of gang membership is a common way in which capital defendants can be demonized in media accounts and in prosecutorial harangues. The popular stereotype of gang membership is that gang members either are somehow intrinsically different than other young people, or that once someone has exercised free will to join a gang they are permanently transformed, as though something essential has been altered within them that cannot be changed. This stereotype plays directly into mythologies about capital crimes that are used to fuel the machinery of the death penalty, as if “gang violence” is somehow worse than other kinds, in part, because of what it implies about its perpetrators.

Given the considerable weight juries give to gang evidence, a competent capital defense attorney must overcome two significant challenges. First, the attorney must break down gang stereotypes; second, the attorney must accurately show the defendant’s gang involvement in the context of the defendant’s social history and the social milieu in which the alleged gang existed. In fact, not all gangs are the same and not all gang affiliations are the same. Gangs are not all bad, and persons whom the legal system would label as “gang members” are not inherently evil or frightening persons. As Professor Haney explains, “Gang membership represents another adaptation taken in adolescence and young adulthood by some capital defendants to overcome the legacy of

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their early developmental problems and the pressures of the communities in which they live.\textsuperscript{5} Contrary to common stereotypes, what [researchers] know about youth gangs suggests both that they “drift” in and out of criminal activity, and that young people “drift” in and out of gangs. . . . [T]here is nothing to suggest that gang members are delinquent types beforehand, or that gang membership creates permanent transformations in persons who belong.\textsuperscript{6}

Because there is no single type of gang, and the circumstances of each defendant’s relationship to a gang will be unique, there can be no single approach to addressing the “gang issue” in a capital trial. Each case is necessarily fact-specific. By way of illustration, this Article will briefly offer a case history from a capital case that demonstrates the potential problems of gang stereotyping and how those problems might be addressed by defense counsel. Accordingly, Part II of this Article offers a study of the case of Patrick Stout, a young man convicted of murder and sentenced to death in Shelby County, Tennessee, largely due to the prejudicial effect of misleading and unexplained gang evidence.\textsuperscript{7}

Part III of this Article discusses how jurors are powerfully inclined to view the evidence in a gang-related case according to their pre-existing, biased personal frames of reference for understanding gangs and offers a potential solution to address the problem. It is certainly necessary to offer evidence that humanizes the defendant and contradicts the jurors’ stereotypical understanding of gangs; but, because of the powerful nature of gang stereotypes, that may not be enough. To effectively debunk specific misconceptions about gangs, often something more needs to be done to address the jurors’ underlying and misleading thought processes.

\textsuperscript{5} Haney, supra note 1, at 585.

\textsuperscript{6} Id. at 588–89 (footnotes omitted).

\textsuperscript{7} Fortunately, because it was later shown that Patrick’s trial counsel was ineffective, a post-conviction court vacated his death sentence and ordered a new sentencing hearing. Post-Conviction Memorandum and Order, Stout v. State, No. M-26091, (Shelby Cnty. Crim. Ct. Dec. 8, 2010). The State did not appeal the post-conviction court’s judgment granting sentencing relief; Mr. Stout is appealing the judgment upholding the conviction.
Drawing on social science theory regarding “framing” and “prototype formation,” concepts of “racialized schema,” and the process of “priming” or “cuing,” this Part argues that an effective defense in gang-related cases should explicitly put the issue of stereotyping itself before the jury. To overcome prejudicial stereotyping, it may be necessary to raise jurors’ conscious awareness of their own thought processes by explaining, through expert testimony, the nature of gang stereotyping. This may enable jurors to break their frames and set aside their stereotypes, thereby achieving a result that is more likely to be fair. Part IV concludes by applying this Article’s proposal to the case of Patrick Stout.

II. THE PATRICK STOUT CASE

A. The Arrest

On November 13, 1995, Verico “Rico” Bowers and Vassie “Boo” Gandy, two members of the Gangster Disciples in Memphis, Tennessee, committed a robbery and led police on a high-speed chase that ended when the two crashed into a nursing home. The police arrested them, searched their car, and found evidence linking them to a series of recent carjackings. In one of the carjackings, Amber Hunter, a young woman returning home from a Wednesday evening church service, was senselessly and tragically shot in the head and killed.

When Bowers and Gandy were interrogated by the police over the course of several days, they eventually admitted to several of the carjackings. Regarding the shooting death of Hunter, they told the police that they were involved in the carjacking, but that a man they identified as “Taurus” was the true culprit; that he led the carjacking and fired the fatal shot. Bowers and Gandy did

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8. Post-Conviction Memorandum and Order, supra note 7, at 6.
11. Post-Conviction Memorandum and Order, supra note 7, at 8.
not know Taurus’s real name, and they told police that they had only known him for about two days prior to the offense.

Several days later, the police identified “Taurus” as Patrick Stout (“Patrick”) and arrested him. Patrick admitted to being present during the Hunter carjacking and the subsequent killing, but he denied that he directly participated in the offense. He said that Bowers and Gandy committed the carjacking, and that Bowers was the one who shot Hunter.

Later, Bowers and Gandy recanted their statements. In their places, two other Gangster Disciples, Derrick “Red Dog” Carmichael and Robert Terrell, stepped forward and confessed to participation in the Hunter carjacking. They both identified Patrick as the leader and shooter.

Patrick, Carmichael, and Terrell were charged with first-degree capital murder, as well as other crimes related to the Hunter carjacking and killing; Bowers and Gandy were not charged with any crimes related to that offense. Carmichael and Terrell testified against Patrick at his capital murder trial and later pleaded to lesser crimes.

B. The Trial

During the year leading up to Patrick’s trial in 1998, gang activity in Memphis had received widespread publicity. Local media included accounts of violent, allegedly gang-related crimes. With a public outcry against gang violence gaining momentum, the trial of Patrick Stout commenced.

In the guilt/innocence phase of Patrick’s trial, his defense counsel attempted to combat the negative atmosphere by showing the jury that Patrick was a “neutron,” a former gang member who

13. Post-Conviction Memorandum and Order, supra note 7, at 11.
16. Id.
17. Id. at 693-94.
18. Id.
19. Carmichael and Terrell each pled to Especially Aggravated Robbery and Especially Aggravated Kidnapping and received 15 year sentences.
was being falsely accused by the active gang members for the crime. Under this theory, Bowers and Gandy were the true culprits. As higher-ranking members of the Gangster Disciples, they arranged for Carmichael and Terrell to take the rap for them while still pointing to Patrick as the guilty party.

Carmichael testified that he was a member of the Gangster Disciples who had recently moved to Memphis from Detroit, and that he met Patrick at an apartment in Memphis where Gangster Disciples congregated. He told the jury that Patrick was the leader in the offense and that Patrick was the one who pulled Hunter out of her car and shot her. Terrell, who also testified that Patrick was the leader and the one who shot Hunter, denied membership in the gang, but testified that he met Patrick at the same apartment where other Gangster Disciples congregated. The implication was clear that this was a gang-related crime, and Patrick was the central figure.

Confronted with the unfavorable testimony of Carmichael and Terrell, defense counsel failed to counter their stories with the prior inconsistent statements of Bowers and Gandy. Moreover, they offered no alternative explanations for the brutal killing. Consequently, the jury never learned that Bowers and Gandy originally admitted to participation in the offense and then recanted as Carmichael and Terrell took their place. Nor did the jury learn about the true nature of Patrick’s relationship to the gang. The jury returned a guilty verdict.

In the capital sentence hearing, defense counsel again failed to provide the jury with a complete account of Patrick’s story.

20. Post-Conviction Memorandum and Order, supra note 7, at 28.
21. Id.
23. Id.
24. Post-Conviction Memorandum and Order, supra note 7, at 12.
25. Id. at 27–28 (noting that the defense attorney’s attempt to introduce testimony concerning alternative explanations was not admitted).
26. Id.
27. Id. at 28.
29. Post-Conviction Memorandum and Order, supra note 7, at 17.
Patrick’s aunts and uncles described Patrick’s family as loving and church-going.\textsuperscript{30} The jury never heard about Patrick’s horrific and unstable childhood, his traumatic experiences as a juvenile in the Shelby County Jail, or his true history with the Gangster Disciples.\textsuperscript{31}

In perhaps the most powerful scene in the trial, one of Patrick’s uncles testified for the defense that Patrick was a good person and not a “villain.”\textsuperscript{32} The prosecution seized upon this testimony and cross-examined the uncle by asking whether he was aware that Patrick had been a member of the Gangster Disciples and was covered with gangster tattoos and graffiti.\textsuperscript{33} The uncle testified that he was aware of these things.\textsuperscript{34}

At the prosecution’s request, the judge then ordered Patrick to roll up his shirt sleeves and show the jury the tattoos on his arms.\textsuperscript{35} Patrick’s arms were covered with crude tattoos that appeared to be gang-related symbols or insignia.\textsuperscript{36} The defense made no effort to explain how Patrick got the tattoos, what the tattoos may have meant, or the course of Patrick’s history with the Gangster Disciples.\textsuperscript{37} The jury was simply left with the impression that Patrick was a tattooed gangster.

The jury returned a verdict to impose the death sentence.\textsuperscript{38}

Concerning the damaging gang tattoo evidence, the APRI monograph on prosecuting gang cases states, “Without question, one of the most dramatic and powerful moments in trial occurs when the prosecutor asks the judge to instruct the defendant to stand and remove his shirt, exposing a large . . . tattoo . . . .”\textsuperscript{39} This was confirmed in post-conviction interviews with the jurors in Pat-

\textsuperscript{30} Id. at 6.
\textsuperscript{31} Id. at 18–19, 22–23.
\textsuperscript{32} Id. at 7.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 38 (stating that failure to object to a request to show the tattoos was consistent with the defense’s theory of the case, and thus not reversible error).
\textsuperscript{36} Id.
\textsuperscript{38} Id. at 692.
\textsuperscript{39} JACKSON, supra note 3, at 16.
rick’s case. The jury had been strongly influenced by the display of Patrick’s tattoos. During jury deliberations, the jury foreperson, a school teacher, told the other jurors that the tear-drop tattoos on one of Patrick’s arms were bullets representing victims that had been shot by the gang. There was, of course, no evidence presented at trial to support such a speculation, and there had been no attempt by the defense at trial to rebut or mitigate any false impressions the jury might have had about the tattoos or Patrick’s association with the Gangster Disciples.

C. The Counter-Narrative

Though Patrick’s tattoos strongly suggested gang affiliation to the jury, he also had a rich counter-narrative that the defense failed to investigate and use to its advantage. The jury in Patrick’s case learned that he was born to an adolescent mother who was a crack-addicted prostitute. Shortly after his birth, Patrick was handed over to his grandmother, Frances, who raised him in a household that included Frances’s five other children and her live-in boyfriend Sonny, whom Patrick regarded as his step-grandfather. The other children in the household, Patrick’s aunts and uncles, were several years older. Patrick never knew his real father and rarely saw his mother. At Patrick’s trial, his family life growing up in Frances’s household came across to jurors as normal and healthy. However, jurors did not hear the rest of the story.

Life in Frances’s household was unstable and traumatic. Sonny, Patrick’s step-grandfather, was an alcoholic who beat Frances mercilessly—virtually every day—often inflicting facial cuts and black eyes that scared the children. During the worst of these beatings, Frances screamed and cried as the children cowered in the one bedroom where they all slept. Because of these beatings, Frances frequently moved with her children and Patrick to new locations to escape Sonny. Unfortunately, she and Sonny

40. Stout, 46 S.W.3d at 695; Post-Conviction Memorandum and Order, supra note 7, at 18.
41. Post-Conviction Memorandum and Order, supra note 7, at 18.
42. Id. at 26.
43. Id.
44. Id. at 18.
45. Id. at 19.
would often reconcile, starting the cycle over again. Frances spent her days cleaning houses in the wealthier neighborhoods of Memphis and, without Sonny’s financial help, could not make enough money to subsist. The family moved an average of three or four times per year, usually leaving all possessions behind except what they could carry in their arms, each time uprooting the children from the neighborhoods where they lived and the schools where they were enrolled. Neither Patrick nor the other children could remember the number of times they moved or all of the places where they lived as they grew up.

Frances was not the only victim of abuse.46 A stern woman, she exercised control by regularly beating her own children with belts, switches, and electrical cords.47 The children were prohibited from leaving the house except to go to school, and none of them had friends outside the family.48

As a child, Patrick was described as frail, skinny, and small. Everyone treated him as the baby of the family. Patrick often would escape the violence in the household by hiding in cabinets or under a table or bed, where he stayed until Frances would find him and make him come out.

Because Patrick never played with friends after school or during the weekends and because he moved from one school to another at least twice each year, he never formed peer relationships.49 Patrick remembers that there was considerable street violence in the neighborhoods where they lived, which frightened him. At school, other children made fun of him because his mother had the reputation of being a prostitute, his clothes were different, and he did not fit in.

At age seven, Patrick met his cousin, Montrell Stout, who was the same age. Patrick usually saw Montrell at church on Sundays, and Montrell became the only friend outside the household that Patrick ever had as a child.50 By age sixteen, Patrick’s body had grown strong, and he dropped out of high school and followed Montrell to the Job Corps in Mississippi. Unable to adapt to this

46. Id. at 18.
47. Id.
48. Id. at 18–19.
49. Id. at 19–20.
50. Id. at 18.
new environment, he left the Job Corps after a few days and returned home, leaving Montrell behind. While Montrell was in the Job Corps, he joined the Gangster Disciples. When he returned to Memphis, he encouraged Patrick to join the gang as well.

Joining a gang in Memphis in the early 1990s meant joining a neighborhood peer group. At that time, gangs were in the process of transitioning into institutionalized organizations. In Patrick’s words, the youth in Memphis then were “playing at being gangsters” and had a “backwater mentality.” Memphis gangs were trying to imitate their Chicago brethren, but had little idea about Gangster Disciple practices or symbols. When Patrick first became involved with the Memphis version of the Gangster Disciples, he did not know much about gangs, either, and his involvement with other gang members remained loose. According to the experts who testified in Patrick’s post-conviction case, Patrick’s association with other adolescents who called themselves Gangster Disciples was a way of hanging out with family and friends. This loose peer group that called itself a gang was to Patrick an extension of his family-relatedness to Montrell.

To identify himself with this adolescent peer group, Patrick drew crude tattoos on his arms. Although Patrick attempted to pick designs that would identify his membership in the Gangster Disciples, in reality he drew symbols from other gangs, too—including the symbol of a rival gang. In the post-conviction phase of the trial, Patrick’s tattoos were described as an attempt by a youngster to represent something he has only heard about and were therefore not in any way symbols of a hardened gang member. The symbols misinterpreted by the jury as bullets were, in fact, tear-drops—a common gang symbol that is often misunderstood by the public.

During his adolescence, Patrick was threatened by peers in his neighborhood in an incident that had nothing to do with gangs. Because he was alone and had difficulty fitting in with peers, he

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51. The institutionalization of Memphis gangs was nurtured by the overcrowded and unconstitutionally violent conditions of the Shelby County Jail, where gangs were allowed to assume control of all aspects of the jail environment. See infra text accompanying note 57.

52. As reflected in the post-conviction trial record, this was how Patrick described his pre-incarceration gang experience to the gang expert. Patrick Stout Post-Conviction Record (on file with author).
sought protection from his aunt’s boyfriend who was older than Patrick. Patrick had been quick to bond with this man who, as it turned out, was committing robberies to feed his drug habit. He induced Patrick to help with the robberies, which eventually led to Patrick’s arrest as a juvenile. At age seventeen, Patrick was sentenced to eighteen months in the Shelby County Jail.

The gang environment within the jail was quite different from Patrick’s previous gang experience. Gangs outside the penal system were usually just a loose affiliation of young men and women, while those inside the penal system were much more organized and formal. In federal court litigation concerning jail conditions, the plaintiff–inmates illustrated that the Gangster Disciples and Vice Lords controlled everything that occurred within the jail, and that inmates were “exposed to constitutionally impermissible violence and threat of personal harm in violation of their Eighth and Fourteenth Amendment rights.” 53 The conditions that prevailed throughout the 1990s were described by one expert witness as follows:

Prior to 2001, the Shelby County Jail had a twenty year history of abysmal leadership, mismanagement, nepotism and cronynism, low hiring standards and poor personnel practices, lack of staff training and other resources and a profound lack of concern, support or accountability from both the Sheriff’s Office and the rest of the Shelby County government. These factors produced an overcrowded jail that was dangerous for inmates and staff alike, a jail in which the living units were largely controlled by gangs and in which assaults, rapes, stabbings, escapes and suicides were relatively commonplace events. 54

Compared with Patrick’s prior experience, the gangs in the jail were highly structured with a defined chain of command

54. Little v. Shelby Cnty., Tenn., 384 F. Supp. 2d 1169, 1170–71 (W.D. Tenn. 2005). The court found that the “[j]ail was considered to be one of the worst urban jails in the United States prior to 2001.” Id. at 1175.
among gang members. The gangs enforced rules and required gang members to memorize laws and prayers. As one post-conviction expert explained, the evidence showed that Patrick was isolated and marginalized from the gang that he had joined. The gang in the jail included no relatives or friends, only ranks in an organization. Another inmate who knew Patrick in the jail testified in post-conviction that Patrick wanted to leave the gang. Patrick was quoted by this witness as saying, “I really don’t want to be in no gang. I don’t even know why I’m even a part of one.”

Before long, Patrick was “beaten out” of the gang. Attacking Patrick from behind, a group of inmates threw a blanket over him so that he could not see, punched him in the head, and stabbed him in the temple with an ink pen. His life was probably saved when another inmate intervened and pulled the ink pen out of Patrick’s head. Thereafter, while in jail, Patrick attempted to isolate himself as protection from further acts of violence and distanced himself from any gang activity.

When Patrick was released from jail at age nineteen, he struggled to maintain a job. Without other friends, he naturally gravitated toward his cousin Montrell, who still identified himself as a Gangster Disciple. Patrick did not participate in any gang activities, and told his uncle of his desire to remove his tattoos, although he was unable to afford doing so. He always kept his arms covered with shirt sleeves so that no one would notice his tattoos. By this time, according to the mental health experts who testified in post-conviction, Patrick suffered from an anxiety disorder with post-traumatic features that resulted from the trauma he experienced throughout his childhood and in the Shelby County Jail.

On the night of the offense, which occurred eleven months after his release from jail, Patrick went to find Montrell at the apartment where the Gangster Disciples congregated. While he was there, a couple of the Gangster Disciples and Montrell talked about going out to “pop” cars—to steal parked cars—but there was no mention of carjacking. According to Patrick, the initiators were Bowers and Gandy, the two who committed the Hunter carjacking and shooting. Patrick agreed to go along, and then Montrell backed out at the last moment. Patrick, who had been “beaten out”

55. Patrick Stout Post-Conviction Record (on file with author).
56. Id.
of the gang while in jail, found himself alone with Gangster Disciples he barely knew in a situation that very likely would have triggered his fear and anxiety disorder.

III. GANGS AND STEREOTYPES

The APRI gang prosecution manual is correct in its conclusion: “Gang evidence can set the tone for the trial and, at the same time, educate the jury.” However, the “tone” of a trial should be informed by research-driven, verifiable data on gangs, rather than crude stereotypes. The Patrick Stout case is a chilling example of how the unchallenged propagation of stereotypes can lead to a sentence of death. Stereotypes can, indeed, kill.

Fundamental to combating stereotypes is the defense’s capacity to humanize the defendant. The prosecution seeks to define the defendant as a violent gang member by typically offering police officers as “expert” witnesses, testifying to the nature of gangs. Prosecutors favor such testimony because police gang experts almost invariably present gangs as criminal and violent, thus implying that the defendant is violent as well. Police expert testimony seizes on society’s predisposition to simplify complex matters and reinforce beliefs consistent with popular stereotypes. As the APRI states, gang testimony can give “rich color to an otherwise pale fact pattern,” and can “explain the inexplicable.”

Indeed, this last phrase is crucial as police expert testimony is regularly relied on to provide motive where one is lacking in other evidence. In many such cases, a homicide with no motive is 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. If trials are about competing stories, the prosecutor’s gang narrative provides “rich color” to paint a picture of good versus evil that relies on stereo-

57. JACKSON, supra note 3, at 7.
58. See THOMAS GILovich, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF REASON IN EVERYDAY LIFE 9 (1991) (“We are predisposed to see order, pattern, and meaning in the world, and we find randomness, chaos, and meaninglessness unsatisfying.”).
59. JACKSON, supra note 3, at 7.
60. See id. at 9–10 (explaining how prosecutors are encouraged to utilize expert testimony on gangs to provide potential motive in gang-related cases).
types, often with police “expert testimony” on the nature of gangs, as crucial evidence.

As gang experts tendered by the prosecution, police officers seldom have training in social science studies of gangs and indeed are often dismissive of them. Academic gang expert testimony, based on social science and empirical study, can help counter the prosecution’s testimony, which may seem at first glance like a seamless narrative of evil deeds. By presenting this “discrepant information” about gangs and homicide derived from social science research, researchers can challenge police testimony and offer an alternative interpretation of the evidence.

Thus, discrepant information is necessary, but often not sufficient, for an effective defense to a prosecution designed to appeal to gang stereotyping. In addition to offering the jury research-based information about gangs and gang affiliations that weaken the prosecution’s case, it is also important for the defense to explicitly present expert testimony on the nature of stereotyping itself. The public’s misconceptions of gangs should be one of the subject matters of the trial.

Part A of this section presents a theoretical overview of stereotyping, framing, priming, and other key social psychological concepts. Part B applies this literature to gangs in the courtroom. Part C briefly outlines essential elements for the defense in “counter-framing” gang stereotypes at trial and sentencing.

A. The Social Cognition Theory of Stereotyping

The process of stereotyping, or category-based reactions to individuals, is most succinctly reviewed in Susan Fiske’s treatment in the authoritative Handbook of Social Psychology. Fiske points out that academic notions of stereotyping have evolved from early beliefs that stereotypes are the product of a faulty mind to the modern-day exploration of the consequences of the normality of

61. See e.g., SUSAN T. FISKE & SHELLY E. TAYLOR, SOCIAL COGNITION 366–68 (1st ed. 1984) (explaining how empirical studies have illustrated that attitudes toward a subject can change with the introduction of competing information).

62. Id. at 361.

categorical thinking. Fiske relates that in the years following World War II, social science grappled with the problem of the “evil” of fascist leaders. During that time, German philosopher-sociologists Max Horkheimer and Theodor Adorno’s work led to the development of an “F-scale” that measures a deviant “authoritarian personality” centered on the personality structure of an individual. Social psychology at the time saw stereotyping and prejudice, like the anti-Semitism of the Nazis, as rooted in troubled family upbringing and deviant youthful experiences.

In 1954, psychologist Gordon Allport published his groundbreaking work *The Nature of Prejudice*, a book that deeply undercut theories of stereotyping as faulty thinking and raised important, if not seldom explored, questions for courtroom practice. Allport argued that humans inevitably categorize objects and people in the world and that to prejudice is inherently normal. Culturally accepted categories may be prejudicial, but are also useful cognitive tools that help people interact more easily. Fiske summarizes Allport’s core insight: “Just as people categorize furniture into tables and chairs, putting their drinks on one and sitting on the other, so, too, people categorize each other into ingroups and outgroups, loving one and . . . hating the other.”

Building on Allport’s work, social identity theory argues that our distinctions between “in-groups” and “out-groups” result in subconscious in-group favoritism. This favoritism manifests itself in two ways: in-group differences are minimized and out-group characteristics are accentuated. This has powerful reper-

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64. *Id.*
65. *Id.* at 358–59.
69. *Id.* at 20–23.
70. Fiske, *supra* note 63, at 361.
71. *Id.*
72. *Id.; see also* ALLPORT, *supra* note 68, at 31 (“It is difficult to define an in-group precisely. Perhaps the best that can be done is to say that members of an in-group all use the term we with the same essential significance.”).
73. Fiske, *supra* note 63, at 361.
cussions in a trial, where the jury constitutes itself as an in-group and categorizes the defendant as belonging to an out-group of criminals or gang members.  

Allport’s work also provides the source of what modern social psychologists call, “schema.” He argued that pre-existing beliefs, schema, help shape our attitudes and decisions. A schema is “a cognitive structure that represents organized knowledge about a concept or type of stimulus . . . [including] its attributes, and the relations among those attributes.” Sociologist Erving Goffman’s classic work on the “presentation of self” points out that schema is “a primary framework” of how people think that subconsciously creates meaning. In other words, schema are one’s prior beliefs—accurate or not—about categories, such as race, gender, or in the present case, gang members. If people think in categories, consistent with Allport’s argument, their schema are the “stuff” of those categories—what people unconsciously attribute to group members.

Why this is important is underscored by the insight that human beings are fundamentally “cognitive misers.” When presented with confusing, emotionally charged, and overwhelming

74. Benjamin Fleury-Steiner, Jurors’ Stories of Death: How America’s Death Penalty Invests in Inequality 8 (2004) (“[The jury] first construct[s] a sense of themselves as a small group, and through this sense they respond to the accused and to characteristics of the accused. . . . [T]hey cast the accused as an outsider.”). Social psychologists have made consistent findings of “outgroup homogeneity” or the tendency to impute stereotypic qualities to any outgroup member. See, e.g., Fiske, supra note 63, at 367 (“[T]he perceiver will see [outgroup members] as especially similar, lacking in variability.”).


76. Fiske & Taylor, supra note 61, at 140 (citation omitted).


78. This is similar to cultural competency theory. Dan Kahan and Donald Braman, two leading scholars in the area of cultural cognition, define cultural cognition as “the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation.” Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol’y Rev. 149, 152 (2006). Social cognition theory encompasses and extends concepts of cultural competence.

79. Fiske, supra note 63, at 362.
information, as in a trial, people unconsciously “conserve scarce mental resources” and more easily apply their schema or stereotypes to the case at hand. As psychologist Thomas Gilovich concludes in his popular analysis of the limitations of reason:

When examining evidence relevant to a given belief, people are inclined to see what they expect to see, and conclude what they expect to conclude. Information that is consistent with our pre-existing beliefs is often accepted at face value, whereas evidence that contradicts them is critically scrutinized and discounted.

People normally engage in cognitive shortcuts unless motivated to go beyond them. This idea is not just speculation. As argued by Fiske: “What is startling about categorization is, first, how rapid and apparently automatic it can be; and second, whether automatic or not, how many potentially automatic ramifications it has.” This conclusion is based on a set of experiments called “implicit association tests,” which “reveal the strength of association between two concepts that exists independently of conscious thought.” For example, the tests “prime,” or introduce words or concepts like “blacks” or “women,” in a format that calls for rapid response. What is measured is not the correctness or incorrectness of the response, but the time it takes for the participant to respond.

In one classic formulation, the “shooter test,” a video game presents black and white armed and unarmed targets for split second decisions by the shooter. The research found that shooters

80. Id.
81. Gilovich, supra note 58, at 50.
82. Fiske, supra note 63, at 363.
83. Id. at 364.
85. Id. at 136–37.
86. Id.
87. Joshua Correll et al., The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–18 (2002). See textual and video summaries of this
shot armed targets more frequently or quickly when the target was black.\footnote{88} These same participants decided not to shoot an unarmed target more frequently or quickly when that target was white.\footnote{89} The researchers concluded that participants seem to process stereotype-consistent targets (armed Blacks and unarmed Whites) more easily than counter-stereotypic targets (unarmed Blacks and armed Whites).\footnote{90} Reversing the old adage, this set of experiments demonstrates that we sometimes see it when we believe it.

Central to categorical thinking are the concepts of “prototypes” and “exemplars.”\footnote{91} Once people have a category in mind, e.g., a gang member, they envision a picture of what their prior schema or stereotypes interpret as the typical gang member. Researchers Robert M. Entman and Andrew Rojecki point out that “[p]rototypical thinking means a thinker will visualize a single fixed type every time a concept like person or bird [or gang member] comes up.”\footnote{92} Images, research has found, are even more salient than words in cueing stereotypes.\footnote{93}

In addition to prototypical thinking, another common way of thinking is through correlation. If people find a characteristic in one member of a group, they tend to think it occurs in all others.\footnote{94} When people are confronted by a situation they do not understand or that distresses them, they more easily think of it in terms of fa-
miliar concepts. These stereotypes—famously coined by Walter Lippman as “pictures in our head”—can be “primed” or “cued” by words or images. In a trial setting, these cues remind a jury that the defendant belongs to the category “gang” that is reviled in their stereotypes and schema. It produces a “frame” which focuses the understanding of a jury on characteristics congruent to an image of violent gangs. Fiske summarizes that “most people, given the wrong context, are prone to stereotypes, prejudice, and discrimination.”

A frame is defined as “a central organizing idea or story line that provides meaning to an unfolding strip of events, weaving a connection between them.” A frame “construct[s] a narrative, with actors, a plot, and a structure.” One way to understand this is to think of a picture frame that focuses attention on what is inside the frame and away from what is outside it. One might also envision the frame of a house as scaffolding for a person’s ideas. Regardless of definition, the result of categorical thinking is the creation of frames that shape how we think about a topic.

Frames have an awesome power. George Lakoff argues that “[t]o be accepted the truth must fit people’s frame. If the facts do not fit a frame, the frame stays and the facts bounce off.” This has a frightening relevance for the courtroom, where “dangerous frames”—i.e., stereotypes, and racialized schema of menacing minority gang members—are deeply embedded in the public

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96. WALTER LIPPMANN, PUBLIC OPINION 3 (1922).
97. Claude Steele’s popular work on “stereotype threat” provides evidence of the awesome power of priming or cuing. CLAUDE STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 5 (2010). His educational experiments demonstrate, for example, how subliminal priming of images of powerful independent women cue female students to perform math at the same level as males, while images of domestic women cue poorer performance. Id. at 144, 214.
98. Fiske, supra note 63, at 375.
100. WINTER, supra note 95, at 22.
mind. These frames are primed or cued by prosecutors in the course of a trial by references to notorious gang members or events, pictures of gang signs and tattoos, or the display of gang symbols or writing. The jury then subconsciously, by analogy, attributes these “dangerous frames” to the defendant.

Framing has four main purposes. First, frames define problems, most frequently in terms of prevailing cultural values. Second, they diagnose the causes of the problem. Third, frames make moral judgments of the causes and their overall effects. Finally, they suggest remedies for treating the problem while evaluating potential effectiveness of those remedies. The APRI manual is an excellent example of framing: gangs are violent and evil scourges of society and the only remedy for this problem is conviction for such evil people. The evidence need hardly matter. As Lakoff says, the facts can bounce off a well-constructed frame.

A final concept, “attribution theory,” links notions of stereotypes to jurors’ decision-making. Attribution theory assigns a cause to behavior based on the characteristics of the frame or stereotype. It explains how a “social perceiver” uses information to arrive at causal explanations of events. The “fundamental attributional error” is the tendency to attribute causality to the innate dispositions of people, rather than examining situational factors. This is a companion to the basic social science concept of the “ecological fallacy.” Basically, this error in reasoning states that it is fallacious when one makes conclusions about individuals

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102. See Winter, supra note 95, at 37–41.
103. Id. at 19. Winter calls this “the process of group implication.” Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. See Jackson, supra note 3, at 8.
110. Lakoff, supra note 101, at 17.
111. See Fiske & Taylor, supra note 61, at 21.
112. Id.
113. Id. at 73–75.
based only on analyses of group data.\textsuperscript{115} In other words, if the Tennessee Titans are the fan favorite in Tennessee, not all residents of Tennessee can be assumed to be fans of the Titans. Similarly, a frame or stereotype that “gangs are violent” cannot logically be applied to a specific defendant.

\textbf{B. Gangs and Stereotyping}

The relevance of social cognition theory to gangs in the courtroom should be manifestly apparent. First, the public has a stereotyped view of gangs.\textsuperscript{116} This means that there is an engrained image of the gang member that is the starting point for how the public, including a jury, processes information or evidence. What is that stereotype? \textit{Roget’s Thesaurus} lists the following synonyms for “gang member”:

bad person, evil person, no saint, sinner, hardened sinner, limb of Satan, Antichrist, evildoer, fallen angel, backslider, recidivist, lost sheep, lost soul. . . one without morals, immoralist reprobate, scapegrace, good-for-nothing, ne’er-do-well, black sheep, scallywag, scamp, rake. . . profligate, libertine, wanton, hussy, loose woman. . . outcast, dregs, riffraff, trash, white trash, scum, object of scorn. . . .\textsuperscript{117}

Whoa! The point here is that the prototype, the picture of the typical gang member people subconsciously and automatically envision, is of a very “scary dude.” Fiske and Taylor explain the problem: “Categorizing others leads to exaggerating perceived differences between groups and minimizing perceived differences within

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} See, \textit{e.g.}, Finn-Aage Esbensen & Karin E. Tusinski, \textit{Youth Gangs in the Print Media}, 14 J. CRIM. JUST. \& POPULAR CULTURE 21, 22 (2007) (explaining that research on youth gang culture does not correlate to common ideas about gangs); John Eyres & David L. Altheide, \textit{News Themes and Ethnic Identity: Los Angeles Times News Reports of Vietnamese, Black, and Hispanic Gangs}, 11 PERSP. ON SOC. PROBS. 85, 87 (1999) (finding that “news and popular culture depiction of minority groups as different and often criminal is a function of cultural assumptions and stereotypes, as well as organizational processes of news work.”).

\textsuperscript{117} \textit{ROGET’S THESAURUS}, \textit{in MICROSOFT BOOKSHELF} (1995).
each group.”\textsuperscript{118} This means the burden on the defense is not only to contest the facts, but also to challenge the frame juries use to make sense of them.

When the stereotype of “gang member” is joined to public attitudes on race, the problem is two-fold. Fiske explains racial schema as the belief that blacks are “dirty” and “physically skilled (e.g., athletic),” as well as “militant, violent, criminal, and hostile.”\textsuperscript{119} Below is a random sample of the American public’s beliefs that blacks are more violence-prone, unintelligent, and lazy than other groups.\textsuperscript{120}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
 & Violence Prone & Neutral & Not prone & Unintelligent & Neutral & Intelligent & Lazy & Neutral & Hardworking \\
\hline
Blacks & 47.0 & 37.5 & 15.5 & 21.9 & 48.3 & 29.6 & 34.3 & 43.7 & 22.0 \\
Hispanics & 37.4 & 44.1 & 18.5 & 23.9 & 30.8 & 25.3 & 21.9 & 40.3 & 37.8 \\
Asians & 16.9 & 46.5 & 36.6 & 10.5 & 39.7 & 49.8 & 10.9 & 31.9 & 57.2 \\
Whites & 21.4 & 47.9 & 30.7 & 6.7 & 40.9 & 52.4 & 10.8 & 43.3 & 45.9 \\
\hline
\end{tabular}
\caption{Racial/Ethnic Hierarchy Revealed in Negative Stereotyping}
\end{table}


Taken together, popular beliefs on race and gangs are strong evidence of an American cultural schema. This schema produces frames through which juries, as well as the American public as a whole, produce stereotypes on gangs. Fiske gives a

\textsuperscript{118} Fiske & Taylor, \textit{supra} note 61, at 165.
\textsuperscript{119} Fiske, \textit{supra} note 63, at 379.
vivid description of the misuse of categorical thinking for the courtroom:

Even if, for example, the violent crime rate among blacks is, as the stereotype goes, higher than that among whites, there are many times more whites in the United States than there are blacks. So there are many more white criminals than black criminals. The odds that any particular violent crime was committed by a black person are lower than the odds that it was committed by a white person. Moreover, violent criminals are the minority among both blacks and whites, so the odds are low that any particular black person or white person is a violent criminal.\(^{121}\)

However, beliefs about categories like blacks or gang members can create a frame that resists logical rebuttal. For example, Entman and Rojecki explain how news reports of a shooting can be manipulated by the use of a “gang frame”: “By highlighting this gang frame, the report obscures other possible mental associations such as, perhaps, the shooter’s absent father, unemployment or low wages, and clinical depression. The gang frame makes these more sympathetic connections less available to the audience.”\(^{122}\)

When an observer, such as a jury, is “primed” or “cued” by a reference to gangs—particularly by an image like a tattoo, or other allegations of gang involvement—this subconsciously evokes pre-existing stereotypes. The prosecutor may refer to a news story about gangs and murder, unrelated to the case at hand. This evokes the gang frame that then triggers “analogical reasoning that makes people transfer evaluations from the schema to the issue.”\(^{123}\)

In other words, without a legitimate counter-explanation, what Fiske calls “discrepant information,”\(^{124}\) introducing a news story on gang murders or displaying a gang tattoo cues a stereotyp-

\(^{121}\) Fiske, *supra* note 63, at 382.
\(^{122}\) ENTMAN & ROJECKI, *supra* note 92, at 49.
\(^{123}\) WINTER, *supra* note 95, at 23.
\(^{124}\) FISKE & TAYLOR, *supra* note 61, at 361.
ical “gang frame.” A particularly effective tactic is the introduction of gang prototypes or exemplars—infamous gang members like the Blackstone Rangers’ Jeff Fort, or the Black Gangster Disciples’ Larry Hoover. The alleged horrific deeds of these men then form a specific “picture in the minds” of jurors who subconsciously accept that the defendant belongs to a group represented by this “evil” example. When people are in stressful situations, like a death penalty trial, research reports the resulting anxiety is more likely to produce analogous thinking that relies on stereotypes.

To summarize, Fiske’s review is a cautionary tale for defense attorneys. She warns that deeply held stereotypes—like those of gangs—unless vigorously countered, will inevitably have powerful, non-logical effects. “A strong stereotype plus judgment-irrelevant, category-irrelevant information allows perceivers to maintain their stereotypes; why should they change a well-established view in light of such weak information?”

C. Countering the Frame

Why indeed? This Article proposes that the job of the defense in gang-related cases only begins with contesting the facts. Unless the “frame of evil” is also contested, facts can be too easily re-interpreted to fit a “dangerous frame.”

The defense is at a disadvantage because implicit stereotypes have been repeated over and over by mass media. Even public campaigns like those against the executions of Troy Davis and Tookie Williams have come up short. It is not always possible

125. Jeff Fort was the legendary leader of the Chicago gang, the Blackstone Rangers, and the first American convicted of terrorism. See NATALIE Y. MOORE & LANCE WILLIAMS, THE ALMIGHTY BLACK P STONE NATION: THE RISE, FALL, AND RESURGENCE OF AN AMERICAN GANG (2010).

126. Larry Hoover was the founder and leader of the Gangster Disciples. See ROD EMERY, THE BLUEPRINT: FROM GANGSTER DISCIPLE TO GROWTH & DEVELOPMENT (1996).

127. Fiske, supra note 63, at 391.

128. Id. at 386.

to contest stereotypes and misinformation through media and public campaigns, though it is obviously desirable to have a counter argument aired in mass media. Yet, humanizing a gang defendant in the face of uncontested media stereotypes is a daunting task.

Psychologist Myron Rothbart explains there are three ways deeply embedded frames or schema can be changed: through the book-keeping, conversion, and sub-typing models. The first two are familiar processes in a trial of accumulating evidence that contradicts the story of the prosecution. Jurors add up the discrepant information from the defense (book-keeping), and then either conclude gradually or suddenly that the prosecutor’s story “does not add up” (conversion). The final method, sub-typing, has particular relevance for gang cases. This approach admits the difficulty of dispelling implicit stereotypes and adopts a strategy that argues that even if the schema or “frame of evil” exists, it does not apply to the present case. A sub-typing strategy attempts to humanize the defendant, while leaving the validity and power of stereotypes aside.

Subtyping provides a potential counter to the APRI manual’s argument that gang testimony can “explain the inexplicable.” The uncontested evil represented by “gangs” absolves the jury of the responsibility of considering the circumstances of what happens; the facts do not really matter if the frame holds. Applying a sub-typing model, the defense would decide not to contest the gang stereotype but would argue instead that the defendant is different—a sub-type. For example, the defendant may not have a history of violent crimes, or may have acted as a peacemaker in certain situations. In short, the defendant can thus be described as a human being and juries can be asked to put some distance between the defendant and the stereotype of a “gang member.” Under this approach, the jurors’ frame is left intact.

130. John M. Hagedorn and Aubri F. McDonald, “Frames Fatales: The Demonization of Jacqueline Montanez” (unpublished manuscript under review, on file with author).
132. Id.
133. Id.
134. JACKSON, supra note 3, at 7.
While this approach has advantages, it also poses grave risks. If the theme of the prosecution rests on the frame of “gangs = evil,” a defense that relies on “gang members may be bad, but not my guy” may be easily rejected by jurors. As Lakoff said, the facts can just bounce off a frame of deeply held cultural beliefs.\textsuperscript{135}

While humanizing the defendant is necessary, this Article’s authors question whether it can be effectively invoked without attacking the process of framing itself. Essential to “breaking the frame” is making stereotyping conscious to the jurors. Fiske points out: “When social cognition researchers describe people ‘using’ information, they imply that the use is intentional. Yet people are not aware that they have a bias toward group-differentiating, negative, stereotype-confirming information, or paired distinctiveness. If they are unaware, how can they control these biases?”\textsuperscript{136}

Fiske argues that people have a “default mode” that accepts stereotypes unless the stereotypes are both aggressively challenged and made conscious.\textsuperscript{137} No matter how jurors think, making stereotyping conscious can change the dynamic in the jury room by adding an element that questions the validity of the prosecutor’s frame. This Article proposes that stereotyping should, wherever possible, be made an issue for the jury in gang-related trials. In cases where the prosecution appeals to gang stereotypes, the defense should counter with expert testimony not only about gangs, but also about the process of stereotyping and common public misconceptions about gangs. In Patrick Stout’s post-conviction case, for example, the gang expert was qualified to testify not only about gangs, but also about the public perception of gangs.\textsuperscript{138} That allowed for the introduction of testimony on stereotyping.\textsuperscript{139}

Juries, like all people, think in several related manners. They can be consistency-seekers, naïve scientists, cognitive misers, or motivated tacticians.\textsuperscript{140} While each of these types draws inferences in different ways, what they have in common is that they

\begin{itemize}
  \item \textsuperscript{135} Lakoff, supra note 101, at 17.
  \item \textsuperscript{136} Fiske, supra note 63, at 387.
  \item \textsuperscript{137} Id. at 366.
  \item \textsuperscript{138} Post-Conviction Memorandum and Order, supra note 7, at 22–23.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Fiske & Taylor, supra note 61, at 9–12.
\end{itemize}
function critically only in an atmosphere that calmly elevates the
capacity for rational thought. A mood of deliberation needs to be
as unemotional as possible, as social psychological research ex-
plains that nearly all heightened emotional states, especially anger,
lead people to attend more closely to pre-existing beliefs. The
appeal to reason in many gang cases should explicitly include ask-
ing the jury to soberly consider both the applicability and validity
of stereotypes.

This means that the “gang frame” itself must be challenged,
or else any facts that are presented are likely to bounce off. A
classic example of making stereotyping conscious was Clarence
Darrow’s 1926 defense of Dr. Ossian Sweet. In that case, a
white Detroit mob surrounded the Sweet family residence, which
prompted Dr. Sweet to fire his rifle into the crowd, killing a rioter,
Leon Breiner. Dr. Sweet and ten others were charged with
Breiner’s murder. After a mistrial, Darrow’s strategy
changed. During jury selection, his voir dire exemplified the
essence of making stereotyping conscious.

Darrow began by asking the all-white, all-male jury about
their knowledge of “colored people.” The background to the
case, Darrow said, was that a colored man had bought a house in
an all-white area. “Now you wouldn’t want not to be fair. You
just tell me yourself whether any view you have or surroundings
you have would handicap my client or the state. . . .” Darrow
had put prejudice—stereotyping—in the front of the minds of the
jury. At the end of the trial, in his closing remarks, Darrow under-
scored this approach: “Now gentlemen, I say you are prejudiced.

143. Id. at 138–40.
144. Id.
145. Id. at 299.
146. Id. at 317.
147. Id.
148. Id.
149. Id.
150. Id.
. . You need not tell me you are not prejudiced. I know better.”\textsuperscript{150} The verdict was “not guilty.”\textsuperscript{151}

With Darrow’s case as proof that making stereotyping conscious was possible in the courtroom setting, the defense’s strategy should follow accordingly. George Lakoff provides more precise examples of how to form such strategies. He argues that people adhere to one of two basic models that guide thinking: a model that sees strict enforcement of rules versus one that relies more on empathy for others.\textsuperscript{152} He argues that while many people fiercely hold on to one perspective, most people, including juries, are “biconceptual” and open to persuasion.\textsuperscript{153} This means that most people hold aspects of both the “rule-enforcement” and “empathetic” worldviews. Among the lessons Lakoff lists are two relevant ones for work in court. First, “[r]ebuttal is not reframing. You have to impose your own framing before you can successfully rebut.”\textsuperscript{154} Second, “[t]he facts themselves won’t set you free. You have to frame facts properly before they can have the meaning you want them to convey.”\textsuperscript{155} This means that the “gang frame” itself must be challenged or any facts that are presented are likely to bounce off.

While this subject matter benefits from a more detailed treatment, it basically entails that:

1. Discrepant information needs to be presented continually to raise questions of the applicability of the “gang frame.” For example, not all gang members are equally violent. This discrepant information should focus both on the defendant’s actual characteristics as well as contesting the prosecution’s broader stereotypes of gangs.

\textsuperscript{150} ld. at 331.
\textsuperscript{151} Id. at 336.
\textsuperscript{152} GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 3–23 (2d ed. 2002); see also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 24–63 (1982) (discussing these models of thinking in the context of gender).
\textsuperscript{153} LAKOFF, supra note 152, at 175–76.
\textsuperscript{154} Id. at 420.
\textsuperscript{155} Id.
2. Stereotyping itself should become an issue in the trial. The use of gang experts by the defense should detail explicitly the power of framing and stereotypes of gangs as we have explained here. By focusing on stereotypes, the jury is encouraged to use reason and even question their own prior knowledge and assumptions.

3. The facts of the case need to be embedded in an alternative story that challenges the prosecution’s frame. This defense frame should prioritize empathy, such as providing common-sense ideas of why someone like the defendant would join a gang. The very act of weighing two competing stories against one another is a step toward a jury decision based on evidence, not stereotypes.

IV. CONCLUSION: BACK TO PATRICK STOUT

In the APRI report,\textsuperscript{156} as was true in Patrick Stout’s trial, it is an unstated assumption that gangs are all of one kind—in short, inherently evil. The uncontested notion in Patrick’s trial that “all gangs are alike” allowed the prosecution to implicitly evoke pre-existing juror images of prototypes of violent gangs from media depictions. This cued the jurors that the defendant belonged to the category gang just like the “evil others.” While this is an example of the ecological fallacy, the tactic succeeded in stereotyping Patrick.

The result is that the defense in Patrick’s trial should have challenged the stereotype that “all gangs are alike” by offering research on the different kinds of gangs. Research on gang variation can be traced as far back as a 1927 study of 1313 gangs in Chicago that argued “no two gangs are just alike.”\textsuperscript{157} Since that time, aca-

\textsuperscript{156} See supra note 3 and accompanying text.

demics have repeatedly typed gangs based on level of organization, neighborhood opportunity structure, gender, and other variables. In agreement with these academics, research-based testimony in Patrick’s post-conviction hearing highlighted the stark differences between neighborhood peer groups and institutionalized gangs like the Gangster Disciples, who have persisted for generations despite changes in leadership, police repression, and changing conditions. Patrick joined a neighborhood peer group, the most common kind of gang, which is drastically different from Chicago’s Gangster Disciples. Once he went to the Shelby County Jail, he encountered a much more organized reality of gang life, which was in stark contrast to his more informal, kinship-related, neighborhood peer group. He resisted the jailhouse gang discipline and was beaten out, or in his words, “eradicated” out of the Gangster Disciples by a life-threatening assault.

If the jury included members who grew up in poor neighborhoods, the prevalence of wild, disorganized kinship-related peer groups may have been familiar to them. Membership in neighborhood cliques is defined by social science as “normal deviance” for kids from diverse family backgrounds. Jurors who lived in a neighborhood with wild peer groups might recall the youthful, familiar face of a next-door neighbor’s child who hung out with a neighborhood gang. When a crime is committed by someone who may be related to a juror’s reference group, such as a neighborhood, blame is more likely to be ascribed to circumstance. 

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162. Gilovich, supra note 58, at 70.
versely, when crimes are committed by people they consider outsiders, jurors are more likely to ascribe the crime to the nature of the offender. It is important to look for any common ground between the jurors and the defendant in order to evoke empathetic reasoning. Expert witness testimony also needs to persuade jurors to draw distinctions, beginning with contesting the prosecution’s assumption that “all gangs are alike.”

A second stereotype in Patrick’s trial, described above, was even more salient in convincing the jury to agree on a death sentence. At sentencing, Patrick was forced to display his tattoos for the jury.\textsuperscript{163} The jury was left to draw on their prior, or “folk,” knowledge of gangs and tattoos, concluding that the tattoo represented a deep commitment to the Gangster Disciples.

Several points are relevant here. First, the interpretation of the tattoos could have been decisively contested at trial, as was done later in the post-conviction hearing. For example, the defense consultant pointed out the teardrop tattoo, which is commonly misconstrued as standing for how many people the tattoo wearer has killed, but in fact has an alternate, more typical meaning. Even specialist publications written by law enforcement agree that a teardrop could represent “tears” for someone who the tattooed person knew that died, not those the tattooed person killed.\textsuperscript{164}

Second, the defense should have realized that visual images, like tattoos, are more effective than words in cueing or priming existing stereotypes. Recall Walter Lippman’s definition of a stereotype as “a picture in your head.”\textsuperscript{165} Whenever visual evidence is presented, it needs to be vigorously rebutted or given an alternative, contested interpretation. The defense in Patrick’s sentencing hearing had a major opportunity to turn the tattoo to their advantage by having an expert point out its amateur nature.

For example, in the post-conviction hearing, expert testimony not only drew on the witness’s academic expertise, but also that the expert witness enlisted a former leader of the Chicago

\textsuperscript{163.} Post-Conviction Memorandum and Order, \textit{supra} note 7, at 38.
\textsuperscript{164.} \textsc{Bill Valentine}, \textsc{Gangs and Their Tattoos: Identifying Gangbangers on the Street and in Prison} 37 (2000); \textit{see also} Megan Twohey, \textit{A Troubling Trend: Some Worry That Youths are Getting Teardrop Tattoos Without Knowing Dangerous Significance}, \textsc{Milwaukee J. Sentinel}, Jan. 30, 2005, at B1.
\textsuperscript{165.} Lippman, \textit{supra} note 96, at 1.
Gangster Disciples to examine photographs of Patrick’s tattoos.\(^{166}\) This Chicago gang member explained that Patrick’s crude tattoos were not acceptable for a “real member” of the Gangster Disciples.\(^{167}\) In fact, the former leader explained to the expert that those tattoos “could get [Patrick] killed in Chicago.”\(^{168}\) This kind of testimony, if presented at sentencing, would have urged the jury to use reason and weigh the opposing descriptions of the meaning of the tattoo. A description of young Patrick Stout copying a tattoo he had seen on others could have led jurors to recall some understanding of how young people they knew acted. The jury could then apply that memory to Patrick. But unchallenged at trial, the jury relied on their own pre-existing stereotypes and the one-sided explanation of the prosecution.

Patrick’s post-conviction hearing had a mixed result: his death sentence was vacated but his conviction was not.\(^{169}\) Reviewing his case, we concluded that the damage of stereotyping colored Patrick’s trial from beginning to end. Taking this trial as an example, we argue that an effective defense in gang-related cases ought to include expert testimony regarding social cognition literature and the inherently biasing effects of gang stereotypes.

\(^{166}\) Patrick Stout Post-Conviction Record (on file with author).
\(^{167}\) Id.
\(^{168}\) Id.
\(^{169}\) Post-Conviction Memorandum and Order, supra note 7, at 40.