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Reifying Injustice: Using Culturally Specific Tattoos as a Marker of Gang Membership

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REIFYING INJUSTICE: USING CULTURALLY SPECIFIC TATTOOS AS A MARKER OF GANG MEMBERSHIP

Beth Caldwell*

Abstract: The “gang” label has been so highly racialized that white people who self-identify as gang members are almost never categorized as “gang members” by law enforcement, while Black and Latino people who are not gang members are routinely labeled and targeted as if they were. Different rules attach to people under criminal law once they are labeled gang members, yet this two-track system is justified under the guise that the racially disparate treatment is legitimate because of gang association.

This Article takes one concrete example—culturally specific tattoos—and unmasks how racial markers are used to attach the gang label. Specifically, I describe examples of how tattoos symbolizing Chicano cultural identity are used to categorize people as gang members.

I discuss four types of tattoos that represent important aspects of Mexican-American identity, but that are regularly used to define people as gang members. Specifically, I discuss how tattoos and symbols of people’s racial identities or places of origin, such as “Mexicano” or “Brown Pride,” have been used as evidence of gang membership. I also describe the use of tattoos that depict Aztec or Mayan imagery, as well as tattoos of Catholic religious symbolism.

The Article then builds on scholarship in the field of Critical Race Studies to criticize the current construction of the law, which keeps racially disparate treatment entrenched. Here, I rely on academic literature about tattoos to explain how central tattoos are to people’s identities, and to argue that the law should evolve to acknowledge disparate impact claims in the absence of evidence of discriminatory intent, and to recognize discriminatory intent when it is masked behind language that legitimizes discrimination.

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INTRODUCTION

The Equal Protection Clause of the United States Constitution prohibits discrimination based on race, ethnicity, or national origin.¹ And yet, U.S. law and its enforcement mechanisms continue to perpetuate longstanding historical racial disparities that systematically disfavor

1. See U.S. CONST. amend. XIV, § 1; *Brown v. Board of Education*, 347 U.S. 483, 490 (1954). There are notable exceptions to this general rule in the field of immigration law, where discrimination based on national origin has been allowed under the theory that Congress and the Executive Branch enjoy broad power to regulate immigration matters because they relate to national sovereignty and security. See *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2419–20 (2018); Devon W. Carbadó & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLAL REV. 1543, 1550 (2011) (exploring how Fourth Amendment intrusions into the lives of Latinos have “import[ed] a pernicious aspect of immigration exceptionalism into criminal procedure: namely, that the government can legitimately target on the basis of race when it is enforcing immigration laws”).

Black, Indigenous, and Latino people.² Racial inequality persists under the law even though racial discrimination is constitutionally barred.³ This is the tragedy of civil rights law in the United States today. As Professor Derrick Bell warned decades ago, the U.S. legal system is structured in such a way that gains for racial equality will be “short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”⁴

An example from New York demonstrates how Professor Bell’s theory has played out in the context of racially discriminatory policing. A New York court forced the New York Police Department (NYPD) to change its stop and frisk policy because it was either “applied in a discriminatory manner” or amounted to “express racial profiling, targeting young [B]lack and Hispanic men for stops based on the alleged criminal conduct of other young [B]lack or Hispanic men.”⁵ On the surface, this would seem like an important step in the direction of racial equality. But the NYPD responded by creating Operation Crew Cut,⁶ a “war on gangs” fueled by a “‘secret’ gang database.”⁷ Gang crime was then used as a pretext to “develop[] a policing tactic that is race-based in practice, race-neutral on its face, and ‘avoids both public and judicial scrutiny.’”⁸ Thus racial profiling was able to persist through a different legal mechanism, making the limits the court placed on the stop and frisk policy largely irrelevant.

Operation Crew Cut exemplifies how the law allows racial inequality to persist through policies that appear to be facially race-neutral, but that are actually used as tools of racial subjugation.⁹ Nowhere are racially

2. See *infra* section III.A. I use the term “Black” rather than “African American” to encompass Black immigrants who do not identify as American. I use the term “Latino” here to include people with Latin American ancestry from all gender identities. Although much of this Article focuses on Mexican-American identity, as discussed further in Part II, I deliberately chose to broaden the category here by using the term “Latino.” When referring specifically to Latino men, I use the term “Latino.” When referring more broadly to people of all gender identities of Latin American descent, I also use the term “Latino.”

3. See *infra* section III.A.

4. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992).

5. See Jasmine Johnson, *Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City*, 94 ST. JOHN’S L. REV. 1033, 1036–37 (2020) (quoting *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664 (S.D.N.Y. 2013)).

6. See *id.* at 1035–36.

7. See *id.* at 1036.

8. *Id.* at 1042 (quoting K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 4 (2015)).

9. Cf. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 8 (3d ed. 2017) (“Color-blind, or ‘formal,’ conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination.”); see also Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 965 (2002) (“Part of

disparate impacts more pervasive than in the criminal justice and immigration systems of the United States. Black people are incarcerated at a rate of 2,306 per 100,000; Latino people at a rate of 831 per 100,000; and white people at a much lower rate of 450 per 100,000.¹⁰ In the immigration context, nearly *all* of the people the United States deports are Latino,¹¹ and a disproportionate number are Black.¹² Myriad policies, both formal and informal, overlap to create legal systems that systematically under-protect and over-criminalize Black and Latino people.¹³ And yet, the law allows these gross racial disparities to stand.

The use of code words that give racially-biased policies the appearance of legitimacy play an important role in this process.¹⁴ Words such as “inner city,” “ghetto,” “thug,” or “gang,” “are so imbued with racial meaning that they can and do convey racist ideas and attitudes beneath a veneer of neutrality or objectivity.”¹⁵ Through the use of racial code words

the project of Critical Race Theory has been to illustrate not only the role courts play in constructing racial identities, but also the relationship between the construction of race in judicial opinions and the production and legitimation of racial inequality.”).

10. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://www.perma.cc/9XBA-WC6P>].

11. MEXICAN AM. LEGAL DEF. & EDUC. FUND, NAT’L DAY LABORER ORG. NETWORK & NAT’L HISPANIC LEADERSHIP AGENDA, DETENTION, DEPORTATION, AND DEVASTATION: THE DISPROPORTIONATE EFFECT OF DEPORTATIONS ON THE LATINO COMMUNITY 2 (2014), https://www.maldef.org/assets/pdf/DDD_050614.pdf [<https://perma.cc/U8N9-N3UY>] (“In 2013, 96.7 percent, or 356,303 of all deportees were of Latinos descent.”).

12. Jeremy Raff, *The ‘Double Punishment’ for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/> [<https://perma.cc/B8DS-855F>] (reporting that although Black immigrants comprise approximately seven percent of the non-citizen population in the United States, “they make up more than [ten] percent of immigrants in removal proceedings”).

13. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* (2d ed. 2013); MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* (2016).

14. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS* 129 (2014) (“The once pervasive use of [racial] epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class.”); Patrick O’Donnell, *When Code Words Aren’t Coded*, 46 SOC. THEORY & PRAC. 813, 814 (2020) (explaining how racial code words emerged in the Civil Rights era after explicit racial discrimination was outlawed and disfavored so that now “racial appeals in politics are generally implicit rather than explicit,” and racial code words “are the linguistic vehicles of racial appeals” (emphasis omitted)).

15. NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* 142 (2014); Vanessa Barford, *Is the Word ‘Ghetto’ Racist?*, BBC NEWS (Jan. 15, 2016), <https://www.bbc.com/news/magazine-35296993> [<https://www.perma.cc/KJ2L-9KYP>] (discussing how the word ghetto is “often used pejoratively to describe low-income African Americans, or their presumed forms of behavior, dress, and speech”

or “dog whistles,” the racial animus motivating the differential treatment is obscured and is placed out of reach of judicial intervention.¹⁶ This Article focuses on one of these racially coded constructions—the concept of “gang” or “gang member.”¹⁷

No one seems to be able to agree on how to define what a “gang” is, but the term generally refers to a group of people who engage in a pattern of criminality with some kind of unified name or symbol.¹⁸ Although a wide variety of group behavior could conceivably count as gang activity given how broad the definitions tend to be, only the behavior carried out by people of color tends to be categorized as gang-related.¹⁹ The gang label has been so highly racialized that white people who self-identify as gang members are almost *never* categorized as “gang members” by law enforcement, while Black and Latino people who are *not* gang members are routinely labeled and targeted as if they were.²⁰ Self-reported data—widely accepted among criminologists to be the most accurate—indicates that approximately forty percent of gang members in the United States are white.²¹ However, ninety-nine percent of those listed in the New York

(quoting Mario Small)); Tamari Kitossa, *‘Thugs’ Is a Race-Code Word that Fuels Anti-Black Racism*, CONVERSATION (Oct. 17, 2018, 6:55 PM), <https://theconversation.com/thugs-is-a-race-code-word-that-fuels-anti-black-racism-100312> [<https://perma.cc/E9DA-GVUJ>]; Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 350–56 (2016) (discussing the use of the word “thug” as racially coded language); National Gang Intelligence Center, *Gang Tattoos*, NAT’L GANG CTR. NEWSLETTER (Nat’l Gang Ctr., Tallahassee, Fla.), 2016, at 4, <https://www.nationalgangcenter.gov/Content/Newsletters/NGC-Newsletter-2016-Summer.pdf> [<https://perma.cc/9BG2-43D2>].

16. See HANEY LÓPEZ, *supra* note 14, at 129.

17. For an in-depth study of how “gang” functions as a proxy for race, see ANA MUÑIZ, *POLICE, POWER, AND THE PRODUCTION OF RACIAL BOUNDARIES* 45 (2015). See *id.* (describing how prosecutors seeking the first Los Angeles gang injunction—a court order that prohibited a broad range of lawful activities—relied on “unequivocally racist ideas about black youth, morality, intelligence, and family life” to such an extent that “the term ‘gang’ is really a reference to black men”).

18. See *infra* section I.A.

19. See MUÑIZ, *supra* note 17, at 38–39.

20. See Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 307 (2012) (arguing that “systemic racial biases” characterize the process of defining groups as gangs, thus “[c]onflating gang activity with racial minorities” and “shield[ing] [white criminal offenders] from being conceptualized as gang members or affiliates for RICO purposes”); see also Steven W. Bender, *Knocked Down Again: An East L.A. Story on the Geography of Color and Colors*, 12 HARV. LATINO L. REV. 109, 121–22 (2009) (tracing the racialized representations of Latinos from east Los Angeles as gang members in movies, writing “the media association of Latino/as and gangs is vastly overblown”).

21. A study of 5,156 eighth graders conducted in eleven cities across the United States found that one in four gang members is white. Finn-Aage Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multisite Survey*, 15 JUST. Q. 505, 516–17 (1998).

Police Department's gang database are reportedly Black and Latino,²² and ninety-six percent of those listed in Chicago's gang database are Latino or Black.²³ In Los Angeles County, ninety-eight percent of those who have been sentenced to prison with gang sentencing enhancements are people of color.²⁴ In Mississippi, the Association of Gang Investigators reported that fifty-three percent of the gang members in the state are white, but *everyone* arrested under the state's gang law between 2010 and 2017 was Black.²⁵ Nationally, as of 2007, "African Americans and Latinos were roughly 15 times more likely than non-Hispanic whites to be identified by the police as gang members."²⁶ The evidence is abundantly clear that the gang label is disproportionately applied to people of color.

Once labeled gang members, people are subject to much harsher treatment under the law.²⁷ Law enforcement resources are poured into arresting people labeled gang members, making this group of people much more likely to be arrested—and subsequently convicted—than others.²⁸ "Gang members" can be prosecuted for behavior that is not

22. Daryl Khan, *New York City's Gang Database Is 99% People of Color*, *Chief of Detectives Testifies*, JUV. JUST. INFO. EXCH. (June 14, 2018), <https://jjie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies/> [<https://perma.cc/EYV5-5TMQ>]. Jasmine Johnson calculates that 97.7% of the NYPD's gang database consisted of Black and/or Hispanic New Yorkers as of 2019. Johnson, *supra* note 5, at 1041.

23. See Janaé Bonsu & Andy Clarno, POLICING CHI. RSCH. GRP., TRACKED AND TARGETED: EARLY FINDINGS ON CHICAGO'S GANG DATABASE 5 (2018), <http://www.erasethedatabase.com/wp-content/uploads/2018/02/Tracked-Targeted-02017.pdf> [<https://perma.cc/72K2-8CZE>].

24. Assemb. B. 333 § 2(d)(4) (Cal. Assemb. 2021); see also Loren Siegel, *Gangs and the Law*, in GANGS AND SOCIETY: ALTERNATIVE PERSPECTIVES 213, 225–26 (Louis Kontos, David Brotherton & Luis Barrios eds., 2003); CAL. DEP'T JUST., ATTORNEY GENERAL'S ANNUAL REPORT ON CALGANG FOR 2017, at 3, <https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2017.pdf> [<https://perma.cc/MSP9-E9QX>]. Across California, ninety-two percent of all people sentenced to prison with gang sentencing enhancements are people of color. See CA. COMM. ON REVISION PENAL CODE, 2020 ANNUAL REPORT AND RECOMMENDATIONS 44 (2021) [hereinafter CA. COMM. ON REVISION], http://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf [<https://perma.cc/CBR8-DRVV>].

25. CA. COMM. ON REVISION, *supra* note 24, at 46.

26. JUDITH GREENE & KEVIN PRANIS, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES, JUST. POL'Y INST. 36–37 (2007) https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-ij.pdf [<https://perma.cc/388Z-6H67>].

27. See Assemb. B. 333 § 2(b) (Cal. Assemb. 2021) ("Being designated as a gang member or associate negatively impacts a person's criminal legal system contact from start to finish by hindering pretrial release, influencing sentencing, incarceration, parole, and reentry, and can lead to deportation.").

28. See MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 267–300, 313–17 (2d ed. 2006) (describing "anti-gang sweeps" and raids conducted by gang units within the Los Angeles Police Department); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 321 (2007) (describing

defined as criminal for others.²⁹ They are more likely to remain in pre-trial custody, which often pushes people to plead guilty even when they are not.³⁰ Courts have even circumvented the long-standing principle of double jeopardy in gang-related cases, such that people have been tried twice for the same conduct.³¹ Even evidentiary rules are relaxed, making it easier to introduce unreliable evidence in gang-related cases.³² Gang members can be sentenced to up to ten years longer in prison for committing the same crime as someone who has not been labeled a gang member.³³ Things are worse in prison for those labeled gang members—they may be housed in prolonged solitary confinement in prison, and may be denied parole because of their alleged gang association.³⁴ In the immigration sphere, “gang members” may be deported or denied admission to the United States even though they would otherwise qualify for a green card or citizenship, all because of this designation.³⁵

Operation Community Shield, an ICE enforcement operation that focused on conducting mass arrests in Latino communities).

29. See Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 245–50 (2010) (describing the enforcement of gang injunctions in Los Angeles); see also MUÑIZ, *supra* note 17, at 48 (discussing how one goal of gang injunctions is to allow police to arrest people before they have done anything illegal, and providing examples of the kinds of behavior that becomes criminal under a gang injunction, including carrying binoculars or flashlights, standing on balconies, or riding bikes).

30. See K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 621, 623 (2011).

31. See Fareed Nassor Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS U. L. REV. 1463, 1476 (2021) (discussing “an alarming development in gang prosecutions across the United States” where prosecutions violate the Double Jeopardy Clause of the Fifth Amendment).

32. See, e.g., Nicole Taubman, *Crawford and the Crips: The Battle Between Basis Evidence and the Sixth Amendment in Gang Prosecutions*, 43 W. ST. L. REV. 127, 135–36 (2015) (discussing hearsay evidence in gang cases). *But see* *People v. Sanchez*, 374 P.3d 320, 343–44 (Cal. 2016) (reversing a gang enhancement because testimonial hearsay had been improperly admitted); *People v. Valencia*, 489 P.3d 700, 713 (Cal. 2021) (holding that predicate offenses required for purposes of establishing a gang enhancement may not be established through hearsay).

33. See Howell, *supra* note 30, at 623 (indicating that “in the majority of jurisdictions, substantial sentence enhancements may be imposed upon conviction of a gang related incident”); CAL. PENAL CODE § 186.22 (2022); see also MUÑIZ, *supra* note 17, at 49 (discussing how a ticket for driving on a suspended license that would result in a fine for someone else turns into a 90 or 120 day jail sentence for “this person in this neighborhood,” speaking about someone subject to a gang injunction (emphasis omitted)).

34. See Assemb. B. 333 § 2(i) (Cal. Assemb. 2021) (“Gang enhancements and allegations have additionally been used to legitimize severe punishment, including the use of prolonged solitary confinement. Upon incarceration by the Department of Corrections and Rehabilitation, a person accused of being a gang member can affect a person’s housing, access to programs, and often lead to a denial of parole.”).

35. The State Department used the national security “reason to believe . . . [will] engage in organized crime” provision to refuse visas to two people in 2006, but eighty-two in 2010. Miriam

Taken together, an entirely different set of rules attaches to people once they are labeled gang members—rules that make it easier to convict people of crimes and to sentence them to longer terms of imprisonment.³⁶ These rules also make it more difficult to obtain release from prison, and to remain in, or return to, the United States.³⁷ This different set of rules applies almost exclusively to Black and Latino men.³⁸ The project of gang labeling is so highly racialized that, at one point, a group of immigration officers characterized the Los Angeles Police Department gang units as “waging war against ‘a whole race of people.’”³⁹

While well-documented, the unequal treatment of people defined as gang members has not been found to violate the law because the disparate treatment is not *explicitly* based on race.⁴⁰ The gang label is used to justify differential treatment such that it is not perceived as racially biased.

The central premise of this Article is that the law should not allow different rules to apply to people who are labeled gang members because the gang label cannot be divorced from race and culture. And *if* our society is serious about undoing centuries of racism, this is the kind of policy that needs to be questioned rather than tacitly accepted.

I begin from the premise that many believe that treating gang members differently makes logical sense. After all, we want the legal system to deter people from engaging in gang violence. In order to demonstrate why targeting people labeled gang members for harsher treatment under the law is not the right social response to the problem of gangs, I focus on one concrete example—culturally specific tattoos. I describe the mechanics of how these tattoos are employed to perpetuate systems of subordination that maintain the racial inequalities that have characterized the United States for centuries. The goal is to expose the racialized construction of gang association vis-à-vis tattoos to unmask the invisible ways in which this practice targets people due to their race and national origin in a way that is shielded from judicial intervention. In this Article, I focus

Jordan, *Tattoo Checks Trip Up Visas*, WALL ST. J. (July 11, 2012) (quotation marks omitted), <https://www.wsj.com/articles/SB10001424052702303933404577505192265987100> (last visited Sept. 7, 2023).

36. See Howell, *supra* note 30, at 623 (“An allegation of gang affiliation affects every aspect of a criminal case because it is so prejudicial that it is difficult to get a fair trial.”).

37. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 739 (1990) (explaining that “[t]he label ‘gang-related’ has far-reaching ramifications in criminal cases,” including being “singled out for investigation and prosecution by special units” and enhancing sentencing).

38. See *supra* notes 20–26 and accompanying text.

39. GREENE & PRANIS, *supra* note 26, at 28.

40. See *State v. Frazier*, 649 N.W.2d 828, 830, 834–36 (Minn. 2002).

specifically on how tattoos symbolizing Latino cultural identity are used to categorize people as gang members.

This analysis is theoretically rooted in Critical Race Studies. According to Devon Carbado, “[p]art of the project of Critical Race [Studies] has been to illustrate not only the role courts play in constructing racial identities, but also the relationship between the construction of race in judicial opinions and the production and legitimation of racial inequality.”⁴¹ This Article addresses both the role the law plays in constructing racial identity through the use of the gang label, and the way in which this construction legitimates racially disparate treatment by framing the problem as if it relates to gangs rather than race.

This is a timely and important project because, in the wake of George Floyd’s murder, there have been more widespread calls for addressing racism, particularly in the context of the criminal justice system.⁴² However, these calls are unlikely to lead to long-term change unless we address the complex and nuanced systems that maintain racial hierarchies.⁴³ If processes like imposing harsher rules for people who are labeled gang members continue, the criminal justice system is unlikely to fundamentally change.

I do not deny that gang violence is a social problem that warrants our attention. On the contrary, I have spent much of my life focusing on implementing strategies that have been proven to reduce gang violence and, in the process, I have been personally touched by the tragic loss of young lives that is so often tied to gang activity. But the legal strategies that have been employed to respond to gang violence often do more harm than good by further marginalizing, stigmatizing, and demonizing people who may be more likely to gravitate towards, or remain entrenched within, gangs because of this marginalization.⁴⁴ The gang-labeling process and its consequences not only pose normative questions about

41. Carbado, *supra* note 9, at 965.

42. See, e.g., Elliott C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), <https://edition.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/GU2J-TYBU>] (reporting that whereas the highest turnout for any American protest prior to George Floyd’s death was 4.6 million people at the 2017 Women’s March, “as many as 21 million adults had attended a Black Lives Matter or police brutality protest” in the wake of George Floyd’s death).

43. See, e.g., Frank W. Munger & Carroll Seron, *Race, Law, and Inequality, 50 Years After the Civil Rights Era*, 13 ANN. REV. L. & SOC. SCI. 331, 331 (2017) (examining how the law helps to maintain “persistent racial inequality in the United States” through the carceral state, employment discrimination, and residential segregation).

44. See Caldwell, *supra* note 29, at 26–69 (exploring how gang injunctions can be counterproductive when considered in light of the multiple marginality theory framework for understanding gangs).

fundamental fairness under the law, but also raise practical concerns that such treatment is likely to make gang violence worse.

Part I of this Article provides some context about how the law defines people as gang members using markers of racial and cultural identity, which has led to the systematic overidentification of young men of color as gang members. Part II focuses on Chicano tattoos and the role they have played in the construction of a unique Chicano (or Mexican-American) cultural identity in the United States—an identity purposefully distinct from both Mexicans (from Mexico) and white people (from the United States). This Part provides a detailed description of how tattoos that represent Chicano cultural or racial identity, and Latino identity more broadly, are used to label people as gang members based on aspects of their identity that are central to their race or national origin. People are often labeled gang members based on tattoos of cultural symbols that may indicate gang membership for some, but not for others.

Specifically, I discuss four types of tattoos that represent important aspects of Latino identity, but that are regularly used to define people as gang members. First, I discuss how tattoos and symbols of people's racial identities or places of origin, such as "Mexicano" or "Brown Pride," have been used as evidence of gang membership. Second, I describe the use of tattoos that depict Aztec or Mayan imagery to prove gang membership. Third, I discuss tattoos of Catholic religious symbolism. Taken together, these two groups of tattoos—Aztec or Mayan imagery and Catholic imagery—represent the two sides of the ancestry of most people from Mexico and Central America: Indigenous and Spanish. Finally, I discuss tattoos that are popular in Latino youth culture and that have been conflated with gang membership, but that often do not in fact represent gang identity. The most iconic tattoo discussed here is a tattoo of two clown faces, one smiling and one crying, that is often accompanied by the words "Smile Now, Cry Later."

Part III introduces the legal framework that allows racism to persist under the law by summarizing the current state of equal protection law and presenting an overview of Critical Race Studies' major criticisms of the way the law has been interpreted to (1) minimize the importance of racially disparate impact and (2) require, in most situations, evidence of discriminatory racial intent. Here, I also discuss how courts have narrowed the understanding of what qualifies as discriminatory racial intent by requiring that explicit discrimination be based on an immutable characteristic of race—a characteristic that people are born with. I argue that this conception of race is fundamentally at odds with how race manifests in our society—through a combination of mutable and immutable characteristics that form people's identities.

Part IV uses the examples of the tattoos discussed in Part II to highlight how courts have interpreted the Equal Protection Clause in a way that systematically fails to protect people from unequal treatment that is clearly tied to race or national origin. Here, I rely on academic literature about tattoos to explain how central tattoos are to people's identities and make the argument that they are central markers of racial or cultural identity even though people are not born with them.

The Article concludes in Part V by considering some interim measures that could curtail the harm that is done by using culturally specific tattoos to attach the gang label. Specifically, I suggest that courts should find evidence regarding culturally specific tattoos such as those discussed in this Article as more prejudicial than probative and should thus exclude any evidence of them in court. In addition, I argue that legislative reforms could bar the use of culturally specific tattoos not only in courtrooms, but also in the different stages of the gang labeling process.

I. OVERVIEW OF THE GANG LABELING PROCESS AND ITS IMPLICATIONS

Carlitos was only eleven years old. He was still in elementary school. The son of immigrants from Mexico, he attended an after-school arts program I facilitated every week. One day he arrived visibly shaken. I asked him what was wrong, and he explained that as he had been riding his bike the few blocks from his home to the arts program, a police car started to follow him. He was scared, and they pulled out their loudspeaker broadcasting "V-13er." That was the name of the neighborhood gang—a gang that one or two of his three older brothers were active members of—a gang that Carlitos was decidedly *not* a part of. He was a kid. We went on weekend field trips to zoos, aquariums, and museums. He sought tutoring for help with schoolwork that challenged him. That day, the police broadcasting that message that he was a gang member absolutely crushed him. "I used to want to be a police," he told me, "but not anymore."

Based only upon his Mexican-American appearance, his presence in a community where a gang existed, and his relationship to at least one brother who was a gang member, the police quite literally labeled him a gang member. They announced it for the world to hear—a tactic that could have only been to harass this child who was on his way to an art and tutoring class.

Given how loose the legal criteria for defining a gang membership is, the officers probably could have "proven" Carlitos was a gang member in court. But it would not have been true. Part I begins by discussing how common misidentifications such as this occur in the context of gang

labeling and provides an overview of the criteria used to define people as gang members. It then discusses how racial or cultural identity is often conflated with gang identity, resulting in the overidentification of Black and Latino men as gang members. This pattern is situated against the backdrop of the history of radicalized policing in the United States. Finally, this Part summarizes the consequences of being labeled a gang member, such as the greater likelihood of arrest, conviction, and longer sentences.

A. *Systemic Misidentification of Gang Members*

The legal criteria that are employed to define people as gang members are so broad that virtually anyone who lives in a community where gangs exist, and/or who has family members who are in a gang, can be legally qualified as a gang member.⁴⁵ Most legal definitions of a “gang” require that the group have more than three to five members, include members who have engaged in criminal activity, and share a common name or symbol.⁴⁶ David Kennedy, a sociologist whose work focuses on gangs, argues that legal definitions like this fail to accurately distinguish gangs from other groups, and fail to properly distinguish gang members from non-gang members.⁴⁷ Kennedy argues that our collective inability to devise language “that clearly distinguishes a gang and a football team, or a gang member and his mother (who certainly has associated with him and who has probably written him in prison, which would make her a gang

45. See generally Victor M. Rios & Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, 18 CRITICAL CRIMINOLOGY 21 (2010).

46. Julie Barrows & C. Ronald Huff, *Gangs and Public Policy: Constructing and Deconstructing Gang Databases*, 8 CRIMINOLOGY & PUB. POL’Y 675, 684–85 (2009) (summarizing the elements of gang definition statutes in forty-one states and the District of Columbia); see, e.g., MINN. STAT. § 609.229 (defining criminal gang as “any ongoing organization, association, or group of three or more persons, whether formal or informal, that: (1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9; (2) has a common name or common identifying sign or symbol; and (3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity”); see also 18 U.S.C. § 521(a) (2009) (defining “criminal street gang” at the federal level as “an ongoing group, club, organization, or association of 5 or more persons—(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce”).

47. David M. Kennedy, *Gangs and Public Policy: Constructing and Deconstructing Gang Databases*, 8 CRIMINOLOGY & PUB. POL’Y 711, 712 (2009) (“Scholars have been at this issue for generations and have not yet reached a satisfactory resolution.”).

member in Minnesota)” suggests that taking “legal action, based on imprecise language [is] something of a problem.”⁴⁸

State laws and local police agencies use specific criteria to identify people as a gang members, usually based on two to three of the following factors:⁴⁹

- **Self-admission**,⁵⁰ where the individual has told a police officer that they are a gang member or associate;
- **Identification by a reliable informant**,⁵¹ where someone police deem reliable informs law enforcement that an individual is a gang member;
- **Appearance**—wearing clothing or tattoos associated with a gang, or having a hair style associated with a gang;⁵²
- **Displaying gang signs or symbols**, which might include jewelry, belt buckles, logos, or hand signs;⁵³
- **Being present in a geographic area that is a gang territory**, even if that is the place where the individual lives;⁵⁴
- **Being seen in the presence of gang members or associates**,⁵⁵ including childhood friends, classmates, family members, or coworkers; and
- **Being arrested with gang members or associates**,⁵⁶ arguably the criteria most closely tied to criminality, although this too may measure racial profiling more than actual criminal behavior.

48. Kennedy, *supra* note 47, at 714 (explaining that, in Minnesota, two criteria are required to establish gang membership, and that associating with a gang member and corresponding with a gang member are both criteria that establish gang membership).

49. Barrows & Huff, *supra* note 46, at 686 (finding that ten states set forth specific criteria that establish gang membership and summarizing the criteria used by each state). Most states require that two criteria be established, although one state requires three, and one state only requires that one criterion be established to prove gang membership. *Id.*; Malcolm W. Klein, *Street Gangs Databases: A View from the Gang Capitol of the United States*, 8 CRIMINOLOGY & PUB. POL’Y 717, 718 (2009) (describing the typical criteria used to establish gang membership).

50. In a review of the criteria used to define gang membership in ten states, Barrows and Huff found that all ten states used self-admission as a criteria; self-admission was also the most common criteria. Barrows & Huff, *supra* note 46, at 686.

51. *Id.*

52. *Id.* (reviewing the criteria used to define gang membership in ten states and finding that many states include dress, hand signs, and tattoos as indicia of gang membership).

53. *See id.* (finding that using hand signs or possessing paraphernalia depicting gang-related symbols are common criteria for defining gang membership).

54. *Id.* (reviewing the criteria used for defining gang membership in ten states and finding that residing in or being present in a gang area is a common criterion in the law).

55. *Id.*

56. *Id.*

The overinclusive reach of the criteria employed to define gang membership is perhaps most evident in the findings of a study conducted in California by sociologists Victor Rios and Karlene Navarro.⁵⁷ The researchers randomly selected six California cases where a defendant's sentence had been enhanced based on the allegation that the defendant had committed the act for the benefit of, or in association with, a gang.⁵⁸

Rios and Navarro constructed a survey based on the testimony that was used to establish gang membership in each of the six cases.⁵⁹ They wanted to test whether gang experts who were not members of law enforcement would agree with the gang experts from law enforcement backgrounds.⁶⁰ The researchers administered their survey to people who had developed an expertise in gangs either because they were community workers who work in nonprofit organizations serving gang members, because they had family members who were gang members, or because they were ex-gang members themselves.⁶¹ Rios and Navarro found that the respondents sharply disagreed with the conclusions the law enforcement gang experts had testified to in court.⁶²

For example, in *People v. Sanchez*,⁶³ a gang officer had testified that having a gang nickname or moniker is evidence of gang membership.⁶⁴ All of the respondents in Rios and Navarro's study disagreed, explaining instead that a gang moniker is often a childhood nickname that evolves into a gang moniker *if* the person joins a gang, but that using a nickname would not indicate membership because it may just be a nickname.⁶⁵ According to one respondent, "[i]n the Hispanic community a nickname is usually given by a loved one when growing up. For example, Flaco for a thin person, Gordo for a fat person, Grumpy if you're often in a bad

57. Rios & Navarro, *supra* note 45, at 21.

58. *Id.* at 25.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 27–28. The opinions of gang experts are paramount in trials because the testimony of experts is often the only evidence the jury hears regarding gang enhancement. And in ninety-five percent of cases, prosecutors call law enforcement members as their gang experts. *Id.* at 22. This presents a skewed perspective to jurors, as evident by the fact that Rios and Navarro's study found that the vast majority of the non-law enforcement gang experts disagreed with the findings of police experts in almost all of the scenarios they were presented with. *Id.* at 27.

63. 374 P.3d 320 (Cal. 2016).

64. Rios & Navarro, *supra* note 45, at 30.

65. *Id.*

mood.”⁶⁶ Another respondent commented, “[y]ou don’t need to be part of a gang to have or obtain a nickname or moniker.”⁶⁷

In another case, a police detective testified that using the nickname “Pancho” was a gang nickname that demonstrated active gang membership because, by using a moniker, the defendant had strengthened his reputation as a gang member and commanded respect from peers.⁶⁸ Almost all of the respondents disagreed that using the name “Pancho” indicated gang membership.⁶⁹ One respondent explained, “I come from a Mexican family and we refer to all Francisco’s as ‘Pancho.’ Also, ‘Pancho’ identified himself as that maybe because that is the only way people would know who he is, not because of reputation.”⁷⁰

Respondents also contested the opinions expressed by a law enforcement officer in *People v. Castaneda*⁷¹ that being in the presence of gang members and “kick[ing] back with [them]” or “back[ing] [them] up” indicates gang membership.⁷² According to Rios and Navarro, “[t]he consensus among the respondents was that people who grow up in communities with gangs have family and other relationships with gang members.”⁷³

Ronald Huff, a sociologist whose research has focused on gangs for decades, found that widespread misidentification regarding who is a gang member is common—so common that he characterizes misidentification as the third stage of a three-stage pattern that typifies community responses to gangs.⁷⁴ According to Huff’s research, the first stage in most community’s responses to gangs is denial, the second stage is overreaction, and the third stage is misidentification.⁷⁵ Huff has found that during the overreaction phase “police often include in a database individuals who meet only one criterion of gang membership . . . without the requirement of a criminal conviction or even an arrest.”⁷⁶ This leads to the third stage “wherein police misidentify (i.e., overidentify) gang

66. *Id.*

67. *Id.*

68. *People v. Melgoza*, No. G031464, 2004 Cal. App. LEXIS 4260, at *5 (Cal. Ct. App. Apr. 29, 2004).

69. Rios & Navarro, *supra* note 45, at 33.

70. *Id.*

71. 3 P.3d 278 (Cal. 2000).

72. *Id.* at 280.

73. Rios & Navarro, *supra* note 45, at 31.

74. Barrows & Huff, *supra* note 46, at 677 (summarizing Huff’s prior research that describes these three stages).

75. *Id.*

76. *Id.*

members and the causes of gang membership.”⁷⁷ During this phase, according to Huff, “police often target the wrong individuals, thereby potentially driving them into gang membership because they are being treated as, and known as, gang members, thus exacerbating the crime problem, including violent crime.”⁷⁸ This misidentification causes real problems in people’s lives, including being suspended or expelled from school, facing barriers to employment, landlord-tenant issues such as eviction, and the possibility of being “so ostracized from normative institutions that the identify of ‘gang member’ is embraced” since they have already been labeled and treated as a gang member.⁷⁹

B. *Conflating Racial or Cultural Identity with Gang Membership*

In Rios and Navarro’s study, “[t]he majority of respondents countered that everyday urban Latino culture in California could be characterized by the very same components that officers used to criminalize defendants. In other words, the central premise in [a] gang detective’s testimony often described a youth cultural practice as a criminal practice.”⁸⁰

Law enforcement officers frequently construe gangs as existing primarily in lower-income communities of color.⁸¹ And the stressors and lack of resources in systemically marginalized communities certainly create conditions that promote criminality and gang activity.⁸² But by conceptualizing gangs as being comprised of “either social or economic minority groups,”⁸³ as one FBI Bulletin explains, the behavior of white people that could otherwise qualify as gang-related is systematically excluded from being categorized as such. For example, when a group of young men in Malibu, a wealthy suburban enclave of Los Angeles, were arrested for committing various crimes, prosecutors declined to apply the rules reserved for gang prosecution and sentencing even though they met the legal definition of a gang: a group of three or more people whose

77. *Id.*

78. *Id.* at 678.

79. *See id.*

80. Rios & Navarro, *supra* note 45, at 29.

81. *See* Lawrence Breen & Martin M. Allen, *Gang Behavior: Psychological and Law Enforcement Implications*, 52 FBI L. ENF’T BULL. (FBI Off. Cong. Aff., Washington, D.C.), Feb. 1983, at 20 (“[T]he greatest concentration of gangs is found within large metropolitan cities that contain pockets of segregated people—either racially or economically—in areas called ghettos or barrios. These rundown and overcrowded neighborhoods have become the home, or ‘turf,’ of the street gangs.”).

82. *See* JAMES DIEGO VIGIL, *MULTIPLE MARGINALITY AND GANGS: THROUGH A PRISM DARKLY* 1–6 (2020) (providing an overview of the author’s multiple marginality theory to explain the gang phenomenon).

83. Breen & Allen, *supra* note 81, at 22.

members have engaged in criminal acts and who share a common name,⁸⁴ which in this case was “Malibu Locals Only.”⁸⁵

Applying the criteria for defining gang membership is highly discretionary—Malibu Locals Only, a group comprised primarily of white suburban young men, is not prosecuted as a gang,⁸⁶ but similar groups comprised primarily of Black or Latino members are.⁸⁷ Implicit bias flourishes when law enforcement officers are allowed to exercise high levels of discretion.⁸⁸ An individual officer can choose to interpret wearing a Los Angeles Dodgers hat as indicative of being either a Dodgers fan or a gang member. They can decide whether being in the presence of a gang member means that you are a gang member or merely that you know a gang member.⁸⁹ The Ninth Circuit has acknowledged the complexities involved with defining gang membership, stating that the process “presents a considerable risk of error” given “[t]he informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment,” which “all heighten the need for careful factfinding.”⁹⁰ However, the law does not require the kinds of close oversight needed to promote “careful factfinding” and prevent errors.⁹¹

84. See CAL. PENAL CODE § 186.22(f) (2022).

85. See Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 312–15 (2007) (describing how Malibu Locals Only, a youth gang in a wealthy suburban community of Los Angeles, meets the definition of a gang, but has not been treated as a gang by law enforcement).

86. *Id.* at 347.

87. The under-identification of white gang members by law enforcement is also evident in the self-report data demonstrating that about forty percent of gang members are white. See GREENE & PRANIS, *supra* note 26, at 37 (citing two self-report data sets: the NLSY and the GREAT).

88. Cf. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2055 n.106 (2011) (“[I]t is difficult to use arrest statistics as evidence of criminality when the process of arrest involves so much discretion.”).

89. The United States Supreme Court struck down an antiloitering ordinance in Chicago, finding that it was unconstitutionally vague because it failed to give people notice of what behavior would be considered criminal due, in part, to the lack of specificity regarding what qualified as “gang loitering,” and because “the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police.” *Chicago v. Morales*, 527 U.S. 41, 64 (1999); see also *id.* at 41, 56–57. The opinion was praised for limiting the racial profiling that would naturally flow from the vague construction of the law, which gave inordinate discretion to individual officers to determine who was a gang associate subject to the rule. According to Dorothy Roberts, one problem with the ordinance was that “[w]ith no criminal conduct to go by, police officers probably used race as a critical factor in judging whether an individual might be a gang member.” Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806 (1999).

90. *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1143–44 (9th Cir. 2018) (citing *Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 (9th Cir. 2013)).

91. *Id.* at 1144–45.

The result has been that young people of color who are not gang members have routinely been categorized as gang members in electronic gang databases that are used to track—and prove—gang membership.⁹² In one case, three Asian girls were categorized as gang members because they were wearing baggy clothing.⁹³ The police officers who labeled them as gang members justified their decision with the phrase, “if you walk like a duck.”⁹⁴ In another case, a young man with no criminal record was alleged to be a gang member because he had worn the colors black and gold to school one day.⁹⁵

Based on these vague definitional criteria individual police officers have virtual *carte blanche* to categorize people as gang members. They often use that discretion in racially biased ways, whether conscious or not.⁹⁶ The racialized overidentification of Black and Brown youth is evident in the fact that nearly *half* of all African American men between the ages of twenty-one and twenty-four in Los Angeles County had been listed as gang members in a statewide gang database.⁹⁷ Even some children under the age of one were listed as gang members.⁹⁸ Statistics from across the country confirm that the gang labeling process is undeniably informed by race.⁹⁹

92. See *infra* notes 97–99 and accompanying text.

93. Doreen Carvajal, *O.C. Girl Challenges Police Photo Policy: Lawsuit: Attorneys Contend Youths' Attire, Race Made Them Targets of Mug Shots for Gang File.*, L.A. TIMES (May 20, 1994, 12 AM PT), <https://www.latimes.com/archives/la-xpm-1994-05-20-mn-60111-story.html> [<https://perma.cc/5HD5-XD68>].

94. *Id.*

95. Howell, *supra* note 30, at 627–28.

96. See MUÑIZ, *supra* note 17, at 86 (reporting a police officer’s statement that even if a crime “may not fit the criteria for gangs, I could probably point, or draw the nexus between gangs and that crime, whatever it is”).

97. Ana Muñiz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 SOC. PROBS. 216, 216 (2014) (“By 2003, 47 percent of African American men in Los Angeles County between the ages of 21 and 24 were on the Los Angeles County CalGang Database.”).

98. CAL. STATE AUDITOR, THE CALGANG CRIMINAL INTELLIGENCE SYSTEM, REP. 2015-130, at 3 (2016), <https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf> [<https://perma.cc/4S7Y-F3SM>] (finding forty-two individuals in CalGang who were supposedly younger than one year of age at the time of entry—twenty-eight of whom were entered for “admitting to being gang members”).

99. See *supra* notes 20–26 and accompanying text. For example, an empirical study of federal prosecutions of gang members under the Racketeer Influenced and Corrupt Organizations (RICO) Act found that eighty-six percent of the gangs prosecuted under the RICO Act were primarily Black, Latino, or Asian gangs. Woods, *supra* note 20, at 307. Further, the government prosecuted smaller gangs that were affiliated with Black, Latino, or Asian groups more frequently than it prosecuted white-affiliated gangs. *Id.* at 307. Of the five gangs in the sample that were prosecuted over three times under the RICO Act, all were Latino and Black gangs. *Id.* This study discusses several crimes committed by groups of white people that

C. *History of Racialized Gang Policing*

This conflation of the term “gang” with race did not emerge in a vacuum. Rather, it is one current manifestation of a long history of policing that has been designed to subjugate people of color. Gang policing in the present day replicates past efforts to preserve racial hierarchies through the “Black Codes” that many Southern states passed after slavery was legally abolished, which were designed to criminalize and punish African American people for low-level offenses like loitering and vagrancy.¹⁰⁰

Legal definitions of gang membership, and the subsequent harsher treatment of those labeled gang members under the law, emerged alongside the now-debunked superpredator myth that fueled draconian juvenile justice legislation in the 1990s.¹⁰¹ At the time, the highly racialized construction of the superpredator myth was not seen as a problem by mainstream media, politicians, and academics, but it has now been widely recognized that the term “superpredator” functioned as a

could have been prosecuted as gang crimes, but that were not. *Id.* at 339–40 (discussing five white adults arrested for running a meth lab and twelve white men involved in an interstate theft and drug ring, and contrasting these arrests with a case where five Black men were involved in a similar drug operation and charged as a gang crime). California’s legislature recognized the significant racial implications of sentencing enhancements based on gang affiliation. Assemb. B. 333§ (2)(d)(1)–(2), (Cal. Assemb. 2021) (“The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity. . . . The current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that impose criminal punishments.”).

100. See Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 170 (2001) (“Similar to the Black Codes of previous eras, gang profiling has developed into a system for ‘keeping tabs’ on virtually an entire generation.”); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2250 (1998) (highlighting links between the Black Codes and gang injunctions and “identify[ing] modern anti-gang civil gang injunctions as a legacy of postbellum vagrancy ordinances”).

101. In 1995, John DiLulio projected a wave of violent youth crime that DiLulio predicted would be perpetrated by a wave of young “super-predators.” John DiLulio, *The Coming of the Super -- Predators*, WASH. EXAM’R (Nov. 27, 1995, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [https://perma.cc/2UXG-76FD] (“On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons.”). DiLulio’s predictions of a juvenile crime wave did not materialize and have been widely criticized for being based on radicalized fears of young Black men. See James Forman Jr. & Kayla Vinson, *The Superpredator Myth Did a Lot of Damage. Courts Are Beginning to See the Light*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/20/opinion/sunday/prison-sentencing-parole-justice.html> (last visited Sept. 8, 2023); see also Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 753–54 (2001) (explaining the emergence of harsh laws and enforcement directed at youth gang members and the influence of the superpredator myth on these policies).

proxy for race.¹⁰² Although people who once embraced the superpredator myth now decry it for being racist, the gang label has not been similarly rebuked for its racialized connotations. And yet, the parallel is undeniable.

In 1986, California passed its influential STEP Act—the Street Terrorism and Enforcement Prevention Act—designed as a tool in the state’s war on gangs.¹⁰³ The Legislature found California was “in a state of crisis . . . caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”¹⁰⁴ The STEP Act has served as a model for anti-gang legislation across the United States, to the extent that many criminal codes have adopted its language verbatim.¹⁰⁵

Many jurisdictions have declared “[w]ars” on gangs, framing people who are deemed to be gang members as enemies.¹⁰⁶ Once framed as such, gang members become what criminologist Nils Christie has termed the “suitable enemy.”¹⁰⁷ According to one linguistic study, “the gang provides a ready made ‘suitable enemy’, suitable precisely because no one can disagree with its classification as such.”¹⁰⁸ And “there is an ethnic dimension to this fear in so far as the gang is always seen to wear a black or brown face. . . . These are outsiders threatening the good society; outsiders unlike us, essentialized in their difference.”¹⁰⁹

Simon Hallsworth and Tara Young explain that the definition of gang membership is totalizing:

While it might be thought that the term “gang” is an innocent descriptive, this is certainly not the case. It is rather a transcendental signifier saturated with meanings that are immediately brought into play when it is mobilized. The term gang does not designate a social problem in any neutral sense; it denotes and, in a tautological way, explains this problem simultaneously. . . . [I]n one simple beguiling term, we find

102. See Forman & Vinson, *supra* note 101.

103. CAL. PENAL CODE § 186.21 (2012).

104. *Id.*

105. See David R. Truman, *The Jets and the Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 710 (1995) (reporting that Louisiana, Georgia, and Missouri have passed legislation nearly identical to California’s STEP Act).

106. See Beres & Griffith, *supra* note 101, at 747–48 (describing how the “War on Gangs” mentality “fosters illegal police conduct,” such as planting false evidence, and promotes “draconian anti-crime measures directed against young offenders”).

107. See Simon Hallsworth & Tara Young, *Gang Talk and Gang Talkers: A Critique*, 4 CRIME MEDIA CULTURE 175, 185 (2008) (applying the term “suitable enemy,” coined by renowned criminologist Nils Christie, to the gang label).

108. *Id.*

109. *Id.*

embedded a convenient and simple thesis about why things are as they are. The term gang signifies not this or that group out there but a *Monstrous Other*, an organized counter force confronting the good society; what [some authors] describe[] as a “transcendental evil.”¹¹⁰

Gang members are framed as a “transcendental evil” or “suitable enemy”¹¹¹ to such an extent that Hans Toch compares the process of identifying an individual as a gang member with witch hunts in the Middle Ages.¹¹² Toch highlights how reliance on questionable sources, treating people as guilty by association, and questionable allegations of self-admissions operate in similar ways in both contexts.¹¹³ Given the negative presumptions that surround the gang label, scholars and advocates have challenged the legitimacy of introducing gang evidence in trials because of its extraordinarily prejudicial nature.¹¹⁴ And yet, rather than limit its scope, courts have relaxed evidentiary rules to allow for evidence of gang membership based on hearsay that would otherwise be excluded based on concerns that it is unreliable.¹¹⁵ This has very real consequences in terms of how people are treated throughout the criminal justice process.

D. *Implications of Being Labeled a Gang Member*

The implications of being labeled a gang member are severe. All states and the federal government have passed legislation providing for the harsher treatment in the criminal law of people who are labeled gang members.¹¹⁶ This often takes the form of sentencing enhancements and mandatory prison terms,¹¹⁷ but can exceed far beyond sentencing to affect

110. *Id.* at 184–85.

111. *Id.* at 185.

112. Hans Toch, *Sequestering Gang Members, Burning Witches, and Subverting Due Process*, 32 CRIM. JUST. & BEHAV. 274, 275 (2007).

113. *Id.* at 274.

114. See Fareed Nasser Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 135 (2019) (discussing gang evidence as “unduly prejudicial character evidence” and arguing that “[b]elievers in constitutional principles of fundamental fairness, equal protection, and due process must resist the slippery slope of permitting trampling of the detested ‘gang member’ from becoming the trampling of us all”).

115. See, e.g., *People v. Gardeley*, 927 P.2d 713, 721 (Cal. 1996) (allowing the introduction of otherwise inadmissible hearsay in a gang case for the purpose of the gang expert’s opinion).

116. NAT’L GANG CTR., *Highlights of Gang-Related Legislation*, U.S. DEP’T. JUST., <https://nationalgangcenter.ojp.gov/legislation/highlights> [https://perma.cc/PSR3-M7GA].

117. Sara Hildebrand, *Racialized Implications of Officer Gang Expert Testimony*, 92 MISS. L.J. 155, 163–64 (2022) (discussing gang sentencing enhancements and mandatory prison terms in cases with gang allegations).

virtually every stage of the criminal justice process, and every aspect of people's lives, including:

- **Police Practices**, such as specialized gang units with additional resources that target specific people and communities, making arrest much more likely, and gang injunctions, which criminalize behavior that is not criminal for non-gang members;¹¹⁸
- **Pretrial Detention** laws and policies that make release while criminal charges are pending much more difficult for people alleged to be gang members;¹¹⁹
- **Prosecutorial Resources**, such as specialized gang units that invest significant resources in prosecuting gang members and associates, making it more likely that this population is charged and convicted of criminality;¹²⁰
- **Sentencing Enhancements** that attach additional prison time to sentences when a crime is committed in association with, or for the benefit of, a gang;¹²¹
- **Double Jeopardy** protections that do not apply equally to gang members or associates;¹²²

118. See, e.g., Caldwell, *supra* note 29, at 242–53 (describing police practices and civil gang injunctions applied towards gang members and associates).

119. In Virginia, for example, there is a rebuttable presumption against bail when the charge is gang participation or gang recruitment, and gang membership is a factor that weighs against setting bail in all contexts. VA. CODE § 19.2-120. In a law review article, Professor Fareed Nassor Hayat recounts the experiences of a client, KJ, who was arrested twenty-five times but was only convicted once, but because KJ was not released while charges were pending due to the gang allegations in those cases, KJ spent seventy-five percent of their adult life incarcerated, primarily in pretrial detention. Hayat, *supra* note 114, at 131.

120. Cf., e.g., David Jaffe, *Introduction*, 68 DEP'T JUST. J. FED. L. & PRAC. 1, 1 (2020) (describing a federal prosecution program focused on gangs).

121. According to sociologist Malcolm W. Klein, “[i]n California and some other states, conviction for a ‘gang-related’ offense can double the length of one’s sentence, and misuse of the gang database easily contributes to this.” Klein, *supra* note 49, at 720. Klein also notes, “[m]ost gang members became ex-gang members, although not in the eyes of many officers and database recorders (once a gang member, always a gang member).” *Id.* at 719 (quotation marks omitted). In Arizona, prosecutors can enhance sentences and make prison mandatory in gang cases. Howard Skenic, *Gang Wars: Prosecuting Gang-Related Offenses — The Legal and Logistical Hurdles*, 33 ARIZ. ATT’Y 24 (1997) (describing a three-year sentencing enhancement and mandatory prison). Ethnographic research “has found that gang-associated youth are being incarcerated for long periods of time” due to gang enhancements “even though they are not committing crime for the benefit of the gang.” Rios & Navarro, *supra* note 45, at 22.

122. See Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISC. 18, 36–46 (2021) (discussing double jeopardy violations in the gang prosecution context).

- **Conditions of Confinement** for alleged gang members that are more restrictive than for other people in jails and prisons;¹²³
- **Parole Release** for people serving indeterminate sentences, which is much less likely for people who have been identified as gang members;¹²⁴
- **Immigration Consequences** of gang allegations that include deportation and disqualification from entering the United States, even for people who are married to U.S. citizens;¹²⁵ and
- **Collateral Consequences** of gang allegations that include being evicted and being barred from employment opportunities.¹²⁶

Given the extensive implications of being defined as a gang member under the law, it is important that the identification process be accurate. However, the gang label is often mistakenly attached based on race, culture, or national origin. Tattoos are one of the clearest examples of the racialized nature of gang labeling given that the tattooed words, numbers, and symbols used to define people as gang members are often more indicative of culture than of gang ties.

II. CHICANO TATTOOS AND RACIAL IDENTITY

Henry was a teenager when he got into in a brawl at a party.¹²⁷ In the course of the brawl, someone died. Not at the hands of Henry, but since he was a part of the fight, he was charged with murder through a theory of accomplice liability. The evidence was weak, but he was convicted nonetheless and was sentenced to spend fifteen years to life in prison. The judge thought he would be released after fifteen years, as did his lawyer.

123. See Jean Casella & James Ridgeway, *Voices from Solitary: Gang “Validation” and Permanent Isolation in California Prisons*, SOLITARY WATCH (Aug. 7, 2010), <https://solitarywatch.org/2010/08/07/voices-from-solitary-gang-validation-and-permanent-isolation-in-california-prisons/> [https://perma.cc/UVZ7-SK5Z] (describing California prisons’ process of housing gang members in solitary confinement under highly restrictive conditions for many years).

124. See Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. REV. 455, 479 (2019) (summarizing the conclusions of a study reviewing parole suitability transcripts and finding that “active gang validation was the only dichotomous variable that was a perfect predictor of a denial of parole”).

125. See *Cardenas v. United States*, 826 F.3d 1164, 1173 (9th Cir. 2016) (holding an applicant for an immigrant visa to be ineligible for a visa despite their marriage to a U.S. citizen because of alleged gang association).

126. See Paul Elias, *Trial Seeks Evictions for Alleged Gang Ties*, L.A. TIMES (Apr. 5, 1996), <https://www.latimes.com/archives/la-xpm-1996-04-05-me-55002-story.html> [https://perma.cc/9DHD-WWG7] (describing how government officials sought to evict families of gang members).

127. This is a narrative example derived from a client I represented.

But twenty-eight years later, Henry was still in prison. His tattoos were the primary reason why he remained behind bars for so much longer than anyone had anticipated.

He had several Aztec tattoos. According to Commissioners from the Board of Parole Hearings, who are responsible for determining whether someone with a life sentence can be released from prison, the tattoos demonstrated that he was a member of a prison gang and therefore should not be released from prison.

Many of the tattoos that are used to legally designate people as gang members overlap with key markers of Mexican-American cultural identity to such an extent that using these tattoos as criteria for defining gang membership essentially equates Mexican-American identity with gang association. Aztec or Mayan symbols depicting people's ancestral roots, words or numbers representing places in Mexico or other Latin American countries, religious symbols, and Cesar Chavez's iconic *huelga* bird are some examples of tattoo art that has been used to define people as gang members.¹²⁸ But these symbols are not uniquely used to demonstrate gang membership; rather, they are more broadly characteristic of Chicano identity.¹²⁹

A. *The Social Construction of Mexicans as a Racial Group in the United States*

Although there is some debate as to whether Mexican Americans ought to be conceptualized as a racial or ethnic group, or as a group unified by national origin, Mexican Americans have clearly been socially constructed as a distinct race within the United States.¹³⁰ Race is “always and necessarily a dynamic social and historical process,”¹³¹ and Mexican

128. See *infra* sections II.C–II.H.

129. See *infra* section II.B.

130. See MOLINA, *supra* note 15, at 2 (describing how her students debate over whether Mexicans are “a nationality, an ethnicity, a separate race, [or] white,” and describing how Mexicans were constructed as a distinct race in the United States between the years of 1924 and 1965); see also JULIE A. DOWLING, MEXICAN AMERICANS AND THE QUESTION OF RACE (2014); Linda Martín Alcoff, *Is Latina/o Identity a Racial Identity?*, in HISPANICS/LATINOS IN THE UNITED STATES: ETHNICITY, RACE, AND RIGHTS 23, 42 (Jorge J.E. Gracia & Pablo De Greiff eds., 2000) (“Using only ethnicity belies the reality of most Latinas/os’ everyday experiences, as well as obscures our own awareness about how ethnic identifications often do the work of race while seeming to be theoretically correct and politically advanced.”).

131. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 110 (3d ed. 2015).

identity has been treated as a distinct racial identity in the United States for decades.¹³²

The social construction of Mexicans as a race in the United States can be traced back to the late nineteenth and early twentieth centuries. As of 1897, Mexicans were racially categorized as “white” by U.S. law and could become United States citizens at a time when people categorized as “nonwhite” could not.¹³³ But, as Laura Gómez explains in the formative book *Manifest Destinies: The Making of the Mexican American Race*, “[m]ore than a century and a half ago, a series of events occurred that resulted in the formation of Mexican Americans as a *racial* group in the United States.”¹³⁴ Notably, in 1848, the United States took over the Northern part of Mexico through the Treaty of Guadalupe Hidalgo which ended the U.S.-Mexico War.¹³⁵ Through the treaty, the United States took what is now “California, Nevada, Utah, New Mexico, most of Arizona and Colorado, and parts of Oklahoma, Kansas, and Wyoming.”¹³⁶ According to Professor Gómez, debates arose as to “what was to become of the more than 115,000 Mexicans who lived in the conquered lands.”¹³⁷ As part of a justification for taking Mexico’s land, popular discourse that denigrated Mexicans as a “colored mongrel race” and “semi-barbarous hordes” had gained traction.¹³⁸ This public depiction of Mexicans as “others” became firmly entrenched in U.S. popular discourse.¹³⁹ This, in turn, shaped decisions about how to treat Mexicans whose land had been taken over by the United States and influenced the racial construction of Mexicans in the United States for years to come.

Mexican Americans were treated as an inferior race of people within the United States. Hundreds of racially motivated lynchings of people of Mexican descent occurred throughout the Southwest in the early 1900s.¹⁴⁰

132. The racialization of Mexicans in the United States has changed over time. In 1897, Mexicans were racially categorized as “white” and could become United States citizens at a time when people categorized as “nonwhite” could not. MOLINA, *supra* note 15, at 5–6. That changed by 1930, however, when Mexicans were categorized as a separate race to the extent that the United States Census created a separate category of “Mexican.” *Id.* at 2.

133. *Id.* at 2, 5–6.

134. LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 1 (2d ed. 2018).

135. *Treaty of Guadalupe Hidalgo (1848)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo> [<https://perma.cc/CU73-ENB9>].

136. *Id.*

137. GÓMEZ, *supra* note 134, at 17.

138. *See id.* at 19 (quoting Robert J. Walker, a United States Senator for Mississippi at the time of the United States’ annexation of Texas).

139. *See* CHAVEZ, *supra* note 13, at 6–7.

140. *See* William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 417 (2003).

Racial segregation laws and practices referred to as Juan Crow Laws were used in the early twentieth century to justify racial segregation in schools and housing, limit access to restaurants and other services, and prohibit people from speaking Spanish.¹⁴¹ By 1930, Mexicans were categorized as a separate race on the United States Census.¹⁴² Negative treatment of Mexican Americans has persisted throughout the twentieth century. Police and immigration officials rounded up and deported hundreds of thousands of Mexican Americans in the 1930s, and then again in the 1950s.¹⁴³

This social construction of Mexican Americans as a race extended to apply equally to other people of Latino origins within the United States. According to anthropologist Leo Chavez, people from Mexico and other Latin American countries have been constructed as a threat, “part of an invading force from south of the border” that is distinctly nonwhite and cannot be assimilated into U.S. society.¹⁴⁴ Mexican Americans were the specific focus of this racialization project because people with Mexican ancestry have been the predominant Latino group in the United States for many years, due to the geographic proximity of the countries and historically entrenched patterns of migration.¹⁴⁵ However, the racialization of Mexicans has extended beyond people of Mexican ancestry and largely applies to people with roots in other Latin American countries as well.¹⁴⁶

In a deliberate effort to push back against the racism and marginalization directed towards people of Mexican ancestry within the United States, and in the context of the civil rights movement, a uniquely Mexican-American identity emerged during the civil rights era—the

141. See Fernanda Echávarri & Marlon Bishop, ‘No Mexicans Allowed’: School Segregation in the Southwest, WBEZ CHI. (Jan. 30, 2017, 12:31 PM), <https://www.wbez.org/stories/no-mexicans-allowed-school-segregation-in-the-southwest/86012e0a-f9b7-46cb-b738-86e499b9ecaa> (last visited Aug. 28, 2023) (describing how “‘Juan Crow’ laws, patterned after American Jim Crow laws, enforced the racial discrimination practiced against Mexicans”); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 132 (2004) (“Throughout the Southwest, and especially in Texas, all Mexicans suffered from a system of segregation that mimicked the Jim Crow policies of the South.”).

142. MOLINA, *supra* note 15, at 5.

143. NGAI, *supra* note 141, at 72–73, 155–56. For a detailed historical account of widespread deportations in the 1930s of people of Mexican ancestry, including U.S. citizens, see FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, A DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (2006). *See id.* (detailing how nearly one million people of Mexican ancestry were rounded up and removed to Mexico).

144. See CHAVEZ, *supra* note 13, at 3, 5.

145. See KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 25–29 (2004).

146. CHAVEZ, *supra* note 13, at 3.

Chicano identity. In the 1960s and 1970s, the Chicano identity distinguished itself from both Mexican identity and mainstream American (white) identity.¹⁴⁷

A defining aspect of the Chicano identity is the idea of being caught in between two cultures—not fully American and not fully Mexican.¹⁴⁸ Leaders of the Chicano movement rejected the idea of being fully Mexican while cultivating an emerging pride in Indigenous Mexican history by incorporating Aztec mythology into the Chicano identity.¹⁴⁹ Aztec imagery, including the Aztec calendar, became important markers of Chicano cultural pride.¹⁵⁰

The Chicano identity emerged alongside the struggles for workers' rights led by César Chávez and Dolores Huerta, and historians note that the emerging Chicano generation was struck by Chávez's use of Mexican cultural and ethnic symbolism: the modified eagle on the union's banner, taken from the flag of Mexico[,] . . . the use of the figure Emiliano Zapata, the agrarian leader in the Mexican revolution of 1910; and, of course, the devotion of Chávez, Huerta, and the farmworkers to La Virgen de Guadalupe, the patron saint of Mexico.¹⁵¹

According to historian Randy J. Ontiveros, one of the most significant contributions of the Chicano movement was the creation of a distinctly Mexican-American form of cultural expression.¹⁵² According to Ontiveros,

147. See RANDY J. ONTIVEROS, *IN THE SPIRIT OF A NEW PEOPLE: THE CULTURAL POLITICS OF THE CHICANO MOVEMENT* (2014).

148. See OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE: LIFE AND THOUGHT IN MEXICO* 12–20 (1985) (discussing the experiences of Mexicans in the United States and highlighting how one group of Mexicans in the United States—pachucos—struggle to develop an identity that is neither purely Mexican nor American).

149. See MARIO T. GARCÍA, *THE CHICANO GENERATION: TESTIMONIOS OF THE MOVEMENT* 176 (2015); see also GÓMEZ, *supra* note 134, at 166 (“Part of the Chicano movement’s rhetoric was to embrace—rather than denigrate—Mexicans’ indigenous ancestry as part of the embrace of an oppositional, non-white identity.”); Esperanza García, *The Chicano Movement and Identity*, 64 *VOICES MEX.* 50, 52 (2003), <http://www.revistascisan.unam.mx/Voices/pdfs/6410.pdf> [<https://perma.cc/VJ3V-3KF8>] (noting that there was a recognition among activists who constructed the Chicano identity that Mexican “cultural symbols are indispensable to him/her despite the fact that they continue to change because of the distance—not only physical, but cultural—of his/her country of origin”).

150. GARCÍA, *supra* note 149, at 257 (recounting painting an Aztec calendar and other Aztec symbols on the walls of a Chicano community health clinic in the 1960s and discussing a civil rights march where one participant “yelled out to Tlaloc, the Aztec rain god, ‘We are here!’”); *id.* at 180–81; see also ONTIVEROS, *supra* note 147, at 96, 122–24, 137 (discussing examples of Aztec mythology and symbolism in the Chicano movement).

151. GARCÍA, *supra* note 149, at 5.

152. See ONTIVEROS, *supra* note 147, at 2.

[u]nlike the African American civil rights movement, the Chicano movement won no direct legislative victories in the postwar decades. However, Chicano/a cultural expression of the period has been well received in many corners of the U.S. culture industry, including museums and galleries, corporate and independent publishing houses, colleges and universities, and theater venues.¹⁵³

Tattoos became one important way to represent Mexican-American identity. One of the forms of this cultural expression that has gained the most notoriety is the black and grey style of Chicano tattooing.¹⁵⁴ Art historian Jacquelyn Moreno explains that Chicano style tattoos depict “the struggle and strife Mexicans have faced while coming to America, all while keeping their identity.”¹⁵⁵ According to Moreno, through their tattoos, Chicanos “sent a message to Americans that their people were here to stay for a better life through tattooing their values of religious beliefs, neighborhoods they came from, and pride of their roots.”¹⁵⁶ This style, primarily developed by Mexican Americans, has also been adapted by Latino people with ancestral roots in countries other than Mexico.¹⁵⁷

Although the black and grey style of Chicano tattoos first gained popularity in prisons, they “are deeply rooted in Chicano culture[;] they tell the story of religious beliefs, pride and their roots.”¹⁵⁸ Thus, having tattoos associated with the Chicano style of tattooing that emerged in prisons is not necessarily indicative of having been in prison or having a gang association. Rather, prison tattoo art embraced aspects of the Chicano identity that represent racial and cultural identity, and while some gang members choose to represent their identities through these tattoos, so too do people who are not gang affiliated in any way.¹⁵⁹

Although most Chicanos—and most Latinos—are not gang members or associates, there is a long history of conflating Latino youth with “gang

153. *See id.*

154. Jacquelyn Moreno, *Cultural Identification Marked with Ink*, SACMEDIA (Nov. 19, 2018), <https://sac.media/2018/11/19/cultural-identification-marked-with-ink/> [https://perma.cc/4TBN-KBYP]. Chicano tattoos have gained international notoriety for their artistry and influence on tattoo art. *See id.*

155. *Id.*

156. *Id.*

157. Mexicans are the largest group of Latino people in the United States and have been a part of U.S. society in large numbers for much longer than more recent waves of migrants, particularly from Central America. And thus, Chicano culture has shaped Latino culture and identity more broadly in the United States. *See* CHAVEZ, *supra* note 13.

158. Moreno, *supra* note 154.

159. *See* Shereen Marisol Meraji, *Black and Grey . . . and Brown: A Tattoo Style's Chicano Roots*, NPR (Apr. 16, 2018), <https://wamu.org/story/18/04/16/black-and-gray-and-brown-a-tattoo-styles-chicano-roots/> [https://perma.cc/G7T5-NKJ7].

membership.” This practice can be traced back to the widespread depiction of Mexicans as violent during the Mexican-American War and, later, the demonization of pachucos that surrounded the “Zoot Suit Riots” in Los Angeles in 1943.¹⁶⁰ Media representations of Latino youth as gang members abound and permeate popular consciousness. Latino youth are so widely depicted as dangerous gang members that even those who are not are commonly treated as gang members.¹⁶¹ Tattoos play an important role in this process.

B. *Mislabeling Racial/Cultural Identity as Gang Membership Using Tattoos*

In a survey of criminal defense attorneys in twelve states, most of the attorney respondents reported that they had seen gang allegations brought against clients who were not gang members.¹⁶² Most also indicated that such allegations were only brought against clients of color.¹⁶³ Respondents attributed this overidentification of people of color as gang members to a variety of factors, including “the use of ‘fairly generic tattoos.’”¹⁶⁴ Tattoos play a primary role in the gang labeling process, and “[m]any individuals with tattoos who are not gang members are erroneously identified as such even though there is no articulable suspicion of criminal activity.”¹⁶⁵

Here, I examine four categories of tattoos that are regularly employed to categorize Latino youth as gang members, all of which are inextricably tied to the Latino racial and cultural identity.¹⁶⁶ First, tattoos regarding

160. Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. L. REV. 1081, 1091–94 (2001).

161. *Id.* at 1102–10 (detailing the tragic story of a teenager who was shot and killed by police responding to a family disturbance).

162. Howell, *supra* note 30, at 632.

163. *Id.*

164. *Id.* at 637; see also SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 6 (Sameer Ashar & Annie Lai eds., 2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> [<https://perma.cc/82RX-KN4L>] (sharing the experience of Sergio, who was alleged to be a member of “Hillside Gang” because of a “H.S.” tattooed above one eyebrow, which are his daughter’s initials, even though there was no Hillside Gang in Sergio’s country of origin nor in the county where he lived).

165. Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 279 (1996).

166. Although this is a contested issue, I refer to Latino identity, and more specifically Chicano or Mexican-American identity, as a racial identity, albeit a racial identity that is also tied to culture and national origin. People who identify as Latino or Chicano—and who are identified as such—have a range of different skin colors, phenological characteristics, and countries of origin. And yet, in the context of the United States, this group has been highly racialized.

one's geographic roots or racial pride have been categorized as gang-related tattoos. Second, tattoos depicting the Indigenous cultures of people's ancestral roots, such as Mayan and Aztec symbols, have been used. Third, religious symbols and other culturally specific representations of Mexican-American identity are routinely used as indicia of gang membership. Fourth, culturally popular tattoos, such as one specific tattoo that has come to symbolize Chicano identity—colloquially referred to as “Smile Now, Cry Later”—have been used to categorize people as gang members.

This discussion of culturally specific tattoos demonstrates how the overidentification of gang members gets skewed towards people of color, in this case towards overidentifying Latino youth as gang members. In some cases, I address Latino identity when the tattoo in question pertains to someone from a country other than Mexico or to a cultural representation that applies to Latino culture more broadly. In other situations, I focus more narrowly on expressions of Chicano or Mexican-American identity, when the symbol or language is more narrowly focused on one's Mexican roots or a specifically Chicano—Mexican-American—aspect of one's identity.

C. *Tattoos Regarding Geographic Roots or Racial or Cultural Pride*

One of the most obvious ways that tattoos have been used to stigmatize people as gang members because of their Latino identity is through tattoos that literally depict the names or area codes of the city or country of one's national origin, or through tattoos that express pride in being “Brown.”

Tattoos of the names or numeric symbols of immigrants' hometowns in the countries they migrated from have been used as evidence of gang membership in immigration cases across the United States.¹⁶⁷ In

167. Drawings of this sort have also been used. In New York, the government used a sixteen-year-old's drawing of the numbers “504” to prove that they were a gang member. Hannah Dreier, *How a Crackdown on MS-13 Caught Up Innocent High School Students*, N.Y. TIMES MAG. (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html> (last visited July 30, 2023). Alex, a nineteen-year-old asylum-seeker from Honduras, was identified as an associate of the Mara Salvatrucha gang by a police officer who was housed at his high school in New York. *Id.* Alex vehemently denied having any gang association and was, by all accounts, a good student. *Id.* The government alleged he was a gang member because he wore blue tennis shoes to school one day, he doodled “504,” and he drew a sketch of a devil with horns. *Id.* Each of these pieces of evidence has an innocent explanation or could be interpreted to show a flirtation with a gang. *Id.* Blue is a color that represents the MS-13 gang, but the blue shoes he wore that day were a gift from his mother, and there is nothing inherently criminal about wearing the color blue. *Id.* A devil with horns is a symbol of MS-13, but it was also his school mascot, emblazoned in the hallway to his school and on school sweatshirts worn by all students. *Id.* The Honduras country calling code is 504, which symbolizes a connection to his home. *Id.* However, it is also employed by MS-13 gang members as a symbol of

Washington State, a twenty-three-year-old's tattoo of "La Paz BCS," literally the name of the city and state they had migrated from in Mexico, was used as evidence of gang membership despite no evidence of any connection between the city of La Paz and a gang.¹⁶⁸ The gang allegation in this case was used to attempt to strip the teenager of their lawful immigration status under the Deferred Action for Childhood Arrivals (DACA) program, because gang membership can disqualify an individual from DACA protections on the ground that gangs "pose a threat to national security or public safety."¹⁶⁹ In another case, doodles of the number "504," representing the area code of a teenager's country of origin, were used as evidence of ties to the Mara Salvatrucha gang.¹⁷⁰

A tattoo of the words "Brown Pride" has also been used as evidence of gang association.¹⁷¹ Rolando Mora-Huerta, the husband of United States citizen Madeline Cardenas, was denied lawful permanent residence in the United States when a consular officer concluded he was a risk to national security because he was determined to be a gang associate.¹⁷² The only evidence of gang association on the record was that Mora-Huerta had been issued a citation while in a car with someone police considered a gang associate, at least in part because the other person in the car had two tattoos; one said "Brown Pride," and the other was a tattoo of his daughter's name.¹⁷³ In addition, there was some discussion on the record about a tattoo Mora-Huerta himself had of two clown faces, commonly referred to as a "Smile Now, Cry Later" tattoo.¹⁷⁴ Mora-Huerta's wife challenged the visa denial in the Ninth Circuit, claiming that her rights as

their identity, which is also linked to the homeland of many of its members. *Id.* In Alex's words, "[f]or the police, it's a gang thing, but for us, it's about being proud of your country." *Id.* Based on this evidence, immigration enforcement officers arrested Alex in his home, initiated removal proceedings, and detained him in ICE custody for over a year. *Id.* Ultimately, he was deported to Honduras, while his parents and younger brother remained in the United States with viable asylum claims. *Id.* The allegations of gang association were what distinguished Alex from his family members. *Id.*

168. Nina Shapiro, *Do Feds Have Evidence that Detained Dreamer is a Gang Member Beyond Tattoo?*, SEATTLE TIMES (Feb. 16, 2017, 10:58 AM), <https://www.seattletimes.com/seattle-news/feds-says-detained-dreamer-is-gang-member-lawyer-denies-it/> [<https://perma.cc/JD9A-XXQ2>].

169. Press Release, Dep't of Homeland Sec., DHS Statement on Arrest of Alien Gang Member in Washington (Feb. 15, 2017) <https://www.dhs.gov/news/2017/02/15/dhs-statement-arrest-admitted-alien-gang-member-washington> [<https://perma.cc/7JH4-LZGD>].

170. Dreier, *supra* note 167.

171. *See* Cardenas v. United States, 826 F.3d 1164, 1173 (9th Cir. 2016).

172. *Id.* at 1167–68.

173. Appellants' Reply to Answering Brief of Appellees, Cardenas v. United States, 826 F.3d 1164 (9th Cir. 2016) (No. 13-35957), 2016 WL 164413, at *29.

174. Transcript of Oral Argument, Cardenas v. United States, 826 F.3d 1164 (9th Cir. 2016) (No. 13-35957), 2016 WL 3021616, at *10.

a citizen were violated by the denial.¹⁷⁵ Although Mora-Huerta and Cardenas argued “that the consular officer acted on the basis of racial stereotypes,” the Ninth Circuit rejected the argument that this determination “was made on a forbidden racial basis” and allowed the visa denial to stand.¹⁷⁶

In contrast, some courts have been reluctant to allow similarly vague tattoos to be used to establish gang ties for white people.¹⁷⁷ In a Massachusetts criminal case, the defense attempted to introduce expert testimony proving a white supremacist gang association of the victim in a case based on his tattoo of the number “211.”¹⁷⁸ The trial court barred two experts from testifying, reasoning that “if it’s merely the number[] ‘211’ that make this a gang tattoo[,] . . . I see no connection with any kind of . . . scientific methodology.”¹⁷⁹ The court reasoned that “if somebody’s going to argue in court that somebody’s a white supremacist, it’s got to be on some pretty compelling evidence.”¹⁸⁰ The Massachusetts Supreme Court later weighed in, allowing the testimony of one expert and upholding the judge’s decision to bar the other on the basis of that the foundation required for expert testimony had not been established for that witness.¹⁸¹

In the criminal justice system, tattoos depicting the word “Mexican” or “Mexicano” have been used as evidence of gang affiliation on the ground that these tattoos demonstrate a tie to the Mexican Mafia.¹⁸² Similarly, tattoos of the word “Chicano” have been cited as indicia of gang membership.¹⁸³ This interpretation is clearly overbroad, in that many people with no ties to criminal organizations are Mexican or Chicano and may want to tattoo that aspect of their identity onto their bodies. The

175. Opening Brief of Appellants, *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) (No. 13-35957), 2015 WL 5471589, at *25–27.

176. *Cardenas*, 826 F.3d at 1172–73.

177. *Commonwealth v. Hinds*, 166 N.E.3d 441, 457–59 (Mass. 2021).

178. *Id.*

179. Brief of Amicus Curiae The Massachusetts Ass’n of Crim. Def. Laws. at 10, *Commonwealth v. Hinds*, 166 N.E.3d 441 (Mass. 2021) (No. SJC-12953) (alterations in original).

180. *Id.*

181. *Hinds*, 166 N.E.3d at 457–59.

182. *See Anguiano v. Frauenheim*, No. 1:14-cv-01779-SAB-HC, 2016 WL 492645, at *1–2 (E.D. Cal. Feb. 9, 2016) (discussing a tattoo of BPM, which stood for “Brown Pride Mexican,” as evidence of gang membership); *see also* *Martinez v. Fischer*, No. CIV S-10-0366 GGH P, 2011 WL 4543191, at *3 (E.D. Cal. Sept. 28, 2011) (where prison officials considered drawings of the letter “M” to be indicative in prison gang membership).

183. *See* *People v. Ruiz*, No. H044308, 2018 WL 4376253, at *3 (Cal. Ct. App. Sept. 14, 2018) (“Chicano” tattoo); *see also* CAN. BORDER SERVS. AGENCY, *Tattoos and Their Meanings* (May 2008), <https://info.publicintelligence.net/CBSA-TattooHandbook.pdf> [<https://perma.cc/J5U4-LQV8>] (suggesting that a “100% Chicano” tattoo was indicative of gang membership).

huelga bird, a symbol of the United Farm Workers Union that Cesar Chavez created with his brother based on the shape of an Aztec eagle,¹⁸⁴ has also been cited as evidence of gang membership by members of law enforcement.¹⁸⁵

These are but some examples of how tattoos that explicitly represent or name people's national origin or racial identities are used to define people as gang members. Using words and symbols that represent Mexican origin as a definitional criterion for gang membership is clearly problematic because the process conflates national origin with gang membership. This troubled an appellate court judge in the California case of *People v. Perez*.¹⁸⁶ In *Perez*, the prosecution had convinced a jury that a gang enhancement should apply to a conviction for a shooting based on evidence that the defendant and other people at a party were Mexican and had tattoos.¹⁸⁷

The judge was concerned that being a Mexican person with a tattoo was a flimsy criterion for determining gang membership or affiliation. According to the court,

[m]ost striking is the absence of gang evidence. . . . [T]here is no evidence that any of the visible tattoos on defendant or any of the tattoos on the other Mexican partygoers were gang related and there is no evidence that any of the other Mexicans were present during the shooting, let alone assisting defendant in any way. There is no evidence the other Mexicans at the party were members of any gang whatsoever. There is no evidence that any participant shouted out a gang name or threw up a gang sign.¹⁸⁸

Accordingly, in this case, the judge concluded that the gang enhancement the trial court had imposed could not stand.¹⁸⁹ This case is emblematic of the vague and racialized criteria often employed by members of law enforcement to link Mexican identity and tattoos to gang association.

Treating tattoos of the literal names of the cities or countries of people's national origins—or based on a tattoo that signals one's pride in being a

184. UNITED FARM WORKERS, *The Story of Cesar Chavez*, <https://ufw.org/research/history/story-cesar-chavez/> [<https://perma.cc/2XM4-S5TD>].

185. William Riley, *Interpreting Gang Tattoos*, 46 CORRECTIONS TODAY 10 (2006) (citing the *huelga* bird as a tattoo associated with the Northern Structure prison gang); BLUE LIGHTNING OPERATIONS CTR., GULF COAST HIGH INTENSITY DRUG TRAFFICKING AREA & U.S. DEP'T HOMELAND SEC., MEXICAN GANG TATTOO IDENTIFIERS 8 (2009), <https://info.publicintelligence.net/mexicangangtattoos.pdf> [<https://perma.cc/48WP-NLN6>] (listing the *huelga* bird as a tattoo symbolizing gang membership).

186. 226 Cal. Rptr. 3d 820, 832 (Cal. Ct. App. 2017).

187. *Id.*

188. *Id.*

189. *Id.* at 835–36.

member of a particular race of people—as evidence of gang affiliation conflates national origin with gang membership. This is one way that the overrepresentation of Latino youth in governmental categorizations of gang members occurs. This process is often hidden from public view, playing out in low-level discretionary decision-making by police officers and in day-to-day decision-making in busy criminal courts. When it is addressed in appellate court decisions, they are often unpublished. And yet the routine practice of conflating tattoos that are literally of people’s racial identities or national origin has a cumulative effect that contributes to the racial disparities that are evident in the gang labeling process.

D. Tattoos Regarding Cultural Heritage

Members of law enforcement who claim expertise in gangs regularly reference culturally-specific tattoos of Aztec or Mayan imagery as evidence of gang membership.¹⁹⁰ Although there are some circumstances where specific symbols may be tied to specific gangs, the widespread and generic ways in which Aztec or Mayan images are used to label people as gang members raise serious concerns about whether people’s cultural or ancestral roots are being used as a tool to over-criminalize people based on their national origins. Images depicting one’s culture or ancestry should not be considered as evidence of gang membership given the high stakes of this definition and the documented history of over-defining Latinos as gang members.

Generic references to “Aztec tattoos” as gang-related abound in criminal cases.¹⁹¹ The Aztec god of war, Huitzilopochtli;¹⁹² an “Aztec

190. *See, e.g.*, Appellee’s Answering Brief at 2, *Arizona v. Hernandez*, No. 1 CA-CR 17-0160, 2019 WL 313457 (Ariz. Ct. App. Jan. 24, 2019) (detailing the testimony of a police officer that a tattoo of a Nahuatl numeral, an Aztec warrior, and Aztec gods indicated membership in the Mexican Mafia).

191. *Cf.* *People v. Hernandez*, No. F077379, 2021 WL 5769068, at *5 (Cal. Ct. App. Dec. 6, 2021) (citing Officer Jacob Adney’s assessment that Hernandez was a gang member in part because he “observed an Aztec tattoo on Hernandez, which is common among Norteño gang members”).

192. *E.g.*, *Gonzalez v. State*, No. 13-09-121, 2010 WL 2136595, at *3–4 (Tx. Ct. App. May 13, 2010). A gang expert testified that the appellant was a Mexican Mafia member based on tattoos on the appellant’s stomach and head that represented “Mexicano.” *Id.* at *4. On the appellant’s stomach was the number thirteen, symbolizing the “thirteenth letter of the alphabet . . . [:] ‘M’ for Mexicano[,] for Mexican Mafia,” and “[t]he back of his head had a tattoo of an Aztec symbol, which showed homage to the god of war called Huitzilopochtli.” *Id.*

warrior”;¹⁹³ an “Aztec serpent,”¹⁹⁴ and the Aztec god of the underworld¹⁹⁵ have also been cited as proof of gang membership.¹⁹⁶

Aztec imagery is routinely used by prison officials to categorize people as prison gang members or associates. In California, Elvin Cabrera was deemed to be a prison gang associate because he had photocopies of several drawings with Aztec and Mayan images, including a drawing of an armed woman with a spear and a “Matlactomei” Mayan symbol on her hat, and a “female Mesoamerican warrior armed with a sword and shield as well as a bow and quiver of arrows.”¹⁹⁷ These photocopied drawings were signed by associates of a prison gang, but there was no indication that Elvin ever had personal contact with any of the artists, and these were but a few pages in a voluminous collection of artwork that he kept.¹⁹⁸

An appellate court overruled the designation of Elvin as a prison gang associate based on this evidence, explaining that

if a prisoner had a photocopy of a painting signed by David Hockney, a drawing or watercolor signed by Adolf Hitler (perhaps the most infamous failed artist of the 20th century), or a Doonesbury cartoon containing Garry Trudeau’s signature, that photocopy would not adequately support the inference that the

193. See MUÑIZ, *supra* note 17, at 86 (listing “symbols and brands that, if worn or included in a tattoo, may be considered in determining gang membership within the Glendale Corridor Gang Injunction zone”); see also, e.g., *Orduna v. Salazar*, No. SACV 07-167-AG (MAN), 2010 WL 2991398, at *3 (C.D. Cal. May 28, 2010), *report and recommendation adopted*, No. SACV 07-00167-AG, 2010 WL 2991394 (C.D. Cal. July 25, 2010) (“He has some tattoos, including an Aztec warrior, his mother’s name, and ‘OC’ for ‘Orange County.’”).

194. See, e.g., *People v. Rocha*, No. D062907, 2014 WL 4594195, at *2 (Cal. Ct. App. Sept. 16, 2014) (“He also had a tattoo of an Aztec serpent and a tattoo on the middle finger of his left hand, consisting of three dots, which meant ‘mi vida loca’ (i.e., ‘my crazy life’) and was common in Hispanic street gang culture.”); Appellee’s Answering Brief at 2, *Arizona v. Hernandez*, 1 CA-CR 17-0160, 2019 WL 313457 (Ariz. Ct. App. Jan. 24, 2019) (reporting that “[an] officer with extensive gang experience explained how many of these tattoos” such as an Aztec feathered serpent and an Aztec jaguar warrior “indicated membership in the Mexican Mafia”).

195. Appellee’s Answering Brief at 2, *Arizona v. Hernandez*, 1 CA-CR 17-0160, 2019 WL 313457 (Ariz. Ct. App. Jan. 24, 2019).

196. See *People v. Ruiz*, No. H044308, 2018 WL 4376253, at *3 (Cal. Ct. App. Sept. 14, 2018) (“Based on his training and experience, Le expressed the opinion that Ruiz was a member of the Sureño gang. Ruiz had the word ‘Chicano’ tattooed on his neck; a single dot under his left eye, with two piercings to make it three dots (a truncated representation of the number 13); a shark fin on his neck; ‘408’ on the back of his neck; an Aztec warrior on his left arm, and the words ‘East Sider’ on his arms. Neither the shark fin nor ‘408’ was in and of itself a Sureño tattoo, but the dot under his eye did indicate Sureño affiliation. The Aztec warrior and ‘Chicano’ were not specifically Sureño indicia, but they can represent racial pride, while ‘East Sider’ is a ‘locale type of tattoo.’ Taken together, however, all of these tattoos indicated gang membership.”).

197. *In re Cabrera*, 287 P.3d 72, 75 (Cal. 2012).

198. *In re Cabrera*, 158 Cal. Rptr. 3d 121, 123 (Cal. Ct. App. 2013) (explaining that Cabrera was validated as a prison gang associated based on his possessing four drawings amongst an “artwork collection” consisting of a “large quantity of drawings from various artists”).

prisoner had a mutual relationship with Hockney, Hitler, or Trudeau.¹⁹⁹

However, although Elvin denied prison gang association, the California Supreme Court reversed the appellate court's decision, allowing the prison's designation to stand based on this evidence alone.²⁰⁰

A federal court in New Mexico limited the use of Aztec tattoos, finding that "gang members often have tattoos depicting various aspects of Aztec symbolism and culture."²⁰¹ The court added that "although the image depicted in Plaintiff's most recent tattoo may be associated with gang culture, it holds legitimate religious significance to Plaintiff" and therefore does not undermine his argument about his religious beliefs.²⁰² In other words, these kinds of tattoos may show a gang affiliation in some cases, but not others.

The Aztec and Mayan cultures were impressive, powerful civilizations that have contributed to humanity in significant ways, and their descendants are right to take pride in these ancestral roots. Within Mexico, there is a long-standing record of negative bias towards Indigenous people; Nobel Laureate Octavio Paz has written about how this bias runs so deep that some Mexicans have internalized a sense of self-hatred towards their Indigenous roots.²⁰³ The Chicano movement's choice to champion Aztec and Mayan cultures, and to re-identify with this side of people's roots, was a deliberate rejection of this deeply ingrained tendency within Mexican culture more broadly to reject Indigenous traditions.²⁰⁴ And so, when people choose to identify with their Indigenous roots, it is a deliberate act of cultural expression and, in many cases, is a radical act of self-love and self-acceptance. To conflate this reality with expressing gang membership is wrong.

According to tattoo artist Freddy Negrete,

Aztec imagery became big in the late '60s, with the Chicano movement; it was a way of reuniting the Mexican-American communities around Aztlán, the mythical homeland of the Aztecs. So, along with Catholic icons like the Virgin of Guadalupe, we started to introduce Aztec imagery into our murals

199. *In re Cabrera*, 131 Cal. Rptr. 3d 578, 594 (Cal. Ct. App. 2011).

200. *In re Cabrera*, 287 P.3d at 77–78 (concluding that the prison's determination that Cabrera was a gang affiliate was not unreasonable, particularly because gangs "present a serious threat to the safety and security of California prisons").

201. *Gonzalez v. Joey*, No. 12-834, 2016 WL 10587953, at *3 (D.N.M. 2016).

202. *Id.*

203. See PAZ, *supra* note 148, at 12–20.

204. See GARCÍA, *supra* note 149, at 4 (describing that Chicanos felt "empowered . . . based on rediscovering their indigenous and mestizo roots").

and tattoo art with Aztec girls, warriors, and gods. . . . [I]t was also spiritual, a way for us to connect to an ancient culture that was in our blood and our history.²⁰⁵

While it is true that some gangs use specific symbols derived from Aztec or Mayan imagery as markers of their specific gang, it is virtually impossible to distinguish a tattoo of cultural significance from a tattoo indicating gang association. For example, a tattoo of an Aztec warrior may have a gang association for one person and may have absolutely nothing to do with gangs for others. Thus, rather than over-criminalizing an entire population because of cultural representations of their ancestry, it would be preferable to avoid the use of these images as evidence of gang membership and look instead to more concrete evidence of gang membership. This would allow authorities to draw lines defining gang membership in a way that does not conflate racial identity with gang membership.

E. Religious Symbols

Religious images, such as praying hands or the *Virgen de Guadalupe*, have also been used as evidence of gang membership.²⁰⁶ However, religious imagery—particularly Catholic religious imagery—is so deeply tied to Mexican culture that these tattoos are often more indicative of one’s cultural identity as a Mexican or Mexican-American than of gang association. The Catholic Church is so important in Mexico that the government’s laws are informed by Catholicism in many respects.²⁰⁷ And Catholic imagery represents, to many Mexicans and Mexican-Americans, the Spanish side of their ancestral roots.²⁰⁸

205. FREDDY NEGRETE & STEVE JONES, SMILE NOW, CRY LATER: GUNS, GANGS, AND TATTOOS 43 (2016).

206. See Lou Savelli, *Understanding East Coast Mexican Gangs, Part 2*, POLICE1 (Dec. 19, 2005), <https://www.police1.com/gangs/articles/understanding-east-coast-mexican-gangs-part-2-PJzWfEWcx7QP21r/> [<https://perma.cc/34QW-DT6R>] (reporting the opinion of a retired NYPD sergeant that a tattoo of “a picture of a pair of praying hands” are “common to these [Mexican] gangsters,” and “[t]he Our Lady of Guadalupe icon is another favorite tattoo worn by gang members”).

207. See Peter L. Reich, *The Mexican Catholic Church and Constitutional Change Since 1929*, 60 HISTORIAN 77 (1997) (discussing the close ties between the Catholic Church and Mexico’s government).

208. See ENRIQUE KRAUZE, MEXICO: BIOGRAPHY OF POWER: A HISTORY OF MODERN MEXICO, 1810-1996, at 51–59 (1997) (describing the important role the Catholic Church played in meshing Spanish culture with Indigenous traditions to create modern Mexican culture, which combines aspects of Indigenous cultures with Spanish culture).

The *Virgen de Guadalupe* is a revered religious symbol in Mexico.²⁰⁹ There is a basilica dedicated to the *Virgen* that people routinely walk for a mile *on their knees* in order to show their respect and to pay homage to the *Virgen*.²¹⁰ While it is true that some Mexican-American gang members may have a tattoo of the *Virgen de Guadalupe*, this tattoo is a representation of their religious and cultural identity rather than gang membership: “Catholic rites, images, and iconography are deeply ingrained in the Mexican-American psyche, and are in turn expressed in Chicano tattoo culture. The Virgin of Guadalupe tattoo is popular, not only among cholos but among Chicanos in general.”²¹¹

According to a famous Chicano tattoo artist discussing a gang member with tattoos of Jesus and the *Virgen de Guadalupe*, “[t]hese were common images with pachucos and cholos, but they were more of a statement, representing Chicano culture, rather than a religious commitment.”²¹²

F. Tattoos as Popular Cultural Symbols

Some scholars have argued that tattoos are “an unreliable identification tool” of gang members because “tattoos are popular.”²¹³ Citing interviews with Los Angeles prosecutors, Matthew Werdeger wrote that one reason some prosecutors overidentify African American men as gang members is that the “clothing, tattoos, music and other paraphernalia equated by law enforcement with gang membership are popular among [B]lack youth in general.”²¹⁴

Sociologists Victor M. Rios and Karlene Navarro agree. According to Rios and Navarro, “police officers often conflate urban youth culture with gang membership and criminal activity.”²¹⁵ In one California case, for example, a detective testified that a tattoo of the number “187”

209. Raul A. Reyes, *Our Lady of Guadalupe Is a Powerful Symbol of Mexican Identity*, NBC NEWS (Dec. 12, 2016), <https://www.nbcnews.com/news/latino/our-lady-guadalupe-powerful-symbol-mexican-identity-n694216> [<https://perma.cc/M6G8-BV68>].

210. Deborah Bonello, *Video: The Virgin of Guadalupe Brings Mexicans to Their Knees*, L.A. TIMES (Dec. 11, 2008), <https://www.latimes.com/archives/blogs/la-plaza/story/2008-12-11/video-the-virgin-of-guadalupe-brings-mexicans-to-their-knees> (last visited Sept. 19, 2023) (describing how “Julio Cesar, a 19-year-old metalworker, crawled on his knees for five hours to reach the Basilica of Guadalupe in Mexico City”).

211. NEGRETE & JONES, *supra* note 205, at 41.

212. *Id.*

213. Plácido G. Gómez, *It Is Not So Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY'S L.J. 581, 620 (2003).

214. Matthew Mickle Werdegar, *Enjoying the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 423 n.86 (1999).

215. Rios & Navarro, *supra* note 45, at 34.

demonstrated an admission that the individual had committed homicide.²¹⁶ California Penal Code section 187 codifies the crime of murder. However, when Rios and Navarro asked gang experts who were not law enforcement officers whether a tattoo of “187” meant that the individual had committed a homicide, all respondents disagreed, expressing the belief that this tattoo “is a popular culture symbol that might make a person feel tough but is not used as a ‘badge of honor’ by gang members when they commit a murder.”²¹⁷

Tattoos of a woman’s lips are another example of a culturally popular tattoo that has been conflated with gang membership.²¹⁸ Law enforcement training manuals describe tattoos of women’s lips as representing the letter “M” and suggesting that the individual with the tattoo is likely a member of the Mexican Mafia prison gang.²¹⁹ However, many people have told me that a tattoo of lips honors a wife or girlfriend and has nothing to do with gangs or mafias. In fact, a number of professional athletes have tattoos of a partner’s lips, demonstrating the cultural popularity of the tattoo.²²⁰

G. *Smile Now, Cry Later*

Perhaps the clearest example of a culturally popular tattoo that has been mischaracterized as a tattoo demonstrating gang membership is a tattoo widely referred to as “Smile Now, Cry Later.” Created by Freddy Negrete, a Chicano tattoo artist whose work has been recognized in international art exhibitions, the now famous “Smile Now, Cry Later” tattoo is comprised of two faces, one smiling and one crying.²²¹ It is an iconic symbol of Chicano culture that is popular among some gang members, but also is popular among many non-gang members.²²²

216. *Id.* at 33.

217. *Id.* at 34.

218. See CAN. BORDER SERVS. AGENCY, *supra* note 183. Canadian Public Intelligence identifies the tattoo of lips as a tattoo indicating association with the Sureños prison gang and alleges the lips are shaped like a “13.” *Id.*

219. National Gang Intelligence Center, *supra* note 15, at 4.

220. See, e.g., Jessica Bennett, *Lamar Odom Tattoos Fiancée’s Lip Print on His Neck*, PAGE SIX (July 4, 2020, 12:03 PM), <https://pagesix.com/2020/07/04/lamar-odom-tattoos-fiancees-lip-print-on-his-neck> [<https://perma.cc/Y6KC-N6RA>] (reporting that former NBA player Lamar Odom tattooed his fiancée’s lip print on his neck to demonstrate his commitment to her in lieu of a traditional wedding ring); J.R. Sanchez-Fortun, *Lionel Messi Reveals New Intimate Tattoo of His Wife’s Lips Inked Near His Abs*, MIRROR (Sept. 12, 2017, 9:01 AM), <https://www.mirror.co.uk/sport/football/news/lionel-messis-reveals-new-intimate-11147709> [<https://perma.cc/ME4P-37DP>] (describing a soccer player’s tattoo of his wife’s lips).

221. NEGRETE & JONES, *supra* note 205, at 112–15.

222. *Id.* at 114.

According to law enforcement entities, “[c]lown face/mask tattoos are common among gang members,” and in particular “Latin and Asian gang members.”²²³ This tattoo has been cited as a basis for denying people entry to the United States because they are deemed to be national security risks because the tattoo points to gang membership.²²⁴

“Smile Now, Cry Later” was one of two tattoos cited as evidence of gang association in the Ninth Circuit case that upheld the visa denial of Rolando Mora-Huerta, the husband of a U.S. citizen.²²⁵ Although a police officer who had reviewed this tattoo submitted a declaration indicating that the tattoo could not definitely point to gang membership, the tattoo still seemed significant to key decision-makers in Mora-Huerta’s case.²²⁶ The consular officer considered the tattoo, as did the Ninth Circuit.²²⁷ At oral argument, a Ninth Circuit judge stated, “he’s got this, you know, Smile Now, Cry Later tattoo that apparently is sometimes found on gang members although the constable couldn’t say that that was indelibly a mark of the Surenos.”²²⁸ The judge then asked counsel for the government if Mora-Huerta would be required to remove the tattoo in order to obtain a visa in the future.²²⁹ Ultimately, the Ninth Circuit upheld the consular officer’s decision to bar Mora-Huerta from obtaining a visa.²³⁰

Tattoo-artist Freddy Negrete describes the origin of the tattoo and its different meanings in his memoir titled after the tattoo he created, *Smile Now, Cry Later*. Negrete recounts how his artwork “ended up influencing the whole Chicano style, because everybody saw it and started to imitate it.”²³¹ Negrete explains that for some, the tattoo relates to the gang lifestyle, but “[d]ifferent interpretations of the tattoo have evolved over the years, some of them not even gang related, so for some people it represents relationships, Smile Now when you fall in love and Cry Later when you break up.”²³²

223. CAN. BORDER SERVS. AGENCY, *supra* note 183, at 81.

224. Jordan, *supra* note 35.

225. Transcript of Oral Argument, *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) (No. 13-35957), 2016 WL 3021616, at *10.

226. Although a police officer who had reviewed this tattoo submitted a declaration indicating that the tattoo could not definitely point to gang membership, the tattoo still seemed significant to key decision-makers in his case. *Cardenas v. United States*, No. 12–00346–S–EJL, 2013 WL 4495795, *2–3 (D. Idaho Aug. 19, 2013).

227. Transcript of Oral Argument, *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) (No. 13-35957), 2016 WL 3021616, at *10.

228. *Id.*

229. *Id.*

230. *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016).

231. NEGRETE & JONES, *supra* note 205, at 113.

232. *Id.* at 114.

Nonetheless, in Mora-Huerta's case at the consulate, the combination of having been in a car with someone with a "Brown Pride" tattoo and having a "Smile Now, Cry Later" tattoo on his own body justified a determination that the husband of a United States citizen, who would otherwise clearly qualify for a green card, did not qualify for a visa to reside in the United States.²³³ While the Ninth Circuit dismissed the argument that the consular officer's decision was racially biased,²³⁴ when we look below the surface, these markers of cultural identity seemed to form the basis of the decision. This is but one example of how this particular tattoo—emblematic of Chicano cultural identity—has been used to mark people as gang members.

Similarly, the husband of a United States citizen who was applying for a visa was recently denied permission to migrate to the United States from El Salvador when he was found to pose a threat to national security.²³⁵ His attorney argued that this conclusion was founded only on the fact that he had tattoos.²³⁶ An expert submitted a declaration that none of the tattoos were gang-related, and that "[m]ost of the tattoos . . . are merely commonly known images, such as images of Catholic icons, clowns, and other non-gang related tattoos."²³⁷ And yet, it is very difficult to overturn the decision of a consular officer.

H. Cultural Tattoos as a Proxy for Race

In recounting the Chicano civil rights movement, one activist described a civil rights march that employed symbols of Chicano identity, such as the Mexican flag and banners of the *Virgen de Guadalupe*.²³⁸ "Brown Pride" was an important slogan of the Chicano movement, representing an acceptance and pride in one's racial identity as an act of resisting the dominant narrative of white superiority.²³⁹ Using people's expressions of these themes to criminalize them as gang members is both overinclusive and racially biased.

Although a single tattoo would not generally be used as the sole evidence of gang association, a tattoo with an innocent explanation can

233. See *Cardenas*, 826 F.3d 1164.

234. *Id.* at 1173.

235. *Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 910 (9th Cir. 2022).

236. *Id.* at 911.

237. *Id.*

238. GARCÍA, *supra* note 149, at 294.

239. See Miguel E. Gallardo, *Chicano*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Chicano> [<https://perma.cc/9YHX-K4Z3>] (describing the use of the "Brown Pride" slogan in the Chicano movement).

have a profound effect on how decision-makers respond to a case.²⁴⁰ Law enforcement training manuals warn that tattoos with potentially neutral meanings, such as religious tattoos, are not necessarily determinative of gang membership.²⁴¹ However, it is still quite damaging to allow these cultural markers to enter into the equation at all, because often they combine with other racialized markers that also have innocent explanations. Then, taken together, several pieces of evidence with innocent explanations, all of which are tied to race, are used to solidify the gang label.

Law enforcement officers, judges, and other decision-makers in the criminal justice system have extraordinarily broad discretion to interpret the meaning of tattoos and whether a particular tattoo represents gang association.²⁴² A California court describes its perspective on interpreting gang tattoos as follows:

[G]ang tattoos may employ obscure symbols not readily recognized or catalogued as gang tattoos. Having dealt with numerous gang-related cases over the years, we observe that in this court's experience the significance of tattoos can change over time, making something as innocuous as the tattoo of a religious figure or the logo of a sports team into something more sinister if adopted by a particular gang as one of their symbols.²⁴³

There is a glaring problem with relying on this kind of vague criteria—research demonstrates that implicit bias flourishes under conditions like this, where decision-makers are vested with high levels of discretion to make these kinds of determinations.²⁴⁴ A law enforcement officer in a gang unit described how they wield this discretion as follows: even if a

240. See *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) (upholding a visa denial that was largely based on tattoos).

241. Cf. BILL VALENTINE, *GANG INTELLIGENCE MANUAL: IDENTIFYING AND UNDERSTANDING MODERN-DAY VIOLENT GANGS IN THE UNITED STATES* 30–32 (1995) (describing tattoos of crosses as indicative of Hispanic gang membership while acknowledging “[t]here is no single interpretation for these tattoos”); California Crime and Violence Prevention Center, *Signs of Gang Membership*, SOLANO CNTY., <https://solano.networkofcare.org/ps/library/article.aspx?id=1812> [https://perma.cc/66MP-D3G7] (“Generic forms of gang tattoos and body modifications by themselves are not evidence of gang membership. Combined with gang-specific tattoos, brands or burns, generic signs may be used to help determine gang membership.”).

242. See, e.g., *Rios & Navarro*, *supra* note 45 (pulling examples of evidence that were used to establish gang membership in criminal trials and demonstrating that a cross-section of gang experts did not consistently agree that the various pieces of evidence were indicative of gang membership).

243. *People v. Morones*, No. H039945, 2014 WL 4104711, at *5 (Cal. Ct. App. Aug. 21, 2014).

244. See *Richardson*, *supra* note 88, at 2083 (“One significant challenge is that officers function in precisely the type of environment that encourages and facilitates nonconscious processing; they often must make decisions quickly and in situations that are ambiguous, potentially dangerous, and where a possible suspect’s appearance, demeanor, and neighborhood are the primary sources of information.”).

given crime “may not fit the criteria for gangs, I could probably point, or draw the nexus between gangs and that crime, whatever it is.”²⁴⁵

Add to these highly discretionary standards the widespread depiction of young Latino men as criminals and gang members, and the tunnel-vision that accompanies law enforcement efforts that specifically target gang members, and you have a system that we can be sure will overidentify Latino youth as gang members based on symbols or imagery that may or may not be gang-related. Sue Burrell explains:

Although no one agrees what gangs are or what constitutes gang membership, Black, Hispanic, and Asian youths often “become” gang members based on law enforcement guesswork. A childhood nickname may be transformed into a gang “moniker,” and neighborhood playmates into “homeboys.” Innocent sounding questions at a field interview, such as, “What do they call you?” or, “Where are you from?” can result in long term sinister complications for young people growing up in areas of high gang activity.²⁴⁶

I have asked former gang members about their tattoos. They can point to specific tattoos that they got to represent gang ties and others that they got because they represented other aspects of their life stories and identities: the names of their children, tattoos honoring their mothers, and tattoos honoring their ancestry and identities. Many people who are not gang-associated similarly have tattoos that represent important aspects of their life stories and identities, and these tattoos should not be conflated with gang membership.²⁴⁷

III. HOW THE LAW ALLOWS RACIAL BIAS TO FLOURISH

Given this strong evidence that tattoos representing cultural and racial identity are routinely conflated with gang membership, we must ask how the law allows a different set of rules to apply to gang members despite clear evidence of the racially disparate impact of gang laws, and of the clear ties between the criteria used to label someone a gang member and race. This Part explains how the Equal Protection Clause of the U.S. Constitution has been interpreted in ways that allow racial inequalities to go unaddressed by (1) requiring proof of discriminatory intent rather than

245. MUÑIZ, *supra* note 17, at 86.

246. Burrell, *supra* note 37, at 751 (citing Paul Feldman, *Gang Nicknames: Sometimes It Gets to Be Too Insane*, L.A. TIMES (Oct. 15, 1985), <https://www.latimes.com/archives/la-xpm-1985-10-15-me-16229-story.html> [<https://perma.cc/79BL-BDTL>]).

247. See Jennifer Patrice Sims, “*It Represents Me:*” *Tattooing Mixed-Race Identity*, 38 SOCIO. SPECTRUM 243, 243, 245–46 (2018) (describing tattoos as “symbols of what [people] see themselves to be” and discussing the nuanced ways in which tattoos reflect people’s racial identities).

allowing claims to proceed based upon a showing of racially disparate impact alone; and (2) narrowly interpreting what qualifies as racial discriminatory intent by limiting race-based discrimination to discrimination based upon “immutable” characteristics people are born with.

A. The Law Prioritizes Discriminatory Intent over Racial Impact

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination based on race, gender, national origin, and sexual orientation.²⁴⁸ However, courts have interpreted the law in a way that places most laws that perpetuate racial inequalities out of reach from judicial intervention.²⁴⁹ In *Washington v. Davis*,²⁵⁰ decided in 1976, the Supreme Court rejected the argument that a personnel test used for hiring and promotions in the Washington, D.C. Police Department was racially discriminatory.²⁵¹ The outcome of the case rested on the Court’s determination that a law cannot be established as racially discriminatory in violation of the Equal Protection Clause “solely because it has a racially disproportionate impact.”²⁵² The Court specified that proof of discriminatory racial *intent* is necessary in order to establish an equal protection violation.²⁵³ According to critical race theorist Charles R. Lawrence III, in *Washington v. Davis*, the Court “held that, because the defendants were not intentional racists, *no* constitutional violation had occurred, even though the facts showed dramatic racial inequality.”²⁵⁴

Nearly a decade later, in *McCleskey v. Kemp*,²⁵⁵ the United States Supreme Court considered an equal protection challenge to racial disparities in the application of the death penalty in Georgia.²⁵⁶ McCleskey’s legal team presented statistical evidence demonstrating

248. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the Equal Protection Clause’s purpose is to prevent official conduct discriminating on the basis of race).

249. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) (describing how Critical Race Studies emerged to challenge legal constructions of “formal equality as *the* measure of racial justice” because this legal framework “recruits racial justice constituencies to participate in normalizing and even celebrating a morbidly unequal status quo” (emphasis in original)).

250. 426 U.S. 229 (1976).

251. *Id.* at 239.

252. *Id.* (emphasis in original).

253. *Id.* at 245.

254. Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 946 (2008) (emphasis in original) (citing *Davis*, 426 U.S. at 245).

255. 481 U.S. 279 (1987).

256. *Id.*

racially disparate outcomes in death penalty sentences for Black defendants and for people who murder white people, as opposed to Black victims.²⁵⁷ Informed by its decision in *Washington v. Davis*, the Supreme Court framed the legal standard for proving an equal protection violation as requiring that the defendant prove *both* “the existence of purposeful discrimination”²⁵⁸ and that the purposeful discrimination “‘had a discriminatory effect’ on him.”²⁵⁹ The evidence of racially disparate impact in the *McCleskey* case was uncontested, but the sticking point was the Court’s requirement that the defense prove that the decision-makers in their case acted with “discriminatory purpose,” meaning that they “‘selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁶⁰

In his dissenting opinion, Justice Brennan criticized the majority for having “a fear of too much justice,”²⁶¹ as demonstrated in the following reasoning from the majority opinion:

Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.²⁶²

This passage demonstrates the Court’s awareness that disparate impacts based upon race, gender, and other protected categories are widespread, and that allowing equal protection claims to be established based on proof of disparate racial impacts would mean that the law would need to take a more active role in rectifying these injustices. And yet, the Court chose to move in the opposite direction by requiring proof of discriminatory purpose, thus deliberately interpreting the law in a way that the Court knew would allow racial inequality to go unaddressed by the law. The Court upheld McCleskey’s death sentence despite uncontested evidence of the racially disparate application of the death penalty in Georgia.²⁶³

In Professor Charles R. Lawrence III’s formative article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,

257. *Id.* at 291.

258. *Id.* at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

259. *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

260. *Id.* at 298 (quoting *Pers. Adm’r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

261. *Id.* at 339 (Brennan, J., dissenting).

262. *Id.* at 315–17.

263. *Id.* at 298–99.

Lawrence addressed the problems with the Court's decision to take the approach of requiring proof of discriminatory intent.²⁶⁴ The starting point of Lawrence's analysis is that "the illness of racism infects almost everyone."²⁶⁵ And, the problem with the Court's framing, is that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role."²⁶⁶ Because of that, we all carry unconscious "ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."²⁶⁷ Lawrence argues that the Court's intent requirement fails to capture unconscious racism and urges a different approach—a test that would "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance."²⁶⁸

Despite a robust body of scholarship criticizing this approach,²⁶⁹ the discriminatory purpose requirement attached to the Equal Protection Clause of the Fourteenth Amendment remains.²⁷⁰ As Ian Haney López writes, this interpretation of the law "promotes the claim that racism only exists when someone confesses to malice or uses an epithet, so that coded speech is never racism so long as it remains in code."²⁷¹ Under the law, "racism cannot be present until someone utters the wrong term."²⁷²

264. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–19 (1987) [hereinafter Lawrence, *The Id, the Ego*].

265. *Id.* at 321.

266. *Id.* at 322.

267. *Id.*

268. *Id.* at 324.

269. *E.g.*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY] (describing a key tenet of Critical Race Studies as a criticism of "the dominant legal conception of racism as a discrete and identifiable act of 'prejudice based on skin color'" because this conception "placed virtually the entire range of everyday social practices" of racism in the United States "beyond the scope of critical examination or legal remediation"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY, *supra*, at 29–45; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY, *supra*, at 103–19; Lawrence, *The Id, the Ego, supra* note 264, at 318–19.

270. Notably, federal civil rights statutes such as Title VII have more favorable rules that allow more racial discrimination claims to be brought based upon evidence of disparate impact, even in the absence of proof of discriminatory intent. See Valencia Richardson, *Data-Driven Discrimination: A Case for Equal Protection in the Racially Disparate Impact of Big Data*, 12 GEO. J.L. & MOD. CRIT. RACE PERSP. 209, 210 (2020) (discussing how violations of the Civil Rights Act and the Fair Housing Act have been established based on disparate impacts carried out by algorithms).

271. HANEY LÓPEZ, *supra* note 14, at 132.

272. *Id.*

B. *The Law Limits Discriminatory Intent to Discrimination Based on “Immutable Characteristics”*

On top of limiting racial discrimination claims to cases where it can be proven that the law was created or enforced with the *purpose* of discriminating based on race (or national origin), courts have drawn narrow boundaries around what qualifies as purposeful racial discrimination. The Equal Protection Clause protects suspect classes like race, gender, and national origin that are based on “an immutable characteristic determined solely by the accident of birth.”²⁷³ Courts have defined “immutable characteristics” as being limited to traits that are fixed at the time of one’s birth, such as skin tone or facial characteristics.²⁷⁴ By limiting the conceptualization of race to “immutable characteristics,” many aspects of racial identity are systematically excluded from constitutional protections.

Notably, in many cases, Black women’s hairstyles have been found to be mutable, rather than immutable, characteristics, and thus employment decisions that have targeted Black women’s hairstyles have not been found to qualify as race-based.²⁷⁵ Scholars and advocates have contested this approach.²⁷⁶ For example, an Eleventh Circuit case challenged the rescission of a job offer made to Chastity Jones—a Black woman—because she refused to cut off her dreadlocks.²⁷⁷ Ms. Jones alleged intentional racial discrimination.²⁷⁸ The court found there was no racial discrimination because dreadlocks were merely “culturally associated with race,” rather than being “an immutable characteristic of [B]lack

273. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (holding that “sex, like race and national origin” is an immutable characteristic triggering protection under the Equal Protection Clause of the Constitution).

274. *Id.* at 686.

275. *E.g.*, *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981). In *Rogers v. American Airlines*, an employee was barred from wearing an all-braided hair style. *Id.* The court upheld this prohibition as racially non-discriminatory because it was not based on immutable, biological characteristics that are constitutive of Blackness but rather an “easily changed characteristic.” *See id.* Further, the court found that “even if [the hairstyle was] socioculturally associated with a particular race or nationality, [it was] not an impermissible basis for distinctions in the application of employment practices by an employer.” *Id.*

276. *See, e.g.*, D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair* in *EEOC v. Catastrophe Management Solutions*, 71 U. MIA. L. REV. 987, 992 (2017) [hereinafter Greene, *Splitting Hairs*] (discussing the history of antidiscrimination laws that do not protect Black women’s hairstyles and arguing “that the immutability doctrine, namely strict immutability, is a ‘legal fiction’: a judicially created rule which is not based in fact yet is treated as such in legitimizing zones of legal protection and inclusion”).

277. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021–22 (11th Cir. 2016).

278. *Id.* at 1023.

persons.”²⁷⁹ The Equal Employment Opportunity Commission pushed back against the court’s narrow construction of race, arguing that the “concept of race encompasses cultural characteristics related to race or ethnicity,” including “grooming practices.”²⁸⁰ However, the court confined its definition of race to “inherited physical characteristics,”²⁸¹ rather than “cultural practices.”²⁸²

Similarly, courts have found that discrimination based on speaking one’s native language does not amount to discriminating based on national origin. Many courts “have directly held that language-based classifications are not the equivalent of national-origin-based classifications,”²⁸³ even though it is difficult to separate one’s native language from one’s national origin. For example, firing an employee who was Mexican-American for speaking Spanish to a coworker in violation of an “English-only” policy did not amount to discrimination based on national origin because, according to the Fifth Circuit, “[n]ational origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage.”²⁸⁴ Thus, under current law, although people are protected from discrimination based on national origin, they are not protected from discrimination based on speaking their native language.²⁸⁵

There have been many challenges to the immutable characteristic doctrine—challenges that argue that this focus on immutable characteristics is too narrow and that other characteristics that are closely associated with race should be entitled to legal protection.²⁸⁶ The argument is that certain characteristics are so central to one’s racial and cultural identity that they cannot be separated from race.²⁸⁷ Thus, a law that discriminates based on one such characteristic should be understood to have a racially discriminatory purpose.

Professor Wendy Greene’s scholarship has been particularly influential in this area. Professor Greene argues that “‘race’ encompasses more than just one’s skin color. Historically and contemporarily in America, how

279. *Id.* at 1021.

280. *Id.* at 1022.

281. *Id.* at 1027.

282. *Id.* at 1030.

283. *Van Son v. Inch*, No. 5:18-cv-TPB-PRL, 2021 WL 2337667, at *5 (M.D. Fla. June 8, 2021) (citing *Olagues v. Russonello*, 770 F.2d 791, 801 (8th Cir. 1985)).

284. *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980).

285. *Id.* at 269–70.

286. See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 20–21 (2006).

287. See *id.* at 21.

one dresses, speaks, behaves, and thinks is also constitutive of race.”²⁸⁸ Greene argues that “characteristics commonly associated with a particular racial or ethnic group should fall into Title VII’s current protected categories of race, color, and national origin.”²⁸⁹

The decision to define racial discrimination so narrowly—as only based on characteristics that one is born with—means that *a lot* of racial discrimination will go unaddressed by the courts. Professor Greene has long criticized this approach, arguing that “[r]ace includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group,”²⁹⁰ and that “the judicial concept of the ‘immutability’ of race defies society’s understanding of race historically and contemporarily. In order to properly address racial discrimination in the employment context, courts must employ a broader definition of race which includes physical appearance, language, cultural activities, or associations.”²⁹¹

Legal scholars have called on both the Supreme Court and Congress to reconsider this narrow approach to defining race and have suggested a broader framing of the issue.²⁹² “[T]raits with which one is born are not the sole characteristics that law and society have used to mark one’s racial identity.”²⁹³ Rather than focus on “immutable characteristics” that are fixed at birth, a more accurate way to determine when racial discrimination is at play would be to adopt a framework that acknowledges that “mutable characteristics such as skin color, hair, language, and dress . . . play a critical role in the external classification of an individual’s race” as well as an internal racial identity.²⁹⁴ One way to do this would be to protect “race/ethnicity performance,” meaning that the law would protect “any behavior or voluntarily displayed attribute which, by accident or design, communicates racial or ethnic identity or status.”²⁹⁵

288. D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1358 (2008).

289. *Id.* While Title VII relates specifically to employment discrimination, the same arguments are relevant to equal protection challenges more broadly because discriminatory purpose has been interpreted similarly in both contexts. *See id.* at 1359 n.13 (explaining that although Title VII allows claims to be brought based on both discriminatory purpose and disparate impact, Greene’s argument focuses on the discriminatory purpose piece).

290. *Id.* at 1385.

291. *Id.* at 1369.

292. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1142 (2004).

293. Greene, *Splitting Hairs*, *supra* note 276, at 1024.

294. *Id.* at 1024–25.

295. Gear Rich, *supra* note 292, at 1139.

Race has meaning in our society because of the social meaning we have ascribed to it, both historically and in the present, and the law should recognize this reality. Courts' decisions to define race as a fixed, immutable, biological construct reflect a misunderstanding of what race is and how it is given meaning in society. However, the law maintains the legal fiction that it is legitimate to discriminate based on these so-called "mutable" characteristics that people have choices over, whereas it would be illegitimate, and therefore illegal, to discriminate based on "immutable characteristics" of race such as skin tone.

C. *Gang Members and Associates Are Treated Unequally*

Many cases have been brought alleging Equal Protection Clause violations for racial discrimination based on labeling people as gang members, but none have succeeded.²⁹⁶ According to one court, "[b]ecause California's gang validation procedures in themselves are race neutral, *i.e.*, they are not based on race but on gang membership, Plaintiff can only state an equal protection claim under a theory of disparate impact."²⁹⁷

The racially disparate effects of gang labeling are well-documented and far-reaching. Statistical information from across the country makes clear that the gang label is consistently overapplied to Black and Latino youth—particularly young men—and is consistently underapplied to white youth.²⁹⁸

And yet, even when the evidence of the racially disparate impacts of gang laws is clear, courts have found that the laws do not violate the Equal Protection Clause.²⁹⁹ The Minnesota Supreme Court considered

296. *See* Lopez v. Cate, No. C 11-2644 YGR (PR), 2012 WL 4677221, at *6–8 (N.D. Cal. Sept. 30, 2012) (rejecting an equal protection argument alleging that the "gang validation process at [Pelican Bay State Prison] violates the Equal Protection Clause because it targets Hispanic inmates"); Cross v. Reynoso, No. CV 13-1080-GHK (JEM), 2013 WL 5771138, at *7 (C.D. Cal. Oct. 24, 2013) (rejecting the argument that gang validation amounted to racial discrimination in violation of the Equal Protection Clause after a prison official stated "[w]e are going to validate all you monkeys" and "[y]ou like cop killing [n-words], you get validated for it," in reference to George Jackson); Ramirez v. Guinn, No. CV-N-02-0469-HDM (VPC), 2005 WL 8166002, at *9 (D. Nev. July 6, 2005) (rejecting a racial discrimination claim based on statistical evidence of racially disparate impact because, according to the court, "[t]he statistics may suggest racial discrimination against Hispanic inmates, but by themselves, they do not prove that defendants had a racially discriminatory motive in validating plaintiff as a gang member," but are instead based on "security concerns due to ongoing violence among Hispanic gang members"); *see also* Johnson, *supra* note 5, at 1060 (concluding that proving an equal protection violation based on clear racial disparities in NYPD's gang database would be difficult because it is so difficult to prove racially discriminatory intent merely based on disparate impact).

297. Cross, 2013 WL 5771138, at *7.

298. *See supra* notes 20–26 and accompanying text.

299. *E.g.*, State v. Frazier, 649 N.W.2d 828, 830 (Minn. 2002).

this issue in 2002 in a case where William Allen Frazier—a Black man—was convicted of drug sales with a gang enhancement based on the allegation that he sold drugs for the benefit of a gang.³⁰⁰ Frazier presented evidence that Minnesota’s gang enhancement statute “has a discriminatory impact on racial minorities.”³⁰¹ He presented statistical evidence indicating that although the Minnesota Gang Strike Force estimated that twenty-seven percent of gang members are white, only ten percent of those sentenced under the enhancement statute are white.³⁰² The District Court found that Minnesota’s gang enhancement statute did in fact have a racially disparate impact, but upheld the statute under Minnesota’s rational basis standard.³⁰³ The Court of Appeals affirmed the District Court’s decision.³⁰⁴

The Minnesota Supreme Court rejected the lower court’s reliance on the statistical evidence of disparate racial impact, raising doubts about the methods, sample size, and reliability of the evidence.³⁰⁵ Notably, the court specified that it could be possible that an equal protection claim could be brought based on this evidence under Minnesota’s Constitution.³⁰⁶

Some legal scholarship has suggested litigating racial discrimination issues in the gang context as violations of the vagueness doctrine, rather than equal protection claims, because of the “exceedingly high discriminatory intent threshold required to prove that a facially neutral policy or custom violates the Equal Protection Clause.”³⁰⁷ The United States Supreme Court followed this approach in *City of Chicago v. Morales*,³⁰⁸ a 1999 case where the Court found that an anti-loitering ordinance that targeted gang members was unconstitutionally vague, in violation of the Due Process Clause.³⁰⁹ The real-world effects of this case, however, were limited.

In a concurring opinion in *Morales*, Justice O’Connor suggested ways in which the city could implement a similar ordinance that would not

300. *Id.* at 830.

301. *Id.*

302. *Id.*

303. *Id.* at 831. For an in-depth analysis of the *Frazier* case, see Janice A. Petrella, Note, *Equal Protection—What Is in a Name? Sign? Symbol? Gang Members and RICO Considered*, State v. Frazier, 649 N.W.2d 828 (Minn. 2002), 34 RUTGERS L.J. 1237 (2003).

304. *Frazier*, 649 N.W.2d at 831.

305. *Id.* at 834–36.

306. *Id.* at 836.

307. Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71, 104 (2021).

308. 527 U.S. 41, 45 (1999).

309. *Id.* at 50–51.

violate the Constitution,³¹⁰ and the City of Chicago listened. It redefined its law to provide additional details that defined “gang loitering” and targeted its enforcement on particular “hot spots” in areas populated primarily by people of color.³¹¹ Unsurprisingly, the new ordinance has been primarily enforced against Black and Hispanic people. Between 2000 and 2010, 1,815 Black people and 1,082 Hispanic people were ordered dispersed under the revised law, while only sixty-one white people were.³¹² And yet, with the revisions Chicago made, the law has been construed as constitutional.³¹³ Thus, even the victory at the Supreme Court regarding vagueness did not result in real change to the racially disparate application of the law.

IV. CULTURAL TATTOOS AS EVIDENCE OF RACIAL DISCRIMINATION?

Even though tattoos of one’s cultural identity are deeply tied to one’s racial identity—and to national origin as well, in many cases—discrimination based on them is unlikely to qualify as intentional discrimination because people are not born with tattoos. Thus, tattoos clearly would not meet the definition of immutable characteristics courts have created. And yet, the clear connection between culturally specific tattoos and racial identity demonstrates how this construction of the law allows racism to persist. Relying on cultural tattoos to demonstrate gang membership reproduces racial inequalities in a manner that replicates patterns of racial subordination that have characterized the United States for centuries.

310. *See id.* at 66–68 (O’Connor, J., concurring).

311. Eric Ferkenhoff, *Anti-Gang Ordinance Passes Test*, CHI. TRIB. (Mar. 20, 2002, 12:00 AM), http://articles.chicagotribune.com/2002-03-20/news/0203200190_1_gang-members-supreme-court-lawrence-rosenthal [<https://perma.cc/CY6R-9P5F>]; Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 137–38 (2002) (arguing that Chicago’s ordinance after the Supreme Court’s decision in *Morales* “enables—even codifies—a more systemic targeting of the poor and racial minorities through the selection of enforcement hot spots by Chicago police” and that “those hot spots have been concentrated on the city’s poor and heavily minority South and West sides”).

312. Jane Penley, *Urban Terrorists: Addressing Chicago’s Losing Battle with Gang Violence*, 61 DEPAUL L. REV. 1185, 1201 (2012).

313. *See* Jenna Marie Stupar, *Gangsta’s Paradise? How Chicago’s Antigang Loitering Ordinance Punishes Status Instead of Behavior*, 64 DEPAUL L. REV. 945, 957–58 (2015).

A. *Intentional Discrimination Based on Immutable Characteristics*

One of the central criticisms critical race theorists have articulated against the immutable characteristic doctrine is that courts have based it on a misconception about race³¹⁴—that race is a biological creation.³¹⁵ In reality, racial categories take on meaning because of the ways in which society ascribes meaning to race; race is socially constructed.³¹⁶ Ian F. Haney López defines “a ‘race’ as a vast group of people loosely bound by historically contingent, socially significant elements of their morphology and/or ancestry,” that is, “an ongoing, contradictory, self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”³¹⁷ In contrast, the immutable characteristic doctrine limits the understanding of race to physical features and characteristics that people are born with and cannot change.

However, there are many aspects of racial identity that people are not born with, but that are nonetheless a reflection of their racial identity. The phenomenon of “passing” as white in an effort to avoid negative treatment reserved for people of color demonstrates the fluidity of race as a social construct.³¹⁸ Often, one’s cultural or racial identity is not immediately apparent by skin color or facial features,³¹⁹ so people find ways to project their racial or cultural identities. In the case of Latino people specifically, people’s skin tones range from dark to light to all shades in between. And so, Latino identity is often expressed through language, clothing, food, and sometimes through tattoos.³²⁰

314. See Greene, *supra* note 288, at 1375 (criticizing cases that have framed race as a biological construct and arguing that “[a]pplying a socio-historical or contemporary definition of race is fundamental to the viability of Title VII cases involving mutable racial characteristics”).

315. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9 (3d ed. 2017) (explaining that a central theme of critical race theory is that race is socially constructed as opposed to being “objective, inherent, or fixed” and that race “correspond[s] to no biological or genetic reality”).

316. Ian F. Haney López, *The Social Construction of Race*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 238, 243 (Richard Delgado & Jean Stefancic eds., 3d ed. 2013).

317. *Id.* at 240.

318. See Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1710–13 (1993) (describing how the author’s grandmother “passed” as white to obtain employment in a bank in the 1930s).

319. See *id.* at 1710–11 (explaining how the author’s grandmother’s “fair skin, straight hair, and aquiline features” allowed her to “enter the white world, albeit on a false passport, not merely passing, but *trespassing*” (emphasis in original)).

320. See Anthony Rivas, Ely Brown & Freda Kahen-Kashi, *Through Food, Language, and Dance, Latinos Preserve Their Unique Cultural Identities*, *ABC NEWS* (Sept. 17, 2021), <https://abcnews.go.com/US/food-language-dance-latinos-preserve-unique-cultural-identities/story?id=80039370> [<https://perma.cc/H53N-4KPX>]; Moreno, *supra* note 154 (discussing the expression of Chicano identity through tattoos).

The academic literature on tattoos makes clear that tattoos function as markers of people's identities and life stories and, in many cases, this includes expressions of people's racial identities.³²¹ As Michael Phelan and Scott Hunt found in their research about the symbolism of prison tattoos, “[b]odily markings, such as tattoos, can communicate one or more of the following: (1) personal identity, (2) cultural values and practices, and (3) membership in sub-groups within societies that are rebellious, peripheral, marginalized, or otherwise set apart from the ‘mainstream.’”³²²

Tattoos are an intimate expression of personal identity, including racial and cultural identity. “[R]acialized identities are being expressed via tattoos as people inscribe symbols of their own and/or others’ cultures onto their body.”³²³ According to one scholar whose research focuses on tattoos, “[y]our tattoo on your body expresses your thoughts, your beliefs, your experiences, your past.”³²⁴ It is quite literally a part of your body: “‘My tattoos express who I am’ is a mantra that can be consistently heard out of the mouths of tattoo[ed] persons, as well as found in numerous articles, books, and blogs in virtually every language on the planet.”³²⁵

Anthropological research shows that tattoos are used in the prison context as “signifiers of ethnicity, class, and convict status” and serve “to create individual and group identities” and “assert cultural differences.”³²⁶ In the context of prisons, where people's identities are stripped through dehumanizing treatment and isolation, the “process of identity formation is particularly important” because “the prisoner experiences his identity being stripped from him, thus becoming tattooed is crucial in order for a convict to establish an identity vis a vis the prison establishment.”³²⁷ Tattooing is thus seen as a “subversive bodily act” that “re-establishes the

321. See Allison Hawn, *Tattoos Have a Long History Going Back to the Ancient World—and Also to Colonialism*, CONVERSATION (Sept. 3, 2021, 8:37 AM EDT), <https://theconversation.com/tattoos-have-a-long-history-going-back-to-the-ancient-world-and-also-to-colonialism-165584> [<https://perma.cc/MZ4E-F5TE>] (describing the history of tattooing in various cultures and reporting that, for example, the Māori of New Zealand “have been practicing sacred Ta Mōko tattooing for centuries as a way to indicate who they are as individuals as well as who their community is” and expressing the view that tattoos are “art and a way of communicating identity”).

322. Michael P. Phelan & Scott A. Hunt, *Prison Gang Members’ Tattoos as Identity Work: The Visual Communication of Moral Careers*, 21 SYMBOLIC INTERACTION 277, 279 (1998).

323. Sims, *supra* note 247, at 246.

324. See Robert Arp, *I Am, Therefore I Ink*, in TATTOOS – PHILOSOPHY FOR EVERYONE, at xiv (Robert Arp ed., 2012) (emphasis omitted).

325. *Id.* at xvi.

326. Margo Demello, *The Convict Body: Tattooing Among Male American Prisoners*, 9 ANTHROPOLOGY TODAY 10, 10 (1993).

327. *Id.* at 13 (footnote omitted).

convict's authority over his own body and challenges the system which attempts to control it."³²⁸

Expressing one's identity through tattoos is a practice that is deeply tied to Mexican-American culture given tattoos' long-standing use by the Indigenous ancestors of modern-day Chicanos.³²⁹ In the Mayan civilization, for example, tattooing and other forms of body modifications were important rituals that took people through "a spiritual transformation as well as a physical one."³³⁰

Although the decision to get a tattoo is a choice, it is nonetheless an expression of one's personal identity. And, as Gowri Ramachandran observed, "[e]ven when an aspect of identity seems 'unchosen,' such as a biological sex or an ethnicity, we still choose, albeit sometimes within very strong and other times within very weak constraints, whether that 'immutable' trait will be part of our identity."³³¹ Thus, the Supreme Court's jurisprudence limiting the expression of racial identity to characteristics people are born with just does not square with reality.

This may change as modern understandings of how race operates become more widely incorporated into the law. Professor D. Wendy Greene sees hope in the *Obergefell v. Hodges*³³² decision, where the Supreme Court held that same sex couples have the right to marriage. Greene points out that, in that case, "the United States Supreme Court interpreted the Fourteenth Amendment to guarantee a parallel protection against discrimination based upon 'personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.'"³³³ Thus, Greene argues, courts should shift from asking "whether a person *could* change a particular characteristic' to 'whether the characteristic is something that the person *should be required* to change' because of its centrality to her identity."³³⁴ Greene argues that in the context of analyzing race-based discrimination based on Black women's hairstyles, dress code regulations that prohibit hair styles that are more commonly worn by Black women, such as braids or dreadlocks,

328. *Id.*

329. Enrique Vela, *Tatuajes*, ARQUEOLÓGICA MEXICANA, <https://arqueologiamexicana.mx/mexico-antiguo/tatuajes> [<https://perma.cc/7B6Q-8Q4Y>] (reporting that tattoos were used to decorate people's bodies in the pre-Columbian era in Mexico).

330. Ali Kellog, *Blood for Water: Ancient Mayan Body Modification*, CVLT NATION (Oct. 31, 2016), <https://cvltnation.com/blood-water-ancient-mayan-body-modification/> [<https://perma.cc/GXA8-Z393>].

331. Ramachandran, *supra* note 286, at 32 (emphasis omitted).

332. 576 U.S. 644 (2015).

333. Greene, *Splitting Hairs*, *supra* note 276, at 1034.

334. *Id.* (emphasis in original).

should be recognized as markers of racial identity such that making decisions based on these hairstyles amounts to racial discrimination.³³⁵

Charles R. Lawrence III argues that courts should adopt a “cultural meaning” definition of race and should ask whether the policy or decision in question “conveys a symbolic message to which the culture attaches racial significance.”³³⁶ Lawrence suggests courts should consider “the historical and social context surrounding the case,” and if they determine that a significant group of people would perceive it as racially motivated, the courts should “presume that socially shared, unconscious racial attitudes made evident by the action’s meaning had influenced the decisionmakers.”³³⁷

Viewed through this lens, expressing Chicano identity through tattoos is a deliberate expression of racial identity, and categorizing people as gang members based on these criteria should be understood to be clearly racially motivated.

B. *Disparate Impacts with Historical Roots*

When a legal system reinforces historical patterns of racism or draws upon similar language or ideology that has been used historically to perpetrate racism, this is a red flag that should cause courts to question the practice. Tattoos have long been used as a tool for perpetuating inequality by dividing “us” from “them.” They were used to mark enslaved people in the Roman times,³³⁸ and were used to “other” Indigenous people whose lands Europeans colonized.³³⁹

Tattoo historians link the emergence of negative perceptions of tattoos among Europeans to the colonialization process. Although tattooing was practiced in Europe, it was driven underground during the time of colonial conquest and in “the 1400s tattoos became an easy way to draw a line between European colonizers and those colonized, who were seen as ‘uncivilized.’”³⁴⁰ In the 1400s and 1500s, in Africa, the Pacific, and North and South America, Western colonizers used tattoos as evidence that the Indigenous residents of these areas were “others.”³⁴¹ “These tattooed individuals were often pointed to as proof that the ‘untamed natives’

335. *Id.* at 987–88.

336. Lawrence, *The Id, the Ego*, *supra* note 264, at 355–56.

337. *Id.* at 356.

338. C.P. Jones, *Stigma: Tattooing and Branding in Graeco-Roman Antiquity*, 77 J. ROMAN STUD. 139, 147–48 (1987).

339. *See* Hawn, *supra* note 321.

340. *Id.*

341. *Id.*

needed the help of ‘good, God-fearing’ Europeans to become fully human.”³⁴²

Although the law as currently constructed has not been open to limiting constitutional challenges on the use of culturally specific tattoos as a proxy for race, the law should evolve to incorporate more realistic understandings of how racism manifests in the present day.

V. LIMITING THE RACIAL IMPACT

Recognizing the limits of the current state of constitutional jurisprudence to respond to the problems of conflating expressions of racial and cultural identity with gang membership status, this Part recommends some changes the law should incorporate to minimize the harm of these practices.

A. *Tattoo Evidence Should Be Disallowed as It Is More Prejudicial than Probative*

Rule 403 of the Federal Rules of Evidence provides that courts “may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”³⁴³ Gang evidence is recognized as among the most prejudicial evidence that can be presented to a jury,³⁴⁴ and there has been much litigation about the introduction of evidence of gang membership in legal proceedings.³⁴⁵

One solution would be to prohibit evidence of the kinds of tattoos discussed in this Article—tattoos that name one’s racial or cultural identity or that depict their places of origin; tattoos of Aztec or Mayan imagery; tattoos of religious symbols; and tattoos that are widely representative of specific cultural groups, such as the “Smile Now, Cry Later” tattoo. This would be a relatively easy way that individual courts

342. *Id.*

343. FED. R. EVID. 403.

344. Mitchell Eisen, Brenna Dotson & Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISC. 2, 12 (2014) (discussing the prejudicial nature of gang evidence); cf. Mitchell L. Eisen, Brenna M. Dotson & Alma Olaguez, *Exploring the Prejudicial Effect of Gang Evidence: Under What Conditions Will Jurors Ignore Reasonable Doubt*, 2 CRIM. L. PRAC. 41, 41 (2014) (describing results of studies demonstrating that “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”).

345. *E.g.*, *People v. Hernandez*, 94 P.3d 1080 (Cal. 2004); *State v. Gonzalez*, 345 P.3d 1168 (Utah 2015); *United States v. Irvin*, 87 F.3d 860 (7th Cir. 1996).

could try to shield a jury's decision-making from being influenced by false evidence of gang membership.

As discussed, much of the evidence that is used to establish gang association is not necessarily indicative of gang membership. Much of the evidence could demonstrate gang membership or could demonstrate involvement in an innocent activity. For example, one person with a tattoo of lips or "Smile Now, Cry Later" may be a gang member, while another may not. Some people may tattoo religious imagery as an expression of religious or cultural identity, while others may get similar tattoos as an expression of a gang identity. The central problem with relying on tattoos to establish gang membership is that many of the tattoos used to prove gang ties are subject to interpretation and, as such, have a low probative value when considered in light of mathematical probabilities.

W. David Ball examines a related issue in an article about the Fourth Amendment, explaining that in order to correctly analyze whether a particular fact demonstrates a likelihood of criminality, we should not conflate that analysis with the probability that someone who is committing a crime has a certain characteristic.³⁴⁶ Rather, we should analyze the probability that someone with a certain characteristic is committing a crime.³⁴⁷ Ball explains this concept using a hypothetical example of an imaginary sophisticated test that can identify a suspicious bulge ninety-nine percent of the time that an individual is carrying a gun:

Imagine one percent of people have guns, and that ten percent of people without guns nevertheless display the suspicious bulge. When an officer observes a suspicious bulge—even under our new, 99% accurate test—the probability that the bulge is a gun is nowhere close to 99% (even though most people, when surveyed, estimate that it is). The actual probability that the bulge is a gun is 9.1%. In other words, guns can be almost perfectly correlated with bulges even when most bulges aren't, in fact, guns.³⁴⁸

Applying this rationale to the context of gang labeling, if we assume that one percent of people in a geographic area are gang members, and ten percent of people who are not gang members meet some of the criteria for prison gang membership, even if ninety-nine percent of members of a particular gang have a certain tattoo, that does not mean that ninety-nine percent of people with that tattoo are gang members. Rather, the probability that an individual with that tattoo is a gang member is closer

346. See W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511, 511–12 (2018).

347. *Id.*

348. *Id.* (footnote omitted).

to 9.1%.³⁴⁹ Thus, common evidence of gang membership is not as probative as it might seem when we analyze whether the criteria can distinguish between gang members and non-gang members.

Taken together, the extremely high prejudicial effect of gang evidence combined with the low probative value of the evidence supports the proposal to exclude this evidence entirely. This is consistent with the approach some courts have taken with respect to gang evidence in trials.³⁵⁰

Eliminating evidence of tattoos that could represent cultural or racial identity would not fully address the problem, as many decisions are made based on these tattoos before a case arrives before a jury, and these decisions have profound effects on the outcomes of cases. However, this would be a meaningful intervention that could reduce some of the harms associated with overidentifying people as gang members.

B. Legislative Reforms Could Limit Reliance on Gang Membership as a Legal Category

Given the way in which the Supreme Court has limited equal protection claims, legislative recourse may be the best response to this problem. For example, California passed two bills—the California Racial Justice Act of 2020³⁵¹ and the STEP Forward Act of 2021³⁵²—that set forth specific requirements to undo and protect against racial disparities in criminal law.

The California Racial Justice Act includes a legislative declaration that “[e]ven though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms,” because “under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish.”³⁵³

The California Legislature set out to reduce the impacts of “racially coded language, images, and racial stereotypes in criminal trials,” which, it found, were tolerated by existing precedent.³⁵⁴ It deliberately took issue with the Supreme Court’s conclusion in *McCleskey* that racial disparities

349. *See id.*

350. *See, e.g.,* *Burris v. State*, 78 A.3d 371, 392–95 (Md. 2013) (holding that the introduction of evidence of gang membership was more prejudicial than probative); *People v. Albarran*, 57 Cal. Rptr. 3d 92, 104 (2007) (concluding that “certain gang evidence admitted was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran’s actual guilt”).

351. California Racial Justice Act of 2020, Assemb. B. 2542 (Cal. 2020) [hereinafter RJA].

352. STEP Forward Act of 2021, Assemb. B. 333 (Cal. 2021).

353. RJA, § 2(c).

354. *Id.* § 2(e).

are “an inevitable part of our criminal justice system”³⁵⁵ and stated, “we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system.”³⁵⁶

The California Racial Justice Act prohibits convictions or sentences based on race, ethnicity, or national origin and specifies that a defendant can prove a violation of the section if they point to “racially discriminatory language,” which includes “racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin.”³⁵⁷ This could clearly apply to racially coded tattoos as well.

California’s STEP Forward Act of 2021 begins with a series of legislative declarations that recognize the racial bias of gang labeling in the state of California.³⁵⁸ The Legislature went so far as to acknowledge the gang enhancement statute as “one of the largest disparate racial impact statutes that imposes criminal punishments.”³⁵⁹ The new law aims to make it more difficult for prosecutors to establish that an individual is, in fact, a gang member, providing that, at defense counsel’s request, a trial involving a gang enhancement be bifurcated so that a jury must first reach a conclusion about guilt before considering evidence pertaining to a gang enhancement.³⁶⁰ Future legislation should prohibit considering culturally specific tattoos when considering whether an individual is a gang member or associate.

CONCLUSION

Tattoos that represent aspects of people’s cultural and racial identities should not be used to prove gang membership because doing so contributes to the widespread overidentification of Blacks and Latinos as gang members. Once identified as gang members, a different set of rules applies—rules that are much harsher and more punitive than those that apply to the rest of the population. The U.S. Constitution, as it is currently interpreted, is unlikely to meaningfully limit this practice despite clear evidence of racial disparities and evidence that definitions of gang membership often rest on expressions of racial and cultural identity, such as tattoos that say “Chicano” or depictions of culturally significant

355. *Id.* §2(f) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987)).

356. *Id.* § 2(g).

357. *Id.* § 3.

358. STEP Forward Act of 2021, Assemb. B. 333 § 2 (Cal. 2021).

359. *Id.* § 2(d)(2).

360. *Id.* § 5.

symbols such as Aztec warriors or the *huelga* bird. The current legal framework's unwillingness or inability to address a practice that so clearly imposes different treatment—and harsher punishment—based on markers of racial and cultural identity points to the need for reconsidering the constitutional approach to equal protection claims and the need for legislative change.

