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BLOOD'S THICKER THAN WATER:
DEFINING "COMMUNITY" FOR THE
STATEMENT AGAINST SOCIAL
INTEREST EXCEPTION TO THE
HEARSAY RULE REGARDING
DECLARANT- GANG MEMBERS.

Kylie Finley¹

¹ The author wishes to give a special thank you to her research advisor on this note, Professor J.C. Lore.

I. INTRODUCTION

“‘Thou Shalt Not Snitch’ is the Golden Rule of gang culture.”² If you snitch, you die.³ “Snitching” is defined as “the practice by which criminals give information to the police in exchange for material reward or reduced punishment.”⁴ For example, rapper Tekashi69 snitched on his fellow gang members during his in-court testimony for a high-profile racketeering case against members of his former gang, and his life is in such serious danger as a result of that testimony that he is pleading with the courts to transfer him to home confinement, where he will be out of the reach of members of his former gang.⁵ Additionally, a 2018 murder case in Detroit charged three gang members who kidnapped and killed a woman who had been “labeled as a snitch.”⁶ These gang members forced the woman into the back seat of a car, shot her ten times, and then set her corpse on fire.⁷ A former member of the Bloods, Alpha “Swag” Privette, has testified that the “strictest rule” in

² Richard Valdemar, *Developing Gang Informants*, POLICE MAG. (June 28, 2007), <https://www.policemag.com/372973/developing-gang-informants>.

³ *Id.* (“[I]t is an unwritten gang rule to kill informants.”).

⁴ Rosenfeld et al., *Snitching and the Code of the Street*, 43 BRIT. J. CRIMINOLOGY 291, 291 (2003).

⁵ Jenzia Burgos, *Tekashi69 Finally Understands What Happens to Snitches, Wants Out of Prison*, REMEZCLA, (Jan. 16, 2020, 12:06 AM), <https://remezcla.com/music/tekashi-69-snitch-fears-prison/>.

⁶ *3 Gang Members Found Guilty of Killing Denver-area Woman They Labeled a ‘Snitch’*, FOX DENVER, (Jan. 29, 2020, 3:44 PM), <https://kdvr.com/2020/01/29/3-gang-members-found-guilty-of-killing-denver-area-woman-they-labeled-a-snitch/> [hereinafter *3 Gang Members Found Guilty of Killing*].

⁷ *Id.*

a gang is “no snitching.”⁸ During the investigation of a murder in Minneapolis, investigators discovered a video depicting the strangulation of the victim.⁹ The video included audio where the murderer says, while holding the murder weapon around the victim’s neck, “See, see this guy, cop caller, for all you snitches . . . all will suffer the same.”¹⁰ As these examples demonstrate, the label of “snitch carries a price, not just of potential violence, but of ostracism” from the gang.¹¹

Hearsay statements are any out-of-court statement made by a declarant proffered for the truth of the matter asserted.¹² The exception to hearsay for statements made against the interest of the declarant in the State of New Jersey allows for the admissibility of statements made

⁸ Josh Shaffer, *Ex-Raleigh Gang Member: ‘It’s like the plague . . . We’re just killing each other off.’*, THE NEWS & OBSERVER (Oct. 17, 2019, 11:05 AM), <https://www.newsobserver.com/news/local/crime/article236328713.html>.

⁹ Mary Divine, *Suspect’s Alleged Facebook Message with Image of Dead Man’s Body: ‘See, see this guy . . . for all you snitches . . . all will suffer the same,’* TWIN CITIES.COM PIONEER PRESS (Oct. 3, 2019, 5:03 PM), <https://www.twincities.com/2019/10/03/suspects-alleged-facebook-message-with-image-of-dead-mans-body-see-see-this-guy-for-all-you-snitches-all-will-suffer-the-same/> (stating that the murder weapon was a belt).

¹⁰ *Id.*

¹¹ JULIE L. WHITMAN & ROBERT C. DAVIS, SNITCHES GET STITCHES: YOUTH, GANGS, AND WITNESS INTIMIDATION IN MASSACHUSETTS 3 (2007) [hereinafter Whitman & Davis].

¹² N.J. R. EVID. 801. For a more in-depth discussion of hearsay, see *infra* Section II of this note.

against the social interest of the declarant.¹³ The reasoning underlying this exception provides that out-of-court statements against the interest of the declarant at the time that such statements were made should be admitted into evidence,¹⁴ as such statements have been determined to be reliable.¹⁵ While the New Jersey Rules of Evidence, as currently written, do not define “social interest,” the New Jersey Supreme Court has adopted and interpreted the meaning of social interest in accordance with the interpretation given by the legislature and courts for the previous version of the statement against social interest exception.¹⁶

¹³ N.J. R. EVID. 803(c)(25); *State v. Feliciano*, No. A-0221-12T2, 2016 N.J. Super. Unpub. LEXIS 1100, at *57 (App. Div. May 12, 2016) (quoting *State v. Nevius*, 426 N.J. Super. 379, 394 (App. Div. 2012)).

¹⁴ *State v. Norman*, 151 N.J. 5, 31 (1997); *One Step Up, Ltd. v. Sam Logistic, Inc.*, 419 N.J. Super. 500, 508 (App. Div. 2011).

¹⁵ *See Williamson v. U.S.*, 512 U.S. 594, 599 (1994) (stating that the federal statement against interest exception is based on the “commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.”); *see also Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 558 (2019); *see also Portner v. Portner*, 186 N.J. Super. 410, 417 (App. Div. 1982) (citing 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1457 (Chadbourn ed. 1974) (“Statements against one’s . . . interest are ‘unlikely to be deliberately false or heedlessly incorrect’ . . . this guarantee of reliability is why they are made an exception to the hearsay rule.”)); *see also State v. White*, 158 N.J. at 238 (“The statement-against-interest exception is based on the theory that, by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably.”).

¹⁶ *State v. Brown*, 170 N.J. 138, 151 (2001); *see also Feliciano*, 2016 N.J. Super. Unpub. LEXIS 1100, at *58-59 (quoting *Brown*, 170 N.J. 138).
Author’s Note: The court in *Feliciano* did not discuss the meaning or interpretation of “community.” Additionally, the Supreme Court of New

Thus, a statement will be found to be against a declarant's social interest if the statement "created such a risk of making [the declarant] an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true."¹⁷ Neither the New Jersey legislature nor the New Jersey judiciary have defined "community" for purposes of this exception.

Moving forward, "community" must be defined in order to allow for a fact-specific test to determine whether the proffered statement would subject the declarant to hate, ridicule, or social disapproval by the specific community to which the declarant belongs, whether that be the dominant culture or a sub-culture. However, most importantly, "community" for purposes of the statement against social interest exception must be defined to allow for a fact-specific test when considering the specific community of a gang if the declarant is a member of a criminal gang. Community is not universal.¹⁸ It is an individualized concept which explains something completely different than community at large when considering the values and sanctioned behaviors of the gang, which the declarant-gang member has accepted

Jersey has only stated this in dicta; this note calls for a fact-specific test to be made a legal requirement in the interpretation of cases regarding a declarant-gang member.

¹⁷ *Brown*, 170 N.J. at 151.

¹⁸ *See Jacobellis v. Ohio*, 378 U.S. 184, 200-01 (1964) (Warren, C.J., dissenting) ("I believe that there is no provable 'national standard,' and perhaps there should be none . . . communities throughout the Nation are in fact diverse, and it must be remembered that . . . the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.").

through their rejection of the norms and laws of the dominant culture.¹⁹ Therefore, upon a factual finding by the court that the declarant is in fact a member of a gang, the fact-specific test must be applied to the proffered statement against social interest.²⁰

Further, as noted by the Supreme Court of the United States and the New Jersey Supreme Court,²¹ in considering the applicability of the statement against interest exception to the hearsay rule, the individual circumstances of each case must be considered. However, a fact-based determination is particularly important in cases considering statements against the social interest of the declarant. The statement against social interest exception specifically requires, in order for the proffered statement to be admissible, that making the statement created a risk that the declarant could be subjected to hatred, ridicule, or social disapproval in the community. Thus, in cases in which the declarant is a gang member, that declarant has rejected the dominant culture, and therefore, society at large, as their community, and instead has embraced only the values related to membership in the sub-culture of the gang.

¹⁹ Michael Clarke, *On the Concept of 'Sub-Culture,'* 25 BRIT. J. SOCIO. 428, 441, 432 (1974).

²⁰ Author's Note: An implementation of the definition argued for in this note would likely necessitate a pre-trial hearing requiring that a declarant be proven to be a gang member, by a preponderance of the evidence, at a minimum. While such issues are typically factual findings reserved for a jury, the use of such a specific test would require some finding more than a simple proffer by the proponent of the statement.

²¹ See generally *Williamson v. U.S.*, 512 U.S. 594, 601 (1994) ("Whether a statement is in fact against interest must be determined from the circumstances of each case."); *State v. Brown*, 170 N.J. 138, 149 (2001) (quoting and incorporating *Williamson*, 512 U.S. at 601).

Accordingly, in order for a proffered statement against social interest to be appropriately reliable to allow for the admission of that statement at trial, the courts must consider community in regard to the community whose hatred, ridicule, or social disapproval would affect the declarant such that the declarant would not make the statement if it was not true. When a gang member is the declarant, that community is not society at large. The relevant community is their gang. Therefore, a statement which would subject a declarant-gang member to the necessary ostracism by the dominant culture would not have the necessary indicia of reliability for admissibility, because the declarant has rejected that community and its values. Thus, a statement by a declarant-gang member is sufficiently reliable to allow for admissibility only if the statement would subject the declarant to hatred, ridicule, or social disapproval in the declarant's chosen community – their gang.

II. THE STATE OF NEW JERSEY'S APPROACH TO HEARSAY

A. WHAT IS HEARSAY?

Hearsay is defined as an out of court statement made by a declarant proffered for the truth of the matter asserted.²² A statement may be either “an oral or written assertion” or any nonverbal conduct if that conduct was intended to be an assertion by the declarant.²³ A declarant must be a human being.²⁴ There need only be “some evidence” that the declarant was who the party claims it was in order

²² N.J. R. EVID. 801.

²³ N.J. R. EVID. 801(a).

²⁴ N.J. R. EVID. 801(b).

for the statement to be presented to a jury.²⁵ It is then the duty of the jury to determine, from the evidence, whether it is correct that the declarant is who the State says it is.²⁶ The “truth of the matter asserted” simply means that a statement which meets the above requirements is hearsay if the truth of the substance of the statement is the reason it is being proffered.²⁷ Therefore, if the truth of the statement is immaterial, or alternatively, it is being proffered to show it is not a truthful statement, then the statement is not hearsay.²⁸

Hearsay statements are generally disallowed by the federal rules of evidence due to the inherent unreliability of a statement which cannot be cross-examined.²⁹ Therefore, unless an exception which has been codified in the New Jersey Rules of Evidence or has developed due to case law applies,³⁰ hearsay statements are inadmissible, regardless of

²⁵ *State v. Kersey*, No. A-5275-13T3, 2016 N.J. Super. Unpub. LEXIS 2433, at *12 (App. Div. Nov. 7, 2016).

²⁶ *Id.* at *11-12 (noting that the jury charge provided that, before the jury could use the evidence in a determination against the defendant, the jury was required to find that the declarant was in fact who the State claimed the declarant to be).

²⁷ *See* BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE 840 (2020).

²⁸ Author’s Note: An example of this would be a prior inconsistent statement by the declarant to demonstrate that the declarant was lying either previously or during testimony. Another example is a clearly delusional or insane statement (i.e. I own a live purple unicorn), which may be proffered to show the declarant’s state of mind, as it is clear the statement is not being proffered to prove that the declarant actually owns a fantasy creature.

²⁹ *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

³⁰ *See generally* N.J. R. EVID. 803, 804; *State v. Phelps*, 96 N.J. 500, 508 (1984); *State v. Bethune*, 121 N.J. 137, 149 (1990).

which party proffers the statement.³¹ Exceptions to the general bar on admissibility of hearsay statements have been created “out of necessity and are justified on the ground that ‘the circumstances under which the statements were made provide strong indicia of reliability.’”³²

B. THE HISTORY OF THE STATEMENT AGAINST INTEREST EXCEPTION TO THE HEARSAY RULE

The statement against interest exception the State of New Jersey allows for the admission of “[a] statement which was at the time of its making so far contrary to the declarant's . . . social interest . . . that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true.”³³ The reasoning supporting the statement against interest exception is that “by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably’ and that, accordingly, ‘statements that so disserve the declarant are deemed inherently trustworthy and reliable.’”³⁴ The statement must have been against the declarant’s

³¹ N.J. R. EVID. 802.

³² *State v. White*, 158 N.J. 230, 238 (1999) (quoting *Phelps*, 96 N.J. at 508 (1984)).

³³ N.J. R. EVID. 803(c)(25); *State v. Feliciano*, No. A-0221-12T2, 2016 N.J. Super. Unpub. LEXIS 1100, at *57 (App. Div. May 12, 2016) (quoting *State v. Nevius*, 426 N.J. Super. 379, 394 (App. Div. 2012)).

³⁴ *Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 558 (2019); *see also* *Portner v. Portner*, 186 N.J. Super. 410, 417 (App. Div. 1982) (citing 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1457 (Chadbourn ed. 1974) (“Statements against one’s . . . interest are ‘unlikely to be deliberately false or heedlessly incorrect’ . . . this guarantee of reliability is why they are made an exception to the hearsay rule.”)); *White*, 158 N.J. at 238 (“The

interest at the time to statement was made in order to qualify.³⁵ Additionally, “there must be some evidence establishing that the putative declarant actually made the statement.”³⁶ In order for such a statement to be admitted at trial, the declarant of the statement need not be a party to the matter.³⁷ Additionally, the declarant need not be available to testify at trial in order for such a statement to be admitted as an exception to the hearsay exclusionary rule.³⁸

However, the judiciary must exercise caution in determining the “general reliability or trustworthiness” of an out of court statement

statement-against-interest exception is based on the theory that, by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably.”); *Williamson v. United States*, 512 U.S. 594, 599 (1994) (stating that the federal statement against interest exception is based on the “commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true”).

³⁵ *State v. Norman*, 151 N.J. 31, 31 (1997); *One Step Up, Ltd. v. Sam Logistic, Inc.*, 419 N.J. Super. 500, 508 (App. Div. 2011).

³⁶ *State v. Sawyer*, No. A-4786-15T2, 2019 WL 361640, at *14 (N.J. Super. Ct. App. Div. Jan. 30, 2019), *cert. denied*, 216 A.3d 971 (2019) (quoting BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE, cmt. 2 (2018) (internal quotes omitted)).

³⁷ *One Step Up, Ltd.*, 419 N.J. Super. at 508 (quoting RICHARD J. BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE, cmt. 2 (2010)).

³⁸ *Id.*; *Rowe*, 239 N.J. at 558 (allowing statements against interest to be admitted whether or not the declarant testifies at trial); The Federal Rules of Evidence require the unavailability of the witness in order for a statement to be admitted under the statement against interest exception, while the New Jersey Rules of Evidence do not. *See State v. Barry*, 86 N.J. 80, 91 (1981) (holding that a lower court erred in finding that the use of the statement against interest exception required unavailability of the witness).

proffered as a statement against interest.³⁹ The primary consideration of the Court in determining the admissibility of a proffered statement against interest must be its intrinsically “self-incriminating character.”⁴⁰ Courts may not use extrinsic circumstances to determine the admissibility of a statement against interest, as “it is a statement’s self-incriminating character which renders a declaration against interest,” rather than the extrinsic circumstances, which demonstrate the reliability and trustworthiness of the statement proffered.⁴¹

1. PENAL INTEREST EXCEPTION

In order for a hearsay statement to be admitted as a statement against the declarant’s penal interest, the statement must have “so far subjected [the declarant] to . . . criminal liability . . . that a reasonable person would not have made [it] unless he believed it to be true.”⁴² The penal interest exception is supported by the premise that an individual would not confess to criminal activity which could result in criminal

³⁹ State v. White, 158 N.J. 230, 240 (1999).

⁴⁰ *Id.*

⁴¹ *Id.*; see also *Rowe*, 239 N.J. at 558.

⁴² State v. Gomez, 246 N.J. Super. 209, 215 (App. Div. 1991) (citing State v. Abrams, 72 N.J. 232, 342, 370 (App. Div. 1976) (Clifford, J., concurring and dissenting)); see also State v. Feliciano, No. A-0221-12T2, 2016 N.J. Super. Unpub. LEXIS 1100, at *57 (App. Div. May 12, 2016) (quoting State v. Nevius, 426 N.J. Super. 379, 394)); but see *Gomez*, 246 N.J. Super. at 215. Under the previous rule, the penal interest exception did not require that “each discrete part” of the statement implicated criminal activity.

punishment if he were not guilty and therefore the statement is true.⁴³ The admissibility of a statement proffered as against a declarant's penal interest "must be determined on 'a statement's self-incriminating character' alone."⁴⁴

The Court has further held that "[s]tatements by a declarant that exculpate another, 'inferentially indicate[] his own involvement . . . and are considered sufficiently against the declarant's penal interests to be admissible."⁴⁵ Conversely, the courts have held self-exculpatory statements made after the commission of a crime to be inherently unreliable.⁴⁶ A person is most likely to make a statement which tends to exculpate themselves from criminal liability when facing penal consequences, even if that statement is false.⁴⁷ However, a statement will not be denied admission under the statement against penal interest exception simply because the statement is "a mixture of exculpatory and incriminatory statements."⁴⁸ Regarding statements which are both

⁴³ *Gomez*, 246 N.J. Super. at 215. See also *Williamson v. United States*, 512 U.S. 594, 600 (1994) ("The fact that a statement is self-inculpatory does make it more reliable.").

⁴⁴ *State v. Williams*, 169 N.J. 349, 359 (2001) (quoting *White*, 158 N.J. at 240).

⁴⁵ *State v. Norman*, 151 N.J. 5, 31 (1997) (holding that a statement by a declarant that he, rather than another individual, had shot the victim was admissible under the statement against penal interest exception).

⁴⁶ *Gomez*, 246 N.J. Super. at 215-16.

⁴⁷ *Williamson*, 512 U.S. at 600

⁴⁸ *State v. Weaver*, 219 N.J. 131, 158-59 (2014). See also *White*, 158 N.J. at 239 (emphasis omitted) ("[S]tatements that exculpate the declarant from liability by shifting blame to another . . . are inherently self-serving and presumptively unreliable"); *Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 559 (2019) ("[T]he test of admissibility under N.J. R. EVID. 803(c)(25) is

exculpatory and incriminatory, those statements which incriminate an opposing party to the declarant may be considered less credible or to hold less weight with the factfinder.⁴⁹ Further, statements which inculcate a criminal defendant and were not made by the defendant are inadmissible in a criminal trial against the defendant, due to constitutional concerns and the explicit text of the statement against interest exception in New Jersey.⁵⁰

‘whether, in the context of the whole statement, the particular remark was plausibly against the declarant’s penal interest, even though it might be neutral or even self-serving if considered alone’). *See also Williamson*, 512 U.S. at 600 (“[W]hen part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable . . . and mere proximity to other, self-inculpatory statements does not increase the plausibility of the self-exculpatory statements”).

⁴⁹ N.J. Div. of Child Prot. and Permanency v. N.T., 445 N.J. Super. 478, 499-500 (App. Div. 2016); *see also Williamson*, 512 U.S. at 599-600 (“The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.” Note that *Williamson* considered the statement against interest exception provided for in the Federal Rules of Evidence.).

⁵⁰ *White*, 158 N.J. at 239 (emphasis omitted). *See also* N.J. R. EVID. 803(c)(25) (“Such a statement is admissible against an accused in a criminal action only if the accused was the declarant”); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (“[A]rrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.”); *Williamson*, 512 U.S. at 603 (holding that inculpatory confessions by arrested

Statements by a declarant which exculpate a criminal defendant may be admitted under this exception “if, when considered in the light of surrounding circumstances, they subject the declarant to criminal liability or if, as a related part of a self-inculpatory statement, they strengthen or bolster the incriminatory effect of the declarant’s exposure to criminal liability.”⁵¹ Further, the New Jersey Appellate Division in *State v. Abrams* held that a hearsay statement which tended to exculpate the defendant was admissible under the statement against penal interest exception when the statement suggested that the declarant was “not merely [defendant’s] agent or partner” in the crime because the statement additionally “intensifie[d] her personal criminal responsibility for the transaction.”⁵² Additionally, a “defendant’s self-serving, exculpatory representations do not constitute a declaration against penal interest” because, even statements that are “not entirely exculpatory,” if “intended to minimize or mitigate [declarant’s]

accomplices may be admitted under Rule 804(b)(3) “if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.”).

⁵¹ *White*, 158 N.J. at 244; *See generally* Adam Banner, *Do People Really Try to Take the Rap for Someone Else’s Criminal Charges?*, ABA JOURNAL, (June 27, 2019, 7:00 AM), <http://www.abajournal.com/news/article/how-often-do-others-try-to-take-the-rap-for-anothers-criminal-charges> (“[M]any people who take the blame for another person’s crime are telling the truth”); *but see id.* (“The Patsy Problem happens when a gullible individual is dumb enough (or devoted enough . . .) to take the fall for another’s criminal wrongdoing . . . the majority of cases involve a felon accused of ‘being in possession’ of a firearm after conviction. Very often in these situations, a friend of family member will step forward and claim that the firearm is theirs.”).

⁵² *State v. Abrams*, 140 N.J. Super. 232, 235 (App. Div. 1976).

exposure to the more serious offense” for which they could be charged, are no longer “inherently trustworthy.”⁵³

Additionally, the New Jersey Supreme Court in *Williams* found that an out-of-court statement facially exposed the declarant to criminal liability because the statement implicated the declarant in numerous crimes, including murder.⁵⁴ Because the proffered statement was self-incriminating on its face, the Court held that the statement fell within the statement against interest exception for the admissibility of evidence, as the statement “undoubtedly was against his penal interest.”⁵⁵ The Court expressly provided that neither the extrinsic circumstances in which the statement was made nor the specificity of the statement may be considered in determinations of admissibility, stating that those considerations were for the trier of fact to take into account when considering the weight of that statement as evidence.⁵⁶

2. PECUNIARY INTEREST EXCEPTION

For a statement to be found against a declarant’s pecuniary interest, the statement must typically subject the declarant to civil liability or an acknowledgement that the declarant “does not own certain land or personal property.”⁵⁷ The most common declarations against pecuniary interest are those “acknowledgments that the declarant does

⁵³ State v. Feliciano, No. A-0221-12T2, 2016 N.J. Super. Unpub. LEXIS 1100, at *58 (App. Div. May 12, 2016) (citing State v. Nevius, 426 N.J. Super. 379, 394-95 (App. Div. 2012)).

⁵⁴ State v. Williams, 169 N.J. 349, 358, 360 (2001).

⁵⁵ *Id.* at 360-361.

⁵⁶ *Id.* at 361.

⁵⁷ BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE, cmt. 3 (2020).

not own certain land or personal property.”⁵⁸ *Portner* exemplifies this concept, in which the New Jersey Appellate Division held that “a statement by a person who has title to valuable property that the property belongs to someone else” must be considered to fall under this exception to hearsay.⁵⁹ Wigmore’s treatise on evidence further provides that, regarding statements against pecuniary interest,

“[a] statement predicating of oneself a limited interest instead of a complete title to property asserts a fact decidedly against one’s interest, and has always been so regarded. In particular, assertions that one’s estate is a leasehold, not a freehold, or that one’s possession is merely as agent or as trustee for another, are admissible.”⁶⁰

Additionally, the New Jersey Appellate Division in *Gomez* reasoned that a statement in which a declarant admits to a violent act that was justified, for example, in self-defense, does not fall under the statement against interest exception,⁶¹ as such a statement exonerates the declarant from criminal liability.⁶²

3. SOCIAL INTEREST EXCEPTION⁶³

⁵⁸ *Portner v. Portner*, 186 N.J. Super. 410, 417 (App. Div. 1982) (citing MCCORMICK ON EVIDENCE § 277 at 671 (Cleary 2d ed. 1972)).

⁵⁹ *Id.* at 417.

⁶⁰ *Id.* (citing 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1458 (Chadbourn ed. 1974)) (emphasis omitted).

⁶¹ Author’s note: The *Gomez* Court considered the rule of evidence regarding statements against interest prior to the 1991 revision, not the current version of the rule.

⁶² *State v. Gomez*, 246 N.J. Super. 209, 216–17 (App. Div. 1991).

⁶³ Author’s note: the Federal Rules of Evidence do not allow for a statement against social interest to be admitted under the statement against interest exception. See FED. R. EVID. 804(b)(3).

While the legislature has not defined “social interest,” the New Jersey Supreme Court in *Brown*, the landmark case for the statement against social interest exception in the State of New Jersey, used the definition from the prior rule of evidence.⁶⁴ Accordingly, a statement is found to be contrary to a declarant's social interest when the statement creates a “risk of making [the declarant] an object of hatred, ridicule, or social disapproval in the community” such that “a reasonable man in his position would not have made the statement unless he believed it to be true.”⁶⁵ This definition was provided in the previous New Jersey Rule 63(10), and the current text of the exception is identical to the text of that former rule.⁶⁶ However, the Court in *Brown* did not define “community.”⁶⁷ Instead, the Court simply stated that a police informant whose statements were made “within the context of [their] investigatory role” did not satisfy the statement against interest exception, without

⁶⁴ N.J. R. EVID. 63(10); *State v. Brown*, 170 N.J. 138, 151 (2001); *see also State v. West*, 145 N.J. Super. 226, 232, 233 (App. Div. 1976) (holding a witness’s statements, under the old rule of evidence, were against his social interest because they could “be expected to make of him an ‘object of hatred, ridicule or social disapproval’”). Note that the NJRE were extensively revised in 1991, but the substance of the statement against exception was unchanged. It should also be noted that the Court in *West* gave no reasoning for its finding, nor did the Court explain its analysis of the statement.

⁶⁵ N.J. R. EVID. 63(10); *Brown*, 170 N.J. at 151; *see also West*, 145 N.J. Super. at 232-33 (holding that the statements, “if made, contrary to [the declarant’s] interest within the meaning of [the statute] . . . can be expected to make of him an ‘object of hatred, ridicule, or social disapproval’”).

⁶⁶ BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE (2020).

⁶⁷ *See generally Brown*, 170 N.J. 138.

coming to an express determination regarding how to define community under the rule.⁶⁸

The Court in *Brown* held that, because the declarant had been used as a police informant on various prior occasions, “no reason [existed] why [he or she] should be treated any differently [from] a police officer who works undercover in drug trafficking as an agent of the government . . . because the informant was acting as an agent of the State” at the time of the proffered statements, there existed no risk of subjecting the declarant to hatred, ridicule, or social disapproval by society.⁶⁹ In its analysis, the Court ignored the declarant’s prior criminal background and participation in the criminal sub-culture, and instead considered the declarant’s community to be society at large.⁷⁰ If extended to other situations, the *Brown* holding could prevent the use of the statement against social interest exception for all cases relying on statements made by declarant-gang members to law enforcement because of its lack of a fact-specific consideration. However, there are two ways to avoid this outcome. First, *Brown* could remain applicable to only those limited facts. Alternatively, *Brown* could be interpreted to have found that, due to the declarant in that case’s lengthy history of informing to the police, the declarant had effectively renounced his membership in the criminal sub-culture, returning to the dominant culture. However, in the two decades since the *Brown* decision, neither the Court nor the legislature has defined community.

III. PSYCHOLOGY AND SOCIOLOGY OF CRIMINALITY

A. CULTURE AND COMMUNITY

⁶⁸ *Id.* at 151.

⁶⁹ *Id.* at 152.

⁷⁰ *See generally* State v. Brown, 170 N.J. 138 (2001).

Culture affects and influences all aspects of life.⁷¹ Culture encompasses the way people live their lives, from food, clothing, and music, to morals and considerations of and behaviors around family.⁷² Culture invades every aspect of one's being, as the compilation of how a person fits into the community.⁷³ On a larger scale, "[c]ulture is the characteristics and knowledge of a particular group of people."⁷⁴ The Center for Advanced Research on Language Acquisition defines culture as "shared patterns of behaviors and interactions, cognitive constructs, and affective understanding that are learned through a process of socialization. These shared patterns identify the members of a culture group while also distinguishing those of another group."⁷⁵

Tangible objects, tools, and artifacts are not what creates a culture. Instead, what creates the culture is "how the members of the

⁷¹ *What is Culture?*, UNIV. OF MINN. CTR. FOR ADVANCED RESEARCH ON LANGUAGE ACQUISITION, <http://carla.umn.edu/culture/definitions.html> (Apr. 9, 2019) (quoting Louise Damen, *Culture Learning: The Fifth Dimension in the Language Classroom* 367 (Addison-Wesley, 1987)).

⁷² Kim Ann Zimmerman, *What Is Culture?*, LIVESCIENCE, (July 13, 2017), <https://www.livescience.com/21478-what-is-culture-definition-of-culture.html>.

⁷³ *Id.*

⁷⁴ *Id.* See also UNIV. OF MINN. CTR. FOR ADVANCED RESEARCH ON LANGUAGE ACQUISITION, *supra* note 71 (quoting John Useem et al., *Men in the Middle of the Third Culture: The Roles of American and Non-Western People in Cross-Cultural Administration*, 22 HUM. ORG., no.3, 169, 169 (1963) ("Culture has been defined . . . most simply, as the learned and shared behavior of a community of interacting human beings.")).

⁷⁵ UNIV. OF MINN. CTR. FOR ADVANCED RESEARCH ON LANGUAGE ACQUISITION, *supra* note 71.

group interpret, use, and perceive” these items.⁷⁶ The way in which cultures are differentiated from one another is through “the values, symbols, interpretations, and perspectives” of that particular culture, as “[p]eople within a culture usually interpret the meaning of symbols, artifacts, and behaviors in the same or in similar ways.”⁷⁷ Culture can additionally be defined as “the growth of a group identity fostered by social patterns unique to the group.”⁷⁸ Thus, culture can be used to distinguish groups from one another.⁷⁹

B. THE SUB-CULTURE OF GANGS AND GANG MEMBERSHIP⁸⁰

The label of snitch carries a lifelong price. At best, a snitch will be ostracized from their community. At worst, they will be murdered.

⁷⁶ *Id.* (quoting JAMES A. BANKS & CHERRY A. MCGEE BANKS, MULTICULTURAL EDUCATION (1989)).

⁷⁷ *Id.*

⁷⁸ Kim Ann Zimmerman, *supra* note 72.

⁷⁹ UNIV. OF MINN. CTR. FOR ADVANCED RESEARCH ON LANGUAGE ACQUISITION, *supra* note 71 (quoting Geert Hofstede, *National Cultures and Corporate Cultures*, in COMMUNICATION BETWEEN CULTURES 51 (Larry A. Samovar & Richard E. Porter eds., 1984)).

⁸⁰ Author’s note: Some sociologists consider the term “gang” loosely, sometimes including less formalized gangs which may only have two or three members. See Paul Lerman, *Gangs, Networks, and Subcultural Delinquency*, 73 AM. J. OF SOCIO. 1, 63, 70 (1967), https://www.jstor.org/stable/2776128?seq=1#metadata_info_tab_contents. Further, this note considers the statement against interest exception as it specifically relates to declarant-gang members, as general criminality differs from the more structured gang sub-culture.

The code of the streets will not be ignored; those who violate it will be punished.⁸¹

A subculture is defined as “a segment of society that shares a distinctive pattern of . . . [norms] . . . and values that differs from the pattern of the larger society . . . a culture existing within a larger, dominant culture.”⁸² The attitudes and norms within a given sub-culture contradict those of the dominant culture.⁸³ However, it is important to note that a given sub-culture will differ greatly from another unrelated sub-culture, such that each sub-culture will have “separate traditions and styles – the hippy may have little understanding of the skinhead, or the revolutionary.”⁸⁴ Each individual sub-culture

⁸¹ Rosenfeld, et al., *supra* note 4, at 299.

⁸² Michael K. Carlie, *Into the Abyss: A Personal Journey into the World of Street Gangs* (2002), http://people.missouristate.edu/MichaelCarlie/what_I_learned_about/gangs/culture.htm (quoting Richard T. Shaefer, *Sociology* (McGraw-Hill, 7th ed. 2001)); *see also* Elijah Anderson & James F. Short, *Delinquent and Criminal Subcultures*, LAW.JRANK.ORG, <https://law.jrank.org/pages/954/Delinquent-Criminal-Subcultures.html> (last visited Oct. 7, 2020). (“The critical element in defining a subculture, however, is the extent to which the shared values, norms, and identities associated with a membership category or a behavior pattern distinguishes the category or pattern of behavior from the larger, more inclusive, social and cultural systems with which it is associated.”).

⁸³ Christian Wickert, *Subcultural theory (Cohen)*, SOZTHEO, https://soztheo.de/theories-of-crime/learning-subculture/subcultural-theory-cohen/?lang=en#implication_for_criminal_policy (last updated May 10, 2019).

⁸⁴ Clarke, *supra* note 19, at 432.

will therefore have its own “system[] of norms,⁸⁵ values, interests, and related artifacts.”⁸⁶ Specifically relating to criminal sub-cultures, these norms, values, interests, and artifacts support the values of the sub-culture of the gang.⁸⁷ This sub-culture necessarily includes supporting and facilitating the criminal activity which is an inherent part of life for members of a sub-culture of a criminal gang.⁸⁸ Therefore, snitching would go directly against the norms, values, and interests that support the criminal behavior inherent in the sub-culture of the gang because it could possibly lead to the conviction and incarceration of one of their fellow gang members. Accordingly, snitching would clearly be outside the social interest of the declarant-gang member. Further, while each individual gang will vary on a micro-level as to factors such as the specifics of a code of conduct, the appropriate clothing, and the vocabulary used, generally, there is very minimal variance among gangs regarding their main tenants and codes.⁸⁹ Specifically, either implicitly or explicitly, individual gang members are taught the code of the gang, which, universally is “Thou Shalt Not Snitch.”⁹⁰ While sub-cultures

⁸⁵ See Carlie, *supra* note 82 (“[N]orms are behavioral expectations”).

⁸⁶ Anderson & Short, *supra* note 82.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Carlie, *supra* note 82.

⁹⁰ Valdemar, *supra* note 2; Carlie, *supra* note 82; see also John Mack, *Full-Time Miscreants, Delinquent Neighbourhoods and Criminal Networks*, 15 BRIT. J. OF SOCIO. 38, 48 (1964) (“It is on the face of it unusual that one criminal should inform against another . . . break[ing] the code”). In this instance, Mack was referring to two criminals who did not appear to be particularly close, just in the same general “criminal network throughout the west of Scotland.” *Ibid.* The author postured that the reasoning behind this particular seeming betrayal was that the informant “was not a member of the

have great influence over their own members,⁹¹ in order to be considered a sub-culture, that community must not be a dominant culture in society.⁹² In fact, a sub-culture is that which is “distinctively different” from the dominant culture, with some sub-cultures rejecting at least part, if not all, of the dominant culture.⁹³ Thus, to determine where a sub-culture exists, the “nature and boundaries” of the dominant culture must be first determined.⁹⁴ A determination of these boundaries is rarely difficult, as the behavioral patterns and accepted norms of the members of the sub-culture are fundamentally different than the behavior of the dominant culture.⁹⁵ The dominant culture is that which “most people act or believe” in or if that is “the culture of the most powerful group which can impose its practices and definitions on the others where it thinks fit[.]”⁹⁶ For example, the dominant culture, specifically regarding criminality, includes the practice of not performing criminal acts.

Certain social factors, including age, sex, religion, socioeconomic status, and race have “extensive cultural implications”

particular corner of the network to which [the criminal] belonged.” *Id.* at 48-49. (“He was an outside. He didn’t ‘run with’ the Gallowgate crowd. In his own area . . . he did belong.”) *Id.*

⁹¹ Author’s Note: While certain aspects of gang culture, which have been exemplified in pop culture through media such as rap music and movies, may have influences over members of the dominant culture, the essence of the gang, their code, is not part of the values and norms of the dominant culture.

⁹² Clarke, *supra* note 19, at 431.

⁹³ *Id.* at 432.

⁹⁴ *Id.*

⁹⁵ Wickert, *supra* note 83.

⁹⁶ Clarke, *supra* note 19, at 431.

regarding the formation of sub-cultures, but particularly regarding the formation of criminal sub-cultures such as gangs.⁹⁷ Sub-cultures generally only arise when detachment from other groups in society is combined with some form of marginalization by the dominant culture, as well as ideologies and interests specific to that cohort.⁹⁸ Turning specifically to socioeconomic status, categorization in a lower socioeconomic class may be a driving factor behind the creation of a sub-culture or the decision by an individual to join the sub-culture.⁹⁹ Where socioeconomic status is such a factor, the rejection of the values and behavioral patterns of the dominant culture by the individual may be caused by the lack of opportunities, particularly regarding the path to and definition of success accepted by the dominant culture, which a person of lower socioeconomic status suffers in the United States.¹⁰⁰ Therefore, especially when considering individuals who reject the dominant culture at a young age, such individuals frequently join other individuals who are willing to completely “reverse[] the norms and

⁹⁷ *Id.* It should be noted that sociologists argue that “gang” is not synonymous with “sub-culture.” Lerman, *supra* note 80, at 71. However, that is exactly the point this author hopes to convey, as not all sub-cultures are gangs; gangs are simply one type of sub-culture.

⁹⁸ Clarke, *supra* note 19, at 431.

⁹⁹ Karl Thompson, *Subcultural Theories of Deviance*, REVISESOCIOLOGY (May 31, 2016), <https://revisesociology.com/2016/05/31/subcultural-theories-crime-deviance/>; *see also* Carlie, *supra* note 82 (“The idea that gangs represent a subculture, combined with the notion that street gangs are most commonly found in lower class neighborhoods, has been around for nearly fifty years.”).

¹⁰⁰ *Id.*

values of mainstream culture,” creating or joining a sub-culture.¹⁰¹ This rejection of the norms and values of the dominant culture leads to “success” within the context of the sub-culture of the gang being re-defined as the most deviant behavior.¹⁰² Thus, going against the deviant values, norms, and mores of the sub-culture of the gang by informing law enforcement of the criminal activity of a fellow gang member would be socially disapproved of, leading to, at a minimum, ridicule, hatred, and social disapproval in their chosen community of the gang.

A sub-culture which revolves around criminality may be found where a group shares “deviant values,” a specific speech pattern or vocabulary, a specific type of behavior, and a different moral code than that of the dominant culture.¹⁰³ Conforming to these differences allows the members of the sub-culture to become successful within the terms of the gang.¹⁰⁴ In fact, criminal sub-cultures are frequently viewed as

¹⁰¹ Thompson, *supra* note 99. One reason for this complete shift is that the natural lack of cognitive development in young people leads to an inability to think in complex ways. Thus, youth typically only have the cognitive ability to think in “black and white,” or extremely rigid and extreme terms. *Understanding families: Dealing with ‘Black and White’ Thinking*, JESUIT SOCIAL SERVICES, <http://www.strongbonds.jss.org.au/workers/youngpeople/thinking.html> (last visited Oct. 10, 2020).

¹⁰² Thompson, *supra* note 99; *see also* *Understanding families: Dealing with ‘Black and White’ Thinking*, *supra* note 101 (“Status may be gained by being malicious, intimidating others, breaking school rules or the law and generally causing trouble.”).

¹⁰³ Lerman, *supra* note 80, at 63; Wickert, *supra* note 83.

¹⁰⁴ Wickert, *supra* note 83.

“a form of shared, collective deviance.”¹⁰⁵ It has further been argued that “deviance is the result of whole groups breaking off from society who have deviant values (subcultures) and deviance is a result of these individuals conforming to the values and norms of the subculture to which they belong.”¹⁰⁶ Further, without the marginalization necessary to form such a sub-culture,¹⁰⁷ this specific type of collective deviance related to gang membership would not occur.¹⁰⁸

In fact, the influence of the criminal sub-culture generally, as well as the influence of other individual members of the sub-culture, have been hypothesized to be extremely influential in leading a person to commit deviant criminal acts.¹⁰⁹ Therefore, when considered against other factors found to have correlational or causal relationships with criminality,¹¹⁰ the gang is the most relevant determinant in predicting

¹⁰⁵ Lerman, *supra* note 80, at 71; author’s note: the words “counterculture” and “sub-culture” relate to the same concept regarding criminal sub-cultures specifically. For continuity’s sake, this note uses “sub-culture” throughout. See MERRIAM-WEBSTER, *Counterculture*, <https://www.merriam-webster.com/dictionary/counterculture> (last visited Feb. 24, 2020) (defining counterculture as “a culture with values and mores that run counter to those of established society”); Thompson, *supra* note 99 (“A Subculture is a group that has values that are different to the mainstream culture.”).

¹⁰⁶ Thompson, *supra* note 99.

¹⁰⁷ Clarke, *supra* note 19, at 431.

¹⁰⁸ Thompson, *supra* note 99.

¹⁰⁹ *Id.*; see also Wickert, *supra* note 83. (“[Cr]iminals . . . As members of subcultures, they are subject to different behavioural requirements based on values and norms that deviate from those of mainstream society.”).

¹¹⁰ See *What Influences Criminal Behavior?* WALDEN UNIVERSITY, <https://www.waldenu.edu/online-bachelors-programs/bs-in-criminal-justice/resource/what-influences-criminal-behavior> (last visited Oct. 10, 2020) (explaining that common risk factors for criminal activity include biological

whether an individual involved in a gang will commit a future crime.¹¹¹ In fact, it has been shown that criminal behavior, particularly committed by individuals who are members of a criminal sub-culture, is often due to the members' need to conform to the values and norms of the gang.¹¹² Therefore, gang membership is so influential that it leads previously law-abiding individuals to commit crimes which would not have been committed but-for those individuals' memberships in the gang.

The existence of a sub-culture can be determined based on "evidence as to who is in and who is out, what it means to be in and what kind of person is in, and most importantly that there is a feeling that being in is significant."¹¹³ The universality of particular indicia or identifying characteristics of belonging to a gang can be exemplified by those elements of identity of gang membership and gang culture which are similar across gangs. Such elements include extensive initiation processes or wearing only a specific color of clothing to signify identity as a member of a specific gang. However, across gangs, even if the specifics of these indicia differ. Additionally, membership in a gang is so significant that the gang becomes the individual member's *de facto* family.¹¹⁴ Approximately one-half of gang members cite "friendship or

risk factors, adverse childhood experiences, negative social environments, and substance abuse).

¹¹¹ Thompson, *supra* note 99.

¹¹² *Id.*

¹¹³ Clarke, *supra* note 19, at 433.

¹¹⁴ Shaffer, *supra* note 8; *see also* S.E. HINTON, *THE OUTSIDERS* 26 (Penguin Books, 1995) ("You take up for your buddies, no matter what they do. When you're a gang, you stick up for the members. If you don't stick up for them, stick together, make like brothers, it isn't a gang anymore."). *But see* Lerman, *supra* note 80, at 66-71 (arguing that cliques of two to three

protection” as a reason for joining the gang,¹¹⁵ while one-third of gang members joined once blood relatives joined the gang.¹¹⁶ Thus, the gang becomes the individual’s community and family,¹¹⁷ frequently including actual blood relatives.¹¹⁸

It is well-known that gangs recruit new members in order to expand their family.¹¹⁹ These recruits are often extremely young at the time of their joining the gang. The average age of an individual joining a gang is 12 years old, with some members joining before they reach ten years old.¹²⁰ Therefore, before most of the gang members even start puberty, they have been indoctrinated with the code of the gang, including that the first rule of the gang and the first rule of survival in the life of a gang member is “not to cooperate with cops.”¹²¹ “Thou

individuals within a gang is much more important to and influential over the individual member than the larger structure of the gang).

¹¹⁵ Whitman & Davis, *supra* note 11, at 20; *See also* THE OUTSIDERS (Zoetrope Studios 1983). (“They grew up on the outside of society. They weren’t looking for a fight. They were looking to belong.”).

¹¹⁶ Whitman & Davis, *supra* note 11, at 20. It should be noted that these gang members interviewed in this study were juveniles from Massachusetts; however, these gang members are generally representative of the purposes and reasoning behind joining the gang. Further, as discussed, while there are specific indicia, such as clothing or vocabulary, which differ among gangs, there are universal concepts among all gangs within the sub-culture of gang life. *See* Carlie, *supra* note 82.

¹¹⁷ *See* Shaffer, *supra* note 8 (stating that the gang is “family”).

¹¹⁸ Whitman & Davis, *supra* note 11, at 20. Blood relatives are included about one third of the time.

¹¹⁹ Mack, *supra* note 90, at 51.

¹²⁰ Whitman & Davis, *supra* note 11, at 20.

¹²¹ Valdemar, *supra* note 2; *see also* UNIV. OF MINN. CTR. FOR ADVANCED RESEARCH ON LANGUAGE ACQUISITION, *supra* note 71 (quoting TALCOTT

Shalt Not Snitch' is the first commandment of the gang culture,"¹²² and it is well-known throughout the sub-culture of the gang that snitches will be killed.¹²³ In fact, among young gang members, the two most common reasons given for not reporting criminal activity which the gang members knew about were "not want[ing] to be seen as a snitch" and a "fear of being beaten up or killed."¹²⁴ The former is due to the fact that, while the physical attacks may not be immediately following the individual's conversation with law enforcement, eventually the gang will retaliate against a violator of the code of conduct.¹²⁵

PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 8 (1949)) (stating that culture is the behavior passed down from person to person and generation to generation, regardless of biological ties).

¹²² Valdemar, *supra* note 2; *see also* Mack, *supra* note 90, at 49 ("[T]he network, such as it is, is sustained by a common code of not talking to the police."); Rosenfeld et al., *supra* note 4, at 298 ("Snitching is universally condemned."); LoftyLife, *Jugga x Killahman - Mandown Dir By @Luzity*, YOUTUBE (Aug. 14, 2015), <https://www.youtube.com/watch?v=GECBx1jhJXE> ("Mandown, Mandown, Mandown, everybody here asking who did it. I'm true to my religion, can't change on my n****s"). Author's Note: Jugga and Killahman are two suspected gang members from New Jersey.

¹²³ Valdemar, *supra* note 2.

¹²⁴ Whitman & Davis, *supra* note 11, at 4.

¹²⁵ Rosenfeld et al., *supra* note 4, at 304; *see also id.* ("danger does not disappear when s/he has ceased to provide information to the police – indeed, it may increase"); Valdemar, *supra* note 2. Many gangs maintain websites in order to easily and publicly identify snitches. Examples of such websites include "Who's a Snitch" and "Stop Snitching."; Rosenfeld et al., *supra* note

While the values, interests, and approved behaviors of a given sub-culture may not have been significant for a given individual in the past, there may arise a point in time at which those values and interests “suddenly gain salience and the cultural differences which existed all along are suddenly brought into focus.”¹²⁶ Specifically, snitching as a violation of the norms of the gang is not relevant to the life of a future gang member who is still conforming to the dominant culture. The ban on snitching or talking to law enforcement only becomes a part of the individual’s life once in the gang. Further, this phenomenon relates to snitching because a gang’s code against snitching is not salient or important until someone breaks that code. At that point, the code relating to snitching and the required punishment for breaking the code become salient and primary in the lives and actions of the members of the gang. The core nature of a gang is the often explicit rule that the gang is more important than anything else, but that rule is not salient until a member’s loyalty is tested.¹²⁷

“[I]solation or partition from the rest of society and culture” is additionally an important part of the identifying of a sub-culture as distinct from the dominant culture.¹²⁸ This isolation leads to the members of the sub-culture holding a status of “outsider” in the eyes of the dominant culture.¹²⁹ This is particularly due to the high levels of permanent conflict between the dominant culture and a sub-culture,

4, at 304 (reporting that if “the person that you told on” finds out that you were the snitch, “they gonna wind up killing you.”).

¹²⁶ Clarke, *supra* note 19, at 433.

¹²⁷ LoftyLife, *Jugga x Killahman - Mandown Dir By @Luzity*, YOUTUBE (Aug. 14, 2015), <https://www.youtube.com/watch?v=GECEBx1jhJXE> (“they all on us but I would never snitch because its loyalty and trust.”).

¹²⁸ Clarke, *supra* note 19, at 430–31.

¹²⁹ *Id.*

particularly when that sub-culture is a gang.¹³⁰ Membership in a sub-culture permeates all aspects of the member's life, generally becoming the primary identifying facet of someone's being.¹³¹ At its strongest, membership in a sub-culture will become synonymous with one's identity, particularly as that person views themselves in relation to society and how society views them.¹³² Further, the identity of the member of the sub-culture may be partially formed due to, or strengthened and reinforced by, the stigma that comes with such an identity.¹³³ This formation or reinforcement is much stronger and more likely to occur when considering gang members. It is extremely common for a "gang member's whole existence" to revolve around his membership in the gang.¹³⁴ This phenomenon necessarily leads to every single action by the gang member, whether it is what he says or what he does, to be "colored by gang identity," as membership in the gang is the individual's entire sense of self.¹³⁵ "The code of the street matters . . . They cannot ignore it. It shapes world-views and provides a compelling vocabulary for motives for social action on the street."¹³⁶

The particular circumstances of an individual may lead to their participation in and acceptance of the dominant culture being

¹³⁰ *Id.* at 436.

¹³¹ *Id.* at 433.

¹³² *Id.*

¹³³ Clarke, *supra* note 19, at 433.

¹³⁴ Carlie, *supra* note 82 (citing SANDRA GARDNER, STREET GANGS IN AMERICA 54 (Franklin Watts, 1992)).

¹³⁵ *Id.*

¹³⁶ Rosenfeld et al., *supra* note 4, at 299.

impossible, virtually requiring that individual to join a sub-culture.¹³⁷ Specifically for gangs, those circumstances which frequently lead to an individual feeling as if he has no other choice but to join the sub-culture of the gang include geographic, economic, and social circumstances.¹³⁸ However, it is undisputed that individuals in nearly identical geographic, economic, and social circumstances may differ from their peers in choosing whether to remain within the dominant culture, even in the face of difficulty or lack of opportunity, or join a sub-culture such as a gang. It is additionally undisputed that some individuals do in fact choose to join a gang in light of their circumstances. Specific to socioeconomic status, social inequalities are often considered to be at least partially responsible for the individual adaptation to circumstances of joining a sub-culture such as a gang.¹³⁹ Clearly, however, only a minority of individuals in a given situation, even if rejected by the dominant culture, join the sub-culture of a gang.¹⁴⁰ Thus, in considering a given sub-culture, particularly a criminal sub-culture, there must be a consideration by the courts as to why these specific individuals, rather than all individuals in a given circumstance, formed or joined a particular sub-culture.¹⁴¹ Importantly, it must not be assumed that criminal sub-cultures, and memberships in a criminal sub-

¹³⁷ Clarke, *supra* note 19, at 430, 438; *see also* Mack, *supra* note 90, at 51–52. Some argue that criminal sub-cultures are simply “a coming together of already maladjusted individuals.” *Id.* However, studies show that the overwhelming majority of these individuals “become delinquent and later criminal because they are only too well-adjusted to their local community.” *Id.*

¹³⁸ Clarke, *supra* note 19, at 438.

¹³⁹ Wickert, *supra* note 83.

¹⁴⁰ Mack, *supra* note 90, at 52.

¹⁴¹ Clarke, *supra* note 19, at 430.

culture, are simply an inevitability based on circumstances rather than an active choice made in light of an individual's circumstances.¹⁴²

It is well-known and well-established that gangs are one iteration of a criminal sub-culture.¹⁴³ This determination has been based on the following factors: (1) gang members “share a common set of values and activities . . . (2) [t]here are implicit or explicit criteria for evaluating whether the values are expressed appropriately or inappropriately and the activities carried out well, indifferently, or badly[;]” (3) gang members receive positive feedback and reinforcement when they perform activities in furtherance of or by the direction of the gang, or when they verbally support the values of the gang; (4) activities or actions by members of the gang signal to other members that they all belong to the same sub-culture, including both gang-specific language or vocabulary and non-verbal action; (5) gang members routinely interact with fellow gang members, generally using a vocabulary or language unique to the sub-culture of gang life during those interactions;¹⁴⁴ and (6) there may exist certain members of the

¹⁴² *Id.*; Author's note: The author does not intend to say that individuals who join gangs necessarily have significant opportunities or options other than gang membership; simply, there is always technically a choice not to join the gang, regardless of consequences of that choice.

¹⁴³ See Mack, *supra* note 90, at 5 (“They form, in short, a sub-culture, a criminal sub-culture.”); Carlie, *supra* note 82 (“a gang may be viewed as a mini-society or subculture . . . The idea that gangs represent a subculture, combined with the notion that street gangs are most commonly found in lower class neighborhoods, has been around for nearly fifty years.”).

¹⁴⁴ The special vocabulary and language used by a subculture is often referred to as “argot,” which is defined as the jargon or slang of a particular group.

gang who have a particularly strong influence over the other members.¹⁴⁵

The sub-culture of the gang involves both a cultural and social dimension.¹⁴⁶ Regarding culture, the gang has shared behaviors which are furthered by shared symbols such as language, clothing, or, as specific to gangs, hand signs.¹⁴⁷ The gang also provides its members with a new belief system, which often replaces the beliefs which were once provided by the dominant culture.¹⁴⁸ Regarding the social aspect of the sub-culture, members of a gang interact with each other and the outside world in a way that distinguishes them from non-members.¹⁴⁹

MERRIAM-WEBSTER, *Argot*, <https://www.merriam-webster.com/dictionary/argot> (last visited Feb. 24, 2020).

¹⁴⁵ Lerman, *supra* note 80, at 65–6. It should be noted that sociologists frequently add a seventh factor of recognition of cliques within the sub-culture. *See Id.* Author’s Note: This author does not view this as relevant, as those cliques will not have such distinct values and interests as to go against the general interest and values of a gang that speaking to law enforcement about your fellow gang member’s criminal activity is strictly prohibited. Thus, for purposes of this note, the distinction of cliques within the larger gang sub-culture is irrelevant.

¹⁴⁶ *Id.* at 66 (“Differentiation of youth who share consonant symbols from youth who do not share these symbols demarcates the *subcultural boundaries*. Differentiation of interacting participants from non-participants demarcates the *social boundaries*.”); Clarke, *supra* note 19, at 430 (stating that the determination of a community as a sub-culture may depend on one’s “conceptualization of culture and society”).

¹⁴⁷ Lerman, *supra* note 80, at 66.

¹⁴⁸ Carlie, *supra* note 82.

¹⁴⁹ Lerman, *supra* note 80, at 66; *see also* Carlie, *supra* note 82 (“To the extent that gangs are recognized as groups: gang members recognize themselves as members, fellow gang members recognize them as members, and gang

Notably, this social aspect may include the gang members' refusal to interact with law enforcement in any capacity.

Those who have spent time in communities with high levels of gang activity are aware that gangs operate such that there exists within them “a persisting system of relationships, a common acceptance of a privately enforced code of conduct, and a generally recognized status system.”¹⁵⁰ A “criminal community” in modern-day America is therefore “a system of social relationships and functions, including a status system.”¹⁵¹ Further, “a consensus of understood gang norms” exists among gang members.¹⁵² Criminal communities can be distinguished from the dominant culture because the values, interests, and practices of these communities directly contradict those of the dominant culture.¹⁵³ In fact, criminal communities commonly repudiate “the police-enforced code” accepted by the dominant culture.¹⁵⁴

Regardless of the additional requirements of individual gangs, a code against snitching is the universal sub-culture which is seen in all gangs.¹⁵⁵ A subset of that code is a mandate of respect, both of the gang as a whole and of the individual members.¹⁵⁶ Accordingly, the

members – as well as non-gang members – outside a gang recognize who members of other gangs are.”).

¹⁵⁰ Mack, *supra* note 90, at 46.

¹⁵¹ *Id.* at 43.

¹⁵² Lerman, *supra* note 80, at 65.

¹⁵³ *Id.*

¹⁵⁴ Mack, *supra* note 90, at 48.

¹⁵⁵ Carlie, *supra* note 82 (“Respect is a cherished value, so disrespecting a gang or gang member violates a cherished norm.”).

¹⁵⁶ *Id.*

universal code across gangs is “never cooperate with the police, never leave an insult unattended and never snitch.”¹⁵⁷ Thus, any form of disrespect committed against an individual member or the gang as a whole, including snitching, will result in severe punishment for the individual who violated the code.¹⁵⁸ Specifically, rather than involving law enforcement when a member of a criminal community breaks the code, these communities sanction that member “in their own way.”¹⁵⁹ However, even in these “violent and aggressive sub-cultures,” members may not be completely exiled from the gang or killed for violating the norms and code of the sub-culture.¹⁶⁰ Instead, the gang may “punish or attempt to reform” the member who violated the code through physical beatings.¹⁶¹ However, it is important to note that, even without full social exile from the gang or death, a snitch still subjects themselves to sufficient hatred, ridicule, or social disapproval within the gang to satisfy the statement against social interest exception due to their statements to law enforcement. Therefore, exile or murder is not required as the necessary consequence to snitching in order for the

¹⁵⁷ *Id.*; Rosenfeld et al., *supra* note 4, at 298 (“[G]eneral attitude . . . is to avoid the police whenever possible.”).

¹⁵⁸ Carlie, *supra* note 82; *see also* Rosenfeld et al., *supra* note 4, at 306 (“[S]nitching . . . poses dangers for street criminals.”).

¹⁵⁹ *Id.*; *3 Gang Members Found Guilty of Killing*, *supra* note 6 (reporting that a woman labeled a snitch was kidnapped and brutally murdered by three gang members); Divine, *supra* note 9 (reporting a videoed murder in which the murderer calls the victim a “cop caller” and threatens that all other snitches will receive the same end).

¹⁶⁰ *See* DMX, X IS COMING (Def Jam Recordings 1998) (“F*ck whoever’s standin’ there when you get what you got comin’ ‘cause once I hit you in your head, the witnesses start runnin.’”).

¹⁶¹ Clarke, *supra* note 19, at 434-35.

statement against interest exception to apply, as other consequences of snitching, such as physical beatings or even, in the best case scenario, social disapproval, meet the elements of the statement against social interest exception. Accordingly, these criminal communities and gangs fit well within the definition of a sub-culture.

There are three ways to gain higher status in the sub-culture of a gang: money, fear, and “skill in outwitting the forces of law and order.”¹⁶² Therefore, the converse is necessarily true, in that working with “the forces of law and order,” as in snitching on a fellow gang member, would lead to social disapproval within the gang. Additionally, turning specifically to fear, a particular individual designated to enforce the code, even if he has actually committed few violent acts, may be considered violent due to threats of “the use of violence to enforce his will on other criminals and even on non-criminals,” allowing for a successful intimidation of the other gang members into submission.¹⁶³ The gang member knows what his family is capable of; therefore, he knows these threats are not idle. For example, the gang would know of the incidents regarding the murder of a snitch.¹⁶⁴ This knowledge is built upon not only the general, abstract promise of the code of conduct within the gang, but also “the occasional assault or even murder of” an individual who violates the code by

¹⁶² Mack, *supra* note 90, at 48.

¹⁶³ *Id.*

¹⁶⁴ See generally *3 Gang Members Found Guilty of Killing*, *supra* note 6; Divine, *supra* note 9.

snitching to law enforcement.”¹⁶⁵ These threats are therefore made all the more powerful when someone in the gang is subjected to them, such as someone who has snitched.

As in any culture, violations of the norms or code of the gang will result in punishment of the violator.¹⁶⁶ However, the difference between the gang and other non-criminal sub-cultures lies in the fact that the punishment of a violator of the norms of a gang may be extremely severe.¹⁶⁷ The most important difference, however, is the fact that the physical harm done to a snitch is not viewed as morally wrong in the eyes of the gang. This is due to the fact that, in the context of criminal sub-cultures, “what is considered deviant or criminal for one person can be normal and conformal [sic] for another, perhaps even absolutely necessary, since it is prescribed by one’s own system of values and norms.”¹⁶⁸ For example, the dominant culture would not view physical harm or death as an appropriate sanction for a violation

¹⁶⁵ Whitman & Davis, *supra* note 11, at 7. It should be noted, however, that studies show that “even in the absence of actual violence against witnesses, the community norm against ‘snitching’ is itself quite powerful.” *Id.*

¹⁶⁶ Carlie, *supra* note 82.

¹⁶⁷ See *3 Gang Members Found Guilty of Killing*, *supra* note 6 (reporting that a woman was kidnapped, killed, and then her body was set on fire because she had been “labeled as a snitch”); see also Jana Hollingsworth & Brandon Stahl, *Hells Angels Members Live by the Code: Hells Angels Members and Prospects Follow Strict Rules that Led to Their Mystique and Give Them Some Security*, DULUTH NEWS TRIBUNE, <http://www.juliansher.com/books/angels/interviews/duluth.htm> (last visited Oct. 3, 2020) (explaining that exiled Hell’s Angels will often get physically beaten or have their tattoos burned off upon exile) [hereinafter Hollingsworth & Stahl]; Divine, *supra* note 9 (reporting that a man labeled as a “cop caller” and “snitch[]” was strangled to death).

¹⁶⁸ Wickert, *supra* note 83.

of the norms of that culture.¹⁶⁹ However, gang culture does not agree.¹⁷⁰ Upon violation of a rule of the code of conduct of the gang, it is standard practice to physically beat the violator.¹⁷¹ In fact, these sanctions in

¹⁶⁹ Rosenfeld et al., *supra* note 4, at 304 (“Street justice tends to be far more swift, certain, and severe than formal sanctions like arrest and prosecution.”); Author’s Note: By making this statement, the author refers only to physical harm or death as carried out by a non-state entity. Thousands of incarcerated individuals die in prison in the United States each year, with more getting injured in the course of their incarceration, and this is implicitly sanctioned by the dominant culture by a refusal to change the manner in which prisons are operated. Michael Sainato, *Why are So Many People Dying in US Prisons and Jails?*, THE GUARDIAN (May 26, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/may/26/us-prisons-jails-inmate-deaths>. However, as a rule, the dominant culture in the United States does not sanction non-state entities or individuals taking matters into their own hands by physically harming or killing a person who has violated a norm of the dominant culture. See Daisy Ni, *Vigilante Justice in America*, CLAREMONT JOURNAL OF LAW AND PUBLIC POLICY (Nov. 7, 2018) (“Vigilantism itself is not illegal under U.S. law but involves actions that are oftentimes illegal”); Travis Peeler, “Vigilante Liability,” LEGALMATCH, (May 8, 2019 1:58 AM) <https://www.legalmatch.com/law-library/article/vigilante-liability.html> (“all vigilantism is generally considered to be dangerous. Although being a vigilante is not technically illegal, nearly every aspect of vigilantism is.”).

¹⁷⁰ Rosenfeld et al., *supra* note 4, at 304 (“Street justice tends to be far more swift, certain, and severe than formal sanctions like arrest and prosecution.”).

¹⁷¹ Carlie, *supra* note 82; see also Whitman & Davis, *supra* note 11, at 32 (reporting that individuals cite safety as the main concern for reporters of gang crimes to law enforcement, which was “often reinforced by actual threats or violence directed against” those who reported such crimes); Rosenfeld et al.,

response to snitching are a part of the code, and the code must be followed.

The physical assaults and murder of snitches are evidence of the disapproval or hatred which the gang shows snitches, because the gang feels so strongly towards the actions of the snitches that members of the gang resort to violence and sometimes even murder. Accordingly, this evidence makes the informer's statements to law enforcement all the more reliable, because the snitch knows the danger in which he puts himself by making such a statement against his gang. However, even without the threat of complete social exile or death upon snitching, a snitch will still subject themselves to sufficient hatred, ridicule, or social disapproval within the gang, due to their statements to law enforcement, to satisfy the elements of the statement against social interest exception. This hatred, ridicule, or social disapproval is exemplified by physical beatings, even without the explicit disapproval of exile or the extreme hatred leading to murder.

The Hell's Angels are one of, if not the most, internationally well-known "outlaw motorcycle gangs."¹⁷² While the particular code of the Hell's Angels is an extremely well-kept secret, a few portions of the code are universally known.¹⁷³ The first known requirement is that if a member of the gang is being pulled over by a law enforcement officer conducting a motor vehicle stop, "the entire group traveling with him often will pull over."¹⁷⁴ Additionally, a Hell's Angel must not be

supra note 4, at 304 (reporting that, if it is made "known that you're the snitch . . . Get my head blown off!").

¹⁷² *Hells Angels International Motorcycle Club*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Hells-Angels-motorcycle-club> (last visited Oct. 3, 2020).

¹⁷³ Hollingsworth & Stahl, *supra* note 168.

¹⁷⁴ *Id.*

seen without his “colors,” which is the jacket branding him as a member of the gang.¹⁷⁵ In fact, the “colors” or jacket of a Hell’s Angel is so sacred that the only persons who may touch the jacket are emergency personnel, but even then, such personnel may not cut through the patch on the jacket which shows the member is a Hell’s Angel.¹⁷⁶ These requirements exemplify the universality of certain codes across different gangs, specifically the pack- or family-like mentality and the branding or “color” requirements.¹⁷⁷ The Hell’s Angels’ code further mandates that “members can’t talk to the media and can never talk to the public about their codes or about other members.”¹⁷⁸ Violations of this code by members of the gang will be punished through physical harm, such as beatings or burning tattoos related to the gang off an expelled member.¹⁷⁹

However, it is important to note that gangs and their members “do not always match preconceived stereotypes,” particularly when those stereotypes are based on media portrayals of gangs or a privileged

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Historically, the Bloods required their members red garments, the Crips required blue, and the Latin Kings required black and gold. Dave Collins, *Gangs Aren’t Wearing Colors Anymore*, BUS. INSIDER (Sept. 16, 2014, 5:48 AM), <https://www.businessinsider.com/gangs-arent-wearing-colors-anymore-2014-9>. It should be noted that, in recent years, this strict requirement of certain clothing colors being worn has been relaxed in the interest of avoiding contact with law enforcement or being identified by witnesses. *Id.*

¹⁷⁸ Hollingsworth & Stahl, *supra* note 168.

¹⁷⁹ *Id.*

view of this sub-culture by members of the dominant culture.¹⁸⁰ Gangs are truly a family to their members.¹⁸¹ “If we don’t have each other, we don’t have anything.”¹⁸² Gangs offer social support, sometimes including actual caring and even love, as well as financial support.¹⁸³ This is the reason that it is so against a gang member’s social interest to snitch: By snitching, the gang member not only subjects himself to physical attacks, but they lose everything.

Further, snitches who inform law enforcement of the criminal activities of fellow members of the gang are “always in jeopardy of retaliation,” no matter how much information was given to law enforcement or the length of time which has passed since the individual stopped giving law enforcement information.¹⁸⁴ The label of snitch

¹⁸⁰ Lerman, *supra* note 80, at 65.

¹⁸¹ Shaffer, *supra* note 8; *see also* HINTON, *supra* note 106, at 26 (“You take up for your buddies, no matter what they do. When you’re a gang, you stick up for the members. If you don’t stick up for them, stick together, make like brothers, it isn’t a gang anymore.”).

¹⁸² *Id.* at 176.

¹⁸³ Shaffer, *supra* note 8; *See* Mack, *supra* note 90, at 51 (stating that members of criminal sub-cultures “carry on a regular acquisitive activity which has its distinctive economic and technical aspects – indeed they operate in a manner not unlike that of a profession or trade . . . in which the way of making a living is also a way of life.”).

¹⁸⁴ Rosenfeld et al., *supra* note 4, at 304 (“danger does not disappear when s/he has ceased to provide information to the police – indeed, it may increase.”); Valdemar, *supra* note 2. Many gangs maintain websites in order to easily and publicly identify snitches. *Id.* Examples of such websites include “Who’s a Rat” (<https://www.whosarat.com/>) and “CopBlaster” (<https://copblaster.com/snitches/>); Rosenfeld et al., *supra* note 4, at 304 (reporting that, if “the person that you told on” finds out that you were the snitch, “they gonna wind up killing you.”).

follows the individual for life; setting them up for, at a minimum, “ostracism by neighbors and peers,” and, at worst, serious violence committed against them.¹⁸⁵ This danger is exacerbated by the fact that the “snitch” has worked themselves into a Catch-22. If they continue snitching, they are in danger of being caught by fellow gang members, facing severe and potentially life-threatening consequences. If they stop, however, the police “gonna talk to the person that you told on and they gonna wind up killing you.”¹⁸⁶

IV. THE IMPORTANCE OF DEFINING “COMMUNITY” IN THE STATEMENT AGAINST SOCIAL INTEREST EXCEPTION TO THE HEARSAY RULE

Gangs in the United States “identify themselves as a people that is separate from the rest of society.”¹⁸⁷ While this separation is primarily due to the marginalization and isolation which created the sub-culture,¹⁸⁸ the separation is further facilitated by the fact that these gangs are self-sufficient and constitute their own communities, complete with territory specifically claimed for the gang, language,

¹⁸⁵ Whitman & Davis, *supra* note 11, at 5, 56.

¹⁸⁶ Rosenfeld et al., *supra* note 4, at 304.

¹⁸⁷ Carlie, *supra* note 82 (citing G.W. Etter, Sr., *Common Characteristics of Gangs: Examining the Cultures of the New Urban Tribes*, 5 J. Gang Rsrch. 261 (1998)).

¹⁸⁸ Clarke, *supra* note 19, at 431.

customs, and a code of conduct.¹⁸⁹ Further, not only are gangs clearly distinct from the dominant culture, due to the marginalization and isolation of the members, as well as gang indicia which distinguishes members, but gang members themselves identify as separate from the dominant culture. Therefore, what is against the social interest of a member of a sub-culture of a gang will be distinct from that which is against the social interest of a member of the dominant culture. Specifically, the dominant culture generally accepts a “police-enforced code.”¹⁹⁰ This would include a general support of an individual telling, or “snitching to,” the police when that person has knowledge that a crime was committed by another person. Therefore, using the same definition of “community” for the test for a statement’s admissibility under the statement against social interest exception for a gang member as one would for a member of the dominant culture would be frustrate the purpose and reasoning behind the exception.

Defining “community” as society in general, even when the declarant is a member of a gang, would contradict the purpose and reasoning of this exception in such cases, as it would effectively prevent its usage when the declarant was a gang member, as snitches are not subject to disapproval, hatred, or ridicule by the dominant culture.¹⁹¹

¹⁸⁹ Carlie, *supra* note 82 (citing G.W. Etter, Sr., *Common Characteristics of Gangs: Examining the Cultures of the New Urban Tribes*, 5 J. Gang Rsrch. 261 (1998)).

¹⁹⁰ Mack, *supra* note 90, at 48.

¹⁹¹ See N.J. R. EVID. 803(c)(25) (disallowing the use of this exception in criminal cases unless the declarant is also the defendant). The author recognizes that the statements at issue in this note would potentially be subject to other evidentiary issues, as well as *Bruton* and Confrontation Clause issues; however, those issues are more easily resolved and well-settled. Additionally, those issues are not the subject of this note.

Thus, if a declarant gang member has made a statement which subjects him to hatred, ridicule, or social disapproval in the dominant culture, that statement loses all reliability. The statement may not be true, as the statement would tend to make the declarant more successful under the idea of success within the gang, as the interests and values of the gang are directly contradictory to that of the dominant culture. Therefore, if a gang member makes a statement which would subject him to hatred within the dominant culture, his gang would likely support that statement, as such a statement would align with the values and interests of the gang. Accordingly, such a statement would be inherently self-serving, and thus, unreliable.

The community whose approval the declarant-gang member seeks is that of his chosen gang; the opinions, ridicule, hatred, or disapproval of society at large has no effect on a gang member's behavior, because that culture has been rejected by the declarant. Accordingly, under the reasoning behind the statement against social interest exception, the truly reliable statement would subject the declarant to ridicule, hatred, or social disapproval by his gang. Only a statement which would subject the declarant to such consequences would truly have been made against the declarant's social interest. A gang member has rejected society and the dominant culture, in favor of the interests and culture of the gang. Thus, what would be a statement against social interest for a member of the dominant culture may not necessarily be such for a gang member.

As discussed above, certain social factors, including age, race, and socioeconomic status, play a significant role in the formation of criminal sub-cultures such as gangs.¹⁹² This is especially relevant in

¹⁹² Clarke, *supra* note 19, at 431.

light of the fact that sub-cultures generally only arise due to marginalization and isolation of the members of the sub-culture by the dominant culture, which leads to a detachment from society at large and a further aligning with the ideologies and interests of the sub-culture.¹⁹³ Because gang members have been marginalized by the dominant culture, they are even less likely to conform with the values of the dominant culture,¹⁹⁴ such as reporting criminal activity to law enforcement.¹⁹⁵

Additionally, gangs frequently form and gather new members based on facts such as race and socioeconomic status. In fact, more than eighty percent of gang members in the United States are of Latino, Hispanic, or African American race or ethnicity, while eighty-five percent of gang members come from a working class socioeconomic status or lower.¹⁹⁶ While an addition of socioeconomic status or race to the consideration of the statement against social interest exception is not recommended, it is important to consider these factors when making policy decisions, as demographics, particularly race and socioeconomic status, can significantly affect not only the path to possibly aligning with a sub-culture, but can affect the subsequent choices made. However, the courts must be cautioned not to make assumptions that all persons

¹⁹³ *Id.*

¹⁹⁴ Carlie, *supra* note 82 (“never cooperate with the police, never leave an insult unattended and never snitch.”); Rosenfeld et al., *supra* note 4, at 298 (“[G]eneral attitude . . . is to avoid the police whenever possible.”).

¹⁹⁵ *See generally* State v. Brown, 170 N.J. 138 (2001) (stating that the majority of society would not subject an informant to hatred, ridicule, or social disapproval for snitching to law enforcement).

¹⁹⁶ *National Youth Gang Survey Analysis: Demographics*, NAT’L GANG CTR. (2011), <https://www.nationalgangcenter.gov/survey-analysis/demographics>; Carlie, *supra* note 82.

of a certain race or socioeconomic status would disapprove of a member of that demographic speaking to law enforcement. Therefore, the primary consideration should be that of the nature of the gang membership, with just the background knowledge of the marginalization and isolation imposed by the dominant culture on those persons of a lower socioeconomic status, as well as black and brown bodies.

One sub-culture will differ greatly from another unrelated sub-culture, such that each individual sub-culture has different and distinct behavior patterns, values, interests, and norms.¹⁹⁷ Therefore, even just a consideration of criminal sub-culture as a whole as the test for the statement against social interest exception would be insufficient, as all individual sub-cultures are different. For example, vigilante groups would technically fall under the definition of criminal sub-cultures, due to their operation outside the parameters of the law, but for an allegedly *good* purpose.¹⁹⁸ However, such a group would not have the same code as a gang which required silence regarding law enforcement. Therefore, in the context of gangs and gang members speaking with law enforcement, the courts must consider the statement specifically in light of the sub-culture of a gang, rather than just a sub-culture of general criminality. Gangs require a special fact-specific consideration in light

¹⁹⁷ Clarke, *supra* note 19, at 432.

¹⁹⁸ See *Vigilante*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/vigilante> (last visited Feb. 24, 2020) (defining vigilante as “a person who forces obedience to the law without legal authority to do so” and “a person who tries in an unofficial way . . . to catch or punish someone who has committed a crime.”).

of their membership in the specific criminal sub-culture of a gang. In fact, the influence of the sub-culture generally, as well as the influence of the other individual members, has been hypothesized to be extremely influential in leading a person to commit criminal acts.¹⁹⁹ This therefore suggests that, rather than other factors typically found to have correlational or causal relationships with criminality,²⁰⁰ specifically regarding gang members, the gang is the most relevant determinant for if an individual will commit a crime.

Further, if gang membership is so influential as to lead a previous law-abiding individual to commit crimes which would not have been committed but-for the individual's membership in the gang, is it really so unlikely that gang membership would lead that individual to completely reject the norm of the dominant culture condoning snitching? It is a clear violation of the code of the gang to snitch on a fellow gang member for any criminal activity committed, especially those activities committed in furtherance of the gang.²⁰¹ Thus, the label of snitch will lead to a lifetime of ostracism by the individual's chosen

¹⁹⁹ Thompson, *supra* note 99; *see also* Wickert, *supra* note 83 (“criminals . . . [a]s members of subcultures, they are subject to different behavioural requirements based on values and norms that deviate from those of mainstream society.”).

²⁰⁰ *See* WALDEN UNIVERSITY, *supra* note 103. Common risk factors for criminal activity include biological risk factors, adverse childhood experiences, negative social environments, and substance abuse. *Id.*

²⁰¹ Mack, *supra* note 90, at 48. The author was referring to two criminals who did not appear to be particularly close, just in the same general “criminal network throughout the west of Scotland.” *Id.* The author postured that the reasoning behind this particular seeming betrayal was that the informant “was not a member of the particular corner of the network to which [the criminal] belonged.” *Id.* at 48–9. “He was an outsider. He didn’t ‘run with’ the Gallowgate crowd. In his own area . . . he did belong.” *Id.* at 49.

community, as well as the potential of violent retaliation.²⁰² Snitching goes against not only everything with which the gang member has been indoctrinated, but it additionally goes against the approved behaviors of the gang.

Further, as noted by the Supreme Court of the United States and the New Jersey Supreme Court, in considering the applicability of the statement against interest, the individual circumstances of each case must be considered.²⁰³ Even though the Supreme Court of the United States used context as a consideration and reasoning for the federal exception for a statement against interest, this can, and should, be extrapolated to the social interest exception for the State of New Jersey because of the similar purpose behind and the goal of the federal and state rules.²⁰⁴ The statement against social interest exception is

²⁰² Whitman & Davis, *supra* note 11, at 5, 56.

²⁰³ State v. Brown, 170 N.J. 138, 149 (2001); *See* Williamson v. United States, 512 U.S. 594, 601-04 (1994). The Advisory Committee's Notes to Federal Rule of Evidence 804(b)(3) provided that "[w]hether a statement is in fact against interest must be determined from the circumstances of each case." The Court further noted that the inculpatory nature of a statement "can only be determined by viewing it in context," as neutral statements considered in context may become against the declarant's interest. "The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." *Id.*

²⁰⁴ BIUNNO ET AL., CURRENT N.J. RULES OF EVIDENCE, cmt. 2 (2020) ("The rationale for admitting statements against interest is that 'by human nature, individuals will neither assert, concede, nor admit to facts that would affect

important because there may be no other hearsay exception through which to allow a non-defendant's out-of-court statement which implicates a fellow gang member in criminal activity to be admitted at trial. These statements are inherently reliable, thus overcoming the reasoning behind disallowing hearsay statements, because no gang member would make such a statement, subjecting himself not only to rejection by his family, but possible injury or death, if it were not true.

Although the federal rule does not have a social interest component, the consideration of circumstances and context is even more important when considering social interest, as the specific circumstances of a person's chosen community, particularly when considering a gang member, would deeply affect the reliability of that statement. Thus, this reasoning by the Supreme Court of the United States must be applied to the New Jersey Rule, and the New Jersey Judiciary must hold and New Jersey legislature must expressly provide, that "community" as provided in the text of the statement against social interest exception must be the community chosen by the declarant, not society at large. This consideration as to context and the factual circumstances of the individual's situation must include the community to which the declarant belongs, particularly when considering a declarant who belongs to a gang, because the code of that gang are what drives every action by the declarant. Without that community being involved in the consideration of the court's determination as to admissibility, all purpose behind the statement against interest exception is lost. If a declarant rejects society as a whole, then makes a

them unfavorably' . . . Thus, 'statements that so disserve the declarant are deemed inherently trustworthy and reliable.'" (quoting *Brown*, 170 N.J. at 149); see generally *Williams*, 512 U.S. at 605 (stating that statements against a declarant's interest are admissible if the surrounding circumstances make it such that the statement is inherently reliable and trustworthy).

statement which would subject them to ridicule or hatred or social disapproval within the rejected dominant culture but makes them a hero within their chosen community of the gang, the reliability and trustworthiness of that statement, as well as the very reasoning behind allowing for the admissibility of statements against interest, is lost, because there is no reason for the declarant to tell the truth to appease the society which he hates and has rejected.

Gang members have rejected the dominant culture and its values by joining the gang. Therefore, considering a gang member's statement under the test of whether that statement would subject them to hatred, ridicule, or social disapproval by society at large would lead to every statement implicating its fellow gang members in a crime to fail under this exception.²⁰⁵ Every statement by a gang member to law enforcement could be considered a statement by "an informant," due to the nature of the statements. Thus, if the informant status analyzed by the New Jersey Supreme Court in *Brown* is extended to situations outside of specifically a drug sting operation, to just general snitching, that extension would eviscerate the use of this exception in cases concerning a declarant-gang member. However, society at large is not the community in which a gang member has chosen to live. By joining the gang, members have rejected common values pervasive throughout the dominant culture, such as informing law enforcement when you

²⁰⁵ See *Brown*, 170 N.J. at 149–51 (stating that a police informant whose statements were made "within the context of [their] investigatory role" did not satisfy the statement against interest exception). Author's note: This author recognizes that, at trial, statements made by a non-defendant declarant are inadmissible as evidence against the defendant; however, this note considers merely the proper test for the consideration.

witness an illegal action or avoiding physical altercations. Therefore, the relevant community is that of the gang.

Anecdotes, such as that of rapper Tekashi 6ix9ine testifying against his former gang then subsequently requiring additional protection during his incarceration, underscore just how dangerous it can be for a gang member to speak to law enforcement.²⁰⁶ Social interest, when it comes to gangs, goes beyond simple ridicule, hatred, or disapproval. Gangs “have a common code of conduct enforced by internal group sanctions.”²⁰⁷ Therefore, those members who break that code by informing law enforcement about the criminal activities of their fellow gang members are in danger of serious bodily injury, if not death, resulting from that ridicule, hatred, and disapproval due to their snitching.²⁰⁸

²⁰⁶ Burgos, *supra* note 5.

²⁰⁷ Mack, *supra* note 90, at 51.

²⁰⁸ See DMX, X IS COMING (Def Jam Recordings 1998) (“Who’s afraid of the dark? Responsible for murders in the park . . . wanna see me taste my own medicine, picture that, get on some old second grade shit, I’m a get you back, Retaliate . . . But then we in the streets, n****s should’ve been stucked you plucked you like a chicken wit’ your head cut off. They’ll find you wit’ your back open and your legs cut off . . . forgettin’ you ever saw me is the best thing to do . . . You got yourself in a predicament, that you can’t get out of. You already in some shit, but it’s about to get hotter. Fuckin’ with a n**** like you runnin’ your mouth will have that same n**** like you, gun in your mouth . . . This is revenge, no dap before you die, and despite how much I hate to see a grown man cry, I’m a make you suffer, see your ass in hell, motherfucker. Click, boom-boom, see your ass in hell.”); N.W.A., STRAIGHT OUTTA COMPTON (Ruthless Records 1988) (“n****s start to mumble, they wanna rumble, mix ‘em and cook ‘em in a pot like gumbo. Goin’ off on a motherfucker like that, with a gat that’s pointed at yo ass.”); THE LOX, FUCK YOU (Interscope Records 2000) (“Everybody’s a snake,

It is important to note that, while gang members may not have had many options or opportunities prior to their initiation as a member, ultimately, they made a choice to join that sub-culture. Gang membership is never an inevitability. That choice strengthens their bond in their chosen sub-culture, because they made an active choice to follow the code of that gang, including no snitching. Therefore, gang membership may make the statement more reliable, as they are not only going against everything they believe in, they are going against every value, norm, and interest they actively chose to support and follow.

Membership in a gang is more than just a status symbol; it's a community.²⁰⁹ A former member of the Bloods, while under oath, described the gang as "family."²¹⁰ Many gang members join the gang before even hitting puberty.²¹¹ Accordingly, as the gang members grew up, they were formed by the rules and norms of the gang, rather than those of society. Therefore, those indicia that would make a statement by a law-abiding member of the dominant culture reliable are different

that's why I try to keep the grass cut, to see them when they coming, then I heat they ass up.").

²⁰⁹ Lerman, *supra* note 80, at 70 ("Membership in a group with a publicly identifiable name still constitutes a facilitating condition for the acquisition of shared symbols.").

²¹⁰ Shaffer, *supra* note 8; *see also* HINTON, *supra* note 106, at 26 ("You take up for your buddies, no matter what they do. When you're a gang, you stick up for the members. If you don't stick up for them, stick together, make like brothers, it isn't a gang anymore.").

²¹¹ Whitman & Davis, *supra* note 11, at 20 (stating that the average age of a new gang member is 12 years old, with some being initiated before their 10th birthday).

than those for a statement by a gang member. Gangs have a different code, a stricter code. Willingness to violate that code by implicating a fellow gang member often carries a much heavier punishment than social disapproval.²¹² The declarant is risking everything by telling law enforcement of the activities of his family members – his financial security,²¹³ his family and support system, and even his life. Therefore, statements by a gang member to law enforcement which implicate a fellow gang member are even more reliable than other statements against interest when considered in light of the facts and circumstances of the declarant’s chosen community and the consequences of making such a statement. Thus, statements by gang members must be considered under this lens to ensure reliability of the statements. Specifically, the gang must be substituted for “community” in the test for a statement against social interest when the declarant is a gang member.

V. RECOMMENDATIONS

Criminality, particularly gang criminality, is here to stay.²¹⁴ Sub-cultures of gangs have been woven into the fabric of the American

²¹² It is well-documented that snitching can lead to physical violence committed against the snitch. *See DMX, X IS COMING, supra* note 209; *N.W.A., STRAIGHT OUTTA COMPTON, supra* note 209; *THE LOX, FUCK YOU, supra* note 209.

²¹³ *See Mack, supra* note 90, at 51 (stating that members of criminal sub-cultures “carry on a regular acquisitive activity which has its distinctive economic and technical aspects – indeed they operate in a manner not unlike that of a profession or trade . . . in which the way of making a living is also a way of life.”).

²¹⁴ *Id.* at 52 (“[C]riminality is a normal aspect of the social structure, a permanent feature of any complex society, an ongoing social activity”); *see*

system. Therefore, much like the code of the streets, their existence must not be ignored. The law must reflect the realities of the life of a member of a gang. This reflection is particularly important where the rule being proffered is based on a reasoning which requires the consideration of the individual's circumstances. The statement against social interest exception is one such situation. In order for the reasoning which supports the use of the statement against interest exception to hold in circumstances where the declarant is a gang member, the courts must use a test which provides for the reliability of the statement.

Accordingly, the New Jersey legislature and New Jersey judiciary must define "community" to allow for a fact-specific test, when the declarant is a gang member, to determine whether the proffered statement would subject the declarant to hate, ridicule, or social disapproval by the specific community of the gang. Community is not universal. In fact, community connotes a completely distinct set of values, norms, interests, and behaviors when considering the dominant culture or the sub-culture of a gang. Therefore, the legislature and the courts must define community with a fact-specific consideration, particularly in the case of declarant-gang members who have rejected the dominant culture.

Thus, upon a finding by the courts that the declarant is in fact a member of a gang, the fact-specific test must be applied to the proffered statement against social interest. Thus, when a statement is proffered as against the social interest of a declarant, and the party proffering the statement asserts that the declarant is a member of a gang, the courts must analyze that claim first.

also Thompson, *supra* note 99 ("Today, subcultures are just a normal part of life.").

Thus, this note recommends a two-step process in such situations. First, the courts must find that the declarant is a member of a gang. In accordance with the requirements of the general statement against interest exception, as provided in *Sawyer*, the standard for this determination need only be that the proffering party offer “some evidence” that the declarant is a member of a gang.²¹⁵ A standard of beyond a reasonable doubt would prove too cumbersome and additionally subject the declarant to potential prosecution for crimes connected to the specific gang. Alternatively, a slightly higher, preponderance of the evidence standard would be more than sufficient, requiring that the proffering party demonstrate that it is more likely than not that the declarant is a member of a gang. If the declarant is found by the court to be a member of a gang under this standard, the second step of this proposed test would be triggered. The court would then apply the fact-specific test for statement against social interest, relying on the community of the gang, rather than the dominant culture, to determine if the statement was in fact against the interest of the declarant.

The statement against social interest exception is even more reliable when appropriately considered in the context of gang members than when the declarant is a member of the dominant culture. Gang members subject themselves to not only social disapproval or ridicule, but terribly violent physical attacks, by informing police about criminal activity committed by fellow gang members. Such statements are inherently against the social interest of such a declarant, but such statements are inherently reliable because conceivably no person would

²¹⁵ *State v. Sawyer*, 2019 N.J. Super. Unpub. LEXIS 228, at *14 (App. Div. Jan. 30, 2019)

subject themselves to physical beatings, burnings, or death by making a false statement.²¹⁶

Importantly, this fact-specific test will not greatly affect judicial efficiency. While gangs vary in their clothing or specific language, whether the gang is locally-based or internationally recognizable, the singular universal code among gangs across the United States is to never snitch.²¹⁷ Thus, once the determination of a declarant's membership in a gang is completed, the courts need not go further into the specifics of the code of conduct within a gang. The only determination for the courts once a declarant is determined to be a member of a gang is whether the actual statement could be considered snitching. If the answer is in the

²¹⁶ Burgos, *supra* note 5 (reporting that Tekashi 69 feared for his life so much after testifying against his former gang that he requested a prison transfer); 3 *Gang Members Found Guilty of Killing*, *supra* note 6 (reporting that a woman labeled a snitch was kidnapped and brutally murdered by three gang members); Divine, *supra* note 9 (reporting a videoed murder in which the murderer calls the victim a "cop caller" and threatens that all other snitches will receive the same end); Whitman & Davis, *supra* note 11, at 5, 56 (reporting that the label of "snitch carries a price, not just of potential violence, but of ostracism").

²¹⁷ Valdemar, *supra* note 2; Rosenfeld et al., *supra* note 4, at 291 ("The snitch violates the code of the street and is universally despised by street criminals."); LoftyLife *Jugga x Killahman - Mandown Dir By @Luzity*, YOUTUBE (Aug. 14, 2015), <https://www.youtube.com/watch?v=GECBx1jhJXE> ("They are going to ask me questions and I don't know shit"); Shaffer, *supra* note 8 (reporting that a former member of the Bloods stated that the strictest rule in the code was no snitching). Authors Note: The Jugga and Killahman song lyrics support the general proposition that all gangs, from the Bloods to the local Atlantic City gangs, have this same code.

affirmative, the statement will necessarily be against the declarant's social interest, thus satisfying the statement against social interest exception.

VI. CONCLUSION

Gang members speaking out against their fellow gang members in order to alert law enforcement to a crime that was committed by a fellow member of the gang is inherently against their social interest. Snitches risk everything – their status, their financial income, their family, even their lives – to make these statements to law enforcement. No statement could be more against the social interest of an individual than that of a gang member snitching on their family.

The hearsay exception for statements made against the interest of the declarant in the State of New Jersey allows for the admissibility of out-of-court statements if the statement was made against the interest of the declarant, as that provides for the reliability of that statement. However, sociological studies require such a statement to be made in such a way to cause the declarant problems in *their* community in order to allow for the admissibility of the statement, particularly when considering a declarant who is a member of a sub-culture. While the New Jersey Rules of Evidence, as currently written, do not textually define “social interest,” the New Jersey Supreme Court has interpreted the rule to consider a statement to be against a declarant's social interest if the statement “created such a risk of making [the declarant] an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.”²¹⁸

²¹⁸ State v. Brown, 170 N.J. 138, 151 (2001); see also State v. Feliciano, No. A-0221-12T2, 2016 N.J. Super. Unpub. LEXIS 1100, at *58 (App. Div. May

Neither the New Jersey legislature nor judiciary have defined “community” for purposes of this exception. However, the legislature and the judiciary must consider the definition of “community” using a test which considers, where the declarant is a gang member, the specific facts and circumstances of the sub-culture of the gang. Specifically, the consideration of “community” for purposes of the statement against social interest exception to the hearsay rule should take into account the specific sub-culture of a gang when the declarant is a member of a gang. Therefore, upon a finding by the courts that the declarant is in fact a member of a gang, the fact-specific test must be applied to the proffered statement against social interest.

The label of snitch carries a lifelong price, whether that payment be social rejection or murder. The code of the streets will not be ignored; those who violate it must be punished.²¹⁹ By subjecting themselves to this punishment, the declarant-gang member has satisfied the statement against social interest exception to the hearsay rule. The law must reflect that.

12, 2016) (quoting *Brown*, 170 N.J. 138). Author’s Note: The court in *Feliciano* did not discuss the meaning of “community.”

²¹⁹ Rosenfeld et al., *supra* note 4, at 299.