

NOTE

CHALLENGING GUILT BY ASSOCIATION: RETHINKING YOUTHS' FIRST AMENDMENT RIGHT TO ASSOCIATE AND THEIR PROTECTION FROM GANG DATABASES

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The purpose of this Note is to help rethink how to better protect minors and emerging adults from the long-standing threat of gang policing and databases. This Note applies the First Amendment right to associate to challenge gang policing in New York as an example of potential challenges to gang policing in other jurisdictions. However, the legal community needs to understand how and why gang policing and databases disproportionately target low-income environments that Black and Latinx youths rarely choose and cannot easily leave. Then legal advocates can effectively assert youths' First Amendment right to associate to prevent their inclusion in gang databases. This Note relies on research in social sciences, neuroscience, and youth development to understand the social, cultural, and structural circumstances in which youths are more likely to be added to gang databases. Ultimately, this Note argues that the inclusion of minors and emerging adults, who are disproportionately Black and Latinx, in New York's gang databases likely violates their First Amendment right to associate.

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INTRODUCTION

Alex is a sophomore high school student in New York. He loves his history class. But he dislikes his math class. One day, while trying to understand a new math lesson in school, he doodles “504” on his school’s calculator case, which he returns at the end of class. That afternoon, a school security guard pulls Alex into the principal’s office. Alex thinks he is in trouble for doodling on the school calculator. However, he is accused of participating in gang activity. As additional proof, the security guard pulls pictures of Alex’s bookbag on which he had previously drawn his high school mascot, the name of his hometown, and his hometown’s area code. Each of these drawings is allegedly a red flag for gang activity. Alex denies ever being part of a gang. Still, he is suspended. This suspension

and its underlying *evidence* are also the basis for his deportation.¹

Today, youths² like Alex—that is, youths of color—are victims of gang policing.³ They are unknowingly included in a gang database often without any right to challenge their alleged status as associated or actual gang members. Then they are subject to policing that relies on these allegations to detain, deny bail, deport, or convict youth for unrelated charges. Consequently, these youths are denied their livelihood.

Several law enforcement groups rely on gang databases in New York⁴ and several other jurisdictions.⁵ In the name of

¹ See Hannah Dreier, *He Drew His School Mascot—and ICE Labeled Him a Gang Member*, PROPUBLICA & N.Y. TIMES (Dec. 27, 2018), <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/> [<https://perma.cc/X7YR-ESV4>]; see also KIANNA ORTIZ ET AL., YOUTH JUST. BD., CTR. FOR CT. INNOVATION, ALL EYES ON US 14 (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Report_YJB_06302020.pdf [<https://perma.cc/GQU4-N5XJ>] (describing how New York City teens can easily be labeled as gang members or affiliated).

² I define youths as individuals who are minors and emerging adults between the ages of 18 and 25. Both groups are disproportionately represented in gang databases and have unique characteristics compared to mature adults that make them vulnerable to gang policing. For the growing literature on emerging adults and their treatment under the law, see, for example, Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1136–42 (2020) (identifying the key social, psychological, and biological forces that make emerging adulthood distinct from childhood and full adulthood).

³ See, e.g., Anne Teigen, *The Controversy over Gang Databases*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 20, 2018), <https://www.ncsl.org/blog/2018/12/20/the-controversy-over-gang-databases.aspx> [<https://perma.cc/6AYS-SXMH>] (“Recent research shows that gang databases have disproportionately negative effects on young people in communities of color.”); Maritza Perez, *Mistaken Identity: The Dangers of Sweeping Gang Labels for Black and Latino Youth*, CTR. FOR AM. PROGRESS (Sept. 13, 2018), <https://www.americanprogress.org/article/mistaken-identity/> [<https://perma.cc/93ZB-L28T>] (discussing how gang databases “come at too great a cost for young black and Latino individuals who must live with the severe consequences that stem from gang identification”).

⁴ See, e.g., Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill De Blasio*, THE INTERCEPT (June 11, 2018), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio> [<https://perma.cc/EF2H-VRBZ>] (describing use of gang databases in Operation Crew Cut in New York City); NERMEEN ARASTU ET AL., N.Y. IMMIGR. COAL., SWEEPED UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 19–20 (2018), https://nyic.org/wp-content/uploads/2018/06/SweptUp_Report_Final-1.pdf [<https://perma.cc/A6EC-5VB3>] (describing use of gang databases in Operation Matador on Long Island).

⁵ See, e.g., Associated Press, *Court Decision Deals Blow to Boston Police Gang Database*, MYNORTHWEST, <https://mynorthwest.com/3309636/court-decision-deals-blow-to-boston-police-gang-database/> [<https://perma.cc/W3TB-LQGW>] (Jan. 12, 2022) (reporting that the U.S. Court of Appeals for the First Circuit ordered “the federal Board of Immigration Appeals to reconsider the government’s efforts to deport Diaz Ortiz and deny his bid for asylum,” citing “flaws [sic] in that database, including its reliance on an erratic point system built on unsubstanti-

public safety, gang-led violence merits law enforcement's efforts; however, such efforts do not justify the secretive, unaccountable, and disproportionate use of gang databases in poor communities of color. The use of vague and broad criteria for inclusion in gang databases is a threat to the constitutional rights of youths in the United States.⁶ Police often include youths in low-income neighborhoods in these databases based on their association with family, neighbors, and classmates.⁷

ated inferences" (quoting *Diaz Ortiz v. Garland*, 23 F.4th 1, 3 (1st Cir. 2022)); Philip Marcelo, *Gang Database Made up Mostly of Young Black, Latino Men*, AP NEWS (July 30, 2019), <https://apnews.com/article/dd5643e358c3456dbe14c16ade03711d> [<https://perma.cc/D833-H29T>] ("66% of those in [the Boston gang] database are black, 24% are Latino and 2% are white[, while] Black people comprise about 25% of all Boston residents, Latinos about 20% and white people more than 50%."); ATTORNEY GENERAL'S ANNUAL REPORT ON CALGANG FOR 2020, 4-6 (2020), <https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2020.pdf> [<https://perma.cc/8RJ8-UPAS>] (finding that between October 1, 2019 and September 30, 2020, of the 45,336 in the CalGang Database, approximately 21.6% of individuals were Black, 66.7% were Hispanic, and 7.4% were white and 1.3% (613) were between the ages of 10-17 and 43.3% were between the ages 18-30); Annie Sweeney & Paige Fry, *Nearly 33,000 Juveniles Arrested over Last Two Decades Labeled as Gang Members by Chicago Police*, CHI. TRIB. (Aug. 9, 2018), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html> [<https://perma.cc/2PFE-Z5NH>] (critiquing the Chicago Police Department's use of gang databases as inaccurate, overly broad, and harmful); Chris Gelardi, *More Kids & Overwhelmingly Black: New Records Show Concerning Trends in D.C. Gang Database*, THE INTERCEPT (Jan. 9, 2022), <https://theintercept.com/2022/01/09/dc-police-gang-database-mpd/> [<https://perma.cc/S5HH-WHK8>] (discussing the growth of the D.C. Metropolitan Police Department's gang database); Chris Gelardi, *Hacked Emails Give Unfiltered View into the D.C. Police Gang Database*, THE INTERCEPT (June 18, 2021), <https://theintercept.com/2021/06/18/dc-police-gang-database-hacked-emails/> [<https://perma.cc/UAE3-D5UT>] (discussing the leak of D.C.'s 2016 gang database spreadsheet, which includes a supposed gang member who was less than one year old, as well as two-, three-, five-, and six-year-olds, among 2,575 names).

⁶ See, e.g., Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 119 (2005) (describing how the inclusion of individuals in a gang database without a hearing is not a constitutionally permitted practice because it violates due process rights); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 950-51 (2021) (discussing how Big-Data policing creates difficult Fourth Amendment problems, especially in the context of using gang databases, and the need for transparency litigation).

⁷ See, e.g., Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1541 (2014) (describing how youths are included in databases); Tracee Wilkins & Alberto Pimienta, *Attorneys and Activists Question Accuracy of Police Gang Database*, NBC4 & TELEMUNDO44 (Dec. 22, 2020), <https://www.nbcwashington.com/news/local/attorneys-and-activists-question-accuracy-of-police-gang-database/2517076/> [<https://perma.cc/XLZ7-9LBU>] (describing a federal gang database called GangNET, which is "used in police agencies to share information about potential gang members in some 32 regions across the country" and which targets people living in neighborhoods with gang activity); Tamar Manasseh, *To the Chicago Police, Any Black Kid Is in a Gang*,

Further, the labeling of youths as gang members or gang affiliated is often based on inaccurate and unreliable data.⁸ Accordingly, community advocates and scholars have extensively scrutinized the use and effects of gang databases.⁹

Despite these criticisms, legal scholarship devotes little attention to these databases' impact on youth development and youths' First Amendment right to associate. Several aspects of youth development rely uniquely—relative to mature adults—on relationships with neighbors, friends, and family.¹⁰ Unlike mature adults, youths rarely *choose* and—just as importantly—cannot easily leave or avoid these relationships. As a result, law enforcement groups' use of gang databases likely violates youths' First Amendment right of association, especially those raised in low-income settings. The use of gang

N.Y. TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/opinion/chicago-police-black-kids-gangs.html> [<https://perma.cc/RLL2-V7C9>] (implying that poor youth from dangerous neighborhoods can be included in gang databases simply for “sitting on their porch at the wrong moment”); Madina Toure, *NYPD Faces Scrutiny over How It Determines Who Is a Gang Member*, OBSERVER (June 13, 2018), <https://observer.com/2018/06/nypd-federal-gang-raids-database/> [<https://perma.cc/ZEU6-UB8C>] (reporting criticisms that NYPD's gang database included people simply for “hanging out with their friends ‘on the wrong corner’” (quoting Queens Councilman Donovan Richards)).

⁸ See JOSMAR TRUJILLO & ALEX S. VITALE, THE POLICING & SOC. JUST. PROJECT AT BROOKLYN COLL., GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF ‘PRECISION POLICING’ 10, 16 (2019), <https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf> [<https://perma.cc/F7NJ-A5T7>] (“Teens are . . . treated as guilty by association without the prosecution needing to prove that they have done anything wrong.”); *Hearing Before the Comm. on Pub. Safety*, City Council of N.Y. 8 (June 27, 2019) [hereinafter *June 27, 2019 Hearing Before the Comm. on Pub. Safety*] (statement of Donovan J. Richards, Chairperson), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3994395&GUID=AD171899-0BE1-48FA-826B-2D11BEAB9ABA&Options=&Search> [<https://perma.cc/KD7F-PYNR>] (“[W]hen there is a history of racially biased policing in this city that has caused far more collateral consequences for people of color, . . . we have to ensure we are not criminalizing people for having friendship and family members in certain zip codes wearing certain colors or posing in pictures with people from your block and posting them Facebook, there has to be some external[] oversight about who goes into this database and who come[]s out and why.”); Wright, *supra* note 6, at 119–20, 127.

⁹ See TRUJILLO & VITALE, *supra* note 8, at 2–3; *infra* note 22 and accompanying text; JUDITH GREENE & KEVIN PRANIS, JUST. POL'Y INST., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 6, 27–29 (July 2007) (discussing issues with California's longstanding gang database leading up to 2007); CALIFORNIA STATE AUDITOR REPORT 2015-130: THE CALGANG CRIMINAL INTELLIGENCE SYSTEM 36–46 (2016) (concluding that CalGang's oversight structure as of 2016 does not ensure that law enforcement agencies (user agencies) collect and maintain criminal intelligence in a manner that preserves individuals' privacy rights).

¹⁰ See *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (discussing why and how minors should be treated differently than adults under the Constitution).

databases can chill or even prohibit youths' vital relationships when they are likely subject to heightened surveillance,¹¹ criminal penalties,¹² deportation,¹³ or inclusion in broad-reaching injunctions.¹⁴

Little is known about law enforcement's use of gang databases, but recent public hearings and investigations shed light on their disproportionate impact on Black and Latinx youths.¹⁵ For example, over 20,000 people were added into the New York Police Department ("NYPD") Criminal Group Gang Database (hereinafter "Gang Database") between 2003 and 2013, 90% of whom were Black or Hispanic.¹⁶ Of those in the database, approximately 30% were minors when added. Further, Professor Babe Howell's Freedom of Information Act ("FOIA") request approval in March 2018 revealed that over 17,000 people were added to the database between December 2013 and February 2018. Of the newly added people, over 98% were identified as either Black or Hispanic. By July 2019, over 18,000 people in New York City were labeled as active gang members:¹⁷ 1.1 percent were white, sixty-six percent were

¹¹ See Desmond Upton Patton et al., *Stop and Frisk Online: Theorizing Everyday Racism in Digital Policing in the Use of Social Media for Identification of Criminal Conduct and Associations*, 3 SOC. MEDIA & SOC'Y *1, *2 (July 2017), <https://journals.sagepub.com/doi/pdf/10.1177/2056305117733344> [https://perma.cc/B7P6-2LS7]; Meredith Broussard, *When Cops Check Facebook*, THE ATLANTIC (Apr. 19, 2015), <https://www.theatlantic.com/cops/politics/archive/2015/04/when-cops-check-facebook/390882/> [https://perma.cc/YX5E-5RG5].

¹² K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliations on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 631–38 (2011) [hereinafter Howell, *Fear Itself*].

¹³ See ARASTU ET AL., *supra* note 4, at 36; SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, U.C. IRVINE SCH. OF L. IMMIGRANT RTS. CLINIC, MISLABELED: ALEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 5 (2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-Mis-labeledReport.pdf> [https://perma.cc/GN6B-XHN5].

¹⁴ Alex S. Vitale, *The New 'Superpredator' Myth*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/opinion/superpredator-myth.html> [https://perma.cc/E6QT-Q5TR] ("[C]oncerns have been raised about the use of gang injunctions that criminalize people based on their alleged connection to a gang. The restrictions on association are often impossible to abide by, given their broad scope.").

¹⁵ The New York Immigration Coalition (NYIC) and the City University of New York (CUNY) School of Law's Immigrant and Non-Citizen Rights Clinic (INRC) surveyed legal service providers, community-based organizations, and community members in the New York City metro area, including Long Island, detailing how various immigration are using gang allegations broadly in the immigration removal and adjudications process. See ARASTU ET AL., *supra* note 4, at 7.

¹⁶ TRUJILLO & VITALE, *supra* note 8, at 6.

¹⁷ June 27, 2019 Hearing Before the Comm. on Pub. Safety, *supra* note 8, at 30 (statement of Oleg Chernyavsky); Nick Pinto, *NYPD Added Nearly 2,500 New People to Its Gang Database in the Last Year*, THE INTERCEPT (June 28, 2019),

Black, and 31.7 percent were Latinx.¹⁸ At the same time, the NYPD reported a decrease of minors within its gang database between 2018 and 2019;¹⁹ but advocates disputed the NYPD's reported figures.²⁰ In April 2022, New York City's Department of Investigations commissioner Jocelyn Strauber announced that a report based on a four-year investigation into the use of NYPD's gang database will be released by the end of 2022.²¹

The purpose of this Note is to help rethink how to protect minors and emerging adults from the long-standing threat of gang policing and databases, using New York as an example for challenging gang policing and databases in other jurisdictions.²² The legal community needs to understand how and why gang policing and databases disproportionately target low-income environments that Black and Latinx youths rarely choose and cannot easily leave. Then legal advocates can effectively assert youths' First Amendment right to associate to prevent their inclusion in gang databases.

I make the argument in four steps. First, this Note gives an overview of the purpose, use, and effects of gang databases.

<https://theintercept.com/2019/06/28/nypd-gang-database-additions> [https://perma.cc/KW44-KZAN].

¹⁸ Pinto, *supra* note 17.

¹⁹ June 27, 2019 Hearing Before the Comm. on Pub. Safety, *supra* note 8, at 33 (statement of Donovan J. Richards, Chairperson).

²⁰ Nick Pinto, *NYPD Disputes Gang Database Numbers—Its Math Doesn't Add up*, THE INTERCEPT (June 14, 2018), <https://theintercept.com/2018/06/14/nypd-gang-database-city-council-dermot-shea/> [http://perma.cc/N85K-CQX4].

²¹ Elizabeth Kim, *City Investigations Chief Says NYPD's Gang Database Report Will Be Released 'Within This Year'*, GOTHAMIST (Apr. 11, 2022), <https://gothamist.com/news/city-investigations-chief-says-nypds-gang-database-will-be-released-within-this-year> [https://perma.cc/JF57-XY55].

²² This Note focuses on establishing an effective claim based on youths' First Amendment right to associate in *New York* federal courts as an example of how the right may be asserted in other jurisdictions. Thus, the direct application of youths' First Amendment right to associate in state courts is beyond the scope of this Note. Moreover, this Note does not address other relevant First Amendment rights in the context of gang policing, from freedom of expression to freedom of speech. But this Note hopes to spark further research into these and other issues, based on its findings. For a comparison of gang database state statutes and possible legislative solutions, see, e.g., Lauren M. Pittman, Note, *Constructing a Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform*, 106 IOWA L. REV. 1513, 1526–39 (2021), <https://ilr.law.uiowa.edu/print/volume-106-issue-3/constructing-a-compromise-the-current-state-of-gang-database-legislation-and-how-to-effectuate-nationwide-reform/> [https://perma.cc/3JA2-WF6C] (comparing state gang databases in Colorado, Florida, Georgia, Illinois, Virginia, South Carolina, Texas, California, Minnesota, and Washington); Jasmine Johnson, Note, *Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City*, 94 ST. JOHN'S L. REV. 1033, 1035 (2022) (suggesting “reforms that can be made to the NYPD's gang database, largely based on California's CalGang legislation, that would fix the [equal protection and due process] issues pointed out in this Note”).

Second, I discuss the current forms of gang policing in New York City and Long Island. Third, relying on research in social sciences, neuroscience, youth development, and public policy, I explore the factual circumstances in which youths are more likely to be added to gang databases. Lastly, with these circumstances and existing jurisprudence in mind, I explore the First Amendment right to associate in relation to gang databases.

Essentially, this Note argues that the inclusion of minors and emerging adults who are disproportionately Black and Latinx in New York's gang databases likely violates their First Amendment right to associate. Law enforcement authorities' use of gang databases targets associations that may be both private and expressive because of their familial nature and importance to youth development. These databases rely on broad and vague gang membership and affiliation criteria that significantly, if not directly and substantially, burden the associations of youth. Admittedly, even when subject to surviving strict scrutiny, law enforcement authorities may have a compelling state interest to protect the public from violence because of gang disputes. However, gang policing, with or without the use of databases, can be significantly less restrictive of youths' associative freedoms. Many jurisdictions try to effectively implement procedural safeguards; some use alternative community and public health prevention and intervention initiatives;²³ and other jurisdictions completely eliminate the use of gang databases. At the very least, youths' assertion of their First Amendment right to associate is an additional approach to challenging gang policing.

A. The Use and Effects of Gang Databases

1. *What Are Gangs and Gang Databases?*

Between federal, state, and local authorities, there is no consistent definition of a gang. Under federal law, a "criminal street gang" is defined as "an ongoing . . . club, organization, or association of 5 or more persons—(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal

²³ Jaimee Mallion & Jane Wood, *Street Gang Intervention: Review and Good Lives Extension*, 9 SOC. SCI. *1, *15 (Sept. 2020) (noting a shift from viewing street gangs as a problem for law enforcement to considering street gangs as a priority for public health, which "emphasizes the role of research in understanding the causes of street gang membership, with this informing the development of primary prevention, secondary prevention, and tertiary intervention programs" (emphasis omitted)).

offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce.”²⁴ At the same time, as of November 2021, 43 states and the District of Columbia legislatively define gangs. Most of these states define a gang as a group of three or more people.²⁵ Gang identifiers, like clothing and hand signs, vary between states; but each of these states includes “gang activity” as part of the definition of a gang.

Individuals are included within gang databases based on broad criteria.²⁶ These criteria include appearances, associations, locations, or law enforcement intelligence or informants.²⁷ Once an individual is listed within a jurisdiction’s gang database, another jurisdiction can list the same individual in its database. Many databases do not have a process to screen erroneous inclusion of individuals, nor do they require that individuals be notified of their inclusion.²⁸

²⁴ 18 U.S.C. § 521(a). For a list of federal and state gang-related statutory definitions, see *Definition of Gang: Gang-related Legislation by Subject*, NAT’L GANG CTR., <https://nationalgangcenter.ojp.gov/legislation/gangdefinition#ifle9b> [<https://perma.cc/FY6K-GWAW>] (last updated July 2020).

²⁵ Perez, *supra* note 3. Specifically, in the state of New York, the only available definition of “gang” is in the context of the offenses of gang assault in the first or second degree, both of which require a person to be “aided by two or more other persons actually present.” N.Y. Penal Law § 120.06–.07, <https://www.nysenate.gov/legislation/laws/PEN/120.06> [<https://perma.cc/4M5E-VEX9>], <https://www.nysenate.gov/legislation/laws/PEN/120.07> [<https://perma.cc/HZL6-W2DS>]. Currently, the N.Y. State Senate has already passed Bill S2410A and the State Assembly has Bill A5961 in committee to codify the definition of “criminal street gang” as a group of two or more people who satisfy a list of criteria. S. 2410A, 2017–2018 Leg., Reg. Sess. (N.Y. 2017–2018), <https://www.nysenate.gov/legislation/bills/2017/S2410> [<https://perma.cc/C9RG-PMWQ>]; S. A5961, 2021 Leg., 2021–2022 Regul. Sess. (N.Y. 2021), <https://legislation.nysenate.gov/pdf/bills/2021/A5961> [<https://perma.cc/SZJ6-NZ94>] (last visited Nov. 25, 2021).

²⁶ See, e.g., ARASTU ET AL., *supra* note 4, at 24; Howell, *Fear Itself*, *supra* note 12, at 637; Stephen Kang, *The Trump Administration Is Detaining Immigrant Kids for Gang Membership Without Evidence. So We Sued.*, ACLU IMMIGRANTS’ RIGHTS PROJECT (Aug. 14, 2017), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-administration-detaining-immigrant-kids> [<https://perma.cc/S3X4-HDB7>].

²⁷ See K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 15 (2015) [hereinafter Howell, *Gang Policing*].

²⁸ Howell, *Fear Itself*, *supra* note 12, at 649–50 (“[U]niform and regular standards for purging and maintaining the gang databases often do not exist or may be ignored where they do. Finally, it is not clear whether law enforcement agencies even follow their own criteria [for purging]. Thus, databases include those who were never gang members, as well as those who joined and then quit gangs.” (footnotes omitted)); see Richard Winton, *California Gang Database Plagued with*

In sum, the use of gang databases has many detrimental consequences, including: (1) adding people into gang databases based on non-criminal criteria;²⁹ (2) surveillance of social media accounts of those added to gang databases;³⁰ (3) gang raids to make arrests;³¹ and (4) conspiracy prosecutions.³²

2. *Who Is Included in a Gang Database?*

Local jurisdictions have broad discretion to determine their own criteria for including people in gang databases.³³ Moreover, advocates in the criminal and immigration contexts contend that the criteria are often over-inclusive, inaccurate, unreliable, and biased.³⁴

Most jurisdictions, including the state of New York, do not require notification of the individual whose name is added to the database.³⁵ Therefore, any person erroneously added to a gang database may not know about such an error before they suffer a collateral consequence of being included in such a

Errors, Unsubstantiated Entries, State Auditor Finds, L.A. TIMES (Aug. 11, 2016), <https://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> [<https://perma.cc/BRT2-XEZW>].

²⁹ See Howell, *Gang Policing*, *supra* note 27, at 16 (listing the criteria used by the NYPD to add people to its gang database); James B. Jacobs, *Gang Databases: Context and Questions*, 8 CRIMINOLOGY & PUB. POLY 705, 705 (2009) (discussing the proliferation of gang databases).

³⁰ See Megan Behrman, Note, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J.L. & TECH. 315, 320–21 (2015) (discussing how police use social media in gang investigations).

³¹ BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS RAID “GANG” PROSECUTION 2 (Apr. 2019) [hereinafter HOWELL & BUSTAMANTE, BRONX 120 REPORT], <https://static1.squarespace.com/static/5caf6f4fb7c92ca13c9903e3/t/5cf914a3db738b00010598b8/1559827620344/Bronx%2B120%2BReport.pdf> [<https://perma.cc/L8CT-C2GS>]; Monica Davey & Mitch Smith, *140 Are Arrested in Gang Raids in Chicago*, N.Y. TIMES (May 20, 2016), <https://www.nytimes.com/2016/05/21/us/chicago-gang-raids.html> [<https://perma.cc/N36G-DZFU>].

³² Keegan Stephan, Note, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 992–93 (2018).

³³ See Howell, *Fear Itself*, *supra* note 12, at 649–50.

³⁴ See, e.g., Emmanuel Felton, *Gang Databases Are a Life Sentence for Black and Latino Communities*, PACIFIC STANDARD (Mar. 15, 2018), <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities> [<https://perma.cc/7DJM-BBF3>] (“While many in law enforcement hail gang databases as a policing breakthrough, civil rights lawyers have attacked these programs since their conception . . . Reformers argue these databases function like black boxes and demand more information be made public about how someone gets on—or off—these lists.”).

³⁵ See Howell, *Fear Itself*, *supra* note 12, at 649–50; Winton, *supra* note 28 (describing how Los Angeles and Santa Ana “failed to fully implement a 2014 state law that requires juveniles and their parents to be notified before their names are added to the gang database so they could contest the decision”).

database.³⁶ And even in jurisdictions where there is a removal process for people in a gang database, it may be too late for youth. For instance, Oleg Chernyavsky, the Executive Director for NYPD Legal Affairs, stated that a person's status in the NYPD gang database is reviewed on the person's 23rd birthday, 28th birthday, and every three years.³⁷ However, by the time law enforcement supposedly reaches one of these temporal points of review, it may be too late for individuals erroneously included in the gang database to avoid the consequences of their inclusion.

Specifically, the New York City and Nassau County police department gang database criteria, similar to other gang database criteria throughout the country, are likely error-prone.³⁸ The NYPD will enter an individual into the NYPD gang database based on one of two approaches. The first approach involves some form of "acknowledgement of criminal group membership, by": "a self-admission of criminal group membership to a member of the NYPD"; "being identified as a member of a criminal group by two independent and reliable sources"; or "social media posts admitting to membership in a criminal group."³⁹ The second approach requires the individual meet any two of the following criteria: "frequent presence at a known [gang] location"; "possession of criminal group-related documents"; "association with known criminal group members"; "social media posts with known criminal group members while possessing known criminal group paraphernalia"; "scars and tattoos associated with a particular criminal group"; or "frequent wearing of the colors and frequent use of hand signs that are associated with particular criminal groups."⁴⁰ Further, the NYPD will only include an individual into its gang database

³⁶ Howell, *Fear Itself*, *supra* note 12, at 649–50 ("[U]niform and regular standards for purging and maintaining the gang databases often do not exist or may be ignored where they do. . . . [I]t is not clear whether law enforcement agencies even follow their own criteria [for purging]. Thus, databases include those who were never gang members, as well as those who joined and then quit gangs." (footnotes omitted)).

³⁷ *Hearing Before the Comm. on Pub. Safety*, City Council of N.Y. 26–27 (June 13, 2018) [hereinafter *June 13, 2018 Hearing Before the Comm. on Pub. Safety*] (statement of Dermot Shea, NYPD Chief of Detectives).

³⁸ See ARASTU ET AL., *supra* note 4, at 23–24.

³⁹ NYPD, CRIMINAL GROUP DATABASE: IMPACT AND USE POLICY 4 (2021) [hereinafter 2021 NYPD GANG DATABASE POLICY REPORT], https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/criminal-group-database-nypd-impact-and-use-policy_4.9.21_final.pdf [<https://perma.cc/ZJ5C-8FQK>].

⁴⁰ *Id.*; see ARASTU ET AL., *supra* note 4, at 24.

under the second approach if “these actions are deemed a consistent course of conduct.”⁴¹

In 2021, the NYPD published a report on the Impact and Use Policy for its gang database.⁴² This report discusses the policies and procedures for NYPD’s gang database relating to retention, access and use of data; public access or use of the data; limited disclosure of data to external entities like prosecutors or community organizations; and internal audit and oversight mechanisms.⁴³ The report specifically notes that members of the public can request records pursuant to the New York State Freedom of Information Law.⁴⁴ However, the NYPD’s report fails to mention any process for members of the public to be notified of and challenge their inclusion in NYPD’s gang database, which raises due process concerns.⁴⁵

Meanwhile, in Nassau County, an individual is classified as a gang member if the individual: (1) admits to being a gang member; or (2) meets three of the following requirements, not necessarily on the same day: has tattoos depicting gang affiliation; wears clothing consistent with gang membership; possesses gang graffiti on personal property or clothing; uses hand signs or symbols associated with gangs; is identified by a reliable informant as a gang member; associates with known gang members; has prior arrests with known gang members for crimes consistent with usual gang activity; has family members that make statements indicating the individual’s gang membership; attends gang functions or known gang hangouts; or has gang members or rival gang members that identify the individual as a gang member.⁴⁶ Like law enforcement officials in New York City, officials in Nassau County do not notify residents when they are included in a gang database, nor can residents challenge their inclusion and remove themselves from the database.

⁴¹ 2021 NYPD GANG DATABASE POLICY REPORT, *supra* note 39, at 4.

⁴² *Id.* at 1–10.

⁴³ *Id.* at 6–10.

⁴⁴ *Id.* at 7.

⁴⁵ Howell, *Gang Policing*, *supra* note 27, at 15; E-mail from Bronx Defs., NAACP LDF, Legal Aid Soc’y & Ctr. for Const. Rts. to Bill de Blasio, Mayor, Corey Johnson, City Council Speaker, Adrienne Adams, City Council Comm. on Pub. Safety Chair & Margaret Garnett, Comm’r of the Dep’t of Investigation Re: Public Comment on the NYPD’s Draft Impact & Use Policies for the Criminal Group Database and Social Network Analysis Tools 4 (Feb. 25, 2021) (on file with authors), https://ccrjustice.org/sites/default/files/attach/2021/02/Written%20Comment%20on%20NYPD%27s%20Draft%20and%20Use%20Policies%20for%20the%20Gang%20Database%20and%20Social%20Network%20Analysis%20Tools_BXD_CCR_LAS_LDF.pdf [<https://perma.cc/HZ2L-KKRJ>].

⁴⁶ See TRUJILLO & VITALE, *supra* note 8, at 7.

Importantly, community advocates and scholars have criticized the criteria for inclusion in a gang database. Law enforcement authorities can easily check off the gang database criteria based on social media postings of alleged gang members or their affiliates. However, police likely misinterpret these social media posts.⁴⁷ A 2014 study found that 75% of law enforcement professionals report that they are “self-taught” in the use of social media for criminal investigations.⁴⁸ Moreover, in major U.S. cities, including Chicago and New York, police departments increasingly assign residents to gang and criminal databases based (sometimes exclusively) on social media activity.⁴⁹ As a result, individuals can be falsely included in gang databases. Thus, without a transparent, timely process that notifies individuals and allows these individual to challenge their inclusion, a gang database is more likely prone to errors.

Equally, database inclusion criteria that focus on “[gang] location[s]” and “association with known [gang] members” are easily met by policing housing developments.⁵⁰ In fact, authorities intentionally target public housing developments, where families share common spaces and build friendships (and associations) with nearby neighbors.⁵¹ In 2015, the New York Daily News produced a “gang map” using data from NYPD’s Juvenile Justice Division.⁵² NYPD marked most of the areas

⁴⁷ See Patton et al., *supra* note 11, at *1; see, e.g., Forrest Stuart, *Code of the Tweet: Urban Gang Violence in the Social Media Age*, 67 SOC. PROBS. 191, 194 (2020) (“Criminal justice actors are particularly prone to misidentify and thus criminalize non-violent interactions and ordinary behaviors, especially those related to expressions of black cultural identity, such as signifying. The opportunities for misinterpretation have only increased in the social media age, particularly with the emergence of ‘Black Twitter’—defined as the ‘millions of Black users . . . networking, connecting, and engaging with others who have similar concerns, experiences, tastes, and cultural practices.’” (omission in original) (quoting Sarah Florini, *Tweets, Tweeps, and Signifyin’*, 15 *Television & News Media* 223, 225 (2014))).

⁴⁸ Broussard, *supra* note 11.

⁴⁹ FORREST STUART, *BALLAD OF THE BULLET: GANGS, DRILL MUSIC, AND THE POWER OF ONLINE INFAMY* 150–51 (2020).

⁵⁰ 2021 NYPD GANG DATABASE POLICY REPORT, *supra* note 39, at 4.

⁵¹ See Abigail Kramer, *Busts, But Not a Solution*, from *NYPD Tracking of Housing Feuds*, POLITICO (Mar. 2, 2015), <https://www.politico.com/states/new-york/city-hall/story/2015/03/busts-but-not-a-solution-from-nypd-tracking-of-housing-feuds-087367> [<https://perma.cc/NP77-42U4>]; Max Rivlin-Nadler, *The Strange Aftermath of the Largest Gang Bust in New York History*, VICE (May 12, 2016), <https://www.vice.com/en/article/8gkwaaw/the-strange-aftermath-of-the-largest-gang-bust-in-new-york-history> [<https://perma.cc/4YDF-65JP>]; Olivia Heffernan, *‘We’ve Got One in the Sweep’*, THE APPEAL (July 30, 2019), <https://theappeal.org/weve-got-one-in-the-sweep/> [<https://perma.cc/RN4Y-WSS8>].

⁵² N.Y. Daily News, *Gangs of New York and How Close You Live to Them*, N.Y. DAILY NEWS (2015), <http://interactive.nydailynews.com/2015>. Since at least July

with housing developments as gang territories. With an increase of 4,000 cameras in NYCHA housing developments, it is easy to catch someone in a “known gang location.”⁵³ With increased surveillance in these “known gang locations,” clothing choices and hand signals like fist bumps can and will likely be misinterpreted for gang activity.⁵⁴

Beyond gang locations, the NYPD monitors social media to predict criminal activity and build evidence for criminal indictment against suspected individuals.⁵⁵ In 2015, 96.4% of police agencies used social media in some capacity.⁵⁶ The most common use of social media was for criminal investigation. Social media policing “appear[s] to be used disproportionately in cases relating to urban American communities of color, in ‘gang’ related cases, and in ‘anti-terrorism’ monitoring.”⁵⁷ As a result, databases are comprised of a disproportionate amount of people of color. For example, in 2018, Chief of Detectives Dermot F. Shea revealed that the 17,000 individuals named in the NYPD’s gang registry were ninety-nine percent Black or Latino.⁵⁸ Yet, criminal and gang activity among white individuals certainly occurs at greater rates than indicated by NYPD’s gang databases.⁵⁹ For example, Babe Howell, a criminal law profes-

2021, the N.Y. Daily News no longer makes this article available. However, several academic and news articles have previously cited this article. See, e.g., TRUJILLO & VITALE, *supra* note 8, at 9 (commenting on the N.Y. Daily News creating a map of gang locations, where mostly Latinx and Black communities reside, based on available NYPD data).

⁵³ *De Blasio Administration Announces Completion of Camera Installation at 22 NYCHA Developments*, N.Y.C. (June 7, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/396-17/de-blasio-administration-completion-camera-installation-22-nycha-developments> [<https://perma.cc/8CST-2553>].

⁵⁴ As a result, the First Amendment right to expression may also be implicated when youth are labeled as gang members or affiliated based on clothing and hand signs.

⁵⁵ See Ben Popper, *How the NYPD Is Using Social Media to Put Harlem Teens Behind Bars*, THE VERGE (Dec. 10, 2014), <https://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison> [<https://perma.cc/K87W-MN29>]; Patton et al., *supra* note 11, at *2–*3.

⁵⁶ INT’L ASS’N OF CHIEFS OF POLICE, 2015 SOCIAL MEDIA SURVEY RESULTS 1 (2015), https://valorfiles.blob.core.windows.net/documents/Clearinghouse/iacp_2015_social_media_survey_results.pdf?sv=2017-04-17&sr=b&sig=9dkfSAVGEOKZgK5oejoJAT22SaMO4aYDq%2FSifEVwb%2BE%3D&se=2022-04-06T19%3A30%3A03Z&sp=R [<https://perma.cc/Y7HM-9EDP>].

⁵⁷ See Patton et al., *supra* note 11, at *7.

⁵⁸ Crime and Just. News, *Chief: NYPD’s Gang Database Is 99% Minorities*, CRIME REPORT (June 15, 2018), <https://thecrimereport.org/2018/06/15/chief-nypds-gang-database-is-99-percent-minorities/> [<https://perma.cc/YH7Z-LX99>].

⁵⁹ See Adrienne Freng & Terrance J. Taylor, *Race and Ethnicity: What Are Their Roles in Gang Membership?*, in U.S. DOJ & HHS, CHANGING COURSE: PREVENTING GANG MEMBERSHIP 135, 136 (2013), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/243474.pdf> [<https://perma.cc/6P85-XRB5>].

sor at City University of New York, says that even though surveys of young Americans have shown that 40% of those who identify as gang members are white, police tend to undercount them at 10% to 14% and overcount Black and Hispanic members.⁶⁰ Moreover, police agencies do not consider violent groups like the Proud Boys and other white power groups to be criminal street gangs, and these white power groups are generally absent in gang databases.⁶¹

3. *Consequences of Gang Database Inclusion*

Contrary to investigations by scholars and advocates and testimonies of victims, proponents of gang databases, like the NYPD, often argue that a database is only an investigative tool.⁶² The NYPD specifically asserts that entry into its gang database “is not proof of criminal behavior, it is only an investigative lead.”⁶³ Further, compared to other states, NYPD states its database does not result in collateral consequences comparable to other jurisdictions. For example, New York does not permit civil injunctions nor does it have a sentencing enhancement for gang/criminal groups nor a statute that criminalizes gang/criminal group membership.⁶⁴ Additionally, the NYPD asserts that it prohibits the use of racial and bias-based profiling in law enforcement actions based on federal, state, and local laws.⁶⁵

Yet, investigative findings say otherwise: individuals are detrimentally affected by their inclusion in a gang database.

(“[D]iscrepancy in estimates of gang involvement of racial or ethnic minorities could be due to the fact that the racial/ethnic makeup of a gang tends to reflect the racial/ethnic composition of the community . . .”).

⁶⁰ Donna Ladd, *Dangerous, Growing, Yet Unnoticed: The Rise of America’s White Gangs*, THE GUARDIAN (Apr. 5, 2018), <https://www.theguardian.com/society/2018/apr/05/white-gangs-rise-simon-city-royals-mississippi-chicago> [<https://perma.cc/32GL-LSLD>]; see also Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 303 (2012) (arguing that the racially biased application of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) “shields groups of nonimmigrant White criminal offenders from being conceptualized as gangs and shields nonimmigrant White neighborhoods from the stigma of having gang problems”).

⁶¹ Shannon E. Reid & Matthew Valasik, *The Proud Boys Are a Far-Right Gang. Trump Boosted Them on National TV*, THE GUARDIAN (Oct. 3, 2020), <https://www.theguardian.com/commentisfree/2020/oct/03/the-proud-boys-are-a-far-right-gang-trump-boosted-them-on-national-tv> [<https://perma.cc/V422-4PKG>].

⁶² *June 13, 2018 Hearing Before the Comm. on Pub. Safety*, *supra* note 37, at 15–16 (statement of Dermot Shea, NYPD Chief of Detectives).

⁶³ 2021 NYPD GANG DATABASE POLICY REPORT, *supra* note 39, at 10.

⁶⁴ *Id.*

⁶⁵ *Id.*

These consequences can include heightened social surveillance, unemployment, loss of housing, revocation or denial of immigration status, excessive bail or bail denial, and the increase of sentencing enhancements.⁶⁶ Thus, despite differences between jurisdictions, law enforcement officials' use of gang databases has notable consequences in criminal and immigration proceedings.⁶⁷ Notably, the NYPD fails to also consider the effects of its gang database from a First Amendment and youth development perspective.

a. *Consequences in Criminal Proceedings*

Allegations of gang affiliation based on gang databases impact every phase of the criminal process.⁶⁸ During the pre-trial phase, before gang database data are perhaps disclosed as discovery to defendants, the majority of defendants face high bail because of their gang allegations.⁶⁹ Regardless of criminal history and criminal allegations, gang labels on individuals may make them appear more likely to flee the jurisdiction.⁷⁰ Gang allegations reduce or eliminate the possibility of release on reasonable bail for these defendants.⁷¹ These allegations of gang affiliation are often inaccurate and based on unclear definitions of a gang⁷² and broad criteria for inclusion in a gang database.⁷³ Unfortunately, gang membership and affiliation allegations have the greatest impact when defendants would ordinarily be released, or when bail would be set at a low level.⁷⁴

b. *Consequences in Immigration Proceedings*

Allegations of gang affiliations may also impact individuals in immigration proceedings.⁷⁵ As an initial point, immigration

⁶⁶ See TRUJILLO & VITALE, *supra* note 8, at 13–21.

⁶⁷ There is also a specific stigmatic harm—beyond First Amendment injury—when youth are branded as criminals, solely on their place of residence; however, this is beyond the scope of this Note.

⁶⁸ Wright, *supra* note 6, at 134–36 (discussing the impact of consolidated trial, “[g]ang expert” evidence, and the pressure of gang enhancements on plea bargaining in a California trial).

⁶⁹ Howell, *Fear Itself*, *supra* note 12, at 623.

⁷⁰ The New York Criminal Procedure Law outlines the factors to be considered for discretionary bail determinations. N.Y. CRIM. PROC. LAW § 510.30(2)(a)(i), -(viii) (McKinney 2010). These factors focus on the likelihood of non-appearance in court. *Id.*

⁷¹ Howell, *Fear Itself*, *supra* note 12, at 623.

⁷² *Id.* at 645.

⁷³ *Id.* at 637.

⁷⁴ *Id.* at 632.

⁷⁵ ARASTU ET AL., *supra* note 4, at 36.

proceedings are not subject to the same evidentiary standards as are required in the criminal context. As a result, immigration officials can more readily establish gang affiliation and membership with little or no evidence,⁷⁶ impacting non-citizens in a variety of ways that raise significant due process concerns. In immigration proceedings, the Department of Homeland Security (DHS) may identify an applicant as gang-affiliated in multiple ways, including background investigations that require checking whether an applicant has been included in a gang database.⁷⁷ Once officials raise gang-related allegations against a non-citizen, such a person may be denied Special Immigration Juvenile Status, asylum, permanent residency, and other immigration benefits.⁷⁸ Officials may also use these allegations to deny bond or increase bond amounts, affecting a person's ability to fight deportation.⁷⁹

B. The "Gang Problem"

Law enforcement authorities, media outlets, and political leaders often can help perpetuate the threat of gangs and promote a moral panic that justifies more policing of certain communities. Prior to the pandemic, even though national and local crime rates decreased since the 1990s, police pointed to incomplete or misleading data about a growing gang problem to justify invasive operations and raids. Now, during the pandemic, as some crime rates increase without a clear explanation for such an increase, law enforcement authorities are disproportionately blaming a growing gang problem for the increasing violence.

⁷⁶ *Id.* at 21, 29–30.

⁷⁷ MAYA LESZCZYNSKI, NERMEEN ARASTU, TALIA PELEG & REID MILLER, CUNY SCHOOL OF LAW, IMMIGRANT & NON-CITIZEN RIGHTS CLINIC, Guide to Completing U.S. Citizenship and Immigration Services (USCIS) Forms in the Gang Allegations Context 2–3 (June 2019), https://www.law.cuny.edu/wp-content/uploads/media-assets/Guide-to-Completing-USCIS-Forms-in-the-Gang-Allegations-Context_071619.pdf [<https://perma.cc/X2ZX-WR9P>].

⁷⁸ PAIGE AUSTIN ET AL., NYCLU & NYIC, STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS 7 (Dec. 2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf [<https://perma.cc/XV4Q-CGGB>].

⁷⁹ See Stacy Caplow et al., Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 363–64 (2011) (“Represented and released or never detained: 74% have successful outcomes. Represented but detained: 18% have successful outcomes. Unrepresented but released or never detained: 13% have successful outcomes. Unrepresented and detained: 3% have successful outcomes.”).

1. *Gang Policing in the Media and Moral Panic*

The media's unbalanced coverage of gang policing helps to create a moral panic that justifies the use of discriminatory and overreaching policing.⁸⁰ Further, "the public, the media, and politicians reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals."⁸¹ These groups of individuals include Black men, especially Black boys, who are overrepresented crime perpetrators.⁸² For example, "studies show that local news overrepresents Black suspects of crimes—the percentage of Black suspects in news coverage is well above the percentage of Black people who are actually arrested for crimes."⁸³ As a result, the media's unbalanced coverage of the gang menace in law enforcement activities like Operation Crew Cut and Matador helps law enforcement push for legislation and obtain resources for policing.⁸⁴

2. *Operation Crew Cut and Operation Matador*

In 2012, NYPD launched Operation Crew Cut to address its gang problem, despite data indicating there was not a problem

⁸⁰ See, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 108–12 (2008) (discussing the passage of Proposition 21 in California based on a moral panic about juvenile crime); John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 *CRIME & JUST.* 365, 376 (1998) (noting the tendency to construct male gangs as deviant during moral panics).

⁸¹ See Howell, *Gang Policing*, *supra* note 27, at 13 (quoting SCOTT & STEINBERG, *supra* note 80, at 109–10).

⁸² See Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media*, *CTR. FOR AM. PROGRESS* (Aug. 29, 2018) ("[T]he news media not only contributes to the public's overestimation of crime through how it reports on the president's controversies, but it also overreports on violent crime—feeding destructive racial and ethnic biases about those responsible.").

⁸³ THERESA L. MILLER, ANDREW VOLMERT, ABIGAIL ROCHMAN & MIA AASSAR, *FRAMEWORKS INST., TALKING ABOUT POVERTY: NARRATIVES, COUNTER-NARRATIVES, AND TELLING EFFECTIVE STORIES* 11 (2021), <https://www.frameworksinstitute.org/wp-content/uploads/2021/09/Talking-about-poverty.pdf> [<https://perma.cc/764J-BS6E>].

⁸⁴ See Carol A. Archbold & Michael Meyer, *Anatomy of a Gang Suppression Unit: The Social Construction of an Organizational Response to Gang Problems*, 2 *POLICE Q.* 201, 206–15 (1999). In 2017, the New York State Senate passed the Criminal Street Gang Enforcement and Prevention Act to create new felonies for alleged gang affiliation, resulting in backlash for the bill's support of "NYPD's guilt-by-association approach to gang policing." Emma Whitford, *Advocates Fear Anti-Gang Bill Uses MS-13 'Boogeyman' to Criminalize Minority Youth*, *GOTHAMIST* (May 10, 2017), <https://gothamist.com/news/advocates-fear-anti-gang-bill-uses-ms-13-boogeyman-to-criminalize-minority-youth> [<https://perma.cc/Z8AN-B5G4>].

to the extent claimed by NYPD.⁸⁵ In 2011, NYPD first added “gang” as a cause of murder to its annual reports.⁸⁶ Further, in 2011 and 2012, gangs ranked last and second-to-last among the causes of murder, and shootings and homicides ranked lower than at any time in the four decades since police and city officials began to collect and maintain crime statistics.⁸⁷ Yet, Commissioner Raymond Kelly argued that the “looser associations of younger men who identify themselves by the block they live on, or on which side of a housing development they reside” were the new threats to public safety.⁸⁸

Meanwhile, a partnership of federal and local law enforcement authorities launched Operation Matador (“Matador”) in 2017.⁸⁹ Matador seeks to “target violent gang members and their associates, eradicate the violence they inflict upon . . . communities and stop the cash flow to transnational organized crime groups.”⁹⁰ This operation works with schools, local police departments⁹¹ and federal agencies, including ICE, to target MS-13 gang activity in the New York metropolitan area, including Long Island and the Hudson Valley.⁹² Under

⁸⁵ Howell, *Gang Policing*, *supra* note 27, at 2; NYPD, MURDER IN NEW YORK CITY 2011, 3 (2011) [hereinafter N.Y.C. MURDERS 2011], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf [https://perma.cc/E9WE-29CM] (indicating only 5% of murders in 2011 were caused by gangs); NYPD, MURDER IN NEW YORK CITY 2012, 3 (2012) [hereinafter N.Y.C. MURDERS 2012], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf [https://perma.cc/VA2U-MHWE] (indicating only 9% of murders in 2012 were caused by gangs).

⁸⁶ N.Y.C. MURDERS 2011, *supra* note 85, at 3.

⁸⁷ See Howell, *Gang Policing*, *supra* note 27, at 2.

⁸⁸ Rocco Parascandola, *NYPD to Double Gang Division to Combat Street Violence: Commissioner Kelly*, N.Y. DAILY NEWS (Oct. 2, 2012), <https://www.nydailynews.com/new-york/nypd-double-gang-division-article-1.1172347> [https://perma.cc/GQT5-U4VX].

⁸⁹ Victor Manuel Ramos, *Federal Agency Leads New Task Force in Fight Against MS-13*, NEWSDAY (June 14, 2017), <https://www.newsday.com/long-island/federal-agency-leads-new-task-force-in-fight-against-ms-13-1.13736271> [https://perma.cc/2XMJ-FTP4]; U.S. Immigr. & Customs Enft, *Joint Operation Nets 24 Transnational Gang Members, 475 Total Arrests Under Operation Matador*, ICE (Mar. 29, 2018), <https://www.ice.gov/news/releases/joint-operation-nets-24-transnational-gang-members-475-total-arrests-under-operation> [https://perma.cc/77UT-GGWN].

⁹⁰ U.S. Immigr. & Customs Enft, *Operation Matador Nets 39 MS-13 Arrests in Last 30 Days*, ICE (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days> [https://perma.cc/WAB6-N25X].

⁹¹ Mazin Sidahmed, *Emails Show Long Island Police Departments Worked Closely with ICE*, DOCUMENTED (May 27, 2020), <https://documentedny.com/2020/05/27/emails-show-long-island-police-departments-worked-closely-with-ice/> [https://perma.cc/Y9QW-THN5].

⁹² See Preston Huennekens, *Operation Matador Nabs 475 Gang Members in N.Y. City Area*, CTR. FOR IMMIGR. STUD. (Apr. 4, 2018), <https://cis.org/Huen->

the Biden Administration, federal and local law enforcement authorities continue to participate in Operation Matador.⁹³ Through these partnerships, members of Black and Latinx communities, especially youth, are subject to intense surveillance and policing.⁹⁴

3. Crimes and “Gangs” Before the COVID-19-Pandemic

Beginning in 2012,⁹⁵ the media publicized more stories about local crews as new threats to safety in NYC,⁹⁶ despite NYC being the safest city in the world.⁹⁷ As a result, Commissioner Kelly justified the NYPD’s shift in focus from stop-and-frisk policing to policing of crews when he announced the NYPD’s Gang Division’s expansion.⁹⁸ Despite similarities be-

nekens/Operation-Matador-Nabs-475-Gang-Members-NY-City-Area [https://perma.cc/C7P6-X3PS].

⁹³ Sidahmed, *supra* note 91; The GANGS Coal. et al., *Groups Urge US End Discriminatory ICE “Gang” Prioritization*, HUM. RTS. WATCH (Apr. 1, 2021), https://www.hrw.org/news/2021/04/01/groups-urge-us-end-discriminatory-ice-gang-prioritization# [https://perma.cc/366P-N9N8].

⁹⁴ The prosecution of the defendants continues because Operation Matador remains active throughout the country. See, e.g., Dave Minsky, *Motion to Combine MS-13 Defendant Groups Filed, Ruling Deferred to March 19*, LOMPOC REC. (Feb. 5, 2021), https://lompocrecord.com/news/local/crime-and-courts/motion-to-combine-ms-13-defendant-groups-filed-ruling-defered-to-march-19/article_eecc1fd-f4a7-5361-a1ad-8add9536b017.html [https://perma.cc/4HVZ-QAL8].

⁹⁵ See TRUJILLO & VITALE, *supra* note 8, at 2–3; Josmar Trujillo, *Local N.Y. Media Wrongly Pushes for Gang Databases*, TRUTHDIG (July 8, 2018), https://www.truthdig.com/articles/papers-insist-we-need-secret-gang-databases-just-like-we-needed-stop-frisk/ [https://perma.cc/H9LW-AQBP].

⁹⁶ See, e.g., Mosi Secret, *On the Brink in Brownsville*, N.Y. TIMES (May 1, 2014), https://www.nytimes.com/2014/05/04/magazine/on-the-brink-in-brownsville.html [https://perma.cc/2T3E-LYKG]; Eric Konigsberg, *Woo Cho Bang Bang*, N.Y. MAG. (June 13, 2014), http://nymag.com/news/features/brownsville-2014-6/ [https://perma.cc/VP8H-KUN5]; Matthew McKnight, *De Blasio’s Violent-Crime Challenges*, NEW YORKER (July 9, 2014), https://www.newyorker.com/news/news-desk/de-blasios-violent-crime-challenges?source=Search_google_dsa_paid&gclid=CJwKCAjw9LSSBhBsEiwAKtf0n5_YLDBCfhpWx2H3S69kD9JiqEdG05gaCIffh740eCicBk7ZafXnPhoCwa8QAvD_BwE [https://perma.cc/G6FB-Y2PP] (interviewing Jeffrey Fagan about the alleged increase in violent crime to 2014).

⁹⁷ *Is New York City Safe? (2022)*, WHERE THE ROOSTER CROWS (2022), https://wheretheroostercrows.com/is-new-york-safe/#:~:text=Berkshire%20Hathaway%20Travel%20Protection%20ranks,on%20the%20total%20crime%20index [https://perma.cc/TAY5-33DE].

⁹⁸ See Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. TIMES (Sept. 18, 2013), https://www.nytimes.com/2013/09/19/nyregion/frisking-tactic-yields-to-a-focus-on-youth-gangs.html [https://perma.cc/VF7E-WYQH].

tween stop-and-frisk practices and policing of crews, many stop-and-frisk critics supported the NYPD's shift in focus.⁹⁹

On a national scale, prior to the pandemic, violent crime significantly declined in the U.S. over the past twenty-five years.¹⁰⁰ What's more, the threat of national gangs also plummeted,¹⁰¹ with gang activity declining significantly since the 1990s. Youth involvement in crime also meaningfully decreased: the number of youths' arrests fell continuously since 2006, and, in fact, statistics reached a historic low in 2018.¹⁰²

At the same time, New York City crime trends paralleled their national counterparts. Between 1990 and 2016, the number of crimes per 100,000 people decreased from approximately 10,000 to 2,000; the number of violent crimes per 100,000 people decreased from approximately 2,250 to 500; and the number of murders per 100,000 people decreased from approximately thirty to five.¹⁰³ Between 2005–2012, gang-related crimes did not account for even one percent of the crimes in New York City, while gang-motivated crimes comprised an even smaller percentage.¹⁰⁴ All told, some 80 to 85% of shootings and homicides in the city were not gang-related.¹⁰⁵

And yet, despite a wealth of evidence indicating otherwise, in 2014, the NYPD “attributed 40% of recent shootings to

⁹⁹ Richard Esposito, *New York's Kelly Plans 'Crew Cut' for Gang Members*, ABC NEWS (Oct. 1, 2012), <https://abcnews.go.com/Blotter/nypd-plans-crew-cut-gang-members/story?id=17370903> [<https://perma.cc/ZU2V-VABH>]; Daniel Beekman, *Bronx Community Leaders Praise New NYPD Anti-Gang Initiative, Argue More Youth Programs Are Also Needed*, N.Y. DAILY NEWS (Oct. 3, 2012), <https://www.nydailynews.com/new-york/bronx/city-top-raymond-kelly-announces-operation-crew-cut-article-1.1173045> [<https://perma.cc/5WKF-LWPC>].

¹⁰⁰ John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/> [<https://perma.cc/CRU5-MBC8>].

¹⁰¹ Perez, *supra* note 3.

¹⁰² See CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, ARRESTS OF JUVENILES IN 2018 REACHED THE LOWEST LEVEL IN NEARLY 4 DECADES 1 (2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_UCR2018.pdf [<https://perma.cc/S5XN-8SDB>].

¹⁰³ MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, Brennan Ctr. for Just., *Crime Trends: 1990-2016*, 22 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Crime%20Trends%201990-2016.pdf [<https://perma.cc/S94X-AUV5>].

¹⁰⁴ See Howell, *Gang Policing*, *supra* note 27, at 2, 7–9 (citing NYPD PATROL GUIDE PROCEDURE 212–13: REPORTING GANG RELATED CRIMINAL ACTIVITY 1 (2000)). A gang-related crime is a crime committed by any gang member or any suspected gang member whether or not the crime has anything to do with the gang. A gang-motivated crime is one that is done to benefit a gang or because of gang rivalries within or among gangs. *Id.*

¹⁰⁵ See *id.* at 9.

loosely organized ‘crews’ of ‘dozens of 12-to 20-year-olds.’”¹⁰⁶ Confoundingly, prosecutors claimed that Operation Crew Cut was responsible for the 34% drop in shootings between 2011 and 2013.¹⁰⁷ This claim was clearly overstated. Homicides in NYC were already down, making it difficult “to determine the accuracy or larger meaning of NYPD’s claims about short-term drops over indeterminate periods in very local places.”¹⁰⁸

Critically, the NYPD’s own figures of new gang members also belied law enforcement’s claims of an emerging new gang menace.¹⁰⁹ In 2011, the year before Operation Crew Cut commenced, NYPD added 30% fewer new gang members to its database than it had earlier in the decade. The years 2012 and, possibly, 2013 had even fewer additions of new gang members. It may be possible that NYPD relabeled or exaggerated the threat of violence caused by crews.¹¹⁰ For instance, “the largest gang takedown in New York City history,” the Bronx 120 raid, was alleged to target the “worst of the worst.”¹¹¹ But 51 out of 120 defendants swept up in this raid were found not to be gang members, while another 13 individuals had no clear allegations of gang memberships.¹¹²

The overall effectiveness of Operation Matador is unclear. In a May 2017 nationwide sweep, two-thirds of those arrested were U.S. citizens, but only seven percent of the arrestees were MS-13 gang members.¹¹³ More troublingly, there is evidence to suggest the deliberate misclassification of arrestees. Regarding one arrestee, an ICE agent stated that “[t]he purpose of classifying him as a gang member or a gang associate is because once he goes in front of an immigration judge, we don’t want

¹⁰⁶ *Id.* at 7 (citing Jake Pearson & Jennifer Peltz, Associated Press, *Teen Crews Linked to 40 Percent of NYC Shootings*, SAN DIEGO UNION TRIB. (Apr. 30, 2014), <https://www.sandiegouniontribune.com/sdut-teen-crews-linked-to-40-percent-of-nyc-shootings-2014apr30-story.html> [<https://perma.cc/9RNG-SDH9>]).

¹⁰⁷ Heffernan, *supra* note 51.

¹⁰⁸ *Id.*

¹⁰⁹ See Howell, *Gang Policing*, *supra* note 27, at 10.

¹¹⁰ *Id.* at 11 (citing Mercer L. Sullivan, *Maybe We Shouldn’t Study “Gangs”: Does Reification Obscure Youth Violence?*, 21 J. CONTEMP. CRIM. JUST. 170, 170 (2005)).

¹¹¹ HOWELL & BUSTAMANTE, BRONX 120 REPORT, *supra* note 31, at 9, 4 (first quoting Press Conference, Preet Bharara, U.S. Att’y for the S.D.N.Y., *120 Members of Street Gangs in the Bronx Charged in Manhattan Federal Court*, YOUTUBE (Apr. 29, 2016)).

¹¹² *Id.* at 9.

¹¹³ See ARASTU ET AL., *supra* note 4, at 20.

him to get bail.”¹¹⁴ Thus, Operator Matador possibly targets individuals who are not violent, nor gang affiliated.

Notwithstanding these statistics and anecdotes, President Donald Trump and his administration deemed Operation Matador successful, and President Joe Biden has not terminated this operation. According to ICE’s own statistics, ICE arrested 796 “suspected” MS-13 members in 2017, compared to 429 in 2016.¹¹⁵ However, it is not clear how ICE officials identify suspected gang members. Community advocates and organizations have noted that blue and white colors, Chicago Bulls logos on clothing, lines shaved into eyebrows, and social media posts are the basis for gang allegations.¹¹⁶ Moreover, two years after the launch of Operation Matador, law enforcement officials provide conflicting figures for the number of arrested MS-13 members.¹¹⁷

4. *Crimes and Gangs During the COVID-19 Pandemic*

During the COVID-19 pandemic, beginning in March 2020, U.S. cities experienced an increase in certain types of crime but a decrease in other types. For example, across thirty-four American cities, the homicide rate was 29.6% higher in 2020 than the year before.¹¹⁸ Domestic violence crimes also increased. On the other hand, property crimes, such as burglaries and larcenies, fell significantly during 2020. Drug offenses also dropped substantially. In New York City, there has been an increase in murders in each of the last four years; however, the total number of murders are “far lower than three decades

¹¹⁴ *Inside ICE’s Controversial Crackdown on MS-13*, CBS NEWS (Nov. 16, 2017), <https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan> [<https://perma.cc/N43M-T4P7>]; Julianne Hing, *ICE Admits Gang Operations Are Designed to Lock up Immigrants*, THE NATION (Nov. 20, 2017), <https://www.thenation.com/article/archive/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/> [<https://perma.cc/9RSV-7TDW>].

¹¹⁵ Ron Nixon, Liz Robbins & Katie Benner, *Trump Targets MS-13, a Violent Menace, If Not the One He Portrays*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/politics/ms13-gang-threat-trump-policy.html> [<https://perma.cc/T7YC-REEZ>].

¹¹⁶ Victor Manuel Ramos, *Advocates: Authorities Unfairly Target Immigrants in MS-13 Efforts*, NEWSDAY (May 16, 2018), <https://www.newsday.com/long-island/crime/gang-police-immigrants-1.18576841> [<https://perma.cc/YZ26-MXCQ>].

¹¹⁷ Will Van Sant, *Conflicting Figures on Long Island’s MS-13 Membership Raise Questions*, NEWSDAY, <https://www.newsday.com/long-island/investigations/ms13-operation-matador-1.32338567> [<https://perma.cc/2645-UXQM>] (last updated June 14, 2019).

¹¹⁸ RICHARD ROSENFELD, THOMAS ABT & ERNESTO LOPEZ, NAT’L COMM’N ON COVID-19 & CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE 19 (2021), https://craftmediabucket.s3.amazonaws.com/uploads/Year_End_Crime_Update_Design.pdf [<https://perma.cc/HEN4-PR7R>].

ago when crime in the United States crested thanks in part to the [then] crack cocaine epidemic.”¹¹⁹ Further, “[e]ven with recent increases, rates of shootings, felony assaults and overall major crimes are similar to or below the levels of the late 2000s and early 2010s.”¹²⁰

Acknowledging the recent waves of violent crimes, “experts warn against short-term comparisons” of crime data, especially during the pandemic.¹²¹ Experts point to many possible explanations for the increased crime rates, but there are no conclusive answers.¹²² Some experts observe that the effects of infections and social distancing policies during the pandemic have disproportionately affected vulnerable populations, placing at-risk individuals under additional physical, mental, emotional, and financial stress. Others note that the pandemic has weakened institutions responsible for responding to violent offenses, including police agencies, hospitals, emergency medical services, and community-based groups that productively engage at-risk individuals.¹²³ Also, many experts posit that as a result of the 2020 protests against police violence, officers may have pulled back in proactive law enforcement due to fear that they will be unfairly scrutinized, and disadvantaged communities have pulled away from police due to breached trust and lost confidence.

Yet, many law enforcement authorities like the NYPD overly attribute the crime spikes to gang activity and criminal

¹¹⁹ *Factbox: Despite Recent Uptick, New York City Crime Down from Past Decades*, REUTERS (Apr. 13, 2022), <https://www.reuters.com/world/us/despite-recent-uptick-new-york-city-crime-down-past-decades-2022-04-12/> [<https://perma.cc/EC22-4WN4>].

¹²⁰ Ali Watkins & Troy Closson, *Shootings Rise in New York, Coloring Perceptions of City’s Safety*, N.Y. TIMES, <https://www.nytimes.com/2022/04/06/nyregion/shootings-new-york-city-safety.html> [<https://perma.cc/6JY2-GGFV>] (Apr. 12, 2022).

¹²¹ *Id.*

¹²² ROSENFELD, ABT & LOPEZ, *supra* note 118, at 20; *see also* Jeff, Lu Chia-Ching, *Overlooking Crime in New York City amid the Pandemic and Protests*, TOWARDS DATA SCI. (Sept. 15, 2020), <https://towardsdatascience.com/overlooking-crime-in-new-york-city-amid-the-pandemic-and-protests-d227e698182e> [<https://perma.cc/E25Z-4SVW>].

¹²³ *See, e.g.*, Maya King, *First Covid Raised the Murder Rate. Now It’s Changing the Politics of Crime.*, POLITICO (Oct. 28, 2021), <https://www.politico.com/news/2021/10/28/covid-murder-crime-rate-517226> [<https://perma.cc/WM98-X7TJ>] (“Experts have been making the case for years that keeping communities safe depends on the availability of resources that keep communities *stable*: affordable housing, quality education, mental health resources and child care, to name a few. The pandemic reduced or eliminated access to all of these.”).

justice reforms that slashed police budgets.¹²⁴ In the NYPD's case, there continues to be a reliance on vague "gang" labels to demonstrate an increase in gang-affiliated crime, justifying the use of gang policing. For example, the 2020 NYC Mayor Management Report states that "[t]he number of gang motivated incidents increased 52 percent in the Fiscal 2020 reporting period compared to the prior year."¹²⁵ The Report then concludes that NYPD has improved its capacity to identify incidents more accurately as gang-related because it has increased its precision policing capabilities. Yet, the Report fails to provide any details on how the NYPD identifies "gang," define precision policing, or address recent critiques of precision policing. Moreover, it is unclear to what extent NYPD relies on its Gang Database for its gang-motivated-incidents statistics. Accordingly, during the summer of 2021, a coalition of advocacy and community-based groups called for the NYPD Inspector General to investigate the NYPD's Gang Database;¹²⁶ soon thereafter, the city Department of Investigation revealed its investigation was already underway and almost complete.¹²⁷

C. Vulnerability of Black and Latinx Youths to Gang Policing

Gang databases threaten young people, especially those from low-income backgrounds, for four reasons. First, gang database inclusion criteria fail to consider the traits that make youths different from adults. Second, broad and vague gang database criteria erroneously label individuals as gang members for non-criminal activities and non-active, non-criminal roles relating to gangs. Third, the impact of class status and

¹²⁴ See, e.g., Ali Bauman, *Exclusive: Inside the NYPD's Brooklyn North Violent Crimes Task Force as It Takes on the Spike in Gun Violence*, CBS N.Y. (Sept. 9, 2020), <https://newyork.cbslocal.com/2020/09/09/nypd-violent-crimes-task-force-gang-violence-brooklyn/> [<https://perma.cc/57YE-M3WW>] (discussing the NYPD's Brooklyn North Violent Crimes Task Force's gang force activities).

¹²⁵ BILL DE BLASIO, DEAN FULEIHAN & JEFF THAMKITTAKASEM, CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2020, 50 (2020), https://www1.nyc.gov/assets/operations/downloads/pdf/mmr2020/2020_mmr.pdf [<https://perma.cc/C5K9-H95G>].

¹²⁶ Brennan Ctr. for Just., *Coalition Letter Calls on the NYPD Inspector General to Audit the NYPD "Gang Database"*, SCRIBD (Sept. 22, 2020), <https://www.scribd.com/document/477340584/Coalition-Letter-Calls-on-the-NYPD-Inspector-General-to-Audit-the-NYPD-Gang-Database> [<https://perma.cc/XS8V-TZMS>].

¹²⁷ Eileen Grench, *Department of Investigation Confirms Probe of NYPD Gang Database After Advocates Rally*, THE CITY (July 27, 2021), <https://www.thecity.nyc/2021/7/27/22597212/departament-of-investigation-probes-nypd-gang-database> [<https://perma.cc/6CWD-K6K9>].

race on the family relationships and community interactions of youths from low-income backgrounds, especially those who live in housing developments, makes it more likely for these youths to be included in gang databases. Lastly, the increasing presence of school resource officers (“SROs”) in schools makes it more likely that young people, especially Black and Latinx students, will be subject to gang allegations in schools. Individual analysis of each factor follows.

1. *Youth Are Neurologically, Socially, and Psychologically Different from Adults*

Gang policing fails to appreciate that, developmentally, youth are different from *mature* adults.¹²⁸ Researchers find that the human brain does not mature until the mid-twenties.¹²⁹ Reward pathways are still developing during adolescence and early adulthood. As a result, adolescents and young (or emerging) adults are more likely than mature adults to act impulsively and make quick decisions without considering their long-term effects. However, as the prefrontal cortex of young people matures, young people develop better capacity to consider the long-term effects of their actions and decisions. Thus, as the Supreme Court already acknowledges, “youth is more than a chronological fact.”¹³⁰

This developmental difference greatly impacts how courts treat youth in various legal systems.¹³¹ Tellingly, in recent years, the Supreme Court has consistently acknowledged youth’s incomplete development. From waiving *Miranda* rights to sentencing, the developmental difference between minors and adults underlies the Court’s treatment of children and

¹²⁸ See, e.g., *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”); see also Elizabeth S. Scott, “*Children Are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO STATE J. CRIM. L. 71, 72 (2013) (“[T]he Court has announced a broad principle grounded in developmental knowledge that ‘children are different’ from adult offenders and that these differences are important to the law’s response to youthful criminal conduct.” (footnote omitted)).

¹²⁹ Jane Anderson, *The Teenage Brain: Under Construction*, AM. COLL. OF PEDIATRICIANS (May 2016), <https://acped.org/position-statements/the-teenage-brain-under-construction> [<https://perma.cc/MJY2-5ZZ7>].

¹³⁰ See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (finding “just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing”).

¹³¹ See, e.g., Kevin Lapp, *Young Adults & Criminal Jurisdiction*, 56 AM. CRIM. L. REV. 357, 371 (2019) (“[M]aturity determinations are pivotal to outcomes’ across numerous areas of law.”).

adolescents in criminal settings under the U.S. Constitution. In *J.D.B. v. North Carolina*, the Court held that a child's age properly informed the Miranda custody analysis partly because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."¹³² Unlike other personal characteristics, childhood yields objective observations, including that children are "most susceptible to influence"¹³³ and "outside pressures."¹³⁴

In a similar vein, in *Kent v. United States*, the Court held that the Juvenile Court erroneously waived its jurisdiction and transferred the petitioner for trial in the United States District Court for the District of Columbia.¹³⁵ The Court emphasized society's "special concern" for children.¹³⁶ Moreover, the Court was concerned that the child gets neither the "protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."¹³⁷ Here, the Court clearly considered children different from adults and made its holding to protect the special status of children.

The Supreme Court also treated children differently from adults in sentencings. For instance, in *Miller v. Alabama*, the Court held that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."¹³⁸ Recently, the Court held that *Miller* applies retroactively.¹³⁹ In essence, the Court maintains that juveniles have lessened culpability.¹⁴⁰

Moreover, based on neuroscience and social science research, the *Roper* line of cases articulated three important distinctions between children and adults:

First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "control[] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings."

¹³² 564 U.S. 261, 272 (2011).

¹³³ *Id.* at 275 (citing *Eddings*, 455 U.S. at 115).

¹³⁴ *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

¹³⁵ 383 U.S. 541, 552 (1966).

¹³⁶ *See id.* at 553–54.

¹³⁷ *Id.* at 556.

¹³⁸ 567 U.S. 460, 470, 489 (2012).

¹³⁹ *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016).

¹⁴⁰ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." ¹⁴¹

Taken together, these three characteristics of juveniles led the Court to conclude that it is misguided to equate the moral failings of a minor with those of an adult. Moreover, the changing characteristics of youth and the greater possibility of rehabilitation favor granting children greater protections and rights.

Based on recent but still limited research, the developmental differences between children and adults as articulated in *Roper* and related cases may also help to explain the difference between young or emerging adults and older adults. Neuroscientists have identified changes in brain development that extend into the twenties and affect decision-making, emotional regulation, and risk assessment. ¹⁴² Recent legal and medical research underscores the potential to also treat emerging adults differently from mature adults in the criminal justice system. ¹⁴³ In sum, it is likely erroneous to assume that when an individual turns eighteen, they meet the necessary expectations of a mature, competent, and independent adult.

2. *Youths' Race and Class Status Likely Make Them Easier Targets for Gang Databases*

Gang databases like the database in New York City disproportionately include Black and Latinx individuals. Moreover, law enforcement targets low-income settings, like housing developments, where low-income families and their children live. Thus, the youths who are disproportionately included in gang databases are often Black and Latinx youths from low-income backgrounds. Minors in general are less able to control and withdraw from their environments. However, unlike many white youths from similar backgrounds, Black and Latinx youths from low-income environments, like housing developments, must disproportionately deal with policing for non-criminal behavior in an environment they did not choose.

¹⁴¹ *Miller*, 567 U.S. at 471 (alterations and omissions in original) (citations omitted) (quoting *Roper*, 543 U.S. at 569–70).

¹⁴² For a review of the state of brain development research for adolescents and young adults, see Elizabeth Scott, Natasha Duell & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13 (2018).

¹⁴³ See Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 656 (2016).

In order to understand the impact of these gang databases on low-income Black and Latinx youths, scholars and advocates must understand the unique environments in which youth lack agency and their impact on youth development.¹⁴⁴ This is because, for youths, the “character of the social environment and the resources it offers are determined by the accident of birth.”¹⁴⁵ More fundamentally, race and class produce inequalities within different social spheres,¹⁴⁶ especially when it comes to policing.¹⁴⁷

For instance, class and race statuses of youths impact family interactions. Annette Lareau’s ethnographic study found that working-class and low-income children compared to their middle-class peers likely develop closer ties with their cousins and other extended family members because of economic constraints.¹⁴⁸ Furthermore, Black and Latinx children are more likely than their white counterparts to have contact with extended kin.¹⁴⁹ In addition, Black and Latinx children are more likely to share a home, live nearby, or visit their extended kin than their white counterparts.¹⁵⁰ As a result, be-

¹⁴⁴ See DOUGLAS S. MASSEY & STEFANIE BRODMANN, SPHERES OF INFLUENCE: THE SOCIAL ECOLOGY OF RACIAL AND CLASS INEQUALITY 332 (2014).

¹⁴⁵ *Id.*

¹⁴⁶ See *id.* at 334.

¹⁴⁷ Readers should not conflate the subsequent discussion with the dangerous, erroneous discourse that centers on urban, inner-city communities of color where poverty supposedly exists because of a pathological “culture.” The culture of these communities is supposedly perpetuated through individual choices that cause dysfunctional family dynamics, unemployment, and involvement in crime. Instead, this section identifies and explains some of the structural issues grounded in race and class, including policing, that shape environments and the agency (or lack thereof), treatment, and trajectories of targeted individuals and communities therein.

¹⁴⁸ See ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 242–48 (2d ed. 2011).

¹⁴⁹ See, e.g., *id.* at 340 (“[T]he difference between [b]lack and white children is roughly comparable in magnitude to the difference between children whose mothers dropped out of high school . . . and those whose mothers completed a bachelor’s degree . . .”). Moreover, the robust networks of extended family, fictive kin, and community members at least with African American families are grounded in American slavery and emancipation. See DAWN MARIE DOW, *Alternative Configurations of Child-Rearing: Supporting Mothers’ Public-Sphere Activities Through Extended-Family Parenting*, in MOTHERING WHILE BLACK: BOUNDARIES AND BURDENS OF MIDDLE-CLASS PARENTHOOD 164, 167 (2019). Moreover, “[r]ecent migrants to the United States often adopt extended family living arrangements that differ from traditional household structures in both the country of origin and the United States.” Jessica Halliday Hardie & Judith A. Seltzer, *Parent-Child Relationships at the Transition to Adulthood: A Comparison of Black, Hispanic, and White Immigrant and Native-Born Youth*, 95 SOC. FORCES 321, 325–26 (2016).

¹⁵⁰ Natalia Sarkisian & Naomi Gerstel, *Race, Class, and Extended Family Involvement*, NAT’L COUNCIL ON FAM. RELS. REPORT MAG., FAM. FOCUS ON FAMS. & SOC. CLASS, Spring 2007, at F14, F14 (based on the National Survey of Families and

cause of their race and class, working class and low-income Black and Latinx youths are more likely to associate with a wider group of family members and community members than their white peers.

Furthermore, because of differences in child rearing, working-class and low-income youths likely interact with their surroundings differently than their middle-class peers. Lareau found that middle-class parents tend to rely on concerned cultivation¹⁵¹ through which parents actively foster their children's skills, pack their children's day with extracurricular activities, and closely monitor their children's experiences in institutions such as schools.¹⁵² At the same time, working-class and low-income families tend to rely on "the accomplishment of natural growth" through which children grow spontaneously.¹⁵³ These children usually do not have planned activities; instead, they tend to play outside with their cousins and friends with little supervision.¹⁵⁴ As a result of differences in child-rearing practices due to economic realities, the environments of working-class and low-income children are likely less managed and controlled than their middle-class peers.¹⁵⁵ Unfortunately, this likely means that low-income and working-class children are also likely more exposed to activities and associations targeted by gang policing that middle-class children likely avoid through their parents' control.

3. *The Presence of SROs in Schools Makes Gang Allegations of Students More Likely*

Students in schools with school resource officers ("SROs") are also at a great risk of being labeled gang members or associates.¹⁵⁶ These SROs are law enforcement personnel who are

Households), https://sociology.sas.upenn.edu/sites/default/files/National_Council_of_Family_Relations.pdf [<https://perma.cc/99L3-V2GC>].

¹⁵¹ LAREAU, *supra* note 148, at 240–41.

¹⁵² *Id.* at 124, 158–64.

¹⁵³ *Id.* at 2–3, 31.

¹⁵⁴ *Id.* at 66–68.

¹⁵⁵ *See id.* at 164, 245.

¹⁵⁶ *See* ARASTU ET AL., *supra* note 4, at 33–36; Nicole Acevedo, *Gang Crackdowns Have Increased Arrests, Deportations of Latino, Immigrant Youth, Says Report*, NBC NEWS (May 16, 2018), <https://www.nbcnews.com/news/latino/gang-crackdowns-has-increased-arrests-deportations-latino-immigrant-youth-says-n874766> [<https://perma.cc/MU8N-37Y2>] ("In New York, mainly in Long Island, gang policing has been taking place near sensitive locations such as schools—especially those with school resource officers, known as SRO's."); Kenneth Alonzo Anderson, *Does More Policing Make Middle Schools Safer?*, BROOKINGS INST. (Nov. 8, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/11/08/does-more-policing-make-middle-schools-safer/> [<https://>

responsible for safety and crime prevention in schools.¹⁵⁷ Black students are more likely than students in any other racial or ethnic group to attend schools with these officers.¹⁵⁸ Moreover, many of America's biggest school districts, including New York City, have prioritized security officers over counselors.¹⁵⁹

Many scholars, parents, and community stakeholders dispute the role and benefits of using SROs, who are part of the growing school-to-prison pipeline.¹⁶⁰ For instance, SRO trainings between school districts are inconsistent. The U.S. government recommended that an SRO receive "as much pre-service training as possible before he or she ever enters a school."¹⁶¹ But approximately 35 states and the District of Columbia do not have existing laws or regulations on certifying or training SROs; 14 of these states have neither laws nor regulations on certifying or training SROs.¹⁶² Moreover, the states with SRO-related laws and regulations have trainings with different content and requirements that may or may not

perma.cc/EUU3-Y2A9] ("[T]here is evidence of racial disparities in arrests by SROs").

¹⁵⁷ Anderson, *supra* note 156.

¹⁵⁸ Evie Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS NEWSHOUR (Feb. 27, 2017), <https://www.pbs.org/newshour/education/analysis-reveals-racial-disparities-school-arrests> [<https://perma.cc/9A4T-5G24>].

¹⁵⁹ Matt Barnum, *Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors*, THE 74 (Mar. 27, 2016), <https://www.the74million.org/article/exclusive-data-shows-3-of-the-5-biggest-school-districts-hire-more-security-officers-than-counselors/> [<https://perma.cc/MTR5-3LGH>]; ACLU, *Summary of Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students*, ACLU (2022), <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors> [<https://perma.cc/S62X-XDH8>].

¹⁶⁰ See, e.g., Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 922 (2016) (discussing the large amounts of anecdotal evidence of police officers mishandling student disciplinary problems); Harold Jordan, *It Is Time to Get Real About School Policing*, ACLU (Oct. 5, 2016) (suggesting counselors should be prioritized over cops and conversation over control).

¹⁶¹ Statement of Interest of the United States at 14–15, *S.R. v. Kenton Cnty.*, No. 2:15-cv-143 (E.D. Ky. 2015) (No. 32), <https://www.justice.gov/opa/file/780346/download> [<https://perma.cc/645Q-UWGR>].

¹⁶² LISA H. THURAU, LANY W. OR, REBECCA GORMAN & EHRAN HODES, *STRATEGIES FOR YOUTH, TWO BILLION DOLLARS LATER: STATES BEGIN TO REGULATE SCHOOL RESOURCE OFFICERS IN THE NATION'S SCHOOLS: A SURVEY OF STATE LAWS 4–5* (Johanna Wald ed., 2019), <https://strategiesforyouth.org/sitefiles/wp-content/uploads/2019/10/SFY-Two-Billion-Dollars-Later-Report-Oct2019.pdf> [<https://perma.cc/4M3S-F564>]; *School Discipline Laws & Regulations by Category and State*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS (2022), [https://safesupportivelearning.ed.gov/discipline-compendium?sub_category=School%20Resource%20Officer%20\(SRO\)%20or%20School%20Security%20Officer%20\(SSO\)%20Training%20or%20Certification](https://safesupportivelearning.ed.gov/discipline-compendium?sub_category=School%20Resource%20Officer%20(SRO)%20or%20School%20Security%20Officer%20(SSO)%20Training%20or%20Certification) [<https://perma.cc/9KTC-M4CE>].

include youth development and implicit bias trainings.¹⁶³ In November 2015, only 12 states mandated that SROs receive training to work with students in school instead of individuals in public.¹⁶⁴

The lack of implicit bias training makes the misapplication of subjective criminal offenses even more likely for children of color.¹⁶⁵ Also, many SROs can work for different entities, including the local law enforcement agency or the school district.¹⁶⁶ Thus, poorly trained SROs, with conflicting duties as both school and law enforcement officials, can often endanger the rights of students.

At the same time, the use of SROs may undermine the privacy rights of students.¹⁶⁷ Consider that the Family Educational Rights and Privacy Act (“FERPA”) limits a school employee’s access to and use of student information in order to protect student privacy.¹⁶⁸ Equally, the Fourth Amendment requires that police have a warrant or a specific legal exception to access private records.¹⁶⁹ But the collaboration between SROs and outside law enforcement can violate student rights when school officials access student records, school camera footage, and information gathered by students to allege criminal activity of others students.¹⁷⁰ As a result, SROs can condemn youth like Alex, who was erroneously labeled a gang

¹⁶³ Jessica Campisi, *School Resource Officers Need SEL Training, Experts Say—But Their Preparation ‘Lacks Consistency’*, K-12 DIVE (Mar. 28, 2019), <https://www.educationdive.com/news/school-resource-officers-need-sel-training-experts-say-but-their-prepara/550428/> [https://perma.cc/S9PC-6AE4].

¹⁶⁴ See *School Discipline Laws & Regulations by Category and State*, *supra* note 162.

¹⁶⁵ See Johanna Wald, *Supplementary Paper 2: Can “De-Biasing” Strategies Help to Reduce Racial Disparities in School Discipline?*, Charles Hamilton Houston Inst. for Race & Just. Harv. L. Sch., Mar. 2014, at 2 (“[C]hildren of color are punished more severely than White children for relatively minor, subjective offenses in schools.”), <https://nycourts.gov/ip/justiceforchildren/PDF/Central%20Summit/1.6%20SS.AR%20-%20Can%20De-Biasing%20Reduce%20Racial%20Disparities%20in%20Discipline.pdf> [https://perma.cc/7927-PHLC].

¹⁶⁶ Heidi Macdonald, *School Resource Officers: A Policy Option to Improve School Safety*, ED NOTE BLOG (Oct. 22, 2018), <https://ednote.ecs.org/school-resource-officers-a-policy-option-to-improve-school-safety/> [https://perma.cc/9WWR-GK4M].

¹⁶⁷ See MEGAN FRENCH-MARCELIN & SARAH HINGER, ACLU FOUND., *BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING* 16 (2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf [https://perma.cc/C3PX-Q2PM].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *id.*

member because of his clothing and drawings and deported to Honduras.¹⁷¹

Unfortunately, the Trump administration's revocation of President Obama's guidance on school discipline¹⁷² prolonged the detrimental effects of SRO presence in public schools, particularly for students of color. On January 8, 2014, the U.S. Department of Education ("DOE") and the Department of Justice ("DOJ") issued guidance on school discipline ("2014 Guidance").¹⁷³ These departments aimed to help elementary and secondary schools meet their obligations under federal law to administer student discipline without discriminating on the basis of race, color, or national origin.¹⁷⁴ Trump's administration, however, argued that the 2014 Guidance "sent the unfortunate message that the federal government, rather than teachers and local administrators, best handles school discipline."¹⁷⁵

Notably, President Trump's Federal Commission on School Safety ("Commission") failed to mention racial implicit bias and youth development trainings for SROs, despite recommending more SROs and more training for them.¹⁷⁶ While the Commission emphasized the vital need to protect students from tragedies, such as school shootings, the Commission neglected to mention the significant issues of using SROs.¹⁷⁷ Several advocacy groups have called for guidance similar to but more comprehensive than the 2014 Guidance,¹⁷⁸ and President Joe

¹⁷¹ Dreier, *supra* note 1 (describing how an SRO shared a student's records with local police).

¹⁷² Joint "Dear Colleague" Letter from U.S. DOJ & U.S. DOE (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [<https://perma.cc/YRY9-WAZ9>].

¹⁷³ *Id.*

¹⁷⁴ Anya Kamenetz, *Suspensions Are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/677508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain?live=1> [<https://perma.cc/A7XW-G6UK>].

¹⁷⁵ BETSY DEVOS, KIRSTJEN M. NIELSEN, ALEX M. AZAR II & MATTHEW WHITAKER, FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 67 (Dec. 18, 2018), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=Govdelivery&utm_term=.pdf [<https://perma.cc/B6VH-9L4W>].

¹⁷⁶ *See id.* at 101, 155–56.

¹⁷⁷ *See* ARASTU ET AL., *supra* note 4, at 33 (discussing the role of SROs in gang allegations against students).

¹⁷⁸ Letter from the Open Society Policy Center et al. to President-Elect Joseph R. Biden on Fed. Sch. Discipline & Climate Recommendations (Dec. 18, 2020), https://www.idra.org/wp-content/uploads/2021/01/Biden-Harris-Transition-Team-Letter-re-Federal-School-Discipline-and-Climate-Recommendations_12.18.20_FINAL.pdf [<https://perma.cc/H4SQ-WTQH>].

Biden has stated his intention to at least reinstate the Obama-era civil rights guidance.¹⁷⁹ In 2021, “23 state attorneys general wrote to Secretary of Education Miguel Cardona and Attorney General Merrick Garland, asking them to reissue and strengthen the Obama-era guidance.”¹⁸⁰ Without federal guidance while states fail to act, SROs are more likely to erroneously accuse students, especially Black and Latinx students, of gang activity.

D. Proposal: Assert Youths’ Right to Associate in the Context of Gang Databases

The First Amendment right to associate may be a powerful tool to protect youth from gang policing and databases. The Supreme Court remains silent on youths’ First Amendment right to associate; however, several grounds exist to assert this right to challenge the detrimental use of gang databases. *Miller v. Alabama* discusses how and why youths should be treated differently under the constitution in several criminal settings.¹⁸¹ Conceptually, these differences also apply to youths’ First Amendment right to associate. When youths’ associations result in their inclusion in a gang database, they face serious consequences in their lives. Accordingly, youths’ private and expressive associations are significantly burdened when they are included in a gang database based on their interactions with family, friends, and neighbors. Admittedly, even when subject to surviving strict scrutiny, law enforcement authorities may have a legitimate compelling state interest in protecting the public from gang violence. However, when crimes rates are still difficult to explain and misrepresented, gang databases can be used in a manner that is significantly less restrictive of associative freedoms.

¹⁷⁹ Erica L. Green, *Biden’s Education Department Will Move Fast to Reverse Betsy DeVos’s Policies*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/biden-education-devos.html> [https://perma.cc/J9JN-25RD].

¹⁸⁰ Corey Mitchell, Joe Yerardi & Susan Ferriss, *School Policing Falls Hardest on Black Students and Those with Disabilities, Study Shows*, U.S.A. TODAY, <https://www.usatoday.com/story/news/investigations/2021/09/08/police-schools-black-and-disabled-children-face-harsher-discipline/5436023001/> [https://perma.cc/4WLC-AMKP] (Sept. 9, 2021).

¹⁸¹ 567 U.S. 460, 471 (2012).

1. *First Amendment Right to Associate Jurisprudence*

The Supreme Court affords constitutional protection to the freedom of association in two distinct senses.¹⁸² First, the Constitution protects an individual's choice to enter into and maintain certain intimate or private associations from the undue intrusion of the government.¹⁸³ Second, the Constitution protects an individual's right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.¹⁸⁴ This right of association refers to expressive associations. Furthermore, the government's interference with one form of association affects the other form of association.¹⁸⁵ As a result, like in *Roberts*, a court must consider separately the effect of the challenged state action on individuals' freedom of intimate association and their freedom of expressive association to determine the extent of the individual's constitutional protection.

2. *Case Law on and Grounds to Assert Youths' Right to Private Associations*

The freedom to enter and maintain certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.¹⁸⁶ These types of associations can take many forms, but the Court has not yet explicitly declared the boundaries where constitutional protection begins and ends. Several forms of intimate associations, especially those within families, are clearly protected under the First Amendment.¹⁸⁷ On the other hand, however, the First Amendment also extends to relationships “that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of

¹⁸² See *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544 (1987); *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 472 (S.D.N.Y. 2004).

¹⁸³ See *Roberts*, 468 U.S. at 617–18.

¹⁸⁴ *Id.* at 618.

¹⁸⁵ See *id.*; *Rotary Int'l*, 481 U.S. at 544–45.

¹⁸⁶ See *Rotary Int'l*, 481 U.S. at 545.

¹⁸⁷ See *Zablocki v. Redhail*, 434 U.S. 374, 384–86 (1978) (marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685–86 (1977) (the begetting and bearing of children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (child rearing and education); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (cohabitation with relatives).

one's life.'"¹⁸⁸ A court determines whether an association is sufficiently personal or private to require constitutional protection by considering the following factors: size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.¹⁸⁹ And even where relationships meet these criteria, they may not receive constitutional cover. Even when subject to surviving strict scrutiny, a compelling state interest may justify the state's interference with intimate relationships.¹⁹⁰

The associations of youth disproportionately included in gang databases may be constitutionally protected as private associations. The First Amendment's protection of the right to intimate association is usually reserved for immediate family relationships, but it can also be applied to other relationships as well. For instance, individuals who are included in gang databases are disproportionately Black and Latinx youths from low-income backgrounds because of gang policing's focus on housing developments.¹⁹¹ These youths are unlikely to avoid being in the same vicinity as family, neighbors, and friends who live in the same housing development. Moreover, compared to white families, Black and Latinx families from low-income backgrounds are more likely to visit, live nearby, or live with extended family.¹⁹² The children of these families may spend more time with their extended kin, which are a relatively small, exclusive, and intimate group of people. Thus, youths may be able to assert their First Amendment right to associate to challenge gang database criteria that focus on individuals associating with known gang members, which may include family, friends, and neighbors with whom they share close ties.

¹⁸⁸ *Rotary Int'l*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 620).

¹⁸⁹ *See Roberts*, 468 U.S. at 620.

¹⁹⁰ *See, e.g.*, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp. 2d 374, 387–89 (E.D.N.Y. 2006) (applying strict scrutiny and finding that a school's interference with a fraternity's intimate associational rights through its non-discrimination policy likely was not narrowly tailored to serve its compelling state interest in combatting discrimination), *vacated*, 502 F.3d 136, 139, 147, 149 (2d Cir. 2007) (rejecting strict scrutiny and applying a balancing test instead to find that the school's substantial interest in enforcing its non-discrimination policy likely outweighed the fraternity's claim to intimate association, which the school's policy did not even greatly burden).

¹⁹¹ Kramer, *supra* note 51.

¹⁹² Sarkisian & Gerstel, *supra* note 150, at F14.

3. Case Law on Expressive Associations

The right to expressive association is implicit in the right to engage in activities protected under the First Amendment.¹⁹³ These activities include the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.¹⁹⁴ The right to associate for expressive purposes is not absolute, however. This right may be infringed upon, if “regulations [are] adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹⁹⁵ In *Roberts*, the activities of the Jaycees, a nonprofit national organization with the purpose of promoting and fostering young men’s civic organizations, constituted “protected expression on political, economic, cultural, and social affairs.”¹⁹⁶ But the Jaycees failed to demonstrate that the state of Minnesota imposed any serious burdens on the male members’ freedom of expressive association. The state of Minnesota had the compelling state interest to eradicate discrimination against its female citizens. Thus, the Court found that this state interest justified the impact of a Minnesota statute on the associative rights of the male members in the Jaycees. Moreover, the state achieved its interest in the least restrictive manner.¹⁹⁷

By contrast, in *Boy Scouts of America v. Dale*, the state did not have a compelling interest that justified the infringement of the Boy Scouts organization’s right to associate.¹⁹⁸ Associations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections of the First Amendment.¹⁹⁹ The First Amendment protects the right to associate when there are obstacles to one’s right to choose one’s associates.²⁰⁰ Accordingly, the Court held that: the Boy Scouts is an expressive association; the mandatory inclusion of Dale would significantly affect its expression because of Dale’s sexuality; and the application of New Jersey’s public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster violated the Scouts’ freedom of expressive association.

¹⁹³ *Roberts*, 468 U.S. at 622.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 623.

¹⁹⁶ *Id.* at 626.

¹⁹⁷ *Id.*

¹⁹⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

¹⁹⁹ *Id.* at 655.

²⁰⁰ *Id.* at 657–58.

However, social associations are not protected under the First Amendment. In *City of Dallas v. Stanglin*, “recreational dancing” qualified neither as a form of intimate association nor as a form of expressive association as described in *Roberts*.²⁰¹ A statute in Dallas, Texas prohibited minors between the ages of 14 and 18 from attending Class E dance halls, limiting opportunities for minors to dance with adults, who may have not even attended the dance halls. The several teenagers that congregated each night at a particular dance hall were not part of any organized association; the teenagers and adults at dance halls were mostly strangers to each other; and the teenagers—as only patrons of a business—did not take “positions on public questions,” nor perform activities like those described in *Rotary Int’l*.²⁰² The activities of minors at dance halls were simply chance encounters. Thus, the Court found that these opportunities for minors to dance with adults did not fall within the scope of expressive nor intimate associations that are protected under the First Amendment.²⁰³

The Second Circuit also elaborated on the scope of expressive associations that are protected under the First Amendment. Because this Note focuses on the constitutionality of gang databases under federal law in New York, Second Circuit caselaw is important to determine youths’ First Amendment right to associate. In *Fighting Finest, Inc. v. Bratton*, the Fighting Finest, Inc., (“FFI”) a boxing club for NYPD officers, brought a suit against former NYPD Commissioners William Bratton and Raymond Kelly, alleging that NYPD’s actions violated the First Amendment.²⁰⁴ Commissioners Bratton and Kelly barred FFI from posting notices of its boxing matches in police precincts and facilities and also from identifying its activities with the NYPD. The District Court was unsure as to whether the right to associate in a boxing club was a form of expressive association protected by the First Amendment because FFI was not engaged in traditional First Amendment activities, like civic, charitable, lobbying, or fundraising activities.²⁰⁵ However, the Second Circuit did suggest that the right to associate in FFI may be constitutionally protected.²⁰⁶ FFI “arguably benefits some public interest,” because of FFI’s “pursuit of ‘ . . . so-

²⁰¹ 490 U.S. 19, 25 (1989).

²⁰² *Id.* at 24–25.

²⁰³ *Id.* at 25.

²⁰⁴ *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 226 (2d Cir. 1996).

²⁰⁵ *Id.* at 227.

²⁰⁶ *See id.* at 228 (“[T]his case is distinguishable from *Stanglin*, which involved the association of persons solely for recreational pursuits.”).

cial . . . and cultural ends.’”²⁰⁷ For example, the proceeds from FFI boxing events were donated to the Police Widows and Orphans Fund.

Nevertheless, even if the right to associate in FFI was constitutionally protected, the Second Circuit found that the District Court was correct in holding that the actions of Commissioner Bratton did not rise to the level of a First Amendment violation. The government “may engage in some conduct that incidentally inhibits protected forms of association.”²⁰⁸ Government action may make the exercise of the freedom of association more difficult for individuals; but such action is not enough for a First Amendment violation. The government action must be “direct and substantial” or “significant” to be a First Amendment violation.²⁰⁹ Therefore, the Second Circuit found Commissioner Bratton’s decision to withdraw official NYPD recognition from FFI and to prohibit FFI from posting its notices on police premises did not *directly* and *substantially* interfere with the rights of FFI members to exercise their freedom of association.²¹⁰ The Second Circuit found that Commissioner Bratton did not prevent the members of FFI from associating together nor burden in any significant manner their ability to do so. Moreover, the FFI did not allege that the actions of the Commissioner Bratton caused its members to suspend or reduce their associational activities.

In *Tabbaa v. Chertoff*, the Second Circuit affirmed that mere incidental burdens on the right to associate do not violate the First Amendment; instead, the impact on an individual’s First Amendment right must be “direct and substantial” or “significant.”²¹¹ The defendants argued that their actions only incidentally interfered with the plaintiffs’ associational rights, if at all, because (1) the government did not order the plaintiffs to

²⁰⁷ See *id.* at 227 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

²⁰⁸ *Id.* at 228 (citing *Lyng v. UAW*, 485 U.S. 360, 366 (1988) (holding that government may refuse to provide food stamp benefits to striking workers)).

²⁰⁹ *Id.* at 228 (quoting *Lyng*, 485 U.S. at 367) (citing *Younger v. Harris*, 401 U.S. 37, 51 (1971) (“[T]he existence of a ‘chilling effect,’ even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.”)).

²¹⁰ See *id.*; see also *E. Amherst Plumbing, Inc. v. Thompson*, No. 12-CV-0195A, 2013 U.S. Dist. LEXIS 139670, at *22 (W.D.N.Y. Sept. 27, 2013) (holding that an employer withholding payment and precluding further work of the plaintiff on a plumbing project does not constitute a direct and substantial interference with its employees’ ability to remain non-union and cannot violate the non-party employees’ associational rights as a matter of law).

²¹¹ *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (quoting *Fighting Finest*, 95 F.3d at 228).

refrain from associating with others at the conference, nor did it prevent the plaintiffs from doing so; and (2) the plaintiffs did not establish that their ability to associate was chilled by the inspections because some of the plaintiffs expressed a willingness to go to future Reviving the Islamic Spirit ("RIS") conferences. But the Second Circuit clarified that government action can result in direct and substantial impact on associational rights "even if there is no prior restraint and no clear chilling of future expressive activity."²¹² A penalty in itself can constitute a significant burden, if the government penalizes members of a group for exercising their First Amendment rights.²¹³

The Second Circuit did find that the *Tabbaa* plaintiffs, Muslim attendees of a conference, "suffered a significant penalty, or disability, solely by virtue of associating at the RIS Conference: they were detained for a lengthy period of time, interrogated, fingerprinted, and photographed when others, who had not attended the conference, did not have to endure these measures."²¹⁴ The possibility of being selected for extensive processing could reasonably deter others from associating at similar conferences, even if people, like some of the plaintiffs, expressed a willingness to attend. However, the Second Circuit found that the government had a compelling interest in protecting people against terrorism.²¹⁵ Nevertheless, the plaintiffs argued that the government could have achieved this interest in preventing terrorists from entering the country in a manner that would have been less restrictive of the plaintiffs' associational freedoms. But the Second Circuit rejected the plaintiffs' argument. The Second Circuit explained that the government does not need to exhaust every possible means of furthering its interest: "the government must show only that its interest 'cannot be achieved through means significantly less restrictive of associational freedoms.'"²¹⁶

Most recently, Judge Pamela K. Chen in the Eastern District of New York denied the defendants' motion to dismiss in a case in which the plaintiffs were unknowingly added to a gov-

²¹² *Id.* (citing *Healy v. James*, 408 U.S. 169, 181–84 (1972) (finding that the defendant's actions imposed significant disabilities resulting in a substantial burden even though there was no clear chilling effect nor prohibition of future associational activities)).

²¹³ *Id.*

²¹⁴ *Id.* at 102.

²¹⁵ *Id.* at 105.

²¹⁶ *Id.* (emphasis omitted) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

ernment database.²¹⁷ Judge Chen found that the plaintiffs plausibly alleged the deprivation of their First Amendment rights.²¹⁸ Specifically, the plaintiffs claimed, because of being added to a secret Department of Homeland Security (DHS) database, they were (1) “targeted for additional scrutiny while crossing the border based on their membership in the media and their journalistic coverage of migrant conditions at the United States-Mexico border”;²¹⁹ and (2) questioned and forced to “disclose constitutionally protected information about their news-gathering and associational activities.”²²⁰ However, Judge Chen did find that the plaintiffs failed to allege a chilling effect of their prospective expressive activities because of the defendants’ conduct.²²¹

Like the Second Circuit in *Tabbaa*, Judge Chen found that government officers substantially burdened the plaintiffs’ First Amendment rights. It did not matter if the government did not prevent the group from associating with their professions or with specific tasks or if there was no chilling effect.²²² The plaintiffs underwent additional secondary inspections and questioning when they attempted to cross the border into the United States in December 2018.²²³ Government officers singled out the plaintiffs for heightened scrutiny and compelled them to answer questions unrelated to their admissibility into the United States. For example, the plaintiffs were questioned about “their observations in Mexico, their background in journalism, and whether they knew any ‘coyotes,’ or pro- or anti-migrant activists.”²²⁴

Moreover, the plaintiffs were never told in advance how long they would be questioned. One plaintiff was patted down and had his belongings searched and then was questioned for thirty to forty minutes; another plaintiff was detained for more than twelve hours at an airport in Mexico City, denied entry into Mexico, and returned to the United States, where she was subjected to further questioning.²²⁵ Many were made to wait, taken to a separate and often small, windowless room, and

²¹⁷ Guan v. Mayorkas, 530 F. Supp. 3d 237, 266–67, 274 (E.D.N.Y. 2021).

²¹⁸ *Id.* at 274.

²¹⁹ *Id.* at 263.

²²⁰ *Id.* at 266.

²²¹ *Id.* at 257.

²²² *Id.* at 266 (citing *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007), which cites *Healy v. James*, 408 U.S. 169, 181–84 (1972)).

²²³ *Id.* at 267.

²²⁴ *Id.* at 270 n.30.

²²⁵ *Id.* at 248–49.

questioned alone by plainclothes officers.²²⁶ Ultimately, the court found that the plaintiffs reasonably may have felt compelled to answer questions, including those related to information gathering, as a precondition of entering the United States; these plaintiffs were subjected to conditions that “constitute[d] an impairment on [their] expressive and associational rights.”²²⁷

4. *Grounds to Assert Youths’ Right to Expressive Association*

Regarding gang policing, the associations of youth included in NYPD’s gang databases are likely expressive. The right of expressive association of youth targeted by broad and vague gang criteria is implicit in the right to engage in activities protected under the First Amendment.²²⁸ Again, these activities include the pursuit of “a wide variety of political, social, economic, educational, religious, and cultural ends.”²²⁹ As previously described, researchers have shown that Black and Latinx youths from low-income backgrounds engage in different types and levels of activities than their white counterparts because of their class and race.²³⁰ For low-income youths, associations with extended family and neighbors are unavoidable as a product of their economic and cultural environments. Moreover, as the Supreme Court has noted, youth have less of an ability to leave such environments.²³¹ As a result, the fear of including youth in a gang database and causing them to suffer collateral consequences, at a minimum, discourages or prohibits poor people of color from freely engaging with their own family, their support network.²³²

Also, the associations of youth disproportionately included in gang database are likely expressive because their activities are important for integration within their community. As noted earlier, because of different child-rearing practices, youth of different economic classes may interact with their surroundings differently.²³³ While activities and schedules of middle-

²²⁶ *Id.* at 247–49, 261.

²²⁷ *Id.* at 273.

²²⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

²²⁹ *Id.*

²³⁰ *See LAREAU*, *supra* note 148, at 340; *Sarkisian & Gerstel*, *supra* note 150, at F14.

²³¹ *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

²³² *See Bailey*, *supra* note 7, at 1543. For discussion of consequences, see *supra* Part A.3.

²³³ *See LAREAU*, *supra* note 148, at 66–68.

class youth are intensely controlled and monitored by parents, working-class and low-income children are given ample space to interact not only with their family but also with friends without a tightly controlled schedule that limits their interactions. Thus, gang database criteria that target a wide scope of associations and locations are more likely to undermine activities important for community integration for working-class and low-income youth than middle- or higher-income youth.

Lastly, the growing presence of school resource officers and similar officials in schools attended by youth vulnerable to the use of gang database also likely makes the associations of these youth expressive. Students attend school for several educational goals, especially in light of the Supreme Court recently recognizing American public schools as nurseries of democracies.²³⁴ However, the threat that an officer may identify students as gang members or affiliates because of their activities and relationships with classmates, what they wear at school or online, and where they live—or often where their school is located—can undermine students' educational goals. As a result, students are likely discouraged from participating in several aspects of their educational experiences in schools.

Unlike the mere “recreational dancing” in *Stanglin*, the associations of youth subject to gang policing are more than chance encounters.²³⁵ When gang policing targets neighborhoods or settings labeled as gang territories,²³⁶ gang policing targets non-criminal activities and associations of youth that would go unmonitored in non-gang territories. These activities and associations of youth occur frequently and are crucial for their growth and development. Furthermore, while recreational dancing is intended as a fun activity that frequently involves interactions with strangers, youths are still associating

²³⁴ *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021). The specific implications of this recent Supreme Court decision on students' First Amendment rights and policing in schools is beyond the scope of this note, but it is still relevant and merits further exploration. The Supreme Court found schools have less interest to a certain extent in an off-campus student's activities for three main reasons, including protecting their unpopular expressions. *Id.* Moreover, the Supreme Court held that the school violated B.L.'s First Amendment rights when she was suspended from the school's cheerleading squad because of online (Snapchat) posts she made when criticizing the school rules. *Id.* at 2043, 2048. As a result, schools may also be violating students' First Amendment rights when school officials rely on students' social media post to monitor their activities, allege associations and, as a result, impose disciplinary actions.

²³⁵ *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

²³⁶ *N.Y. Daily News*, *supra* note 52.

with family, friends, and others who support their educational, psychological, and social growth.

Even if the associations of youth are not typically protected under the First Amendment because of a lack of an outward message, the value of these associations should be focused on their inward effect.²³⁷ An association's purpose and value is based on the communication of a specific message, while any concern is based on the impact of a regulation on such a message. But, "associations [also] provide welcome sites for the development of ideas, discussions and disputes between members in an environment [youth may] find sufficiently comfortable and conducive."²³⁸ Associations with this purpose may not have a specific purpose, and if they do, the purpose may change. For example, in *Dale*, the Boy Scouts influenced and taught boys how to think and act.²³⁹ These Boy Scouts focused inwardly on their members and their development. Similarly, the associations of youth with their family, including their extended family, and friends helps to facilitate their cultural and social development.

5. *Gang Databases' Unjustified Burden on Youths' Associative Freedoms*

The private and expressive associations of youth in gang databases may be significantly, if not directly and substantially, burdened by these gang databases. There are clear consequences when law enforcement includes individuals in a gang database.²⁴⁰ These consequences range from housing and employment loss to bail denials and deportation. As a result, the livelihoods of individuals are uprooted when they are labeled associated or actual gang members based on non-criminal activities.²⁴¹ For example, in addition to Alex's tragic experiences,²⁴² Jelani, a New York teen, spent more than a year on Rikers Island, mainly because a local prosecution office incorrectly concluded that he was a member of a criminal gang. The prosecutors relied on Facebook photos of the teen with members of a local crew—a group of kids loosely affiliated by

²³⁷ See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 880 (2005).

²³⁸ *Id.*

²³⁹ *Id.* at 880–81.

²⁴⁰ See TRUJILLO & VITALE, *supra* note 8, at 13; ARASTU ET AL., *supra* note 4, at 7; Howell, *Fear Itself*, *supra* note 12, at 649–50.

²⁴¹ See, e.g., ARASTU ET AL., *supra* note 4, at 24 (listing the NYPD and Nassau County Police Department gang membership criteria for gang databases).

²⁴² See *supra* note 1.

block or housing development—and several posts from crew members that he had “liked.” In reality, the teen was affiliated with crew members because they were his neighbors and family members.²⁴³

To avoid these labels and subsequent gang database entries and arrests, youths are subjected to ongoing chilling effects: youths must restrain themselves from associating with friends and family in their own neighborhoods, especially within housing development areas; youths have to be mindful of what they wear, what they say, and what they post online, on and off-campus; and youths overall have to limit their mobility and development within their social and geographical spaces.²⁴⁴ Thus, law enforcement’s use of gang policing may significantly, if not directly and substantially, burden the associative freedoms of youth who are targeted by gang policing.

Even if there is no clear chilling effect, like for the *Tabbaa* and *Guan* plaintiffs, youth who are included in gang databases suffer a penalty.²⁴⁵ The *Tabbaa* plaintiffs were subject to law enforcement’s detainment and extensive processing because of their associations at a conference. Similarly, because of their association with the media and journalistic activities, the *Guan* plaintiffs were subjected to additional questioning often unrelated to their admissions, patted down and searched, and detained in small, windowless rooms.²⁴⁶ In both cases, there was no clear chilling of future expressive activity.²⁴⁷ Nevertheless, the *Tabbaa* and *Guan* plaintiffs were penalized when they were arrested, searched, detained, questioned, photographed, and fingerprinted. Again, in *Tabbaa* and *Guan*, the court found that penalties themselves can constitute significant burdens, if the government penalizes members of a group for exercising their First Amendment rights.²⁴⁸ Here, because of where they live and their associations with family, friends, and neighbors therein, youths in gang databases most likely experience consequences that are also penalties. Again, these consequences include loss of housing, employment, and immigration bene-

²⁴³ Popper, *supra* note 55.

²⁴⁴ Bailey, *supra* note 7, at 1570.

²⁴⁵ *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007).

²⁴⁶ *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 246–51 (E.D.N.Y. 2021).

²⁴⁷ *Tabbaa*, 509 F.3d at 101 (citing *Healy v. James*, 408 U.S. 169, 181–84 (1972) (finding that the defendant’s actions imposed significant disabilities resulting in a substantial burden even though there was no clear chilling effect nor prohibition of future associational activities)); *Guan*, 530 F. Supp. at 257, 273 n.36 (citing *Tabbaa*, 509 F.3d at 102) (“That the Court previously found that Plaintiffs failed to allege a chilling effect is of no moment here . . .”).

²⁴⁸ *Tabbaa*, 509 F.3d at 101.

fits, and school suspensions.²⁴⁹ Thus, the effects of including youth in gang databases may significantly burden youths' First Amendment right to associate.

At the same time, law enforcement authorities may have a compelling state interest to protect the public. Certain crews and gangs harm and kill people.²⁵⁰ These violent crimes merit law enforcement's attention. But law enforcement's use of gang databases is likely not narrowly tailored to its purpose and can be used in a manner that is significantly less restrictive of people's associative freedoms. In *Tabbaa*, the government had the compelling state interest of protecting the public from the threat of terrorism.²⁵¹ There, the Second Circuit found that the state actions could not be significantly less restrictive of individuals' associative freedoms: "[T]he extra hassle of being fingerprinted and photographed—for the sole purpose of having their identities verified—is [not] a 'significant[]' additional burden"²⁵²

Here, New York City and Nassau County's gang policing, relying on gang databases, is not just "extra hassle" for youths. Unlike the *Tabbaa* plaintiffs who were arrested, detained, and processed at an airport—a port of entry—youth who are included in gang databases are likely targeted in their neighborhoods, homes, and schools. These youth cannot be reasonably expected to avoid their neighborhood, home,²⁵³ or school²⁵⁴ and relationships rooted in these important locations. Nor can youth be expected to easily afford to move to a neighborhood not deemed a gang territory, change homes, or attend another school.

Moreover, the NYPD and Nassau County Police Department can pursue their compelling state interest of public safety through means "*significantly less restrictive* of associational freedoms."²⁵⁵ Other jurisdictions have implemented safe-

²⁴⁹ See *supra* Part A.3.

²⁵⁰ See Edgar Sandoval, *After 32 Shooting Victims, a Rallying Cry: 'Stop the Bleeding'*, N.Y. TIMES (Dec. 5, 2019), <https://www.nytimes.com/2019/12/05/nyregion/queens-gang-shooting-aamir-griffin.html> [<https://perma.cc/TN6J-ETZ3>]; Liz Robbins, *Evelyn Rodriguez, Mother of Girl Killed by MS-13, Remembered for Her Guts and Courage*, N.Y. TIMES (Sept. 15, 2018), <https://www.nytimes.com/2018/09/15/nyregion/evelyn-rodriguez-dead-ms-13-long-island.html> [<https://perma.cc/A7UF-WZWW>].

²⁵¹ *Tabbaa*, 509 F.3d at 103.

²⁵² *Id.* at 105.

²⁵³ See *supra* section C.1–2, notes 142–155.

²⁵⁴ See *supra* section C.3, notes 156–179.

²⁵⁵ *Tabbaa*, 509 F.3d at 105 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added)).

guards to prevent the consequences that New York gang policing causes. For example, in California, legislators passed a law that requires minors and their parents to be notified before they are included in a state-wide gang database.²⁵⁶ Some jurisdictions have eliminated the use of gang databases.²⁵⁷ Thus, law enforcement authorities like the NYPD and Nassau County Police Department have several options to use gang databases in ways that are significantly less restrictive of associative freedoms.²⁵⁸ Moreover, these departments can redirect more attention to recommended alternative evidence-based practices to reduce gang violence without violating the rights of vulnerable youth.²⁵⁹

CONCLUSION

As the pandemic persists, law enforcement authorities call for more gang policing, relying on vague gang labels, moral panics, and incomplete data. However, law enforcement authorities' use of gang databases often relies on surveilling associations of individuals, especially poor Black and Latinx youths, in their neighborhoods, housing, and schools. As a result, these youths become subject to several problems with immigration, prosecutions, education, and employment. Unfortunately, in New York and other jurisdictions, many vulnerable youths do not know when, where, and how they are being watched, but they know they *can* be watched at any moment.²⁶⁰

²⁵⁶ CAL. PENAL CODE § 186.35 (West 2018) (allowing appeal of gang member designation in shared gang database); *see also* Winton, *supra* note 28 (describing a 2014 California law that would have required parental notification before adding juveniles to the gang database).

²⁵⁷ *See, e.g.*, Justin Jouvenal, *Virginia Police Task Force Drops Use of Controversial Gang Database*, WASH. POST (Jan. 28, 2021), https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0dec3d4-5bfd-11eb-b8bd-ee36b1cd18bf_story.html [<https://perma.cc/5SH2-XZJQ>] (discussing Northern Virginia Regional Gang Task Force's decision to discontinue use of GangNet, which is used by more than 120 law enforcement agencies in Maryland, Virginia and D.C., and contains nearly 7,800 alleged gang members); Mick Dumke, *Cook County Takes Steps to Erase Its Regional Gang Database*, PROPUBLICA, <https://www.propublica.org/article/cook-county-sheriffs-office-database-new-ban-law> [<https://perma.cc/7YBL-GUJJ>] (Feb. 21, 2019) (discussing eliminating regional gang database); Carimah Townes, *Portland Is Saying Goodbye to Its Controversial Gang Database*, THE APPEAL (Sept. 12, 2017), <https://theappeal.org/portland-is-saying-goodbye-to-its-controversial-gang-database-e88e6c05262c/> [<https://perma.cc/7B4Q-4RBF>] (discussing how and why Portland destroyed its gang database).

²⁵⁸ *See* TRUJILLO & VITALE, *supra* note 8, at 19.

²⁵⁹ GREENE & PRANIS, *supra* note 9, at 95–98.

²⁶⁰ *See* Patton et al., *supra* note 11, at *1.

Thus, it is imperative that the First Amendment right to associate is asserted, along with other rights, in New York and other jurisdictions to protect youth from the overreach of gang policing. Researchers across different disciplines provide detailed roadmaps to understanding youths in communities shaped by racism, economic inequality, and other structural issues.²⁶¹ With these roadmaps, legal advocates can better understand and explain how and why gang databases harm youth and effectively assert youths' First Amendment rights. Otherwise, youths in Alex and Jelani's positions²⁶² are abandoned and presumed guilty of violent gang activity based on how they dress, where they live, and with whom they associate in settings they rarely choose.

²⁶¹ See *supra* Part C; LAREAU, *supra* note 148, at 240–48.

²⁶² Dreier, *supra* note 1; Popper, *supra* note 55.