



**Girls for Gender Equity Testimony for the New York City Council
Committee on Public Safety**

Delivered by: Fawzyiah Siddiqui
Legal Intern

June 27, 2019

Good Afternoon Chairman Richards and Council Members. My name is Fawzyiah Siddiqui and I am a Legal Intern for Girls for Gender Equity (GGE). Thank you for holding this important public safety hearing and giving me the opportunity to speak today. Chairman Richards, I would like to thank you especially for your proposed bill demanding NYPD transparency with respect to the so-called “criminal group database.” Thank you for doing the work to help us move towards a safer and more accountable New York City.

At GGE, we share a common goal with your initiative to protect young people from unethical—and often unconstitutional—race-based policing. GGE is a youth development and advocacy organization based in New York City, committed to the physical, psychological, social and economic development of girls and women. GGE challenges structural forces, including racism, sexism, transphobia, homophobia, and economic inequity, which constrict the freedom, full expression, and rights of transgender and cisgender girls and women of color, and gender non-conforming people of color. We do this work through direct service, advocacy and culture change.

We are offering testimony today to highlight the intersections between the NYPD’s gang policing strategy, school policing, and the so-called “School-to-Prison Pipeline.” This framing is helpful, but does not fully capture the experiences of girls and non-binary youth of color. We instead use the term “pushout,” coined by scholar Dr. Monique Morris to characterize the ways that girls and non-binary youth end up leaving school before graduation. When our young people are arbitrarily added to the NYPD’s surreptitious gang database, they are preemptively fast-tracked into entering the juvenile or criminal legal systems. The gang database is yet another system put in place to incarcerate young people for nonviolent crimes under the guise of supposed “gang membership.” Gang association by itself is not a crime, but inclusion in the database is a well-known police tactic used to bolster a misdemeanor charge into a felony.

Chairman Richards' proposed bill to create an appeals process is a crucial first step towards NYPD accountability and transparency, but I urge councilmembers to push legislation even further by challenging the criteria that the NYPD uses for gang membership identification in the first place. The process for designating young people as a so-called "Identified Gang Member" relies on information from school safety agents and unidentified "outside agency" sources who provide little to no substantive proof of actual gang membership.¹ A "hunch" based on clothing colors, tattoos, scars, and tangential associations with known gang members should never be enough to condemn a young person to a lifetime of NYPD surveillance.²

Last week, the Department of Education and the NYPD released a new Memorandum of Understanding to address the problematic presence of school safety agents in public schools.³ Per the MOU, NYPD personnel are not permitted to interfere with non-criminal minor misconduct in schools such as uniform violations, low level marijuana possession, or disorderly conduct. This is a huge win for GGE's work towards significantly reducing NYPD presence in schools and an affirmative step in reducing pushout for girls and women of color, and gender non-conforming people of color. Trans and gender non-conforming youth, especially, are among some of the most targeted groups for sexual harassment and assault by law enforcement officers in and outside of schools. I implore the City Council to take the MOU's momentum in stride and work towards further transparency in NYPD surveillance and database building.

We thank the New York City Council and in particular the Committee on Public Safety for the opportunity to share our work and look forward to continued support as we work together to serve all New Yorkers. Thank you again for this opportunity to testify.

ABOUT GIRLS FOR GENDER EQUITY: Girls for Gender Equity (GGE) is an intergenerational organization that centering the experiences of young women of color and LGBTQ/GNC youth of color. Through direct services, organizing and culture change work, GGE works to ensure that the voices of youth of color and especially cis and trans Black girls and GNC youth from low-income communities, will be heard and respected.

¹ NAACP Legal Defense Fund (LDF), "Abuse of Police Discretion," available at: <https://www.naacpldf.org/case-issue/nypds-gang-policing-tactics/>

² The Intercept, "NYPD Gang Database Can Turn Unsuspecting New Yorkers Into Instant Felons," available at: <https://theintercept.com/2018/12/05/nypd-gang-database/>

³ The Gothamist, "New DOE Agreement with NYPD Attempts to Take School Security Past the 'Guliani Days'," available at: https://gothamist.com/2019/06/21/doe_nypd_school_security.php.

**Testimony in Support of Int. No. 1548-2019 and 1553-2019
Before the Committee on Public Safety
David Pucino
Staff Attorney
Giffords Law Center to Prevent Gun Violence**

Chairman Richards, members of the Committee on Public Safety: on behalf of Giffords Law Center to Prevent Gun Violence ("Giffords Law Center"), the legal arm of the gun violence prevention organization led by former Congresswoman Gabrielle Giffords, I submit this comment in support of Int. Nos. 1548-2019 and 1553-2019.

Giffords Law Center is a non-profit policy organization dedicated to researching, writing, enacting and defending laws and programs proven to reduce gun violence and save lives. Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens seeking to make their communities safer from gun violence. For over 25 years, our attorneys have tracked and analyzed firearm legislation, evaluated violence-prevention policy proposals, and recommended effective gun safety laws.

I write in support of these bills, which will address the growing public safety risk posed by unserialized firearms. Under federal law, any firearm that is manufactured or imported into the United States by a licensed firearms manufacturer or importer must be permanently marked with a serial number and other identifying information. When the firearm is sold, there is a record of the sale which identifies the firearm by its unique markings. Using this information, law enforcement can track firearms from the manufacturer or importer through the distribution chain. This technique, called "tracing," is critically important to law enforcement. It is an essential investigative tool used when firearms are recovered from crime scenes. But it only works if firearms are serialized, and records are retained, according to federal standards.

The federal serialization standards require that one particular piece of the firearm, called the "frame" in the case of handguns or "receiver" in the case of long guns, carry a serial number. That is because the federal definition of "firearm" includes the frame or receiver of a firearm. Because frames and receivers are "firearms" under federal law, they can also only be obtained from a firearms dealer after a background check. This is the only component of the firearm that is subject to the serialization and background check requirements, and is thus the key component for regulatory purposes. Once someone has a frame or receiver, they can readily obtain the other firearm components without a background check, and these other components need not be serialized.

In recent years there have been new and dangerous efforts to evade federal serialization and background check requirements. The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has stated that partially competed frames or receivers are not "firearms" under the federal

definition.¹ As a result, an individual can buy a nearly complete frame or receiver online, without a background check, drill out a few holes, and then use that now-complete, still-unserialized frame or receiver to build a fully functional firearm. Individuals have also used 3D-printing technology to manufacture frames or receivers from scratch. In either case, the result is an untraceable firearm: there will be no records and there will be no serial number, and law enforcement will have no way of knowing that this firearm exists. These untraceable firearms are often called “ghost guns.”

Untraceable firearms are increasingly the weapon of choice for gun traffickers and organized crime. They are easy to obtain, even if one has a criminal record, because one does not need to have a firearms license or go through a background check to purchase an unfinished frame or receiver. Once they are sold on the black market or left at the scene of a crime, they are nearly impossible to trace back to the original owner.

Somewhat perversely, untraceable firearms pose the greatest threat in places that have the strongest gun laws. In New York one must have a license to obtain a handgun—unless it is a ghost gun. One cannot obtain an assault weapon because they are banned under the SAFE Act—unless the assault weapon is a ghost gun.

We know that untraceable firearms are a problem. They have been used in shootings by individuals who could not obtain a firearm from a licensed dealer. A man who failed a background check assembled an assault rifle using an unfinished receiver in 2013 and went on a rampage on a college campus, killing five people.² There have been many more shootings involving ghost guns in the years since.³ Over the last three years law enforcement have busted ghost gun trafficking rings and recovered hundreds of firearms.⁴ But we don’t really know the full scope of the problem because

¹ *Are “80%” or “Unfinished” Receivers Illegal?*, Bureau of Alcohol, Tobacco, Firearms & Explosives, <https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal>.

² Robert Cavnar, *Santa Monica Shooter Built His Gun from Parts He Bought Online*, Huffington Post (June 15, 2013), https://www.huffingtonpost.com/robert-l-cavnar/santa-monica-shooter-buil_b_3447220.html.

³ *E.g.*, Lyanne Melendez, *Walnut Creek Police Say ‘Ghost Gun’ Used in Murder-Suicide*, ABC7 News (Aug. 4, 2015), <https://abc7news.com/news/walnut-creek-police-say-ghost-gun-used-in-murder-suicide/903250/>; *2 Investigates: Untraceable Guns Showing Up at Crime Scenes More Often*, KTVU News (Feb. 18, 2015), <http://www.ktvu.com/news/2-investigates-untraceable-guns-showing-up-at-crime-scenes-more-often>; Brian Kuebler, *Homemade, Untraceable Guns Pose Threat to Police*, WMAR 2 News (Sep. 22, 2016), <https://www.wmar2news.com/news/crime-checker/baltimore-city-crime/homemade-untraceable-guns-pose-threat-to-police>; David Collins, *Police: Man Fired Several Shots at Officer in West Baltimore*, WBAL TV 11 News (Updated Jul. 18, 2016), <https://www.wbalv.com/article/police-man-fired-several-shots-at-officers-in-west-baltimore/7101771>; Ray Sanchez, Jason Hanna & Phil Gast, *Gunman in Northern California Rampage Was Not Supposed to Have Guns*, CNN (Nov. 15, 2017), <http://www.cnn.com/2017/11/15/us/california-tehama-county-shootings/index.html>; Damon Arthur, *Sheriff: Tehama Shooter Built His Own Illegal Guns*, Record Searchlight, (Nov. 15, 2017), <http://www.redding.com/story/news/2017/11/15/tehama-shooter-built-his-own-illegal-guns/868737001/>.

⁴ *E.g.*, *A.G. Schneiderman Announces Thirty-Two Count Indictment of Two Defendants Charged with Illegally Trafficking Untraceable ‘Ghost Guns’*, Office of the Attorney General of N.Y. (Sept. 21, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-announces-thirty-two-count-indictment-two-defendants-charged>

law enforcement officers who recover ghost guns often don't know how to report this novel weapon. Int. No. 1548 would address this problem by amending the City's administrative code to direct the Police Department to include ghost guns in its reports on seized firearms. I commend Council Members Miller, Richards, and the Public Advocate for introducing the bill urge the Committee to advance it so that we can more fully understand the scope of the threat.

I also commend Council Members Rosenthal, Miller, and Richards, and the Public Advocate for introducing Int. No. 1553 to prohibit the possession or disposal of unfinished frames or receivers that lack serial numbers. Left unregulated and unserialized, these parts are the root of the ghost gun problem, and New York City will be safer without them.

The purpose behind this bill is commendable, and this effort is a credit to this Committee. I would like to suggest some ways in which I believe Int. No. 1553 could be strengthened.

First, I would recommend stating more expressly that the *sale or transfer* of unfinished frames or receivers that lack serial numbers into New York City is prohibited. I believe that the current language, which makes it a misdemeanor to "dispose" of such a part, would encompass sale into the City, but more express language would ensure there is no ambiguity.

Second, I would modify the definition of "unfinished frame or receiver." As drafted, if one of these parts carries a serial number, it would not be defined as an unfinished frame or receiver. I would move the serialization language out of the definition and instead make serialization one of several requirements that must be satisfied in order to possess or transfer an unfinished frame or receiver: possession or transfer could be prohibited "unless the unfinished frame or receiver is engraved with a serial number that meets or exceeds requirements pursuant to" federal law.

Third, also in the definition of "unfinished frame or receiver," I would recommend removing the phrase "with modification by the user" from the definition, because it could create ambiguity. For

illegally; Alex Ceneviva, *Bridgeport Police Confiscate Ghost Guns*, WTNH News 8 (Aug. 2, 2018), <https://www.wtnh.com/news/connecticut/fairfield/bridgeport-police-confiscate-ghost-guns/1341726044>; Ryan Gillespie, *Kissimmee Man Sentenced to 5 Years for Building 'Ghost Guns' Without Federal License*, Orlando Sentinel (June 14, 2018), <https://www.orlandosentinel.com/news/breaking-news/os-kissimmee-ghost-guns-20180614-story.html>; *Machine Shop Employee Pleads Guilty to Federal Charges of Illegally Manufacturing Assault Rifles and Silencers He Intended to Sell*, U.S. Attorney's Office, E.D. Ca. (Dec. 7, 2017), <https://www.justice.gov/usao-cdca/pr/machine-shop-employee-pleads-guilty-federal-charges-illegally-manufacturing-assault>; see also Zusha Elinson, *The Rise of Untraceable 'Ghost Guns'*, Wall S.J. (Jan. 4, 2018), <https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800>; Richard Winton, *L.A. Gangs Stockpile Untraceable 'Ghost Guns' that Members Make Themselves*, L.A. Times (July 6, 2018), <http://www.latimes.com/local/lanow/la-me-la-gangsters-homemade-guns-20180706-story.html>; Maxwell Reil, *Man Indicted After Selling 'Ghost Gun' in Hammonton*, Atlantic City Press (Apr. 13, 2018), https://www.pressofatlanticcity.com/news/man-indicted-after-selling-ghost-gun-in-hammonton/article_16aa48bc-519c-50d5-b66b-748689e9c5b4.html; *12 Arrests in New Jersey 'Ghost Gun' Assault Rifles, Cocaine Ring Bust: AG*, NBC 4 NY, (Mar. 18, 2019), <https://www.nbcnewyork.com/news/local/New-Jersey-Alleged-Ghost-Gun-Assault-Rifle-Cocaine-Ring-Bust-Attorney-General-507304161.html>.

example, it could be ambiguous whether a gun trafficker assembling firearms with the intent to sell them to some other person is the “user.”

Fourth, I would create an exemption for firearms manufacturers who are licensed as gunsmiths under state law so that the local law will not inadvertently reach legitimate, licensed manufacturers. At the same time, a requirement that would-be transferors must confirm that the transferee has a gunsmith license would help prevent transfers to individuals who are prohibited from possessing firearms. Possession or transfer could be prohibited unless the possessor/transferee is a licensed gunsmith (and the unfinished frame or receiver is serialized).

Finally, I would recommend imposing record retention requirements, in addition to the serialization requirements, that are required for firearms under federal law. A provision could state that such records must be retained both by the manufacturer/seller, and could further require that they be sent to the Police Department.

Thank you again for the opportunity provide this testimony in support of these critically important bills.

David Pucino
Staff Attorney
Giffords Law Center to Prevent Gun Violence

ABOUT GIFFORDS LAW CENTER

For over 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America by researching, drafting, and defending the laws, policies, and programs proven to save lives from gun violence.

INTRO
2223

TESTIMONY OF PROFESSOR BABE HOWELL

June 27, 2019

Chairperson Richards and Councilmembers:

My name is Babe Howell. I am a professor at CUNY School of Law and have been researching gang databases, gang policing, and gang prosecutions for a decade with a particular focus on New York City.

I'd like to begin by expressing my appreciation that you are looking into the NYPD's criminal group database, also known as the "gang database". The hearings that were held last June brought an important spotlight to this database. Today's proposal shows a continued recognition that the gang database must not be insulated from review.

This is a brave stance. But I urge you to take greater and braver steps to protect the public for two reasons. First, the gang database is a secret electronic database that is based on appearance and association rather than conduct. It is overly inclusive and racially discriminatory. It infringes on basic freedoms of New Yorkers of color who comprise 99% of the database. Second, the proposal to provide notice to youth and their guardians may, in fact, expose these young people to harm.

First, gang databases allow law enforcement to amass an electronic database in the absence of any criminality. These databases should be prohibited. There are precedents, both in NY and elsewhere for prohibiting electronic databases that do not require criminality.

New York state prohibits maintenance of electronic database with individual identifying information in the stop and frisk context - In May of 2010, the NYCLU challenged the maintenance of an electronic database containing information relating to every person the NYPD stopped or stopped and frisked. *Lino v. City of New York*, 958 N.Y.S.2d 11, 13 (App. Div. 2012). Just two months later N.Y. Crim. Proc. Law §140.50(4) went into effect to prohibit the maintenance of this database.

Portland, Oregon Police Department ended their 20-year-old gang database recognizing that the database disproportionately affected minorities and imposed lifelong barriers for those listed in it.

Gang database audits show they are consistently flawed. Audits and investigations of gang databases in California, Chicago, and London have shown they are rife with inaccuracies and include many people who do not meet the minimal criteria for inclusion. The databases include people who have not committed violent acts or any crime. *The vast majority of those included in gang databases are people of color.*

AWAIT INSP. GEN'L EURE'S REPORT.

Would not do surgery until you get MRI.

every statement regarding criteria seem consistent with this IDS gang entry sheet.

11 arrests sweating harassing these kids

New York's Gang Database. The gang database is even less legitimate than the NYPD's prohibited Stop & Frisk database. A *Terry* stop requires reasonable suspicion of criminal activity. Criteria for gang database inclusion do not require any suspicion of criminality. Instead, clothing, social media posts, rap videos, association, and location are bases for inclusion. Attached is the IDS Gang Entry sheet that lists these criteria.

The Supreme Court has held that It is not a crime to be a gang member and that attempts to criminalize that status alone offend due process and are unconstitutionally vague. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *City of Chicago v. Morales*, 527 U.S. 41 (1999)

We have very little information on the NYPD's gang database but we do know that it is 99.2% non-white. We do know that there is no notice, no review, no requirement of criminality.

The Impact of Gang Allegations – The Bronx 120 case study.

Last year Chief Shea told you that gang policing is the actually "precision policing" despite the broad sweep of the gang database. He claimed that grand jury indictments and prosecutions insured that gang policing was not profiling.

I just finished reviewing the available court documents associated with the Bronx 120 Raid (the twin raids in Eastchester Gardens and the adjoining area along White Plains Road), and fully half of those who were subjected, along with their family, to that militarized pre-dawn raid *were not gang members according to the prosecution*. This information was not provided to the judges setting bail (and 101 were held without the possibility of bail, while 14 others were subjected to house arrest). 80 of the Bronx 120 had no prior felony record, and 35 had no record whatsoever.

Yet all were treated as violent gang members both by joint task forces conducting the arrests, and by the courts denying bail, suspending speedy trial rights, and limiting access to discovery materials.

Over half of the Bronx 120 defendants were re-prosecuted for offenses that had already been subject to state court proceedings. All but ~~few~~ took felony pleas. Dozens of underprivileged young Black men who had grown to adulthood with little to no criminal record were saddled with federal felony convictions because of claimed association with gangs many for allegedly selling marijuana years earlier.

The gang allegation is not harmless but instead subjects individuals to complete loss of due process. It subjects their friends, families and communities, to aggressive policing, and it even creates encounters that can endanger law enforcement themselves in the form of militarized raids. There is nothing "precise" about the gang database or the prosecutions that flow from "gang policing" in New York.

All but 5 convicted of felonies
118 pleas
2 mist pleas
3 DPs
2 trials w/ felony conviction

Notice to Minors & Their Guardians

Turning to the second point, on its face providing notice to minors sounds like a step in the right direction but it is not. Intentions are good but the result will not be. The proposal reflects tacit acceptance that NYPD continue to collect information about New York City minors in an electronic database in the absence of criminal conduct. The proposal makes these young people even more vulnerable both to violence and to gang involvement.

Why do I say this?

Increasing youth vulnerability: There are many studies exploring why and how individuals join gangs. A recurring narrative involves labeling and naming by police. Often when minors are identified as gang members by police, either accurately or inaccurately, overtaxed and disappointed guardians respond by reflexively crediting police and responding in a punitive manner to the minor. Vulnerable youths may be thrown out or rejected by caretakers. The incorrect identification of an individual as a gang member is often a precursor to youth joining gangs. Correct identification of an individual as a gang member strengthens gang ties and weakens family ties. When gang allegations are made in court young people are often detained pre-trial and placed in units with gang members. The label exposes young people to serious harm.

Failure to address the rights of most people in the gang database: This proposal also fails to provide any protection to the vast majority of people in NYPD's gang database who are over 18 years of age – 92%. These individuals may have no idea that they are labeled as gang members, but police will have this information at their fingertips during encounters.

Compromise position?

If the City Council is not ready to abolish the database, at a minimum they should (1) abolish it as to those who are under 18 because they cannot safely be provided notice, and (2) prohibit inclusion of those who have not been convicted of any crime related to violence.

Notice and an opportunity to challenge should be provided but due process must be assured. The current proposal, which allows the NYPD to decide whether or not to provide notice and how to rule on challenges is insufficient.

In conclusion, right now, New York City has historically low crime and particularly low violent and youth crime. We must take advantage of this moment. Consider these next steps –

End the Criminal Group Database: Like the electronic database challenged in *Lino v. City of New York*, and outlawed by N.Y. Crim Proc. L. § 140.50(4), the criminal group

database and maintenance of electronic databases relating to individuals with no criminal records can and should be prohibited.

Oversight of NYPD Surveillance: The City Council needs to approve new technology and surveillance prior to adoption rather than post hoc. Additionally, full reporting and regular reporting requirements regarding surveillance, electronic databases, and other technological means of tracking and targeting New York City residents is needed.

Oversight of Gang Policing Units In addition to oversight of surveillance, oversight of gang policing units is necessary. NYC has low rates of crime and low rates of gang involvement but the NYPD has burgeoning gang units and databases that are 99% non-white. A recent New York Times article indicates that gang unit officers have disproportionately high rates of misconduct complaints. Oversight protects both the vulnerable New Yorkers who are identified as gang members (whether accurately or inaccurately) and all New Yorkers who pay the cost of civil rights settlements for use of excessive force, wrongful arrest, and malicious prosecution.

Oversight also protects communities, as law enforcement-based gang suppression strengthens gangs and increases violence.

Gang Harm Reduction Strategies: New York City enjoys low gang rates in part because it used non-law enforcement outreach workers to address gang involved kids in the 1960s and 1970s. Cities like LA and Chicago that used law enforcement to suppress gangs merely created more entrenched gang problems. New York knows what to do and this is to support communities with job programs, after school programs, mental health services, CURE Violence programs, and other effective non-law enforcement strategies to reduce gang membership and violence.

Integrative Approach: It is often tempting to conflate gang or crew membership with violence and crime but research on gangs and delinquency demonstrates that a few core gang members engage in violence while many members belong to gangs for a sense of family or protection. Moreover, most gang members age out of active involvement in gangs. Thus even accurate "gang databases" capture many individuals who are not appropriate targets for police surveillance. In Ecuador gangs have been allowed to register and engage with local government. Crime there has plummeted. Gangs and crews can be partners in civil society.

These may be bold proposals but New York is a bold city and the City Council today shows that it is not afraid to question the gang label and the appropriateness of applying it to the youth of our city. I know that you are concerned with victims of gang violence but using law enforcement to suppress gang violence is like putting out fires with gasoline. New York has long known better and done better; you can support the initiatives that truly protect both vulnerable youth, and the broader communities.

Thank you,

Professor Babe Howell
CUNY School of Law
babe.howell@law.cuny.edu

Attachments:

1. IDS Gang Entry Sheet, provided by NYPD Legal on Dec. 31, 2013.
2. K. Babe Howell, *Gang Databases: Labeled for Life*, *The Champion*, 28 – 35 (July Aug. 2011)
3. K. Babe Howell, *Gang Policing: The Post-Stop-and-Frisk Justification for Profile-Based Policing*, 5 *U. of Denver Crim. L. Rev.* 1 (2015).
4. Simon Segal, *Ecuador Legalized Gangs. Murder Rates Plummeted*, *Vox*, Mar. 26, 2019.

For additional information:

1. Babe Howell & Priscilla Bustamante, *Report on the Bronx 120 Mass "Gang" Prosecution* (April 2019) available at www.bronx120.report
2. NYPD FOIL responses (2014 and 2017), the Report on the Bronx 120 Mass "Gang" Prosecution, are available at www.bronx120.report
3. California State Audit, Chicago Inspector General, and Amnesty International Reports are also available at www.bronx120.report
4. Articles on gang allegations are available at my author page at <http://ssrn.com/author=1309667>

I.D.S. Gang Entry Sheet

Date of Report _____ Precinct of Report _____ NYSID# _____

Subjects Last Name _____ First Name _____ M.I. _____

Aliases _____ Scars/Marks/Tattoos _____

Additional Scars _____ Ht _____ Wgt _____ Hair _____ Eyes _____ Sex _____ Race _____

D.O.B _____ Social Security# _____ Identification _____

Home Address _____ Apt _____ County _____ Pct _____

Additional Addresses _____ Pct _____

Telephones (Home/Other) _____ (Beeper/Cell) _____

Vehicle Tag# _____ State _____ Make _____ Model _____ Year _____ Color _____

Criteria

In order to maintain the integrity of the Gang Division's Membership data base, the following is the criteria which will be adhered to for an individual to be qualified for entry into the I.D.S. data base as an identified gang member:

- Must Check A Box**
- An individual will be entered if he/she admits to membership during a debriefing
 - Or
 - Through the course of an investigation an individual is reasonably believed to belong to a gang and is identified as such by two independent sources. (Ex. Pct. Personnel, Intell, School Safety, Dept. of Correction, Outside Agency) Sources: _____
 - Or
 - Meets any **Two** below mentioned Criteria:

IDS Check

- Negative

Positive

- | | | |
|--|--|--|
| <input type="checkbox"/> Known Gang Location | <input type="checkbox"/> Scars/Tattoos Associated W/Gangs | <input type="checkbox"/> Gang Related Documents |
| <input type="checkbox"/> Colors Associated W/Gangs | <input type="checkbox"/> Association W/ Known Gang members | <input type="checkbox"/> Hand Signs Associated W/Gangs |

Arrest# _____ Pct of Arrest _____ A/O _____

Arrest Location _____ Charges _____

Phone Calls (Post Arrest) _____ Person(s) Called _____

Gang _____ Position _____ Location Freq _____

Associates _____ Assoc Address _____ D.O.B. _____ NYSID# _____

Narrative: *Include details of Arrest; if gang member is a crime victim include UF61#*

Rank/Signature of Reporting Officer _____ Name Printed _____

Tax# _____ Shield# _____ CMD _____

Rank/Signature Gang Division Supervisor _____ Date _____

For Intelligence Division Use Only

Entered into IDS By _____ Tax# _____ Date _____

Reviewed by Intelligence Division Supervisor _____ Date _____



Juvenile Justice *Juvenile Justice*

Gang Databases: Labeled for Life

Last summer, NACDL members completed a survey on the impact of allegations of gang affiliation on bail decisions and pretrial detention. The survey was inspired by a case in which a 16-year-old — considered an adult in the New York criminal justice system — was jailed on a first-arrest misdemeanor charge when a prosecutor requested high bail at arraignment, alleging that the youth was in the gang database.

How often are gang allegations made in connection with bail requests? What effect do they have on pretrial

release? On case outcomes? How accurate are they? Are the allegations ever tested? Are they generally limited to cases involving gang-related activities or are they made on unrelated misconduct? Do they frequently result in pretrial incarceration?

Research on this issue provided no existing answers to these questions, so I created a survey and sent it to defender offices in New York. NACDL also posted a link to the survey in one of its electronic updates.¹ The results, while limited,² provide preliminary answers to these questions. While the survey does not pretend to provide a complete picture, it does furnish anecdotal evidence that gang allegations (1) are made at bail hearings in many jurisdictions across the country; (2) often have a negative impact on pretrial release and case outcomes; (3) are not consistently accurate; (4) are not tested in most jurisdictions even when hearings are requested; and (5) are primarily made against defendants of color.

I promised *The Champion* an article on the results of the survey.³ The article would pretty much write itself based on the results. Then came the curveball — the article would be placed in an issue focusing on juveniles.

The Juvenile Issue

Juveniles are held or released with or without supervision and services. Bail is not an issue. What relevance do the survey and research have for lawyers who provide defense to juveniles?

On the other hand, youth has everything to do with gangs. Juveniles join gangs. Juveniles hang around gangs. They pretend to be in gangs. Juveniles who do not join gangs, but live in neighborhoods dominated by gangs, may nonetheless have friends, family members, and acquaintances in gangs. They will often end up in gang databases even if they never join gangs.

Juveniles also historically quit gangs. Major gang studies indicate that juveniles typically join gangs in their early teens and quit within a year or two.⁴ Few become core members, sticking with gangs through high school or beyond.

In a single day spent observing juvenile delinquency proceedings in family court, I observed a 15-year-old with parents in the audience and a 96 percent school

BY K. BABE HOWELL

attendance record sent to secure detention for possession of an unloaded sawed-off shotgun and unspecified "gang materials" in a book bag. Would it have made a difference if the gang-related allegation had not been made? Certainly the risk assessment instrument suggested that a child with no prior arrests, parents, and good school attendance should be released.

My research has led me to hypothesize that the creation and maintenance of gang databases may reinforce and strengthen relations to gangs rather than deter gang membership. Thus it may be wise for attorneys who represent juveniles to make an effort to keep juveniles from being identified as gang members, even if this information is accurate, despite the tension between this goal and the therapeutic aspirations of juvenile court.

The Survey

While practices vary from jurisdiction to jurisdiction, the survey establishes that, in many jurisdictions, unsupported allegations of gang affiliation resulted in high bails set on offenses not

related to gang activity.⁵ Four-fifths of respondents reported that gang allegations were leveled against individuals who were not gang members, and three-fourths of the respondents faced such allegations only when their clients were non-white.

Like the case that inspired this survey, a majority of respondents (60 percent) said that they had represented clients who would have been released had it not been for the allegation of gang membership. Finally, evidentiary hearings on the gang allegations were the exception, rather than the rule, with only one in five respondents reporting that the gang allegations were ever subjected to evidentiary review.

Frequency of Allegations Of Gang Affiliation

The responses made it clear that allegations of gang affiliation are regularly made at bail hearings. Ninety percent of the respondents reported that prosecutors regularly use claims of gang affiliation to justify requests for higher bail. In some jurisdictions, gang allegations were made daily, in others, less frequently.

Types of Cases in Which Gang Allegations Were Made

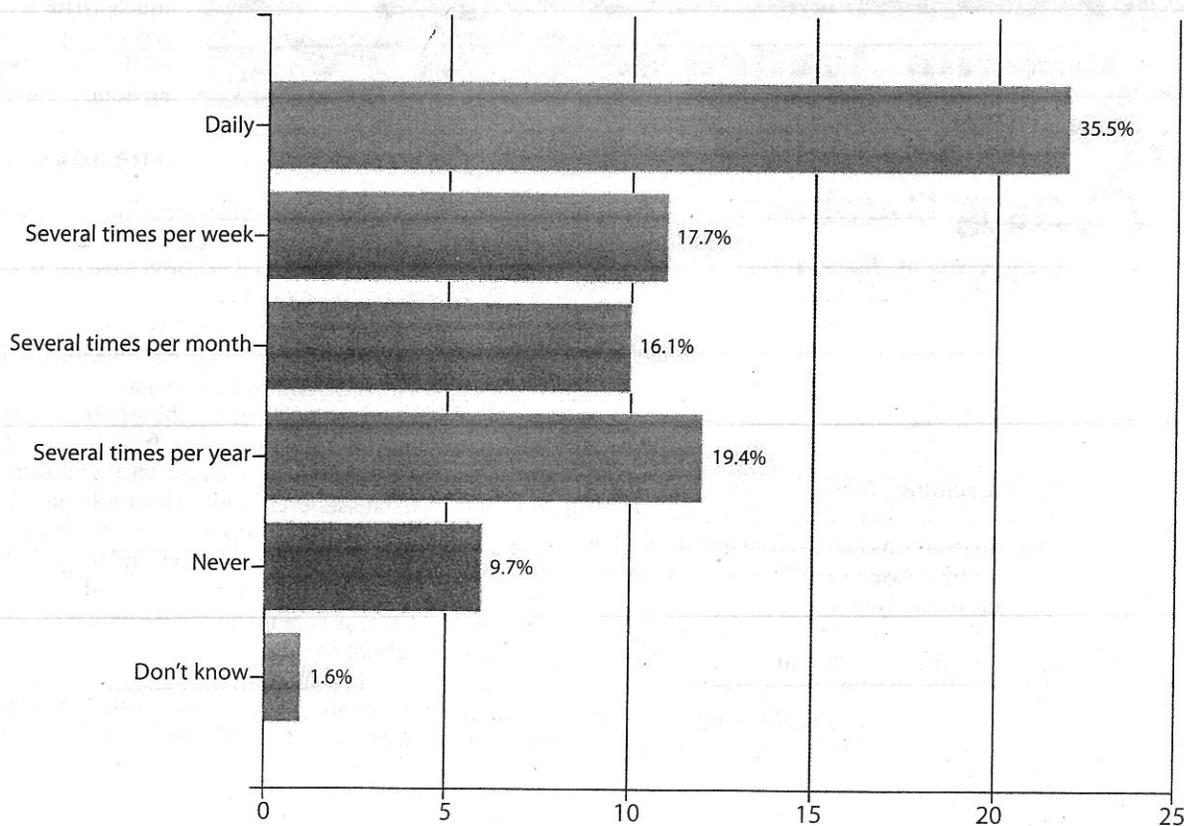
Only 14 percent of respondents reported that most or all of the cases in which gang affiliation was alleged were related to gang activity. In contrast, 36 percent indicated that most or none of the cases in which gang affiliation was alleged were *not related* to gang activity. Half the respondents said some cases were related and some were not.

Nor were allegations of gang affiliation reserved for only the more serious cases. Over half (58 percent) of the respondents said gang allegations were made at bail hearings in misdemeanor cases.

Impact of Allegation Of Gang Affiliation

The respondents reported a significant impact on bail in both felony and misdemeanor cases. Over 90 percent of respondents indicated that the gang affiliation allegation resulted in significantly higher bail or remand in felony cases.⁶ About two-thirds of the respondents indicated that higher or significantly higher bail was set in some misdemeanor cases. Sixty percent of respondents reported handling one or more cases in

Based on your general observations, estimate how often the prosecution (or law enforcement) in your jurisdiction makes allegations of gang affiliation at bail hearings.



which a client “who would otherwise have been released or been able to post bail, was denied bail because of the allegation of gang affiliation.”⁷⁷ The comments made it clear that the impact of higher bail is inversely related to the severity of the charge. Thus, one respondent explained, “These were homicides, so they would not have been able to post bail anyway.”⁷⁸ Another reported: “On misdemeanors where a likelihood would otherwise be a release on their own recognition with no bail at all, the gang affiliation accusation caused bail to be set in some instances; on felonies, bail was likely to be set regardless. ...”⁷⁹

The responses also illustrated the role of wealth in the criminal justice system. One respondent stated, “Most of my clients are retained and therefore end up posting [bail].”¹⁰ Another respondent said, “I can think of one felony assault case where the defendant (17 years old) would have been able to make some modest bail, but the court set higher bail (I believe primarily because of the allegation of gang affiliation) and his family was unable to make bail.”¹¹

To be sure, there are cases and jurisdictions in which allegations of gang affiliation at the bail hearing have little or no impact. In murder and shooting cases, the allegation of gang affiliation is unlikely to have an impact on bail because the bail will be very high or the accused will be remanded, regardless of whether the accused is in a gang. In other cases, the allegation of gang affiliation may not have an effect because the judge is skeptical of the basis for the allegation or deems the alleged affiliation irrelevant. One respondent provided a concise articulation of the relationship between the gang allegation and bail as follows: “Clients had bail set at higher intervals than similarly charged defendants with similar criminal histories simply because of alleged gang affiliation.”¹²

Impact on Outcomes

While the focus was on the impact of gang allegations on pretrial detention, respondents were also asked whether allegations of gang affiliation had an impact on the outcome of the case. In addition to pretrial detention, which is correlated with poorer case outcomes, gang allegations may also interact with prosecutorial policies, statutory sentence enhancements, judicial discretion, and the potential for prejudicial trial evidence about gangs and gang affiliation to be presented to the jury. Seventy-three percent of respondents reported that plea bargaining was affected, 44 percent indicated that

the choice to go to trial was affected, and another 42.6 percent reported that the outcome of the case was affected. On the other hand, 17.3 percent of respondents reported that they had cases in which the allegation did not affect the outcome.¹³

The comments made clear that being incarcerated on bail because of allegations of gang affiliation increased the pressure to plead guilty and led to worse outcomes. Some jails segregate and lock down alleged gang members 23 hours a day.¹⁴ Lock-down conditions increase pressure to accept pleas and create mental strains that inhibit defense preparation. The pressures will be greatest when the offense charged is relatively minor or the evidence is very weak. Where the charge is a violent felony and evidence is strong, a plea is not likely to result in release. When, however, the charge is not serious or the evidence is weak, a plea for time served or a short sentence is likely. Gang members and non-gang members, the guilty and the innocent alike, are likely to be tempted to plead guilty if it leads to immediate release.

Additionally, the respondents reported that prosecutors sought stiffer punishments and had policies restricting plea bargaining in cases in which gang affiliation was alleged. Further, judges were inclined to be harsher. “After hearing these unsupported hearsay allegations from the prosecutor, the judges frequently appear to view the defendant as deserving of a less favorable plea offer ... [and] are more comfortable threatening such defendants with greater punishment in the event they are convicted after trial. These threats cause some defendants to plead guilty when they otherwise would not have.”¹⁵ Finally, the allegation that a defendant is a gang member is so prejudicial at trial that this puts pressure on defendants to accept a worse plea, or risk being convicted for being a “gang member” rather than for whatever crime has been alleged. As one respondent observed, “Unless the crime is one pertaining to gang activity, the evidence of gang membership is so prejudicial as to overwhelm the rest of the case and the case becomes a defense of gang membership and how bad the gang is.”¹⁶

Race

The responses to this question indicate only whether a respondent has ever represented a client of a particular race who is alleged to have a gang affiliation. The responses included Asian, Black, Latino, White, and Other. Most of the respondents had represented Black (86.8 percent) and Latino (86.8 percent) clients

accused of having gang affiliations. Attorneys representing White clients with alleged gang affiliations constituted 24.5 percent of the respondents. Lawyers representing Asian clients with alleged gang affiliations comprised 13.2 percent of respondents. Despite the fact that nearly a quarter of respondents reported representing White clients accused of gang affiliation, the comments indicated that Black and Latino clients were far more likely to face these allegations. For example, one respondent indicated that “80 percent were Black, 15 percent Hispanic, and 5 percent White.”¹⁷ Another commenter said, “Can only recall two cases that my clients were White — overwhelming majority are Black or Latino, with the shift seeming to be toward a larger percentage of Latino.”¹⁸ Other respondents indicated that these allegations were made only about defendants of color, for example: “I have never heard a prosecutor allege gang activity on the part of a Caucasian defendant.”¹⁹

Accuracy of Allegations Of Gang Affiliation

How accurate were the allegations that clients were affiliated with gangs? Only 3.8 percent of respondents indicated that gang allegations were very accurate, that “alleged gang members were active gang members.” A little over 40 percent (40.4 percent) indicated that the allegations were “somewhat accurate,” but included “former gang members or people who pretended to be gang members.” Over one-third (36.5 percent) of respondents indicated that the allegations were “not very accurate” and included “non-gang members.” Nearly six percent (5.8 percent) indicated that they believed the gang allegations were “inaccurate,” and 13.5 percent indicated that they did not know. In addition to inclusion of non-gang members (false positives), two comments indicated that there were false negatives (clients who were in gangs were not so charged).²⁰

The false positives seemed to be the result of overly broad criteria, association with gang members, and failure to recognize when a person has quit a gang. The comments reflected this over-inclusiveness. One respondent stated that inaccuracies arise because “everyone is in a gang who lives in a particular area of town or associates with anyone who has ever been in a gang.”²¹ Another attorney made the following observation:

I don't think that gang information that the prosecution has is very accurate. It seems that once

a notation of possible gang affiliation is made in a police database or elsewhere, it seems to really stick. It also seems that they will indicate that people are affiliated with gangs who aren't gang members but who know people who are. They seem not to understand that our clients can know gang members (by virtue of the neighborhoods in which they live) without being gang members. Sometimes it seems like determinations of gang membership are made for no apparent reason.²²

In addition to association with gang members, the belief that "once a gang member, always a gang member"²³ led to inaccurate allegations of gang affiliation.

Lawyers who responded that they did not know how accurate the gang allegations were did not express confidence in the accuracy of gang allegations, but indicated that there was no opportunity to explore their veracity. One NACDL member noted:

It is hard to tell because judges never require the prosecutor or the police to support these allegations. The judges seem to accept the allegations as accurate. However, I have looked into the bases of many such allegations and I often find the defendants are considered to have gang affiliations for such innocuous activities as being stopped on a corner in the presence of another person that has alleged gang affiliations even though neither was alleged to be engaged in any unlawful conduct, having a brother with alleged gang affiliations, wearing a color associated with a particular gang (red for example), or living in an area with alleged gang activity.²⁴

As discussed below, these comments are consistent with the methods used for compiling gang databases. Most of the criteria for adding an individual to a gang database have nothing to do with actual criminal conduct and include being seen with gang members or in gang locations, having a certain style of dress, wearing gang colors, tattoos, and even having drawings and lyrics in notebooks. Moreover, while some law enforcement agencies require multiple criteria to be met, some will permit the same criteria to be counted multiple times. Thus, if you

are seen three times with gang members, then you can be added to the gang database. Of course, if you live in the same building with, or on the same block as, or are related to gang members and have grown up with them all your life, you are likely to quickly accumulate three "strikes" and be placed in the database. Further, databases include both members and "associates" and are rarely purged.

Evidentiary Review of Allegations Of Gang Affiliation

In the vast majority of cases (80 percent), there was no review of the accuracy of gang allegations. In the cases where there was a review of the gang allegation, it took place long after the bail hearing and in connection with a motion in limine related to the trial. This is particularly problematic because the gang allegations rest on, at the least, double layers of hearsay²⁵ (the prosecutor reports what the police tell him). Comments indicated that requests for hearings on the allegation were denied: "I have asked for [the allegation of gang affiliation] to be substantiated, but have been denied this request every time."²⁶ Given the broad criteria for including individuals in gang databases and the prejudice that flows from gang allegations, prompt hearings are necessary to determine the basis of such allegations if they are to be considered as a factor in setting bail.

Gang Databases

Both the words "gang" and "databases" turn out to be absolutely misleading. The definition of gangs is formalistic and the "data" in databases are a collection of observations that often fall short of establishing membership in a gang.

Defining Gangs

What is a gang and who is a member? In 1939 the Supreme Court issued a unanimous decision in *Lanzetta v. New Jersey*,²⁷ finding that a statute that made it a crime to be a gangster was "so vague, indefinite and uncertain that it must be condemned as repugnant to the Due Process Clause of the Fourteenth Amendment."²⁸ The decision dedicated three pages of seven to different meanings of the word "gang." Since *Lanzetta*, much ink has been spilled with little unanimity about how to define a gang.²⁹

To resolve these issues, legislatures and gang units have adopted formalistic definitions of gangs that make it relatively easy to prove that a particular group (usually of three or more individuals) is a gang without proving that more than one

David M. Benjamin, Ph.D.

Experienced Forensic Toxicologist



- ◆ Analysis of Results of Blood, Urine, & Hair Drug Tests
- ◆ Cocaine/Narcotics Issues: Possession vs. Personal Use
- ◆ Dram Shop & Vehicular Homicide
- ◆ Medical & Law School Teaching Experience
- ◆ Excellent Communicator

References Available

617-969-1393

www.doctorbenjamin.com

medlaw@doctorbenjamin.com

or two "members" have ever committed any crime.³⁰ There is no requirement for collective participation in crime or that crime actually be the primary activity of a gang. Instead, the fact that particular members have been charged with or convicted of certain crimes is typically enough to establish that the group has a "pattern of criminal gang activity." The STEP Act of California provides an example of such legislation.³¹

The danger in these definitions is that juveniles may well start a group, take a name, and claim affiliation with a gang, but have little or nothing to do with the larger gang. Some members of the extended network may have committed crimes within the previous three years, but other members of the same "gang" may have no knowledge of these crimes or complicity in these acts. Further, many juveniles will join gangs for protection rather than for the purpose of committing any crime.

Compilation and Maintenance Of Gang Databases

Although defining gangs is difficult, a second challenge is determining the involvement of particular individuals. Databases do not even attempt to meet

this challenge, but instead are compiled in a manner that will guarantee a great number of false positives. These false positives come from (1) using criteria that lead to inclusion of non-gang members, and (2) not purging former gang members.

Criteria for Inclusion In Gang Databases

The criteria for inclusion in gang databases vary from jurisdiction to jurisdiction, but are uniformly almost entirely unrelated to criminal conduct or to participation in gang activities. Some gang databases are not even nominally limited to members and explicitly include “associates,”³² “affiliates,”³³ or those who “may be engaged in criminal gang activity.”³⁴ Most gang units rely on criteria that are predominantly non-criminal and relate to how a person looks and with whom he associates.

Some databases require that multiple criteria be met, and others require only a single criterion. The impact of using fewer criteria on communities of color is evident in a comparison of two databases developed in Minnesota. Both Minnesota databases use the same 10-point criteria (only one of which relates to criminality):

1. Subject admits to being a gang member;
2. Is observed to associate on regular basis with known gang members;
3. Has tattoos indicating gang membership;
4. Wears gang symbols to identify with a specific gang;
5. Is in a photograph with known gang members and/or using gang-related hand signs;
6. Name is on gang document, hit list, or gang-related graffiti;
7. Is identified as a gang member by a reliable source;
8. Arrested in the company of identified gang members or associates;
9. Corresponds with known gang members or writes and/or receives correspondence about gang activity; and
10. Writes about gang (graffiti) on walls, books, and paper.³⁵

Find Local Bail Bond Agents on AboutBail.com

AboutBail.com
Find Local Bail Agents, Criminal Attorneys & Investigators

www.AboutBail.com
(866) 411-2245

For the more rigorous database — the Gang Pointer File — a minimum age of 14 and a prior conviction for a gross misdemeanor or felony are required by statute in addition to three criteria of the 10.³⁶ This list included about 2500 people in 2009.³⁷ The individuals in the Minnesota Gang Pointer File are 54 percent (1324) African American, and 36 percent (870) Caucasian.³⁸

The alternative database “GangNet” identifies potential gang members who meet at least one of the 10-point criteria (with no requirement of a prior conviction or minimum age).³⁹ This database includes nearly 17,000 individuals.⁴⁰ In 2009, only 18 percent of individuals in this larger database were White (3120).⁴¹ The more flexible criteria of GangNet sweep in many more Blacks, Latinos, and Asians because it requires nothing more than association or dress for inclusion.⁴² Whites, on the other hand, are significantly underrepresented when dress or association alone is sufficient for database inclusion.

The result of these broad criteria is that individuals who never joined a gang — but were observed with friends or relatives, and dress in the normal styles for urban youth — will be included in gang databases.

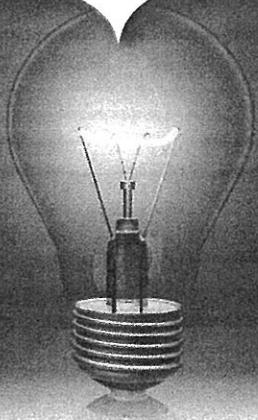
The community groups that evalu-

ated the Minnesota databases posed the following question about the criteria used: “Do the 10-point criteria evidence criminal gang activity or do they highlight factors that are synonymous with urban youth culture?”⁴³ The answer to this question appears to be that the gang databases are over-inclusive of urban youth of color.

While statistics are scarce, reports indicate that the databases around the country are dominated by young men of color, including many with no criminal records. The criteria related to dress and association appear to be largely “synonymous with urban youth culture.” How can an individual not satisfy several criteria if he grew up with people who joined gangs? He will be seen “associating” with relatives, neighbors, and schoolmates whether or not he belongs to a gang. What if the local bodega is also a “gang location”?

In 1997 in Orange County, Calif., over 90 percent of individuals in the gang database were minorities, and nearly half those in the database had never been arrested.⁴⁴ “In Los Angeles County, 47 percent of the county’s young Black men were in the database, but 44 percent of these Black men had no previous arrest record.”⁴⁵ Charlotte, N.C., police “documented” 853 gang

Are you looking for a way to share your legal knowledge and practical tips with other criminal defense lawyers?



Write an article for *The Champion!*

The Champion is seeking practical "here's how you do it" articles for our readers.

The magazine reaches over 10,000 NACDL members, as well as our state and affiliate members.

Manuscripts of practical use in all criminal defense categories are welcome, including:

- coerced confessions
- collateral consequences
- forensic issues
- forfeiture issues
- habeas corpus
- identification issues
- juvenile justice
- RICO
- search and seizure
- sex offender registration and residency restrictions

Editorial guidelines are available at www.nacdl.org.

Send your manuscript to Quintin Chatman (quintin@nacdl.org).

members, only four percent of whom were White.⁴⁶ In Denver in 1993, about two-thirds of young Black men were on the gang list⁴⁷ and Black and Latino men accounted for over 93 percent of this database.⁴⁸ Nevertheless, with federal funding, Denver joined the GangNet database in Colorado in 2002.⁴⁹

Failure to Purge Databases

While gang databases include large numbers of young men of color, social scientists conducting longitudinal studies based on self-reports of youth estimate that the prevalence of gang membership is "statistically infrequent" and temporary even in studies focused on high-risk youths.⁵⁰ The disparity between law enforcement estimates based on broad criteria and research estimates based on in-depth interviews confirms that the broad criteria utilized leads to substantial over-inclusion of young men of color.⁵¹

Unfortunately, once an individual is placed in a law enforcement gang database, whether accurately or inaccurately, there is little oversight or incentive to ensure the databases are purged of non-gang members or former gang members.⁵² The databases are bloated and youths who have the misfortune of growing up in gang-dominated areas are at high risk for inclusion in gang databases whether or not they ever belonged to a gang.

At the Minneapolis-St. Paul hearings, witnesses who stated they were not gang members reported being denied employment with law enforcement, probation, and the National Guard because they were included in either the Gang Pointer File or GangNet.⁵³

The Advocate's Role

The compilation and maintenance of gang databases are largely shielded from external scrutiny. The federal regulations permit sharing among law enforcement agencies and correctional facilities, but prohibit distribution of database information to other entities.⁵⁴ While, on its face, this appears to protect the privacy interests of those included in databases, it also obscures the basis for inclusion. Like "no-fly" lists, an individual in a gang database may only discover his or her inclusion when adverse action is taken based on this inclusion.

Advocates should, however, take two steps to try to ensure that clients are not included in gang databases. First, they should protect the record. Clients and their parents should be advised against admitting gang affiliation even if the clients are juveniles who might benefit

from anti-gang interventions. Further, advocates should challenge and seek to strike any allegations in court records that a defendant is affiliated with a gang. Defense attorneys must also demand hearings when adverse detention decisions are made based on gang allegations.

Advocates should also write to law enforcement agencies and ask if clients are on gang lists and request that they be removed. Whether this will be successful or not, gang units claim that individuals can be removed upon request and this avenue should be utilized, if only to lay the basis for a broader challenge.

Finally, an affirmative challenge to gang databases is needed. In New York, advocates won a battle to dismantle a database based on information garnered in stop and frisks where no arrest or summons was issued.⁵⁵ Like the stop and frisk database, individuals are included in gang databases without any finding or even accusation of criminality. Indeed, the gang databases seem to serve much the same purpose as the stop and frisk database — a collection of identifying information and photographs of most young males of color in certain neighborhoods even when no crime has ever been alleged.

Notes

1. The survey is still available at <http://www.surveymonkey.com/s/gangallegations>. The survey is anonymous, short, and requests no identifiable case information.

2. Sixty-four private and public defense attorneys who practiced in 12 different states and in over 40 jurisdictions responded to the survey.

3. A draft of a longer article on gang allegations and the Eighth Amendment right to reasonable bail is available online. *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, forthcoming, 23 ST. THOMAS L. REV. ___ (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701899.

4. TERENCE P. THORNBERRY, MARVIN D. KROHN, ALAN J. LIZOTTE, CAROLYN A. SMITH & KIMBERLY TOBIN, *GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE* (2003) (In a study of 1000 Rochester youth from the age of 13 to 17.5, about 31 percent reported belonging to a gang at some point but only 1.6 percent of the sample remained in gangs at the age of 18, and this number did not increase through the rest of the study to age 22.); see also IRVING A. SPERTEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 104 (1995) (indicating that "most studies suggest that gang members simply 'mature-out' ...").

5. Of course, attorneys who practice in jurisdictions where gang allegations are

rare, or in jurisdictions where attorneys are not present at bail hearings, were unlikely to respond to the survey. Thus, the 90 percent figure tells us that there are many jurisdictions where gang allegations are made at bail hearings, not that gang allegations are made in 90 percent of all jurisdictions.

6. Respondents made it clear in comments that the impact varies based on jurisdiction and judge. One respondent stated that an allegation of gang affiliation "has a slight impact (higher) in Brooklyn. In Nassau County, it would result oftentimes in twice or three times as much bail." Question 6, Comment 10.

7. Question 7.

8. Question 7, Comment 2.

9. Question 7, Comment 9.

10. Question 7, Comment 7.

11. Question 7, Comment 15.

12. Question 6, Comment 2.

13. These numbers add up to more than 100 percent because a single defense lawyer could have cases in all categories.

14. Question 16, Comment 1.

15. Question 9, Comment 17.

16. Question 16, Comment 2.

17. Question 4, Comment 1.

18. Question 4, Comment 4.

19. Question 4, Comment 6.

20. Question 9, Comments 6 and 14.

21. Question 9, Comment 5.

22. Question 9, Comment 9.

23. Question 9, Comment 7.

24. Question 9, Comment 19.

25. There are often triple layers of hearsay when the inclusion in the gang database is the result of reports from third parties.

26. Question 11, Comment 1.

27. 306 U.S. 451 (1939) (Frankfurter took no part in the decision).

28. *Id.* at 458.

29. See, e.g., C. RONALD HUFF, *GANGS IN AMERICA* (1990) (containing three chapters on definitions); IRVING A. SPERTEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* (1995) (Chapter 2); MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* (1995) (Chapter 2).

30. For a compilation of individual state legislation relating to gangs, see <http://www.iir.com/nygc/gang-legis>.

31. CAL. PENAL CODE § 186.22(f): "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25) ... having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(e) As used in this chapter, "pattern of

criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons ... "

32. FLA. STAT. ANN. 874.09(1)(d) authorizes the maintenance of databases "relating to criminal gangs and their members and associates."

33. The Illinois Statewide Organized Crime Database includes "member or affiliate." 20 ILCS 2640.

34. MINN. STAT. ANN. 299C.091(1) authorizes maintenance of data on individuals who "are or may be engaged in criminal gang activity."

35. COMMUNITY JUSTICE PROJECT, UNIVERSITY OF ST. THOMAS IN COLLABORATION WITH SAINT PAUL NAACP, *EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 3-4* (Nov. 2009) (available at <http://twincities.indymedia.org/files/GangsofStPaulReport.pdf>). This is typical; the Nassau Gang Task Force criteria include 13 separate criteria, only one of which, "arrest with known gang members," relates to crime at all. Like the twin Minnesota databases, the Nassau County Gang Task Force will pre-identify "associates" when only a single criterion is met.

36. MINN. STAT. ANN. § 299A.091, subd. 2; § 299A.641, subd. 1.

37. COMMUNITY JUSTICE PROJECT, *supra* note 35, at 9, n.38. Despite the more demanding criteria, a partial audit of this database revealed a 15 percent "failure rate." *Id.*

38. *Id.* at 22.

39. *Id.* at 10.

40. *Id.*

41. *Id.* at 22.

42. *Id.*

43. COMMUNITY JUSTICE PROJECT, *supra* note 35, at 19.

44. Lorenza Munoz, *Gang Database Raises Civil Rights Concerns*, LOS ANGELES TIMES, July 14, 1997, at 1.

45. Nkechi Taifa, *Laying Down the Law Race by Race: Criminal Sentencing Falls Disproportionately on Blacks and Latinos*, 17 LEGAL TIMES, Oct. 10, 1994, at S36.

46. Mark Johnson, *Legislators Urged to Pass Anti-Gang Laws: Mayor, Police Chief Visit Statehouse to Lobby for Tougher Penalties*, CHARLOTTE OBSERVER, Aug. 4, 2005, at 1B.

47. Dirk Johnson, *Young Black Men in Denver Listed as Suspected Gangsters*, N.Y. TIMES, Dec. 11, 1993.

48. Carol Kreck, *Police to Share GangNet Database: Youth Advocates Say List Will Violate Rights*, DENVER POST, Sept. 24, 2002.

49. *Id.*

50. Esbensen and Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 CRIMINOLOGY 565, 579 (between three and seven percent of at-risk youths in the Denver Youth Survey reported being gang members in any given year and 67 percent stayed in a gang for only one year, while three percent remained in the gang for four years); Thornberry et al. at 33-35 (55 percent quit within one year).

51. JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INSTITUTE, *GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES* 33-39 (July 2007), available at http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

52. CHARLES M. KATZ & VINCENT WEBB, *POLICING GANGS IN AMERICA* (2006) (discussing lack of oversight and failure to follow purging guidelines in gang units); Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQUENCY 485, 500 (2003) (despite guidelines that required continuous purging, database had not been purged for four years prior to research period); COMMUNITY JUSTICE PROJECT, *supra* note 35; (Ice Demming's name remained in the gang databases 13 years after he had left the gang).

53. COMMUNITY JUSTICE PROJECT, *supra* note 35, at 20-21.

54. 28 C.F.R. § 23.20.

55. *Lino v. City of New York*, State Supreme Court, New York County, No. 10-106579 (filed May 19, 2010). ■

About the Author

Associate Professor K. Babe Howell teaches



Criminal Law, Criminal Trial Advocacy, and Lawyering Skills at the City University of New York School of Law. Before joining academia, she was a trial lawyer at both the Legal Aid Society Criminal Defense Division in Manhattan and the Neighborhood Defender Service of Harlem.

Associate Professor K. Babe Howell
CUNY School of Law

65-21 Main Street
Flushing, NY 11367

718-340-4553

E-MAIL babe.howell@mail.law.cuny.edu

2015

Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing

K. Babe Howell
CUNY School of Law

How does access to this work benefit you? Let us know!

Follow this and additional works at: http://academicworks.cuny.edu/cl_pubs

 Part of the [Law Commons](#)

Recommended Citation

K. Babe Howell, Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing, 5 Univ. Denver Crim. Law Rev. 1 (2015).

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.

GANG POLICING: THE POST STOP-AND-FRISK JUSTIFICATION FOR PROFILE-BASED POLICING

*K. Babe Howell**

* Associate Professor, CUNY School of Law. Thanks to Tigran Eldred, Melanie Hart, Sarah Lamdan, Kevin Lapp, Andrea McArdle, Naree Sinthusek, Nicole Smith, Yasmin Sokkar Harker, and Steve Zeidman for their comments and suggestions. Thanks also to Kelly Herrmann for her excellent research assistance.

INTRODUCTION

The New York City Police Department (NYPD) is about to follow a number of other urban police departments down the well-worn path of gang policing. It does not take this path because New York City has a significant gang problem. Gangs ranked last and second-to-last among the causes of murder in the two years since the NYPD added the category of “gangs” as a cause of murder to its annual reports.¹ Nor do gang-motivated crimes account for even one percent of the crimes that take place in New York City each year.² Indeed, having recently transferred 300 new officers to the Gang Division,³ the NYPD has more new police officers in the Gang Division than the 264 gang-motivated crimes⁴ the NYPD identified in the 2013 fiscal year.⁵ With over six hundred police officers dedicated to “Operation Crew Cut,” announced in October 2012, the NYPD has quadrupled its gang division at a time when shootings and homicides are lower than at any time in the four decades since crime statistics have been maintained.⁶

Why would the NYPD commit more officers to gang policing than there are gang-motivated crimes in New York City? Why would it quadruple its gang division in two years during which violent crimes have reached the lowest level in recorded history?

The answer to these questions is that the class action challenging the NYPD’s use of stop-and-frisk⁷ threatened to foreclose the NYPD’s ability to monitor youth of color in the absence of crime based on appearance and geography. After years of stopping suspicious people in high-crime areas, the NYPD is addicted to profile-based policing. Since 2001, the NYPD has adopted a surveillance-based policing model in which the millions of fruitless stops were a concern only because of the political and legal pressure they created, not because of the violation of rights guaranteed by the Fourth and Fourteenth Amendments. For the NYPD to relinquish the intensive policing of these suspect populations is unthinkable. The NYPD is driven by crime statistics and believes that aggressively policing a particular suspect class, which happens to be defined by race and class, is the reason for crime decline. It does not matter that the crime decline began before stop-and-frisk became the pervasive tactic it is today.⁸ Nor is this belief undermined by the fact that crime has declined in cities across the country and around the

¹ NYPD, *Murder in New York City*, NYC.GOV, 3 (2011) [hereinafter N.Y.C. Murders 2011], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf; NYPD, *Murder in New York City*, NYC.GOV, 3 (2012) [hereinafter N.Y.C. Murders 2012], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf. The other categories are Dispute/Revenge, Drug, Domestic, Robbery/Burglary, Unknown and Other.

² NYPD, *GangStat Reports (2005–12)* [hereinafter *GangStat Reports*] (on file with the author). The *GangStat* reports were provided to the author in response to a Freedom of Information Law request by NYPD Legal after three years and a law suit.

³ Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to Focus on Youth Gangs*, N.Y. TIMES, Sept. 18, 2013, at A1.

⁴ See *infra* notes 38–39 and accompanying text for NYPD definitions of gang motivated and gang related incidents.

⁵ N.Y.C., MAYOR’S MANAGEMENT REPORT 4 (2013), available at http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/2013_mmr.pdf.

⁶ N.Y.C., *Mayor Bloomberg and Police Commissioner Kelly Announce 2013 Saw the Fewest Murders and Fewest Shootings in Recorded City History at NYPD Graduation Ceremony*, OFF. MAYOR: NEWS (Dec. 27, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/436-13/mayor-bloomberg-police-commissioner-kelly-2013-saw-fewest-murders-fewest/#/0>.

⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁸ FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 7-14 (2012) (showing New York City crime drops beginning in 1990); Eric P. Baumer & Kevin T. Wolff, *Evaluating Contemporary Crime Drop(s) in America, New York City and Many Other Places*, 2012 Just. Quarterly 1, 4-7 (2012) (demonstrating that for some crimes that the crime drop began prior to 1990).

world regardless of policing strategies.⁹

Like any organization that enjoys success utilizing a particular strategy, the NYPD has enjoyed success in the form of declining crime during the last two decades while policing minor crimes and making millions of stops. To change strategies is unthinkable. Thus, the NYPD's challenge in the face of loss of legal and political support for stop-and-frisk policing is to create a new avenue for intensive surveillance of young men of color in a manner that avoids legal review or political opposition.

This explains the NYPD's "new" focus on gang policing despite the fact that gang crime in New York is low. As it became clear that the NYPD was losing the battle to defend stop-and-frisk in the courtroom, the media, and the political arena, the NYPD issued dire warnings about the dangers of gangs and began trumpeting the success of "Operation Crew Cut."

Who is not afraid of gangs? Or of gang violence? Who could object to policing focused on gang members? To date, no one has objected and the most important critics of the misuse of stop-and-frisk policing – Mayor de Blasio, Police Commissioner Bratton, and key city politicians such as Councilmember Jumaane Williams, have praised the shift from overuse of stop-and-frisk to gang policing.¹⁰

The gang narrative, however, is essentially the same as the narrative used to justify both the overuse of stop-and-frisk itself and the racial disparities that flowed from stop-and-frisk. Rather than requiring actual criminality, each narrative turns on two core concepts – place and person. Stop-and-frisk, according to the NYPD, was not directed at youth of color but at high-crime places and suspicious people.¹¹ Indeed, according to the NYPD it protected the innocent people in these high-crime areas from the criminal suspect. However, during the *Floyd* trial (a class action challenging the use of stop-and-frisk on Fourth Amendment and Equal Protection grounds), the empirical analysis of crime-rates by census tract showed that the NYPD carried out more stops in black and Latino neighborhoods, whether crime levels were high or low.¹² Within these "high-crime" areas the NYPD focused on persons engaged in what they deemed to be suspicious conduct even though 94% of these suspicious people were not arrested after being stopped.¹³ The interplay of cognitive biases about place and appearance provided profiles that, to the police at least, obscured the lack of individualized suspicion and the racial disparities.¹⁴

⁹ ZIMRING *supra* note 8 at 15-18 (comparing New York City to other major U.S. cities); Baumer & Wolff *supra* note 8 at 19-25 (placing New York City crime drop in national and global context).

¹⁰ Stephon Johnson, *Stop-and-Frisk Makes Way for Operation Crew Cut*, N.Y. AMSTERDAM NEWS (Sept. 26, 2013, 11:32 AM), <http://amsterdamnews.com/news/2013/sep/26/stop-and-frisk-makes-way-operation-crew-cut/>.

¹¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 603–05 (S.D.N.Y. 2013).

¹² *Id.* at 560.

¹³ *Id.* at 660. Moreover, the New York State Attorney General's review of arrests resulting from stop-and-frisk revealed that nearly half of these arrests did not result in conviction. ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 3 (2013), available at http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_-_PRACTICES_NOV_2013.pdf. Further, about one in six of these arrests were never even arraigned after being either voided by the NYPD itself or declined by the prosecution. *Id.*

¹⁴ See, e.g., L. Song Richardson, *Cognitive Bias, Policing Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); James B. Comey, Dir., FBI, *Hard Truths: Law Enforcement and Race*, FBI.GOV (Feb. 12, 2015), <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (noting that unconscious bias and mental shortcuts drive different behavior and relationships between law enforcement and communities).

The gang narrative, like the stop-and-frisk narrative, turns on the same core concepts – place and person. Instead of characterizing neighborhoods as “high-crime,” the NYPD now indicate that an area has a “gang problem.” Instead of stating that an individual is suspicious, the NYPD now state that he or she is a suspected gang or crew member. The gang narrative will be used, and has already been used, to justify an even more aggressive regime of stops, summonses, arrests, and surveillance than the pre-*Floyd* regime.¹⁵ The central concepts, however, like those underpinning the stop-and-frisk narrative, are defined so broadly that they can capture any neighborhood or individual the police deem suspicious. No criminal conduct whatsoever is required to be identified as a gang member. The gang allegation provides a facially race-neutral means for policing the usual suspects in the usual way. However, because gang databases and intelligence are secret, this policing avoids both public and judicial scrutiny.

This article takes on the task of challenging the NYPD’s new gang narrative before it takes root as a fully accepted justification for profile-based policing. The project is imperative because studies of gang formation suggest that gang policing encourages gang formation, hardens gang identity, and increases gang delinquency.¹⁶ It is not harmless to mistakenly identify and police individuals as gang members. Like the narrative that justifies stop-and-frisk, the gang narrative can obscure reality. Labeling individuals as gang members, trumpeting gang policing in the media, attributing crime decline to gang policing, and highlighting the relatively rare gang-motivated offenses to gain support for intensive policing exacerbates the adversarial, suspicion, and fear-based relationship between the police and youth of color. Further, gang policing affects communities as well as suspected gang members.

Part I of this article examines the NYPD’s crime statistics for New York City, demonstrating that claims of increasing gang crime are inconsistent with police-maintained data. Part II examines the relation of *Floyd* to Operation Crew Cut, and links the Operation Crew Cut narrative to the creation of “moral panics” based on alleged gang crime in other jurisdictions in the United States. Part III provides background relating to the challenge of defining gangs and identifying gang members, as well as the definitions used by the NYPD to certify gang membership for inclusion in their databases. Part IV explores the harms that flow from using the gang category to justify police intrusions. Among these harms are violations of the Fourth and Fourteenth Amendment such as those found in the *Floyd* case. Additionally, the gang narrative is even more damaging to fabric of vulnerable communities because the narrative creates fear and condemnation that can encourage and reinforce gang ties and potentially increase gang violence. Finally, in Part V, I will examine existing alternatives to address gangs and gang violence.

The *Floyd* decision and the acceptance of its findings by the Mayor and the Police Commissioner and the joint remedial process all provide an opportunity for the NYPD to break its addiction to profile-based policing. The addiction will only be overcome, however, if the NYPD does not adopt malleable “suspected gang member” or “crew member” profiles to continue race, place, and appearance based profiling. If the NYPD successfully advances an exaggerated narrative relating to gang and crew violence in New York City, suppression of informal youth groupings may give rise to a more

¹⁵ See *infra* Part IV.A below for description of gang policing.

¹⁶ FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* 10 (2000 ed., originally published in 1927) (noting that the transformation from informal peer group to gang is often precipitated by oppositional encounters, whether with other groups or with the police); Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification?*, *CRIME & DELINQ.*, July 12, 2013, at 1, available at <http://cad.sagepub.com/content/early/2013/05/23/0011128713492496>.

pervasive and persistent gang problem and will certainly perpetuate profile-based rather than offense-based policing.

Although this article addresses the particular example of the NYPD's reliance on the gang narrative, the issue is one of national significance. Police departments across the United States have developed gang units and committed their forces to gang policing. Law enforcement and prosecutors have pushed for civil injunctions and enhanced criminal penalties, even as researchers demonstrate that youth typically mature out of gangs and delinquent groups and that negative police contact increases rather than decreases delinquency and gang ties. In an era of declining crime, the rise of intensive and secret surveillance of youth based on profiles, the intensive policing of these youth for minor offenses, and the imposition of extensive sentences based on theories of conspiracy and accomplice liability threaten to extend racial disparities in mass-incarceration into the indefinite future. At a moment when the overuse of stop-and-frisk and intensive Broken Windows policing of minor offenses have come to the fore as issues of racial justice, the expansion of gang policing initiatives extends the use of these very same techniques against the same suspect populations, while avoiding oversight and transparency. When police-community relations are strained by instances of excessive force against youth of color, the propagation of narratives about gang-involved youth of color as the source of most violent crime can only heighten the stressful and explosive nature of police contacts with youth of color. Thus, every jurisdiction can benefit from an objective examination of the data supporting the need for gang policing, and an evidence-based evaluation of the actual outcomes of broad police-led suppression efforts, narrowly tailored anti-violence efforts, and non-law-enforcement alternatives to addressing youth violence.

I. GANG CRIME AS PRETEXT

The dramatic nature of youth crime and the quasi-mythical construction of gang crime gives rise to a belief that gang crime is far more common than it actually is and that young vulnerable children are recruited into gangs where they engage in violent crime. More importantly, the conflation of gangs and gang membership with violent crime creates the misimpression that gang membership alone is a proxy for violent criminality. To assess the narrative that attributes large proportions of violent crime to gangs, it is necessary to attempt to disentangle myth from reality.

As a preliminary matter, it is important to make clear that I do not claim that there is no gang-related crime or problems with youth violence and conflicts in New York City. New York City has always had gangs and will likely always have gangs.¹⁷ Nonetheless, New York City has a far smaller gang problem than other large cities.¹⁸ Moreover, a convincing case has been made that New York City's lack of organized gangs and its minimal gang violence is *because* New York used non-law enforcement approaches to address gangs and gang violence in the past.¹⁹ In jurisdictions where gang violence has been used to justify additional resources for broad law enforcement-based

¹⁷ ERIC C. SCHNEIDER, *VAMPIRES, DRAGONS, AND EGYPTIANS KINGS: YOUTH GANGS IN POSTWAR NEW YORK* (1999).

¹⁸ See *infra* Part I.B for New York City data on gang offenses. See also NAT'L GANG INTEL. CTR., NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 47 (2011), available at <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends> (reporting that New York State is in the lowest category for gang violence in the range of zero to two gang crimes per 1,000 people).

¹⁹ Judith Greene & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, JUST. POL'Y INST., July 2007, at 33–39, http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

suppression strategies, gang membership and gang violence have increased.²⁰ Therefore, before arming the NYPD to engage in aggressive surveillance of and crackdowns on loosely organized “crews” of young people, it is necessary to examine the evidence that such “crews” are a major source of violence in New York City.²¹

A. National Crime Trends Versus Reported Gang Threat

To put it mildly, law enforcement reports of a growing gang menace in the United States are in significant tension with the dramatic decline of violent crime across the United States. Between 1993 and 2010, the National Crime Victimization Survey (NCVS) has documented a decline in serious violent crime victimization of 77%.²² The Federal Bureau of Investigations’ Uniform Crime Reports provide law enforcement figures that similarly document a decline in the rate of violent crime of 51% between 1993 and 2012.²³ According to the NCVS, only 6% of victims of violent felonies between 1998 and 2003 perceived the perpetrator to be a gang member.²⁴ This perception is consistent with FBI homicide reports, which classify about 5-7% of homicides as gang-related between 1993-2003.²⁵ Despite claims that gangs are corrupting ever more and ever younger youth, the rates of violence crime among youth under 18 appears to have declined more dramatically than rates for adults during the last decade.²⁶ This is the case even in a state like California, which reports high numbers of gangs and gang members.²⁷ In California, juvenile violent offense rates are lower than at any time during the sixty years that statistics have been kept.²⁸ Indeed, the juvenile crime rates in the 1950s were 2.5 times higher than they were in 2011.²⁹

The perception that gang violence is an ever-growing problem is fed by official law enforcement pronouncements. For example, according to the 2011 National Gang Threat Assessment published by the FBI, gangs and gang violence are a growing problem. In fact, the FBI’s National Gang Intelligence Center (NGIC) estimates a 40% increase in

²⁰ *Id.*

²¹ As discussed below at note 53 a “crew” would certainly fit the NYPD’s definition of a gang. Furthermore, Operation Crew Cut officers are in the Gang Division. It is therefore assumed that crew violence should be captured in reports of gang violence in New York City.

²² JANET L. LAURISTEN & MARIBETH L. REZEY, BJS, NATIONAL CRIME VICTIMIZATION SURVEY 5 (2013), available at <http://www.bjs.gov/content/pub/pdf/mpncnvs.pdf> (“The rate of serious violent victimization—rape and sexual assault, robbery, and aggravated assault—declined 77%, from 29.1 per 1,000 in 1993 to 6.6 per 1,000 in 2010.”). All violent victimization fell by 76%. *Id.* at 1.

²³ FBI, UNIFORM CRIME REPORTS, tbl. 1 (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.->

[2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls) (reporting NCVS statistics reflecting both reported and unreported crime while the UCR provides statistics based on reported crime only).

²⁴ ERIKA HARRELL, BJS, VIOLENCE BY GANG MEMBERS 1993-2003 (2005), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=695> (providing estimates of the number and rate of violent crimes committed by offenders that victims perceived to be members of gangs based on the National Crime Victimization Survey data from 1998-2003: 55% of victims reported that perpetrators were not gang members, 37% did not know).

²⁵ *Id.*

²⁶ *Id.* at tbl. 32, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/32tabledatadecoverviewpdf>.

²⁷ NAT’L GANG INTEL. CTR., *supra* note 18, at 47 (placing California among the five states with the highest prevalence of gang membership in the country).

²⁸ David Pimental, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 92 (2013); Mike Males, *California Youth Crime Plunges to All-Time Low*, CENTER ON JUV. & CRIM. JUST., Oct. 2012, at 1-4, available at http://www.cjcj.org/uploads/cjcj/documents/CA_Youth_Crime_2011.pdf (juvenile violent crime decreased consistently since 1954).

²⁹ Males, *supra* note 28, at 1.

active gang members—from one million to approximately 1.4 million—between 2009 and 2011.³⁰ According to the law enforcement sources that provide information to the NGIC, these gang members were responsible for an average of 48% of violent crime in most jurisdictions and as much as 98% of violent crimes in some jurisdictions.³¹

The notion that gangs are growing exponentially in number and membership and are responsible for the majority of violent crime is nearly impossible to reconcile with the fact that violent crime, and indeed all crime, is down throughout the country.³² Some aspect or aspects of the law enforcement gang and crime narrative is awry. Either the gang problem is exaggerated or crime declines reported to the UCR are illusory. While there are certainly some sources that suggest that, in the age of computerized crime statistics, there is some pressure to downgrade and underreport serious crimes,³³ the sharp decline in homicide numbers (which are not easily susceptible to manipulation) and the substantial decline in reports of victimization recorded by the NCVS confirm that crime has decreased by nearly 80% in the past two decades.³⁴

Before attempting to explain the impetus for exaggerating the extent and danger posed by gangs in the United States, we will turn to the specific case of New York City crime trends and gang offenses.

B. New York City Crime and Gang Trends

New York City, like the entire country, has experienced declining crime in the past two decades. New York has been at the forefront of this trend, boasting crime declines of nearly 80% for violent crime between 1990 and 2014.³⁵

Despite the overall drop in violent crime and drops in youth crime, the NYPD has recently taken to the media and attributed 40% of recent shootings to loosely organized “crews” of “dozens of 12- to 20-year- olds with names such as Very Crispy Gangsters, True Money Gang and Cash Bama Bullies.”³⁶

These attributions are at odds with the NYPD’s statistics for crime, shootings, and homicides in New York City.

First, according to the NYPD’s GangStat Reports which were obtained pursuant to a FOIL request, *less than 1%* of all crime in New York City is “gang-related” and only

³⁰ NAT’L GANG INTEL. CTR., *supra* note 18, at 11 (attributing the increase in gang membership to both improved reporting and “more aggressive recruitment efforts by gangs”).

³¹ *Id.* at 9.

³² FBI, *supra* note 23.

³³ JOHN A. ETERNO & ELI B. SILVERMAN, *THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION* 170 (2012); Dean Scoville, *What’s Really Going on With Crime Rates*, POLICE: L. ENFORCEMENT MAG. (Oct. 09, 2013), <http://www.policemag.com/channel/patrol/articles/2013/10/what-s-really-going-on-with-crime-rates.aspx> (“[C]reat[ing] an illusion of vulnerability, or strength, depending on one’s agenda”) (discussing history of manipulating statistics to either undercount or overcount offenses).

³⁴ LAURISTEN & REZEY, *supra* note 22, at 1.

³⁵ See NYPD, *CompStat Report Covering the Week 1/19/2015 Through 1/25/2015*, NYC.GOV, http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/cscity.pdf (last visited May 1, 2015) [hereinafter *CompStat Report*] (recording a 79.76% drop between 1990 and 2014 in crime categories used by the FBI Uniform Crime Reporting Program).

³⁶ Associated Press, *Teen Crews Linked to 40 Percent of NYC Shootings*, TOWNHALL (May 1, 2014), <http://townhall.com/news/us/2014/05/01/teen-crews-linked-to-40-percent-of-nyc-shootings-n1831975>. See also Goldstein & Goodman, *supra* note 3 (attributing 30% of all shootings in recent years to crews based on Commissioner Kelly’s announcement of Operation Crew Cut in 2012).

a small fraction of that crime is “gang motivated”.³⁷ 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.³⁸ A gang-motivated crime is one that is done to benefit a gang or because of gang rivalries within or among gangs.³⁹ Table 1 provides the number of gang-related and gang motivated crimes as reported in NYPD GangStats reports from 2005 – 2012. The statistics demonstrate that NYPD attributed less than 1% of major categories of felony crimes⁴⁰ in New York City to gang members through 2012.

Table 1: NYPD GangStats 2005-2012⁴¹

Year	Gang Related Crime Total (percentage of all crime)	Gang Motivated Crime Total (percentage of all crime)	All Crimes ⁴²
2005	907 (0.68%)	235 (0.17%)	133,774
2006	1111 (0.87%)	321 (0.25%)	127,478
2007	1009 (0.84%)	280 (0.23%)	119,841
2008	943 (0.82%)	189 (0.16%)	114,487
2009	1006 (0.99%)	134 (0.13%)	102,054
2010	1001 (0.99%)	157 (0.16%)	101,127
2011	990 (0.98%)	143 (0.14%)	101,220
2012	1014 (0.95%)	99 (0.09%)	106,866

The rarity of gang crime in New York City is confirmed by the NYPD’s contribution to the annual Mayor’s Management Report. For each of the past five years, the NYPD has provided statistics for “Gang Motivated Incidents” which have been published in the Mayor’s Management Report.⁴³ Table 2, below reproduces these numbers for fiscal years 2009 – 2013.

Table 2: NYPD’s “Gang Motivated Incidents”⁴⁴

FY09	FY10	FY11	FY12	FY13
335	228	303	310	264

Gang-related and gang-motivated crimes account for a greater percentage of shootings and homicides than of all felony crime, however, the contribution to these

³⁷ GangStat Reports, *supra* note 2. Given the NYPD’s broad definition of “gangs” a crew engaged in violent crime or shooting should be captured in these statistics. See *infra* text accompanying note 53.

³⁸ NYPD, PATROL GUIDE PROCEDURE 212-13: REPORTING GANG RELATED CRIMINAL ACTIVITY 1 (2000) (“Gang Related Incident[.] Any incident of unlawful conduct by a gang member or *suspected* gang member.” (emphasis added)).

³⁹ *Id.* (“Gang Motivated Incident[.] Any gang related incident that is done primarily:

- a. To benefit or further the interests of the gang, or
- b. As part of an initiation, membership rite, or act of allegiance to or support for a gang, or
- c. As a result of a conflict or fight between gang members of the same or different gangs.”)

⁴⁰ See *infra* note 42 for the major crimes included in “All Crimes” in the GangStat Reports.

⁴¹ GangStat Reports, *supra* note 2.

⁴² “All Crimes” include: homicides, non-fatal shootings, rape, robbery, felony assaults, burglary, grand larceny, grand larceny auto. GangStats are provided on a weekly basis, thus the numbers for each year are based on the last full reporting week of the year. *Id.*

⁴³ N.Y.C., *supra* note 5, at 4.

⁴⁴ *Id.*

categories of crimes is nowhere near the 40% that the NYPD has recently been attributing to “crews.” Regarding homicides, the NYPD published annual reports on Murder in New York City until 2012. Like the published statistics for “Gang Motivated Incidents,” the murder statistics contradict the assertion that gang-like groups are responsible for a significant portion of homicides. Gangs were not even included as a potential cause of homicides until 2011, and in that year only 5% of the 515 homicides in New York City were attributed to gangs.⁴⁵ (Except for the category “Other,” this was the lowest of all categories of homicides in that year). In 2012, 9% of a total of 419 homicides were attributed to gangs.⁴⁶

The NYPD’s GangStat figures attribute an even smaller percentage – between 2.6 to 5.8%– of shootings and homicides to “gang-motivated” incidents. Table 3 provides this data for the years from 2005 through 2012.

Table 3: “Gang Motivated” Shootings and Homicides⁴⁷

Year	Gang Motivated Shootings (percentage of all shootings)	Gang Motivated Homicide (percentage of all homicides)	Shootings	Homicides
2005	36 (2.3%)	27 (5.0%)	1533	540
2006	49 (3.1%)	18 (3.1%)	1567	590
2007	31 (2.2%)	13 (2.6%)	1441	492
2008	43 (2.9%)	15 (2.9%)	1497	512
2009	41 (2.9%)	27 (5.8%)	1407	460
2010	57 (3.9%)	21 (4.0%)	1452	520
2011	62 (4.2%)	14 (2.8%)	1482	497
2012	38 (2.8%)	12 (2.9%)	1372	415

As would be expected, the NYPD categorizes a higher percentage of shootings and homicides as “gang related.” A gang-related shooting or homicide would capture all incidents involving actual or suspected gang members even if the shooting/homicide clearly is attributable to a non-gang motive such as domestic violence. Even using this broader category, 80 to 85% of shootings and homicides are *not* gang-related.

Table 4: “Gang Related” Shootings and Homicides⁴⁸

Year	Gang Related Shootings (percentage of all shootings)	Gang Related Homicide (percentage of all homicides)	Shootings	Homicides
2005	186 (12.1%)	82 (15.2%)	1533	540
2006	198 (12.6%)	90 (15.3%)	1567	590
2007	201 (13.9%)	76 (15.4%)	1441	492

⁴⁵ N.Y.C. Murders 2011, *supra* note 1, at 3.

⁴⁶ N.Y.C. Murders 2012, *supra* note 1, at 3.

⁴⁷ GangStat Reports, *supra* note 2.

⁴⁸ *Id.*

2008	220 (14.7%)	81 (15.8%)	1497	512
2009	254 (18.1%)	80 (17.4%)	1407	460
2010	300 (18.8%)	98 (20.7%)	1452	520
2011	286 (19.3%)	96 (19.3%)	1482	497
2012	283 (17.6%)	73 (20.6%)	1372	415
2013			1100 ⁴⁹	335
2014				333 ⁵⁰

Like gang-related crime, the NYPD estimates of new gang members do not appear to suggest a new gang menace. Each year from 2000 through 2012, the NYPD added from 850 to 1600 new alleged gang members to its database.⁵¹ Indeed, in 2011, the year before Operation Crew Cut was announced, the NYPD certified nearly 30% fewer new gang members than it had earlier in the decade. 2012 had even fewer additions to the gang database, and if the last four months of 2013 were consistent with the first eight months, the number of gang members added in that year would have been only about 700, a 30% drop from the 2012 low.

Table 5: Individuals added to NYPD Gang Database 2005-2013⁵²

Year	Individuals added to Gang Database
2005	1419
2006	1542
2007	1419
2008	1381
2009	1555
2010	1614
2011	1144
2012	1104
2013 (through August 30, 2013)	470

The NYPD might assert that it has not historically categorized crime by crews as gang crimes or included “crew” members in gang statistics. However, under the NYPD definitions of gangs, there can be no doubt that loosely organized “crews” that commit 40 percent of violent crimes, would fall into the category of gangs. It would be immaterial that such a group had no defined hierarchy or leadership. Furthermore, individual criminal behavior is enough to qualify such a group as a gang; collective criminal action is not required. The NYPD Patrol Guide, 212-13, provides the following definition:

GANG – Any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities, the commission of one or more criminal acts, having a

⁴⁹ Edgar Sandoval & Tina Moore, *New York City Murders Drop 20% but Not All Denizens Feel Safe*, N.Y. DAILY NEWS (Dec. 30, 2013), <http://www.nydailynews.com/new-york/nyc-crime/nyc-murders-drop-20-2013-not-feels-safe-article-1.1561930> (noting that there were 333 homicides and only 1100 shootings, nearly a 20 percent drop in both categories between 2012 and 2013, and quoting the NYPD as attributing this decline in part to Operation Crew Cut).

⁵⁰ *CompStat Report*, *supra* note 30. J. David Goodman & Al Baker, *Murders in New York Drop to a Record Low But Officers Aren't Celebrating*, N.Y. Times, Dec. 31, 2014, at A1 (noting there were 328 homicides in 2014).

⁵¹ Gang Members Entered by Month, NYPD statistics January 2001 – August 2013, provided by NYPD Legal in response to FOIL request.

⁵² *Id.*

common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁵³

Any “crew” of youths committing violent crimes with a name like “Very Crispy Gangsters” would certainly be considered a gang within this definition.

Operation Crew Cut has resulted in the quadrupling of the Gang Division from 150 officers to 600 in just four years. The narrative attached to it is that of an emerging form of criminality – a “shifted paradigm,” as Deputy Harrington phrased it when addressing the City Council in hearings on Operation Crew Cut.⁵⁴ Shootings have remained remarkably consistent during the past decade and dropped precipitously in 2013 to 1093 shootings for the year.⁵⁵ If crews have emerged as a new threat committing 40% of shootings, all other offenders in New York City must have very abruptly reformed substantially. Alternatively, the NYPD has simply chosen to re-label or exaggerate the threat of violence by crews.⁵⁶

II. THE RELATIONSHIP BETWEEN OPERATION CREW CUT AND THE STOP AND FRISK LITIGATION

The narrative that “crews” of young people are responsible for a large percentage of shootings in New York City was first advanced by Police Commissioner Raymond Kelly in October of 2012, when he announced Operation Crew Cut.⁵⁷ This announcement came just months after an order in *Floyd v. City of New York* granting class certification to:

All persons who since January 31, 2005 have been, or in the future will be subjected to the New York Police Department’s policies and/or widespread customs or practices of stopping, or stopping and frisking persons . . . in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause. . . .⁵⁸

The decision accompanying the order was twenty pages long, included extensive references to the discovery materials, and laid out the basis for concluding that the class of individuals described by the plaintiffs in *Floyd* represented hundreds of thousands of New

⁵³ NYPD PATROL GUIDE PROCEDURE 212–13, *supra* note 38, at 1.

⁵⁴ N.Y.C. Council Comm. on Pub. Safety, *Oversight: The NYPD’s Operation Crew Cut and Crime Reduction Strategies for NYCHA*, N.Y.C. COUNCIL (Apr. 28, 2014, 1:00 PM), <http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=304831&GUID=66D6AF49-65A7-4AA8-851E-DA8755D55FED&Options=info|&Search=>. Deputy Harrington’s comment occurs at 1:15:16 in the hearing video.

⁵⁵ Sandoval & Moore, *supra* note 49.

⁵⁶ See Mercer L. Sullivan, *Maybe We Shouldn’t Study “Gangs”: Does Reification Obscure Youth Violence?*, 21 J. CONTEMP. CRIM. JUST. 170 (2005) for a discussion of how labeling can increase the perception of gang problems in the absence of increased criminality. Mercer explains why the supposed proliferation of national gangs in New York in the 1990s did not increase serious youth crime but merely relabeled existing beefs. *Id.*

⁵⁷ Richard Esposito, *New York’s Kelly Plans “Crew Cut” for Gang Members*, WORLD NEWS (Oct. 2, 2012), <http://abcnews.go.com/Blotter/nypd-plans-crew-cut-gang-members/story?id=17370903&singlePage=true>; Daniel Beekman, *Bronx Community Leaders Praise New NYPD Anti-gang Initiative, Argue More Youth Programs Are Also Needed: NYPD Gang Division to Double in Size in Intensive Effort to Stem Shootings*, N.Y. DAILY NEWS (Oct. 3, 2012), <http://www.nydailynews.com/new-york/bronx/city-top-raymond-kelly-announces-operation-crew-cut-article-1.1173045>.

⁵⁸ *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (granting class certification, May 16, 2012).

Yorkers of color, who faced a heightened risk of being stopped, frisked, and subjected to use of force in violation of both the Fourth and Fourteenth Amendments.⁵⁹ A trial date was also set, but with the certification of the class, the NYPD's stop and frisk activity declined for the first time in decades. While the NYPD were on track in the first quarter of 2012 to exceed the 685,000 stops they made in 2011, by the end of the year only 533,000 stops were reported (a 22% drop).⁶⁰ In 2013, the number of reported stops plunged to about 190,000.⁶¹

Furthermore, in contrast to dire predictions that crime would increase if the NYPD were not permitted to continue the regime of stop and frisks, homicides dropped nearly 20% between 2011 and 2012 (from 515 to 419), and another 20% between 2012 and 2013 (from 419 to 335).⁶² As the weekly CompStat data came through in the fall of 2012, a thinking person might have concluded that the intensive policing of innocent young men of color really was not responsible for the drop in crime.

There can be no doubt that in October 2012, when Commissioner Kelly announced that "crews" were responsible for at least 30% of shootings in New York City and that the NYPD was doubling the number of officers in the Gang Division to police these youth,⁶³ he was aware that homicides would likely drop to a historic low in 2012. The NYPD also faced an upcoming trial based on assertions of racial profiling and unconstitutional stops.⁶⁴ The announcement of a new menace to society, however, together with frightening rhetoric about kids who would hurt you for invading their turf,⁶⁵ served both to give the NYPD a new justification for intensively policing young men of color and to overshadow any argument that stop and frisk was not a deterrent to crime.

In his announcement of Operation Crew Cut, Commissioner Kelly defined the problem as "not . . . large, established gangs such as the Bloods and Crips, but . . . 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."⁶⁶ Although, feuding crews did exist and do cause problems, the NYPD was already collaborating with the District Attorneys and federal prosecutors and its Gang Division was already collecting evidence on crews that were in active conflict. The new resources poured into the Gang Division via Operation Crew Cut allowed an expansion of intensive policing of individuals based on the block or housing development where they reside beyond the investigation of these existing conflicts.⁶⁷ No increase in crime accounted for the massive increase of resources into Operation Crew Cut.

The use of the gang menace to create a moral panic⁶⁸ and increase support for

⁵⁹ *Id.* at 158–78.

⁶⁰ *Racial Justice: Stop-and-Frisk Data*, NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited May 1, 2015).

⁶¹ *Id.*

⁶² *Historical New York City Crime Data: Citywide Seven Major Felony Offenses 2000–2014*, NYPD http://www.nyc.gov/html/nypd/downloads/excel/analysis_and_planning/seven_major_felony_offenses_2000_2014.xls (last visited May 1, 2015).

⁶³ Beekman, *supra* note 57.

⁶⁴ *Floyd*, 283 F.R.D. 153.

⁶⁵ Esposito, *supra* note 57 (quoting Commissioner Kelly as reporting that crews' "rivalries are based not on narcotics trafficking or some other entrepreneurial interest, but simply on local turf.")

⁶⁶ Rocco Parascandola, *NYPD to Double Gang Division to Combat Street Violence: Commissioner Kelly*, N.Y. DAILY NEWS (Oct. 1, 2012), <http://www.nydailynews.com/new-york/nypd-double-gang-division-article-1.1172347>.

⁶⁷ *Id.*

⁶⁸ See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2002) (updating the seminal 1972

intensive profile-based policing is a well-established policing tactic.⁶⁹ In studies across the country, law enforcement has been able to push through legislation and obtain resources and support by providing the media with stories recounting increased gang crime violence.⁷⁰ The media is not necessarily a victim in the creation of moral panic but may benefit commercially from sensational and disproportionate coverage of youth and gang violence, which in turn reshapes public opinion and criminal justice policy as well.⁷¹ While moral panics may involve any type of deviant behavior, they have been used extensively to highlight the risk of youth gang violence even in an era when youth gang is declining.⁷²

In a moral panic, 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. . . . Although sometimes the targeted enemy poses an imaginary threat (the Salem “witches,” for example), more often a moral panic focuses on individuals who do real harm, such as sexual abusers or members of criminal street gangs. . . . But what distinguishes a moral panic from an effort to deal with a pressing social problem is the gap between the perception of the problem and the reality. In a moral panic, the seriousness of the threat and the number of offenders are greatly exaggerated.⁷³

While the predominant narrative throughout the Bloomberg/Kelly era was that the NYPD had made New York the safest city in the world, by the fall of 2012 the press started publishing more and more stories about local crews, suggesting that New York was, in fact, a city facing new dangers.⁷⁴ These stories had always existed, but the threat

book on the moral panic generated around conflicts between the Mods and Rockers in 1960s England); CHARLES KRINSKY ET AL., *THE ASHGATE RESEARCH COMPANION TO MORAL PANICS*, (Charles Krinsky ed., 2013) (providing an overview by various authors of types of moral panics, the role of media, and the impact on governance).

⁶⁹ See 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); Marjorie Zatz, *Chicano Youth Gangs and Crime: The Creation of a Moral Panic*, 11 *CONTEMP. CRISES* 129 (1987); Marjorie Zatz, *Los Cholos: Legal Processing of Chicano Gang Members*, 33 *SOC. PROBS.* 13 (1985).

⁷⁰ See Richard C. McCorkle & Terance D. Miethe, *The Political and Organizational Response to Gangs: An Examination of a “Moral Panic” in Nevada*, 15 *JUST. Q.* 41 (1998); Carol A. Archbold & Michael Meyer, *Anatomy of a Gang Suppression Unit: The Social Construction of an Organizational Response to Gang Problems*, 2 *POLICE Q.* 184, 189–98 (1999) (recounting a particularly dramatic response to a moral panic caused by a single homicide in a town 80 miles away in response to which police in a midsized Midwestern town redefined all crime committed by anyone under 18 as “gang related” and thereby “document” a gang problem that required resources to establish a gang suppression unit).

⁷¹ Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *WM. & MARY L. REV.* 397, 397–98 (2006).

⁷² David Pimental, *supra* note 28, at 92 (discussing how fear of juvenile violence has driven us to punish American youth as adults, even in the face of historic lows in juvenile crime); Jodi Lane, *Fear of Gang Crime: A Qualitative Examination of the Four Perspectives*, 39 *J. RES. CRIME & DELINQ.* 437 (2002) (presenting several theoretical models that might explain why fear of gang violence in parts of Southern California exceeds the actual danger of gang violence).

⁷³ SCOTT & STEINBERG, *supra* note 69, at 109–10 (linking moral panic over youth crime to the adoption of Proposition 21 which required many juveniles to be tried as adults, barred sealing of juvenile records, and extended prison terms for gang-related crimes. Concluding that “Proposition 21 was adopted by a “public who inaccurately thought that youths were responsible for most crime and that juvenile crime was on the rise.”).

⁷⁴ For a cluster of articles in mainstream liberal media focusing on the threat of a new type of youth violence and the NYPD’s response that came out within weeks of the gang raid in June 2014 see, for example, Mosi Secret, *On the Brink in Brownsville*, N.Y. TIMES MAG., May 1, 2014,

and the number of offenses were exaggerated. In the fall of 2013, Commissioner Kelly expressly linked the shift from stop-and-frisk policing to policing of crews, when he announced a second doubling of the size of the NYPD's Gang Division.⁷⁵ By highlighting a new threat,⁷⁶ he was able to garner support for a form of policing that differs more in form than in substance from the prior regime of profile-based stop-and-frisk. Even the biggest critics of stop-and-frisk policing expressed approval for focusing police resources on "crews" who were responsible for forty percent of shootings, despite the fact that only isolated stories support this narrative.⁷⁷ Under the new police commissioner and the de Blasio administration the commitment to Operation Crew Cut has continued unabated.⁷⁸

The larger concern raised by this paper, however, is the fact that there is no definition for "crews," no transparency about who will be considered a possible crew or gang member. Examined closely, policing kids because of associations based on where they live, is not fundamentally different from the stop and frisk regime. Indeed, policing of gangs and crews is more worrisome. First, stop-and-frisk policing is subject to Fourth Amendment requirements and gives rise to occasional review in either criminal or civil cases. Second, gang policing relies on police-developed secret lists, secret surveillance, secret criteria, and is not governed by either constitutional or statutory requirements. Finally, the crew/gang label can be used to justify even harsher treatment than a stop-and-frisk, both for those who are labeled as crew members and for those who associate with alleged crew members either in public or in private.

In the following section the lack of meaningful definitions for gangs, the lack of process, and the vague criteria for certifying gang membership will be reviewed.

III. THE NYPD'S GANG DEFINITIONS AND DATABASE

In May of 2010, the NYCLU filed a lawsuit, *Lino v. City of New York*, challenging the NYPD's practice of maintaining an electronic database containing information relating to every individual that the NYPD stopped or stopped and frisked, even when the stop did not result in a summons or arrest.⁷⁹ The public outrage that the NYPD was keeping an electronic database with identifying information on innocent New Yorkers was widespread.⁸⁰ On July 16, 2010, less than two months after the database was challenged, the criminal procedure law was amended to prohibit the maintenance of an electronic database containing identifying information for individuals stopped and "released without further legal action."⁸¹ *Lino* was settled in August 2013, when the City agreed to remove information from the database relating to people whose cases were

<http://www.nytimes.com/2014/05/04/magazine/on-the-brink-in-brownsville.html>; Eric Konigsberg, *Woo Cho Bang Bang*, NYMAG.COM (June 19, 2014), <http://nymag.com/news/features/brownsville-2014-6/>; Matthew McKnight, *De Blasio's Violent-Crime Challenges*, NEW YORKER (July 9, 2014), <http://www.newyorker.com/news/news-desk/de-blasios-violent-crime-challenges> (interviewing Jeffrey Fagan about the alleged increase in violent crime to 2014).

⁷⁵ Goldstein & Goodman, *supra* note 3.

⁷⁶ See Esposito *supra* note 57.

⁷⁷ Johnson, *supra* note 10 (indicating that Operation Crew Cut had the backing of stop-and-frisk critics, Bill de Blasio and Jumaane Williams).

⁷⁸ J. David Goodman & Joseph Goldstein, *Bratton Takes Helm of Police Force He Pledged to Change*, N.Y. TIMES, Jan. 2, 2014, A14.

⁷⁹ *Lino v. City of New York*, 958 N.Y.S.2d 11, 13 (App. Div. 2012).

⁸⁰ Rocco Parascandola, *Gov. Paterson Signs Law Forcing NYPD to Delete Stop and Frisk Database*, N.Y. DAILY NEWS (July 16, 2010), <http://www.nydailynews.com/news/crime/gov-paterson-signs-law-forcing-nypd-delete-stop-frisk-database-article-1.467911>.

⁸¹ N.Y. CPL §140.50(4) (McKinney 2010).

subsequently dismissed or resolved with no criminal conviction.⁸²

Where the legislation closes a door, however, gang policing opens a window (albeit, a pre-existing window). Although it is not a crime to be in a gang,⁸³ law enforcement agencies across the country have started to maintain extensive databases of gang members or associates and suspected gang members and associates.⁸⁴ There is no right to notice or procedure for challenging inclusion in gang databases.⁸⁵ The challenge of defining gangs has been one that has long plagued researchers, law enforcement, courts, and scholars. Thus, there are no generally accepted definitions for gangs and no universally applicable method for determining gang membership.⁸⁶ Nonetheless, there are commonalities in the definitions used by law enforcement in the United States for defining gangs and, more importantly, for “certifying” gang membership or association for the purpose of collecting intelligence on suspected gang members.⁸⁷

The most important commonality is that there is no jurisdiction that requires proof (or even reasonable suspicion) of any criminality on the part of an individual in order to certify him as a gang member or associate.⁸⁸ Instead, individuals can be certified as gang members or associates, based on appearance, association, location, law enforcement “intelligence,” or informants. There is no notification of inclusion in gang databases and no right to challenge inclusion.⁸⁹

Thus, although the NYPD cannot maintain electronic data on those stopped-and-frisked but not arrested or given a summons, the NYPD gang database allows the NYPD to maintain identifying data, including name, address, and social security number on individuals without even a pretense of reasonable suspicion.⁹⁰ Indeed, the NYPD gang database does not require any information regarding criminality whatsoever. The criteria used by the NYPD to “qualify” an individual as an “Identified Gang Member” were provided to the author January 7, 2014, in response to a FOIL request filed on September 2, 2011.⁹¹ The criteria are listed on the Intelligence Division (I.D.S.) Gang Entry Sheet, and an individual can be certified in any of the following three ways:

⁸² *NYCLU Settlement Ends NYPD Practice of Keeping New Yorkers in Stop-and-Frisk Database*, NYCLU (Aug. 7, 2013), <http://www.nyclu.org/news/nyclu-settlement-ends-nypd-practice-of-keeping-new-yorkers-stop-and-frisk-database>.

⁸³ *Lanzetta v. New Jersey*, 306 U.S. 451, 457–58 (1939).

⁸⁴ For examples of typical criteria for inclusion in gang databases see NAT’L GANG CTR., BRIEF REVIEW OF FEDERAL AND STATE DEFINITIONS OF THE TERMS “GANG,” “GANG CRIME,” AND “GANG MEMBER” (2012), available at <https://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf>.

⁸⁵ Joshua D. White, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 118 (2005). One recent exception to this general rule is California which passed legislation granting notice and an opportunity to challenge gang designation to parents or guardians and minors under the age of 18. CAL. PENAL CODE § 186.34 (West 2014).

⁸⁶ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 643–47 (2011).

⁸⁷ NAT’L GANG CTR., *supra* note 84, at 2–3.

⁸⁸ *Id.* at 3–8. Of the seven states that have legislative criteria for identifying gang members and associates, none requires any criminal conviction or arrest. Instead, each requires that two or more criteria of a list be met. The list typically includes such items as, self-admission, dress, tattoos, correspondence with gang members, and the rather circular “identified as criminal street gang members by law enforcement.” *Id.* As discussed below, Minnesota has a database that requires a gross misdemeanor conviction but it also has second database that does not require criminality. See text *infra* at note 104-110.

⁸⁹ See sources cited *supra* note 85.

⁹⁰ The NYPD does not share its database with the federal government or others. E-mail Response from N.Y.C. Police Dep’t Legal Bureau to author, (March 24, 2014) (on file with author). Therefore it is not bound by 28 C.F.R. § 23.20 which requires reasonable suspicion of criminal conduct or activity and compliance reviews every five years for shared intelligence databases. 28 C.F.R. § 23.20 (2015).

⁹¹ NYPD, I.D.S. GANG ENTRY SHEET (obtained by FOIL from NYPD, on file with the author).

1. An individual will be entered if he/she admits to membership during debriefing OR
2. Through the course of an investigation an individual is reasonably believed to belong to a gang and is identified as such by two independent sources. (Ex. Pct. Personnel, Intell, School Safety, Dept. of Correction, or Outside Agency) ... OR
3. Meets any **Two** below mentioned criteria
 - o Known gang **Location**
 - o **Scars/Tattoos** Associated w/ Gangs
 - o Gang Related **Documents**
 - o **Colors** Associated w/ Gangs
 - o **Association** w/ Known Gang members
 - o **Hand Signs** Associated with Gangs⁹²

None of the three methods for certifying gang members and adding them to the NYPD's database requires any arrest or criminal conduct.⁹³ Nor is there any requirement or provision for notifying individuals that they are included in gang databases or for purging names from gang databases.⁹⁴ For the period covered by the FOIL request (January 2001 – August 2013), the NYPD Legal Bureau responded that they could locate no documents related to maintenance or guidelines regarding purging of the database.⁹⁵

As of August 30, 2013, the NYPD's Gang Database included over 20,000 individuals.⁹⁶ Of the 21,537 who were added between January 2001 and August 30, 2013, just one percent (212 individuals) of those entered into the gang database were categorized as Caucasian or white.⁹⁷ Approximately 48% of the individuals added to the database between 2003 and 2013 were identified by the NYPD as black, another 42% Hispanic, nearly 8% "unidentified" and less than 4% were female.⁹⁸ About 30% were under 18 years of age when they were added to database.⁹⁹ Because of widely accepted narratives regarding gang membership, these percentages may not strike the reader as under-representative of white or female gang membership or over-inclusive of black and Latinos. However, criminologist and youth gang researchers find that gang membership is rare among all races but substantially more common among white youth than law enforcement statistics estimates, with white gang members accounting for 25% or more of all gang members.¹⁰⁰

⁹² *Id.*

⁹³ This is typical of gang databases across the country. There are no generally accepted definitions for gangs and no universally applicable method for determining gang membership. *See, e.g., Howell, supra* note 86, at 643–47. One commonality, however, is that criminal conduct is not necessary for inclusion in gang databases. *Id.*

⁹⁴ E-mail Response from NYPD Legal Bureau to author, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *See* NYPD Gang Members by Age, (obtained by FOIL from NYPD, on file with author); Joseph Goldstein, *Weekly Police Briefing Offers Snapshot of Department and Its Leader*, N.Y. TIMES, Feb. 10, 2013, at A15.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.,* Judith Greene and Kevin Pranis, *supra* note 19, at 37 (noting that white youth accounted for 40% of adolescent gang members according to National Longitudinal Survey of Youth and GREAT surveys); David Pyrooz and Gary Sweeten, *Gang Membership Between Ages 5 and 17 Years in the United States*, J. of Adolescent Health 1, 3 (2015) (noting that the National Longitudinal Survey of Youth establish that while gang participation is more common among black and Latino, the majority of self-reported gang members were white); Finn-Aage Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multistate Survey*, 15 Just. Q. 505, 510 (1998); Adrienne Freng & Finn-Aage Esbensen, *Race and Gang Affiliation: An Examination of Multiple Marginality*, 24 JUSTICE QUARTERLY 600, 609 (December 2007) (approximately 30% of gang youth in this study were white). *See also,* Jordan Blair Woods, *Systemic*

Because criteria for the database do not require any criminality and there is no notice or right to appeal, there is a potential for the database to be or to become both vastly over-inclusive and demographically skewed. The track record for gang databases in other cities and states demonstrate this risk.¹⁰¹ A particularly good example of the potential impact that lack of criteria has on the racial makeup of databases can be seen in Minnesota.¹⁰² Minnesota maintained two databases, one of which, the Gang Pointer File, requires at least one conviction for a gross misdemeanor or felony, a minimum age of 14 for inclusion, and three criteria from a 10-point list.¹⁰³ A second database, GangNet, like the NYPD database, did not require any conviction or a minimum age for inclusion.¹⁰⁴ In 2009, the more demanding Gang Pointer database included about 2500 individuals, 36% of whom were white.¹⁰⁵ The GangNet database was nearly seven times larger and included 17,000 individuals, of whom only 18% were white.¹⁰⁶ As this example illustrates, broad criteria for inclusion can lead to over-representation of youth of color and under-representation of whites.¹⁰⁷ Indeed, the community groups that held hearings on the Minnesota databases asked whether the criteria used to designate gang members were “synonymous with the urban youth culture.”¹⁰⁸

With the increased number of officers assigned to gang division intelligence gathering, we must consider what criteria should be in place before individuals can be added to the database. Further, we cannot be confident that the gang database represents the entirety of the intelligence gathered relating to suspected gang members. The database appears to be just one aspect of the intelligence-gathering machine. In fact, despite the doubling of the gang intelligence division under Operation Crew Cut in the fall of 2012, the number of gang members added to the database in first eight months 2013 was lower than in prior years. The intelligence collected by these officers may be going into other databases, may be broader than that kept in the gang databases, and may be disseminated and used in other ways. While the NYPD’s reply to a FOIL requesting what information is kept in the database was non-responsive, the databases maintained relating to the NYPD’s surveillance of Muslims since 9/11 may be instructive.¹⁰⁹ As part of an intelligence-gathering program, the NYPD debriefed Muslim individuals who were arrested for even minor offenses and maintained a detailed database. As the New York Times reports:

After each interview, the detectives filed detailed reports about the

Racial Bias and RICO’s Application to Criminal Street and Prison Gangs, 17 Mich. J. of Race & Law 303, 307-09 (2012)(for a discussion of how “racial stereotype can shape the way government constructs gangs.”).

¹⁰¹ See Howell, *supra* note 86, at 650-54 (gathering information on database demographics in which over 90% of individuals in gang databases were black or Latino but half had never been arrested).

¹⁰² CMTY. JUSTICE PROJECT, UNIV. OF ST. THOMAS, EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 2-4 (2011), available at <https://dps.mn.gov/divisions/bca/Documents/Evaluation%20of%20Gang%20Databases%20in%20Minnesota%20and%20Recommendations%20for%20Change.pdf>.

¹⁰³ *Id.* at 4. The 10-point criteria are as follows: (1) Subject admits to being a gang member; (2) Is observed to associate on regular basis with known gang members; (3) Has tattoos indicating gang membership; (4) Wears gang symbols to identify with a specific gang; (5) Is in a photograph with known gang members and/or using gang-related hand signs; (6) Name is on gang document, hit list, or gang-related graffiti; (7) Is identified as a gang member by a reliable source; (8) Arrested in the company of identified gang members or associates; (9) Corresponds with known gang members or writes and/or receives correspondence about gang activity; (10) Writes about gang (graffiti) on walls, books and paper. *Id.* See also Howell, *supra* note 86, at 650-53.

¹⁰⁴ CMTY. JUSTICE PROJECT, *supra* note 102, at 2-4; Howell, *supra* note 86, at 652.

¹⁰⁵ CMTY. JUSTICE PROJECT, *supra* note 102, at 22.

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.* at 10, 22.

¹⁰⁸ *Id.* at 19.

¹⁰⁹ See generally Joseph Goldstein, *Police Recruit Muslims to be Informers*, N.Y. TIMES, May 10, 2014, at A1.

prisoner that were entered into a database. In many instances, they included the names of relatives, including children: "Subject daughter is 'Myriam', age 6 and youngest child is 'Omar' age 2 years," stated part of a six-page report filed about a furniture salesman, who had been arrested for driving without a license and making an improper left turn.¹¹⁰

Whether similar detailed statements are being assembled for those in gang databases and for others targeted by Operation Crew Cut, we cannot be sure. However, the NYPD Patrol Guide suggests that this may well be the case. The Patrol Guide identifies Gang Division Intelligence Officers *who are available to debrief suspected gang members 24/7*.¹¹¹ It further designates local Field Intelligence Officers and charges them to disseminate lists of gang members on a monthly basis.¹¹² Other than the very broad non-criminal criteria that relate to certification for the gang database, there are no established criteria for the additional intelligence gathering that the NYPD engages in as part of Operation Crew Cut and its Gang Intelligence Division. There is nothing in the criteria for certifying gang members that would prevent collection of detailed information even for individuals who have never been arrested or charged with any crime based on where they live, what they look like and who they are seen with.

The existence of parallel databases stemming from collaboration with the NYPD is evident in recent statements by New York County District Attorney's Office. After tapping the NYPD to designate the 25 worst offenders in each of the 22 precincts in Manhattan, the DA's Office went on to develop a list of about 9000 individuals of high interest that its Crime Strategies Unit considers the worst of the worst.¹¹³ The fact that the District Attorney averages over 400 persons of interest per precinct, rather than 25, likely reflects the broad collection of data from the surveillance and petty arrests of individuals consistent with Operation Crew Cut. It is worth noting that the number of people on this list is twice as high as the number of all violent felony arrests for 2014.¹¹⁴ Like the surveillance of Muslim drivers and food vendors arrested for minor offenses who are then debriefed, alleged gang members are also detained and questioned for very minor offenses.¹¹⁵ Based on this list, the prosecutors

decide whom we should try to pull out for a debriefing. We don't debrief people arrested for felonies because we don't want to compromise a case. We pull people arrested on low-level misdemeanor charges, maybe two or three a week. We read them their Miranda rights. About 80 percent of them will talk. If you speak to a 16-year-old, they might tell you, 'This kid is running things, this kid is a hanger-on.' That's how we find out information like whether a gang has changed their name. We took down the Flow Boyz gang at the Robert F. Wagner housing project in 2012. But a lot of those gang members have aged out, and now there's a new group of 14- and 15-

¹¹⁰ *Id.*

¹¹¹ NYPD, *supra* note 33, at 1.

¹¹² NYPD, PATROL GUIDE PROCEDURE 212-103: CRIME INFORMATION CENTERS 3 (2010) (requiring field intelligence officers to post lists of "active gang members" who reside within the command by the 5th of each month).

¹¹³ Chip Brown, *Cyrus Vance Jr.'s "Moneyball" Approach to Crime*, N.Y. TIMES MAG. (Dec. 7, 2014), available at <http://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html>.

¹¹⁴ See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2005-2014 (2015), available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf>.

¹¹⁵ Brown, *supra* note 113.

year-olds who want their own set name. Through debriefings, we learned they call themselves Only the Wagner.¹¹⁶

When suspect individuals go through the system, even for a minor offense, they may be pulled aside and subjected to interrogation based on this secret list. If we could be assured that the list was developed to actually target repeat violent offenders, we might (or might not) applaud such an effort, but the debriefing of 16 year-olds to get names of 14 and 15 year-olds goes well beyond targeted enforcement, and is certainly not what a parent would expect prosecuting attorneys to do to an unrepresented teenager in a minor case.

IV. THE HARMFUL CONSEQUENCES OF GANG SUPPRESSION TACTICS

Although the narrative used to justify gang policing rests on the same two concepts – place and suspicion – as the justification for stop-and-frisk, the narrative can lead to even greater harms than the stop-and-frisk regime. First, the gang label permits and encourages even more aggressive and broader police intrusion than the stop-and-frisk narrative. The label affects police perception and behavior, prosecutorial behavior, suspected gang and crew members, and the broader community. Second, gang suppression policing may be counterproductive, leading to increased formation, cohesion, and longevity of gangs, and contributing to individual criminality and delinquency among youth.

A. *The Impact of the Gang Narrative on Police, Suspects, and the Community*

1. Police Perceptions of Gang Problems.

Although the narratives justifying the use of excessive stop-and-frisk and justifying gang policing are very similar, they differ in ways that make gang policing deeply troubling. Unlike a *Terry* stop, there are no legal pre-requisites for categorizing an individual as a gang member. Unlike a *Terry* stop, no criminal conduct must be suspected or established. Unlike *Terry*, there are no official rules or limits for whether a frisk is permissible or how a search might be conducted. And, unlike a *Terry* stop, there are no systems of review. Moreover, the central premise of the gang narrative—that gangs are responsible for most violent crime and engage in violence heedlessly and irrationally—creates circumstances in which an officer approaching a suspected gang member is likely to view him not just with suspicion but with some level of fear and antagonism.

The gang narrative has the power to distort police perception of the prevalence and violence of gangs and to trigger biases¹¹⁷ that affect policing. In a careful study of gang units in four western cities (Inglewood, CA, Albuquerque, NM, Las Vegas, NV, and Phoenix, AZ), Charles Katz and Vincent Webb outline some worrisome aspects of gang policing.¹¹⁸ After following and interviewing police officers from four gang units and their colleagues, these researchers observed a number of disturbing attitudes and trends.

[T]he majority of the officers perceived the magnitude of their local gang problem to be greater than indicated by the official gang crime

¹¹⁶ *Id.*

¹¹⁷ Jessica J. Sim, Joshua Correll, & Melody Sadler, *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 *Personality & Soc. Psych. Bull.* 291, 299 (2013) (finding that special unit officers in gang units demonstrate racial bias in the first-person-shooter task (FPST) similar to untrained novices and unlike trained patrol officers).

¹¹⁸ CHARLES M. KATZ & VINCENT J. WEBB, *POLICING GANGS IN AMERICA* (2006).

data recorded by their department. Except in Las Vegas, the vast majority of officers in each [gang] unit perceived that their city had a major gang problem, that gang members engaged in a wide variety of criminal behaviors, and that roughly 30 to 70% of all local crimes were probably attributable to gang members.¹¹⁹

Gang units across the country similarly attribute 48 to 98% of violent crime to gangs¹²⁰ even though victim reports attribute only about 6% of violent crimes to gangs.¹²¹

This misperception translated into action, as gang unit officers came to perceive their role as a duty to fight “evil perpetrators” and engaged in aggressive directed patrols and sweeps that focus on minor offenses in an attempt to deter gang membership.¹²² “All of the police departments reacted with zero-tolerance law enforcement for gang members, and by initiating gang sweeps and saturating gang neighborhoods.”¹²³ The sweeps contributed to community complaints of over-policing and excessive force, even while community members continued to seek law enforcement assistance to address gang problems.¹²⁴

The use of the gang narrative enhances the sense of danger and dehumanizes the targets of enforcement. The fight against “evil perpetrators” can lead the police to engage in unlawful conduct. Such attitudes were at the root of the Rampart Scandal, in Los Angeles in which gang unit officers engaged in widespread misconduct and corruption.¹²⁵ In Phoenix, thirteen police officers shot at a gang member 89 times, striking him 30 times.¹²⁶ In Las Vegas an FBI investigation led to the arrest of two gang unit officers for engaging in a drive-by shooting.¹²⁷ The attitudes that could lead to such an outcome were expressed by an officer in an anonymous statement to the press:

As for the poor, stupid, innocent gang member, that has spread hatred, vandalism, crime, and murderous-intent-through-profit-motive –legacy of his organization, all that I can say is what goes around comes around . . . and THE only good gang member is a dead gang member.¹²⁸

2. Gang Policing Justifies Intensive Policing and Surveillance

In west coast jurisdictions, where gang policing has long been practiced, the policing is often associated with very broad and intrusive practices. Suspected gang members may be included in civil injunctions that criminalize their presence in public places.¹²⁹ These injunctions can prevent named individuals from participating in sports

¹¹⁹ *Id.* at 122. In Las Vegas, officers stated that they did not know the proportion of crime that was committed by gang members. *Id.* at 122 n.6.

¹²⁰ NAT’L GANG INTEL. CTR., *supra* note 18, at 11, 15 (attributing the increase in gang membership to both improved reporting and “more aggressive recruiting efforts by gangs”).

¹²¹ See HARRELL, *supra* note 24 (reporting that 6 percent of victims of violent crime identify perpetrator as perceived gang member).

¹²² KATZ & WEBB, *supra* note 118, at 71.

¹²³ *Id.* at 88.

¹²⁴ *Id.*

¹²⁵ See *Floyd v. City of New York*, 302 F.R.D. 69, 106–07 (S.D.N.Y. 2014) (“LAPD [CRASH] officers had ‘subject[ed] individuals to uses of excessive force, false arrest, and improper searches.’” (quoting Complaint at 2, *United States v. City of Los Angeles*, No. 00 Civ. 11769 (C.D. Cal. Nov. 3, 2000))).

¹²⁶ KATZ & WEBB, *supra* note 118, at 83.

¹²⁷ *Id.* at 74–75. The shooter was convicted, but contrary to normal practice the driver was not charged as an accomplice. *Id.*

¹²⁸ *Id.* at 75.

¹²⁹ See, e.g., Matthew M. Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement*

teams, after school activities, taking public transportation, and going to job centers.¹³⁰ Some gang units engage in aggressive Broken-Windows style enforcement, ticketing suspected gang members for jaywalking and other minor traffic infractions.¹³¹ The NYPD has indicated that a similar strategy would be adopted as part of Operation Crew Cut, with officers focusing on picking kids up for truancy or ticketing them for bikes on sidewalks if they were suspected crew members.¹³² These minor arrests can lead to debriefing of minors who have never been arrested or accused of a violent offense, based on dress or association with other suspected gang or crew members.

The intensive surveillance extends to following twitter feeds, monitoring Facebook (often by creating fake profiles of attractive young women), and monitoring YouTube videos.¹³³ Whether the police should be engaged in this level of surveillance of youth for intelligence collection purposes, without any prior showing or justification, is an important question that merits serious consideration and is not one that should be answered in a kneejerk manner based on our fear of gangs. Police lists may be shared with immigration¹³⁴ or potential employers¹³⁵ and cause substantial collateral damages even in the absence of criminal convictions or arrests.

The potential impact of gang intelligence was demonstrated quite dramatically in a case decided by the New York State Court of Appeals in 2014.¹³⁶ In *People v. Johnson*, the defendant was standing on the sidewalk of 140th Street at 7th Avenue near three other men. At least two of them were allegedly members of the local gang, the 40 Wolves.¹³⁷ There was no information that the defendant was alleged to be a member of the 40 Wolves.¹³⁸ There was no testimony that any of the men had done anything other than stand on the block (where they lived) but the NYPD, nevertheless ordered them to disperse. When one of the men asked why they were being ordered to disperse, all four were arrested for disorderly conduct for failing to obey an order to disperse.¹³⁹ In a search-incident-to-arrest, drugs were found on the defendant.¹⁴⁰ At the suppression hearing the

Injunctions Against Urban Street Gangs, 51 STAN. L. REV. 409, 411 (1999).

¹³⁰ Youth Justice Coal., *Getting Off a Gang Injunction*, YOUTH FOR JUST. (Apr. 2011), <http://www.youth4justice.org/self-defense-legal-rights/getting-off-a-gang-injunction>.

¹³¹ KATZ & WEBB, *supra* note 118, at 274.

¹³² Goldstein & Goodman, *supra* note 3.

¹³³ *Id.*

¹³⁴ Jennifer Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, 2007 U. CHI. LEGAL F. 317, 348 (noting that a substantial portion of alleged gang members swept up by ICE had not been accused of any violent crime); SEC'Y JEH JOHNSON, DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (categorizing aliens "not younger than 16 years of age who intentionally participated in an organized gang" along with terrorists and convicted felons as Priority 1 for civil enforcement of immigration laws). Suspected gang membership is also being used to deny relief for DACA (Deferred Action for Childhood Arrival) eligible individuals. Defendants' Sur-Reply In Opposition to Plaintiffs' Motion of Preliminary Injunction at 32–33, *Texas v. United States*, No. 1:14-CV-254 (S. D. Tex. Jan. 30, 2015).

¹³⁵ CMTY. JUSTICE PROJECT, *supra* note 102, at 20–21 (discussing witnesses who reported being denied employment by law enforcement, probation, and the national guard); *see also*, N.Y.C. DEP'T OF INVESTIGATION, DOI REPORT REVEALS BROKEN RECRUITMENT SYSTEM AND APPLICATION PROCESS 10–11 (2015), www.nyc.gov/html/doi/downloads/pdf/2015/jan15/pr01rikers_aiu_011515.pdf (critiquing the Department of Corrections for failure to screen for prior gang association and indicating that DOC is now rejecting candidates based on tattoos that suggest gang membership).

¹³⁶ *People v. Johnson*, 22 N.Y.3d 1162 (2014).

¹³⁷ Brief Amicus Curiae for Defendant-Appellant on behalf of the New York Bar Ass'n at 3–4, *People v. Johnson*, 22 N.Y.3d 1162 (2014) (No. APL-2013-00034).

¹³⁸ *Johnson*, 22 N.Y.3d at 1164.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

officer testified that 40 Wolves members only associated with 40 Wolves members, and therefore, the defendant was a gang member.¹⁴¹ The prosecution elicited testimony that two of the men were 40 Wolves members based on “gang intelligence,” but objected to questioning by defense counsel to probe the basis for this intelligence.¹⁴²

The trial court denied suppression, and the intermediate appeals court issued a sweeping ruling that police who had information “about gang problems . . . at that location in the past and the gang background of several of the men” could order dispersal and arrest the men if they disobeyed.¹⁴³ The Appellate Division’s decision, if upheld, would have allowed police to order anyone that they claimed was a member of a local crew or gang off their own block and arrest them for disobeying.¹⁴⁴

In a *per curiam* decision, the New York Court of Appeals stepped in to protect the right to stand peaceably in a public place. As the Court wrote, “It is understandable that police officers become concerned when people they believe to be gang members and their associates gather in public. It is not disorderly conduct, however, for a small group of people, even people of bad reputation, to stand peaceably on a street corner.”¹⁴⁵ Although, this decision forecloses arrest based on the theory of disorderly conduct advanced in the *Johnson* case, there are many ways to achieve similar results by asserting gang allegations. In many jurisdictions, moral panics about the dangers of gang violence have led to civil gang injunctions and curfews that have left alleged gang members and other youth without the right to stand in their own neighborhoods and without a basis to challenge gang classifications.¹⁴⁶

Under a stop-and-frisk regime, the police are required to articulate reasonable suspicion that the individual had engaged or was about to engage in a crime.¹⁴⁷ If the Court of Appeals had upheld the Appellate Division’s decision, reputation alone, and not criminality, would be enough to compromise both an alleged gang member’s right to stand on the street and the right of anyone standing with him, whether that person was aware of the alleged gang affiliation or not. The surveillance and intelligence gathering of Operation Crew Cut create databases for those who have never been arrested or accused of any crime, where the Criminal Procedure Law would not permit the retention of such data after a stop.

3. The Gang Narrative Harms Community Relations

Gang or crew allegations affect not only those who voluntarily associate with gang members, but can render entire communities vulnerable to militaristic anti-gang tactics.

At six a.m. on June 3, 2014, hundreds of police officers in riot gear descended on the Grant and Manhattanville housing projects as helicopters roared overhead.¹⁴⁸ The

¹⁴¹ Brief Amicus Curiae for Defendant-Appellant on behalf of the New York Bar Ass’n, *supra* note 137, at 4.

¹⁴² Hearing Transcript at A53, *People v. Johnson*, 99 A.D.3d 472, 473 (N.Y. App. Div. 2012). (No. 8050 5822/10).

¹⁴³ *Johnson*, 99 A.D.3d at 473.

¹⁴⁴ *See id.* It is not clear how this decision could have been reconciled with *City of Chicago v. Morales*, 527 U.S. 41 (1999), which struck down a city ordinance that provided for dispersal orders and arrests of suspected gang members and those standing with them as void for vagueness.

¹⁴⁵ *Johnson*, 22 N.Y.3d at 1164.

¹⁴⁶ *See supra* notes 61–66 and accompanying text.

¹⁴⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁴⁸ J. David Goodman, *Dozens of Gang Suspects Held in Raids in Manhattan*, N.Y. TIMES, June 4, 2014, at A25;

police broke down doors and ordered residents, including children, to the floor at gunpoint.¹⁴⁹ This raid was New York City's "largest ever gang bust" according to Reuters.¹⁵⁰

The purported goal was to arrest 64 individuals who were charged with crimes related to feuds between crews in the two projects that have simmered for at least three years.¹⁵¹ But when the dust settled, one in three of the wanted individuals remained at large.¹⁵²

These 64 were among 103 individuals charged in two conspiracy indictments. The most serious of the substantive crimes charged in the conspiracy were 2 homicides and approximately 50 shootings (causing 19 injuries).¹⁵³ For at least one of the homicides, that of Tayshana Murphy in 2009, two individuals had already been convicted and imprisoned.¹⁵⁴ The 103 charged were charged based on theories of accessorial liability (primarily conspiracy).¹⁵⁵ A major form of evidence supporting these charges are the communications relating to the on-going rivalry between the Grant Houses-based 3 Staccs gang and the Manhattanville-based Make it Happen Boys and Money Avenue. During the years between the killing of Tayshana Murphy and the conspiracy arrests, the NYPD listened to telephone calls from Rikers, followed social media postings of the kids in the 3 Staccs, Make it Happen Boys, and Money Avenue gangs/crews, and collaborated with the Manhattan District Attorneys office to assemble evidence to charge these 103 individuals with conspiracy to commit homicide, to possess weapons, and to commit various assaults.¹⁵⁶

Although most of those indicted for conspiracy in the first degree and other charges that carry potential life sentences engaged in some form of non-communicative conduct, 9 of the 103 were not characterized as committing substantial criminal conduct.¹⁵⁷ Others were present for one or two street encounters over the course of years.¹⁵⁸ Yet others had pleaded guilty years earlier, had already served part or all of their sentences, and were indicted and faced prosecution based on the same predicate acts in the

Daryl Kahn, *Harlem Residents: We Asked the City for Help, We Got a Raid Instead*, JUV. JUST. INFO. EXCHANGE (June 5, 2014), <http://jjie.org/harlem-residents-we-asked-city-for-help-we-got-a-raid-instead/107031/>.

¹⁴⁹ *The Brian Lehrer Show: We Asked the City for Help and We Got a Raid*, (WNYC radio broadcast June 10, 2014), available at <http://www.wnyc.org/story/we-asked-city-help-and-we-got-raid/> (according to callers who were residents of Grant and Manhattanville Houses, homes were "trashed" furniture "broken" and children were traumatized by the unprofessional heavy handed raids); Abigail Kramer, *Busts, but Not a Solution, from NYPD Tracking of Housing Feuds*, CAPITAL (Mar. 2, 2015), <http://www.capitalnewyork.com/article/city-hall/2015/03/8563012/busts-not-solution-nypd-tracking-housing-feuds#>.

¹⁵⁰ Victoria Cavaliere, *More than 100 Arrested in Harlem in Largest-Ever NYC Gang Bust*, REUTERS (June 4, 2014), <http://www.reuters.com/article/2014/06/04/us-usa-crime-gangs-idUSKBN0EF1DQ20140604>. (Indicating that 40 of the 64 individuals were arrested.)

¹⁵¹ *Id.* 103 individuals were charged in two indictments but 39 of them were already incarcerated. Khan, *supra* note 138.

¹⁵² Cavaliere, *supra* note 15240; Khan, *supra* note 148. The show of force and the militaristic tactics are common to gang units and have led to serious abuses and scandals. See, e.g., *supra* Part IV(A)(1).

¹⁵³ See Press Release, N.Y. Cnty. Dist. Att'y's Office, District Attorney Vance and Police Commissioner Bratton Announce Largest Indicted Gang Case in NYC History (June 4, 2014), available at <http://manhattanda.org/press-release/district-attorney-vance-and-police-commissioner-bratton-announce-largest-indicted-gang>. See also Goodman, *supra* note 148.

¹⁵⁴ Goodman, *supra* note 148.

¹⁵⁵ Press Release, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Assistant Dist. Att'y Christopher Ryan, Comment at N.Y.C. Bar Ass'n Panel on Gang Intervention Panel (Jan. 14, 2015) (stating that 94 of the 103 indicted committed "substantive criminal conduct").

¹⁵⁸ See, for example, defendants Johnny Green and Andre Guzman described in paragraphs 102, 105, and 258 of the MA & MHB indictment. Press Release, *supra* note 153.

Manhattan District Attorney's new conspiracy charges.¹⁵⁹

Moreover, while the NYPD and the District Attorney amassed evidence in the form of gang member communications to charge these 103 individuals, the residents of Grant Houses and Manhattanville sought assistance at the precinct level to diffuse tensions and provide alternatives for the warring factions.¹⁶⁰ How much violence could have been prevented if the NYPD and District Attorney had worked with community members to intervene and mediate conflicts rather than secretly recording, watching and amassing information?

The raid on Grant and Manhattanville Houses is deeply troublesome in two respects. First, one may question the wisdom of watching, listening, spying, waiting and then using conspiracy charges to link dozens of young people to offenses committed by others instead of intervening to defuse the rivalry. Second, one may wonder how a military-style raid to accomplish regular law enforcement goals affects police-community relations. Having obtained the indictment and surveilled the individuals for years, why enter their homes wearing bulletproof vests, with firearms drawn, pointing weapons at family members, while helicopters whir overhead? While some members of the community may applaud such tactics, at least one former gang member reported that for youth in those neighborhoods, the tactics elevated the arrested individuals to "rock star" status and glorified the reputation and standing of crews in the eyes of some vulnerable youth.¹⁶¹

B. Gang Suppression as a Catalyst to Gang Formation and Individual Criminality

Even if one accepts that an intelligence and suppression strategy such as Operation Crew Cut extends to non-gang members, former gang members, and gang members who are not actively involved in any collective crime or violent conduct, one may question whether anti-gang policing does any harm. If an individual is not engaged in gang activity, then surely he or she has nothing to worry about? Surely the overarching message that gangs and crews will be watched and dealt with harshly will be a balm to at-risk communities and a deterrence to those who would become gang members. Unfortunately, like the overbroad use of stop-and-frisk, the impact of gang-suppression tactics reaches far beyond the alleged gang or crew member. Gang suppression units often resort to stops and minor arrests to garner information about suspected gang members and to communicate that police, and not gangs, control neighborhoods. Moreover, even when gang suppression tactics are used against actual gang members, law enforcement opposition can serve to increase individual criminality, entrench gang affiliation, increase gang membership, and prolong gang ties.

¹⁵⁹ Jeff Mays, *District Attorney Cast Too Wide a Net in Harlem Gang Crackdown, Critics Say*, DNAINFO (Oct. 6, 2014, 7:31 AM), <http://www.dnainfo.com/new-york/20141006/west-harlem/vance-cast-too-wide-net-harlem-gang-crackdown-families-say> (recounting how Darrell Rhett, plead guilty to an assault and was serving a five-year sentence for shooting a 3 Staccs member and was rearrested in prison for conspiracy for the same shooting on June 4 in connection with Grant House and Manhattanville raids; similarly, Ralphie Garcia who was arrested at the age of 15 for gun possession was completing an intensive supervision program and completing his GED when the NYPD and the Manhattan DA's office had him rearrested); Ben Popper, *How the NYPD Is Using Social Media to Put Harlem Teens Behind Bars: The Untold Story of Jelani Henry, Who Says Facebook Likes Landed Him Behind Bars*, THE VERGE (Dec. 10, 2014, 01:15 PM), <http://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison> (recounting how Asheem pleaded guilty to possessing a firearm, served a probation sentence, completed high school and was starting college when he was indicted for conspiracy for possessing the same gun and appearing in photos on social media dating back to when he was 14 and 15).

¹⁶⁰ Kahn, *supra* note 148.

¹⁶¹ Kramer, *supra* note 149.

1. Gang Formation

From the earliest studies of street gangs, the transition from informal youth peer group to true gang status has been attributed to oppositional forces.¹⁶² The informal peer group tends to form in neighborhoods with limited resources and to be based on geographic proximity.¹⁶³ In many ways, the “crews” described by the NYPD fit this model. These groups form for protection and to ensure access to limited recreational space.¹⁶⁴ Often opposition comes in the form of other informal peer groups. The police, however, can contribute to the transition from informal group to gang status by treating groups as if they are gangs.

After an exhaustive study of informal youth groupings and gangs in the early twentieth century in Chicago, Frederic Thrasher identified the catalyst that turns typical youth groupings and delinquent groups into gangs. That catalyst is opposition. The opposition can come either from other gangs or from the police. As Thrasher outlines the move from informal groupings based on neighborhood and age group to gang:

[A] play-group may acquire a real organization. Natural leaders emerge, a relative standing is assigned to various members and traditions develop. It does not become a gang, however, until it begins to excite disapproval and opposition, and thus acquires a more definite group-consciousness. It discovers a rival or an enemy in the gang in the next block; its baseball or football team is pitted against some other team; parents or neighbors look upon it with suspicion or hostility; “the old man around the corner,” the storekeepers, or the “cops” begin to give it “shags” (chase it); or some representative of the community steps in and tries to break it up. This is the real beginning of the gang, for now it starts to draw itself more closely together. It becomes a conflict group.¹⁶⁵

Police recognition and suppression efforts confirm and consolidate gang structure, gang identity, and gang duration. Suppression of gangs, like trimming back certain shrubs, is one means of encouraging gang growth.

The contrast between New York City’s experience and that of cities which adopted aggressive gang suppression strategies in the past fifty years supports the conclusion that gang suppression may increase gang cohesion and membership.¹⁶⁶ The Justice Policy Institute study *Gang Wars* traces the divergent approaches to gang problems in New York, Los Angeles, and Chicago from World War II to present.¹⁶⁷ In New York the Youth Board was established in the mid-fifties and street gang workers were dispatched to troubled neighborhoods throughout the city. The street gang workers, who were not law enforcement officers, gave advice, took kids on trips, helped them find jobs, and intervened to attempt to negotiate truces or even alert law enforcement of fights and weapons.¹⁶⁸ In addition to street workers, the social work model based on the Chicago

¹⁶² THRASHER, *supra* note 16, at 10.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Greene & Pranis, *supra* note 19, at 68.

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.* at 15-16.

Area Project “used local residents as family counselors and organizers in their neighborhoods to engage . . . youth and adults in projects designed to improve and strengthen social control in the community.”¹⁶⁹ Truces were negotiated, and gang violence largely abated by the mid 1960s.¹⁷⁰ This is not to claim that there are no gangs in New York, but as discussed in part IB above, the number of offenses attributed to gang violence has been consistently low in New York. The “gangs” that do exist are little more than the informal peer groups as observed by Frederic Thrasher and are not organized criminal associations. Not even the NYPD claims that the “crews” they are now targeting are anything like organized crime groups or hierarchical established gangs.¹⁷¹

This is not the case in cities where gangs have been vigorously repressed and suppressed by law enforcement. In cities like Chicago and Los Angeles, gangs have become institutionalized, and persist across generations.

In Chicago, the police have engaged in round after round of gang suppression. The result of these efforts has not been elimination of gangs. The strength and level of organization of gangs has been linked to these suppression efforts. In a move that sounds much like the expansion of the NYPD’s gang unit, in the late sixties “the gang intelligence unit was increased from 38 to 200 officers” for political reasons rather than because of violent crime.¹⁷² In the years that followed, the Unit engaged in an intensive campaign of harassment that led to greater incarceration and greater resistance of those incarcerated to prison authority.¹⁷³ Prisons became gang-dominated institutions, and imprisonment served to cement gang bonds and gang power rather than deter gangs or undermine their power. Successive attempts at gang suppression, such as the city ordinance that was overturned in *Chicago v. Morales*,¹⁷⁴ have done little to improve matters. Prosecution and imprisonment of the leadership of the largest gang, the Gangster Disciples, has contributed to more gang factions and more violence.¹⁷⁵

Similarly, in Los Angeles, the police have attempted to suppress gangs through force, arrests, and injunctions. The STEP Act has provided prosecutors with tools to obtain lengthy sentence enhancements.¹⁷⁶ Yet,

[d]espite massive, militarized police actions, strict civil injunctions, draconian sentencing enhancements, and a gang database that appears to criminalize upwards of half of its young African American residents, gang violence is worsening, according to media reports. With a reported 729 active gangs and 39,488 gang members Los Angeles remains the dubious honor of being the gang capital of the world.¹⁷⁷

The observation that opposition spurs gang development along with the

¹⁶⁹ *Id.* at 16.

¹⁷⁰ *Id.* at 17.

¹⁷¹ N.Y.C. Council Comm. on Pub. Safety, *supra* note 48 (“[Despite] their lack of defined structure . . . [crews] remain at least as dangerous as their more structured counterparts.”). Deputy Chief Harrington begins speaking on the topic at 1:13:22 of the video.

¹⁷² Greene & Pranis, *supra* note 19, at 22.

¹⁷³ JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 141-63 (1977).

¹⁷⁴ 527 U.S. 41 (1999).

¹⁷⁵ Jeremy Gorner & Jason Meisner, *More than 2 Dozen Gang Members Arrested in Drug Investigation*, CHI. TRIB. (June 12, 2014), http://articles.chicagotribune.com/2014-06-12/news/chi-more-than-2-dozen-gang-members-arrested-in-drug-investigation-20140612_1_drug-investigation-dozen-gang-traveling-vice-lords.

¹⁷⁶ CAL. PENAL CODE § 186.22 (West 2014).

¹⁷⁷ Greene & Pranis, *supra* note 19, at 29.

dominance of gangs in cities that have adopted aggressive anti-gang suppression tactics suggests that pursuing anti-gang tactics in the absence of serious gang problems is unwise. Indeed, even where gang problems are serious, the periods of relative calm in Los Angeles and Chicago have coincided with negotiated truces and community engagement, not with law enforcement crackdowns.¹⁷⁸ It is not surprising that policing and prosecution of peripheral or non-gang members followed by incarceration of these individuals with core members will create or cement gang ties leading to more cohesion over time.

2. Individual Criminality

Aggressive policing does not simply encourage gang cohesion; it can also contribute to individual delinquency and criminality. Negative contact with law enforcement and contact that is perceived of as unfair can contribute to unwillingness to conform to the law in several ways. First, procedural justice research establishes that people are much more willing to conform to the law when they are treated fairly and with respect.¹⁷⁹ For those who experience police surveillance as harassment, are treated harshly during arrests, and are prejudged as alleged gang members if arrested for even a minor offense, the perceived unfairness of the treatment may reduce willingness to comply with the law and the perception that law enforcement is legitimate.¹⁸⁰ Additionally, labeling theory posits that when one is labeled as delinquent, one is more likely to associate with delinquent peers and behave in delinquent ways.¹⁸¹ The raids, high bail requests, double-jeopardy defying reindictments,¹⁸² and fake Facebook friend requests all undermine the legitimacy of law enforcement and respect for the criminal justice system. Labeling and segregation, particularly in jails and prisons, may encourage rather than deter delinquent conduct.

Whether or not these theories correctly explain the impact of negative contact with police and the criminal justice system, there can be no doubt that these factors are causally connected to increased delinquency, criminality and violence. There is strong proof that negative police contact in fact contributes to criminality. Ironically, one of the best sources of proof for this is the research done in connection with a gang intervention program that targets at risk youth at the middle school age.

The GREAT program is a gang intervention program that has been carefully evaluated by researchers. The program brings law enforcement representatives to schools to talk to young people about the dangers of gangs. The program covers 31 schools in 7

¹⁷⁸ *Id.* at 21, 26.

¹⁷⁹ TOM R. TYLER & E. ALLEN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom R. Tyler & Jason Sunshine, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC. REV.* 513 (2003).

¹⁸⁰ Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *LAW & SOC'Y REV.* 163 (1997) (analyzing a randomized study of domestic violence arrests, showing defendants who were treated politely and given an opportunity to speak were less likely to re-offend than those that were treated less politely). See also, Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 *COLUM. HUM. RTS. L. REV.* 71, 97 (2005) (concluding that drug enforcement appears to have an adverse effect on crime rates); Robert White, *Curtailing Youth: A Critique of Coercive Crime Prevention*, 9 *CIV. REMEDIES & CRIME PREVENTION* 117, 124 (1998) (observing one consequence of street policing as crime prevention is the "creation of 'criminals'"); Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 *J. RES. CRIME & DELINQ.* 426 (1993) (noting that defiance to unfair sanctions may explain reoffending); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 *CRIME & JUST.* 1, 22-23 (1998) (noting that stigma-erosion may decrease deterrence effect of sanctions).

¹⁸¹ Wiley & Esbensen, *supra* note 16, at 17 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further).

¹⁸² See *supra* note 159.

cities¹⁸³ and the final sample includes 2614 youth.¹⁸⁴ The program has success in that the GREAT program substantially reduced gang membership by 39%.¹⁸⁵ However, the decrease in gang membership is not matched by a decrease in violent crime or general delinquency.¹⁸⁶ The first lesson of the GREAT program should be that deterring gang membership and deterring violent crime are two different things. Each may be valuable, but decreasing gang membership does not automatically reduce crime or violence.

A second and equally important lesson of the GREAT research and related social science research is that police and criminal justice intervention increase delinquency and violence independent of any other factor.¹⁸⁷ Controlling for initial rates of delinquency, the study follows youth over time, and thus can compare individuals with negative police contact to similar individuals without negative police contact (stops or arrests) and determine if the negative police contact independently predicts a reduction in delinquent acts (as deterrence theory would predict) or an increase in delinquency (as procedural justice and labeling theories would predict).¹⁸⁸

The lesson of the GREAT research is not only clear but it is quite dramatic. Controlling for initial levels of delinquency, those who are stopped by police engage in nearly 60% more delinquent acts than those who have no contact with police.¹⁸⁹ Those who are arrested engage in 230% more delinquent acts than those with no contact.¹⁹⁰ And those who are arrested engage in nearly twice as many delinquent acts as those who are merely stopped.¹⁹¹ In responding to questions about their attitudes toward delinquent behaviors and delinquent peers:

[Y]outh who have been stopped or arrested report significantly less anticipated guilt, greater agreement with neutralization techniques, greater commitment to delinquent peers, and higher levels of delinquency than youth with no police contact. In addition, our findings show that the negative consequences of police contact are compounded for arrested youth; subsequent to arrest they report less anticipated guilt and more delinquency compared with stopped youth.¹⁹²

The rich data from the GREAT research provides affirmative lessons about the

¹⁸³ Albuquerque, NM, Chicago, IL, Dallas-Fort Worth, TX, Greeley, CO, Nashville, TN, Philadelphia, PA, and Portland, OR. *Id.* at 7.

¹⁸⁴ *Id.* at 7–8. The original sample was 3820 students but the 2614 reflects those for whom all data was available at Wave 4 (about 3 years after the initial participation in GREAT). *Id.*

¹⁸⁵ Finn-Age Esbensen et al., *Results from Multi-Site Evaluation of the G.R.E.A.T. Program*, 29 JUST. Q. 125, 139–41 (2012).

¹⁸⁶ *Id.*

¹⁸⁷ Wiley & Esbensen, *supra* note 16, at 17 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further); Jon Gunnar Bernburg et al., *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory*, 43 J. RES. CRIME & DELINQ. 67, 80 (2006) (“[J]uvenile justice intervention increases the odds of involvement in serious delinquency . . . by a factor of 5.5, net of all controls.”) Although this effect is greater for non-gang members, it is also observed for gang members. Thus police intervention and gang membership reinforce each other creating more, rather than less risk of subsequent delinquency. *Id.*

¹⁸⁸ Wiley & Esbensen, *supra* note 16, at 9–10 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further).

¹⁸⁹ *Id.* at 15. In the researchers’ words “The use of propensity score matching reduces the likelihood that our results are being driven by preexisting differences, a problem that may plague much existing labeling research.” *Id.* at 17.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.* at 16.

¹⁹² *Id.* at 17.

relationship between policing, delinquency, and violent crime. The GREAT researchers had extensive data from the program participants about their backgrounds, risk factors, and delinquent behavior. The researchers also followed the GREAT participants over time. There can be little doubt that negative suppression tactics such as those proposed in connection with Operation Crew Cut are likely to increase individual delinquency and commitment to delinquent peers.

In similar research analyzing 1,000 youth from the Rochester Youth Development Study of seventh and eighth graders, the effect of juvenile justice intervention was to increase the odds of serious delinquency by a factor of 5.5 by Wave 4.¹⁹³ As in the GREAT experiments, the researchers control for initial levels of delinquency and substance abuse. Whether these results stem from the label “juvenile delinquent” or the fact that juvenile justice intervention increases contact with delinquent peers, it is evident that suppression efforts are far more likely to increase delinquency than to reduce it.

This research is not intended to suggest that stops, arrests, or juvenile justice interventions are never appropriate. Rather the lesson is that these should be avoided where delinquency is not severe. The broad net of anti-gang policing tends to catch the suspected, the marginal, the former, or the wannabe gang members together with the core members. Databases, surveillance and mass-prosecutions encourage these trends. These interventions are likely to significantly increase delinquent behavior for those who are targeted. If the goal is actually to reduce violence, then expanding policing to those who live on gang blocks and associate with any other gang member, which is virtually unavoidable in some circumstances, will undermine this goal in the long term.

V. ALTERNATIVES APPROACHES TO REDUCING GANG CRIME

As discussed above, intensive gang suppression policing is damaging to police, community, and at-risk youth. This is particularly so where the underlying gang problem is exaggerated and is a pretext for intensive surveillance. The research and history of gang suppression tactics by law enforcement instructs that suppression tactics are often ineffective and counterproductive. The oppositional nature of gang formation and the effect of labeling theory means that the greater the gang suppression effort, the larger the gang problem will likely become.

Fortunately, New York City has a history of successfully using non-law enforcement interventions to reduce gang violence. In the 1960s, New York relied on non-law enforcement street workers and community social work models to connect at-risk youth with services, to mediate conflicts, and to notify law enforcement when serious violent confrontation was anticipated. While these programs were disbanded in the 1970s, the collaboration with street workers and community groups who were not law enforcement provides a model for working with the crew or gang-involved youth today.

The Chicago Ceasefire/SNUG (guns spelled backward) model takes the non-law enforcement street worker model a step further by mobilizing former gang members and convicts as outreach workers and violence interrupters.¹⁹⁴ New York State has funded

¹⁹³ Bernburg et al., *supra* note 187, at 80.

¹⁹⁴ Nat'l Inst. of Justice, Office of Justice Programs, *Program Profile: Cure Violence (Chicago, Illinois)*, CRIMESOLUTIONS.GOV, <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=205> (last visited May 13, 2015). The SNUG model is now called: Cure Violence.

SNUG initiatives with significant reductions of shootings in Albany and Rochester.¹⁹⁵

Building on New York's history with non-law enforcement outreach workers and the Chicago model, several community-based organizations have developed in New York and have been credited with substantial reductions in gang related violence. In East New York, Brooklyn, the neighborhood development organization Man Up! has used former gang members as mentors and mediators and violence interrupters.¹⁹⁶ Similarly, in Crown Heights, Save Our Streets replicated the Cure Violence Model, reducing shootings in the target area by 6% at a time when adjacent comparable neighborhoods experienced an increase in gun violence of 18 and 28%.¹⁹⁷ These are examples of community-based groups that engage directly to defuse violent conflicts and protect communities and gang members.

Successful programming need not be based on or targeted at gang or crew members to be effective. Recognizing that gang membership and violence are independent of each other (GREAT, for example, decreases gang membership but does not affect violence), it is important that the goal of preventing violence be the focus. Programs that reach all youth and keep them in school or get them jobs can prevent violence as effectively as those targeted at gang members. Tutoring in algebra and other subjects in Chicago has reduced drop-out rate and violence in at-risk youth.¹⁹⁸ Job and employment programs have long been associated with reduced gang membership, leaving gangs, and reduced violence.¹⁹⁹

The Boston Ceasefire Program does instruct that law enforcement and even law enforcement intelligence can play an important role in reducing gang violence when it is properly targeted.²⁰⁰ The Boston Ceasefire Program identified the most violent offenders and brought them in to meet with law enforcement and community leaders. Rather than collecting data secretly as the NYPD Operation Crew Cut does and bringing massive indictments seeking decades-long sentences based on conspiracy charges, the Boston Ceasefire surveillance data was used to accomplish specific deterrence. Individuals identified as most likely to commit violent crime were brought to public meetings, told they were being observed and offered assistance.²⁰¹

Another alternative to the current NYPD suppression strategy that is well supported by research relating to gang formation and violence would be to do nothing at all. Gang researchers concur that the vast majority of gang members age out of gangs and

¹⁹⁵ *Cure Violence New York*, CUREVIOLENCE.ORG, <http://cureviolence.org/partners/us-partners/snug/> (last visited May 13, 2015).

¹⁹⁶ Jim Dwyer, *No Shootings or Killings for 363 Days, but the Fight Is Far from Over*, N.Y. TIMES, July 19, 2013, at A17.

¹⁹⁷ SARAH PICARD-FRITSCHÉ & LENORE CERNIGLIA, CTR. FOR COURT INNOVATION, TESTING A PUBLIC HEALTH APPROACH TO GUN VIOLENCE: AN EVALUATION OF CROWN HEIGHTS SAVE OUR STREETS, A REPLICATION OF THE CURE VIOLENCE MODEL 18 (2012), available at http://www.courtinnovation.org/sites/default/files/documents/SOS_Evaluation.pdf.

¹⁹⁸ Jann Ingmire, *Crime Lab Makes Impact for Chicago Youth*, U. CHI. (Feb. 20, 2014), http://www.uchicago.edu/features/crime_lab_makes_impact_for_chicago_youth/.

¹⁹⁹ Justin Dickerson, *'Nothing Stops a Bullet Like a Job': Homeboy Industries and Restorative Justice* (May 14, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1827983 (providing a history of Homeboy Industries, and the philosophy of its founder, Father Greg Boyle).

²⁰⁰ David M. Kennedy et al., U.S. Dep't of Justice, *Developing and Implementing Operation Ceasefire, in REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE 1*, 27-28, 30, 48 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188741.pdf>.

²⁰¹ *Id.* at 3, 35-41.

gang violence with no intervention.²⁰² While neglect is not preferable to employment, counseling, violence prevention, and educational improvements, these strategies should ideally be carried out by community-based groups, not law enforcement. Because police contact, stops, arrests, prosecution, imprisonment, and juvenile justice involvement are all factors that tend to increase delinquency, gang membership, and violence, it would be far better to do nothing than to engage in the intensive policing of vulnerable youth.²⁰³ New York has had little in the way of gang policing during the past three decades and has fared far better than localities that use aggressive gang suppression tactics. These different experiences provide some of the most compelling proof that gang suppression is a catalyst for, not a solution, to gang violence.

In addition to using a social work model of intervention for general crime deterrence, and a limited and targeted law enforcement model for working with violent criminals, narrow and enforceable criteria must be developed to maintain databases that are not overbroad. While the details of appropriate inclusion criteria, oversight, notice and appeal provisions, maintenance, and security measures for such database are beyond the scope of this paper, the databases must, at a minimum, be narrowly tailored with requirements of actual criminality, notice to those included and to parents of minors, and regular purging of non-gang and non-active gang members.

CONCLUSION

By all accounts, New York City has enjoyed a tremendous drop in all crime and particularly in violent crime during the past 25 years. This drop has been accomplished without intensive gang policing or prosecutions. During this time, the NYPD has always recorded a low number of gang crimes. Nonetheless, during the death-throws of the NYPD's stop-and-frisk regime in New York City the NYPD announced a new threat in the form of "crews," and, despite continuing crime declines, quadrupled the number of Gang Division officers dedicated to watching and policing these youth of color. This announcement manipulates and exaggerates an existing phenomenon to increase support for a new profile-based policing. The NYPD's gang division and databases permit extensive surveillance of suspect populations, and essentially recreate and expand the scope of the blanket stop-and-frisk regime without the potential for court supervision. Like the stop-and-frisk regime before it, the strategy will exacerbate tensions with communities of color and sweep up innocent and guilty alike. Unlike stop-and-frisk, there is currently no effective oversight to limit the extent of surveillance or information collected relating to vulnerable youth. Most importantly, these strategies are unsuited to actually reducing problems of gang and youth violence and have historically increased rather than decreased gang violence and the costs associated with it. Rather than following west-coast forerunners into a cycle of gang suppression, long sentences, and community disruption, New York should build on its history of non-law enforcement outreach to provide productive alternatives to gang involvement. This article should also prompt other jurisdictions to examine the empirical need for and efficacy of aggressive gang suppression strategies.

²⁰² See TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 38, 41 (2003) (discussing a study of 1000 Rochester youth from the age of 13 to 17.5, about 31% reported belonging to a gang at some point but only 1.6% of the sample remained in gangs at the age of 18 and this number did not increase through the rest of the study to age 22). See also, IRVING A. SPERGEL, THE YOUTH GANG PROBLEM 104 (1995) ("Most studies suggest that gang members simply 'mature-out'").

²⁰³ See text at notes 189-93 for research demonstrating the adverse impact of negative police contact on youth.

Ecuador legalized gangs. Murder rates plummeted.

A stunningly successful experiment has the potential to upend the mainstream US approach to deviance.

By Sigal Samuel | Mar 26, 2019, 7:40am EDT



Members of the Latin Kings gang pose in 1997 in New York City. | Andrew Lichtenstein/Corbis via Getty Images

FUTURE PERFECT

Finding the best ways to do good. Made possible by The Rockefeller Foundation.

In 2007, the crime-riddled nation of Ecuador did something surprising: It legalized the gangs that had been the source of much of the violence. Then something even more surprising happened over the next decade: Murder rates plummeted.

Ecuador's approach to violence reduction is about as far away as you can get from America's, which tends to criminalize gangs. To be clear, just being a member of a gang is not illegal. But because many gang members are known to engage in illegal activity, US law enforcement targets people it suspects of being members. It uses large gang databases (especially common in cities like New York and Chicago) to round up young people, often from poor communities of color. They may be deported or imprisoned for years. When we talk about criminalizing gangs, we're talking about this punitive approach.

In Ecuador, the unprecedented decision to legalize gangs across the country was basically a decision to adopt the opposite attitude. The country allowed the gangs to remake themselves as cultural associations that could register with the government, which in turn allowed them to qualify for grants and benefit from social programming, just like everybody else.

This approach appealed to David Brotherton, a sociologist at the City University of New York who's been arguing since the 1990s that US policy wrongly pathologizes gang members. So in 2017, a decade after Ecuador legalized gangs, he headed over there to conduct ethnographic research on major groups like the Latin Kings and Queens.

It turned out they'd undergone a stunning transformation. The members were still very active in their gangs, but these were functioning more like social movements or cultural groups. Previously violent Latin Kings were working in everything from catering to crime analysis. And they were collaborating with other gangs they'd warred with in the past.

Brotherton is preparing to head back to Ecuador for the next phase of his multi-year research, which will focus on a gang called Masters of the Street. He just won a **Guggenheim Foundation grant** in support of that work, which is how I learned about it. What he's discovered has the potential to upend the mainstream US approach to deviance.

I spoke to Brotherton about what he saw on the ground in Ecuador and whether he thinks that model can work in other Latin American countries and even in the US. A transcript of our conversation, lightly edited for length and clarity, follows.

Sigal Samuel

How did you get interested in studying street gangs in Ecuador?

David Brotherton

In the late 1990s, I was working with a bunch of groups in New York City, especially the Latin Kings. This was during the period of [Mayor Rudy] Giuliani and his policy of "zero tolerance." I wrote a book on it in 2004. I thought that was the end of the story.

Then I got an email from a social worker in Barcelona who said, "We have a group here called the Latin Kings, and we haven't had gangs like this in Spain. Where are they coming from? Can you help us?" So I went to give a talk there. I said: "I don't think you should do what they do in America, this 'zero tolerance,' because you won't get to the root of the problem. You need to engage them."

They took that seriously and talked to the City Council of Barcelona. In 2004 or 2005, the council proclaimed that these groups would be known not as gangs, but as cultural groups. They found that the more they engaged the groups, the fewer problems they had. Then the city of Genoa in Italy adopted the same approach. They semi-legalized them, and the same thing happened.

Then I got a call from Ecuador. In 2007, there was optimism there because [Rafael] Correa had won [presidential] elections on the platform of the Citizens' Revolution: He said instead of just focusing on law and order, security will be based on social security. Someone close to Correa said, "What will we do about these street gangs? Their membership is in the thousands." They came up with the radical policy of legalization. That took the Spanish thing a step further, because this was national, not just one city. The gangs responded very positively to that engagement.

Sigal Samuel

And that's when Ecuador's murder rates started going down, right? In your 2017 **study**, you note that Ecuador's murder rates fell drastically after it legalized gangs — from 15.35 per 100,000 people in 2011 to 5 per 100,000 people in 2017. To what extent can you show that that was actually caused by gang legalization, as opposed to other factors?

David Brotherton

Statistically, you can only show correlation. And, actually, at first I thought maybe the crime rate was going down because the country had reformed the police. But we spent a year traveling around Ecuador and interviewing all the [gang] leaders. And when you hang out for a while, you see how differently they respond to conflicts now. For example, they [the Latin Kings] put on one of the biggest hip hop concerts ever, and they worked with other previously antagonistic gangs on the project.

We found there was this fascinating phenomenon going on of peaceful coexistence. A number of the senior guys were working with the government or in the police force. Some were doing crime analysis. Some were in college studying constitutional law and social work. Some were getting into entrepreneurship, becoming caterers or graphic designers.

Sigal Samuel

How did legalization change the relationships within individual gangs, for example between men and women?

David Brotherton

The Latin Queens say they feel positively about the possibilities they have in the gangs since legalization. The more power the women get — and the women are very powerful, they're in leadership positions — it helps in the positive transition of the group. Women soften the gangs to a certain degree, especially if there are kids involved. The family instinct kicks in. If you go to a large gang meeting, you might find about 700 or 800 people there. They bring their children — there's maybe 150 kids.

Sigal Samuel

This sounds really positive, but there must have been challenges too. What did not go as hoped?

David Brotherton

Well, not everybody is on board. A lot of members of the public still believe in a more pathological model that says these are deviants and they're not as prosocial as they represent themselves to be. The group members understand that stigma. They say they have to prove themselves.

It also depends on the city. Guayaquil is a much more conservative city than Quito, so that's not been easy. The politicians there don't like the policy [of legalizing gangs]. They have to respect it because it's federal, but they don't put much money into it.

Sigal Samuel

How important is money here? In 2007, Ecuador was doing well economically. There was a lot of oil money coming in. Does a government need to have a lot of cash on hand when kicking off an initiative like this, so it can fund social programs that will support the gangs' transition?

David Brotherton

These programs don't cost a lot of money. They can do amazing things with just a little bit of money and political will. The government ministries spent a bit of money on social and cultural events. The minister of culture set up a train that went to the poorest communities in Ecuador to do street graffiti and art. There was a job training grant, and a grant to set up a community center. The Catholic University of Quito paid for 15 Latin Queens to study to become

nurses. They never would've been able to do that before legalization.

Sigal Samuel

And it sounds like over time, those relatively small changes have had ripple effects.

David Brotherton

Yes, and a big part of that is because the policy was in place for 10 years [by the time we did our study], so trust and long-term relationships had a chance to build up. Some of these guys joined the groups when they were 18, and now they're 28. They become the old hens and they teach the younger members, "Hey, this is how we do things now." We call that "maturing in."

Sigal Samuel

Is there a risk that gangs will be criminalized again when new political parties come into power?

David Brotherton

Yes, big time. When Lenín Moreno took power [after the 2017 presidential elections] everyone was wondering what would happen. All the people we used to work with got purged. They put new people in power.

They didn't abolish the policy, though. Right now there's a decent relationship.

The groups are working with universities, and they're trying to convince the government that this should be a long-term policy, regardless of who's in power, because it's working.

Sigal Samuel

How universalizable do you think Ecuador's approach is? Can it work in other Latin American countries?

David Brotherton

The mayor of Barranquilla, in Colombia, is planning to try to replicate the model. I totally think it could succeed in Colombia. About five years ago, the [Ecuadorian] gang members went to Bogotá to relay their experiences. They also went to Nicaragua and met with the police and community leaders there. Now they want to go to El Salvador.

Sigal Samuel

Do you think it could work in the US?

David Brotherton

Of course it could! Our approach, which we export to the rest of the world, is very moralistic and it's very binary — either you're in or you're out. But it wasn't always that way. Historically, we used to have street social workers [who worked with gang members].

Gang repression came about in the mid-1970s and got a massive boost in the War on Drugs. And right now things are getting much more complicated because of the deportation laws. So now you can only work with people in gangs if they've decided to leave the gangs. But if we had a rational policy ...

Well, we're already doing part of it through the **Credible Messenger Initiative** that's been tried in New York City, and

right now I'm working on it in Washington, DC, too. It involves working with ex-cons, some of them were gang members, and they become transformative mentors to kids in the system or just coming out of it. An evaluation in New York showed that recidivism fell among kids [involved in the mentorship program], and the same happened in DC.

Sigal Samuel

Do you see your research as part of a bigger movement pushing for other kinds of legalization or decriminalization — of drugs, or sex work, for example?

David Brotherton

Absolutely. It's all about a progressive, rational policy for social control. There's this idea known as "deviance amplification" — basically, when you want to stop a behavior, the worst thing you can do is prohibit it. Social inclusion is the most productive means of social control. You have to have a system where most of people's engagement with the authorities is as positive as possible.

The state can't just say, "This is the American dream, you can do it, so do it." The state has to say, "I want you, and I'm going to help you in these concrete ways, and I'm going to win your trust."

Sign up for the *Future Perfect* newsletter. *Twice a week, you'll get a roundup of ideas and solutions for tackling our biggest challenges: improving public health, decreasing human and animal suffering, easing catastrophic risks, and — to put it simply — getting better at doing good.*



@ The Urban Justice Center:
40 Rector Street, 9th Floor
New York, New York 10006
www.StopSpying.org | (646) 602-5600

STATEMENT OF
ALBERT FOX CAHN, ESQ.
EXECUTIVE DIRECTOR
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT, INC.*

BEFORE THE
COMMITTEE ON PUBLIC SAFETY
NEW YORK CITY COUNCIL

SUPPORTING
INT 0635-2018 AND T2018-2223

PRESENTED
June 27, 2019

* My sincerest thanks to S.T.O.P. Civil Rights Interns Ayyan Zubair and James Blum for their invaluable assistance in preparing these remarks.

Good morning, my name is Albert Fox Cahn, and I serve as the Executive Director for the Surveillance Technology Oversight Project (“STOP”). STOP advocates and litigates for New Yorkers’ privacy, fighting discriminatory surveillance. I commend the committee and Chairman Richards for today’s hearing; for bringing much-needed attention to the injustice and discrimination fueled by the NYPD’s gang database and “perp-walks.”¹

I speak in support of both the gang database and Introduction 635; both measures are important steps to protect New Yorkers’ privacy. But I also testify more broadly about the current privacy threats to New Yorkers, many of which will require additional legislation.

Gang Database

For decades, the NYPD’s discriminatory “Stop and Frisk” policy racially profiled New Yorkers of color, stripping them of their most fundamental rights because of the color of their skin. While New York has largely curtailed that unconstitutional blight, we continue to maintain police policies that subject New Yorkers of color to invasive, unjustified, and dehumanizing surveillance. One of the most disturbing systems is the “gang database.”

Let’s be clear, the NYPD’s gang database is little better than high-tech “Stop and Frisk.” Rather than stopping racial profiling, the NYPD simply shifted from physical pat-downs to electronic searches—adding eleven New Yorkers to their sprawling database every single day.² The gang database treats New Yorkers as criminals just for how they dress and where they live. Children and teenagers report that the constant surveillance is so traumatic that they are sometimes afraid to leave their homes and socialize with their friends, terrified of falsely being labeled as a “gang member.” Chair Richards’ gang database reforms are the first step towards correcting this injustice and creating a more equitable criminal justice system in New York City.

It’s hard to understand how the NYPD still defends their discriminatory database. The definition of “gang”³ should include everyone from the mafia to white supremacists, but the database remains ninety-nine percent New Yorkers of color.⁴ When you look at how the database is actually compiled, this discrepancy is no surprise. Leaked NYPD training documents show officers trained to systematically profile people of color as “gang affiliated.”⁵ The NYPD includes numerous New

¹ We believe that the term “perp walk” only normalizes the NYPD’s “guilty until proven innocent” framing. However, the term is used throughout as to avoid potential confusion.

² See, Alice Sperti, *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/>.

³ See, *Gangs and Crews of New York*, THE INTERCEPT (June 11, 2018) <https://theintercept.com/document/2018/06/11/gangs-and-crews-of-new-york/>.

⁴ *Oversight – NYPD’s Gang Takedown Efforts: Hearing Before the Comm. on Pub. Safety*, 2018 Leg., 2018-2021 Sess. at 32 (N.Y.C 2018) (statement of Dermot Shea, NYPD Chief of Detectives) [hereinafter *Oversight Hearing*].

⁵ See, *Gangs and Crews of New York*, THE INTERCEPT (June 11, 2018) <https://theintercept.com/document/2018/06/11/gangs-and-crews-of-new-york/>.

Yorkers simply for wearing a suspicious color of clothing or just being in the same neighborhood as a suspect.⁶

To end this abuse, we need transparency, but we also need more. Even as we applaud Chair Richards' introduction, we don't believe it goes far enough. Yes, New Yorkers must know when they've been caught-up in the NYPD's Surveillance dragnet, but they also need the tools to cut themselves free. Being labeled a "gang member" is no small problem. The label leads to increased surveillance, criminal and immigration consequences, and lasts for at least three years—often indefinitely. Such a label should not be beyond redress for any New Yorkers.

Giving minors the power to contest inclusion in the database is a crucial first step in protecting our most vulnerable communities. But that right should extend to every single New Yorker who is tracked and targeted for the "crime" of their clothing, neighborhood, and skin color. We are encouraged by the committee's attention, but we urge it and the Council to take on the more systemic reforms needed to end this type of digital discrimination.

"Perp-Walks"

Today, so-called "perp-walks" give the NYPD the power to demonize and denigrate New Yorkers who have not yet been indicted for, let alone convicted of, any crime. They are an affront to our constitutional system and the indispensable presumption that we are all innocent until proven guilty. Sadly, we know too well that countless New Yorkers, predominantly New Yorkers of color, are arrested for crimes they never committed. While these adults and children may win their case at trial, they'll never be able to undo the reputational harm from having their photo wrongfully labeled as a "perp."

These extra-judicial photo ops undermine due process and fundamental fairness. In extreme cases, federal courts have even held "perp-walks" as unconstitutional seizures.⁷ Even when lawful, the practice gives the NYPD tremendous power over New Yorkers, power that the NYPD leverages to coerce suspects and reinforce shameful stereotypes. New Yorkers deserve their day in court, not trial in the court of public opinion. I commend the committee and Council Member Dromm, for pursuing this vital reform.

The POST Act

Both of the forgoing measures speak to the urgent need to protect New Yorkers from warrantless, discriminatory privacy invasions. But as important as these measures are, they only address small segments of New York's growing privacy threats. The sheer scale of New York's surveillance requires systematic responses, and no measure is more urgent than the POST Act. The Public Oversight of Surveillance Technology ("POST") Act requires the NYPD to systematically develop privacy protections for each and every spy tool it deploys.⁸

⁶ *Oversight Hearing*, at 25 (statement of Dermot Shea, NYPD Chief of Detectives).

⁷ *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000).

⁸ Public Oversight of Surveillance Technology (POST) Act, Int 0487-2018.

The NYPD built up an arsenal of invasive spy tools on the public tab while trying to block any public notice or debate. These tools not only include the Gang Database, but items like facial recognition, surveillance lightbulbs, and automated license plate readers that can monitor a vehicle's location throughout the city.

These tools pose a privacy threat to all New Yorkers, but they pose a particularly potent threat to our immigrant communities. All too often, these systems create a risk of information sharing with federal agencies...even ICE. For example, the NYPD has contracted for years with the private firm Vigilant Solutions, which operates a nationwide database of over 2 billion license plates data points.⁹ Shockingly, last year we learn that that Vigilant Solutions was not just contracting with local police departments...it was also contracting with ICE.¹⁰ This is the vendor that the NYPD uses to record at least one million license plates per day.¹¹

Perhaps most disturbingly, the NYPD relies on Vigilant Solution's artificial intelligence to map out social networks, label New Yorkers as "criminal associates", and create databases based on the company's unproven algorithms.¹² This is just one example of countless surveillance tools that requires a systematic solution.

The POST Act is a comprehensive response, but it's also a modest one. The NYPD can continue using these tools—no matter how problematic—by complying with modest protections against waste, discrimination, and misuse. In fact, the POST Act would be one of the weakest surveillance reform bills in the country.¹³ Just compare the bill to San Francisco¹⁴ and Oakland, which banned facial recognition technology,¹⁵ and Massachusetts is even considering a state-wide moratorium on

⁹ See ROCCO PARASCONDOLA, *Exclusive: NYPD will be able to track fugitives who drive past license plate readers across the U.S.*, N.Y. DAILY NEWS, Mar. 02, 2015, <https://www.nydailynews.com/new-york/nypd-track-fugitives-drive-license-plate-readers-article-1.2133879>.

¹⁰ The Domain Awareness System collects the license plate data scanned by the approximately 500 license plate readers operated by the NYPD and combines it with footage from cameras and other surveillance devices around the city. The NYPD holds on to the license plate data for at least five years regardless of whether a car triggers any suspicion. See MARIKO HIROSE, *Documents Uncover NYPD's Vast License Plate Reader Database*, ACLU, Jan. 25, 2016, <https://www.aclu.org/blog/privacy-technology/location-tracking/documents-uncover-nypds-vast-license-plate-reader-database?redirect=blog/speak-freely/documents-uncover-nypds-vast-license-plate-reader-database>.

¹¹ See *id.*

¹² See *id.*

¹³ See ACLU, *Community Control Over Police Surveillance*, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance>.

¹⁴ See CONGIER, KATE, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES, May 14, 2019, <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html>.

¹⁵ See EDITORIAL BOARD, *San Francisco Banned Facial Recognition. New York Isn't Even Close*, N.Y. TIMES, May 18, 2019, <https://www.nytimes.com/2019/05/18/opinion/nypd-post-act-surveillance.html>.

facial recognition.¹⁶ The evidence is clear, civilian surveillance oversight enhances public trust in police departments public safety.¹⁷

I'm grateful that the committee is addressing New Yorkers' myriad privacy concerns. Our alarm grows by the day, as emerging technologies exacerbate the threats we are only now starting to address. I hope that New York City rises to the task before it is too late. We urge this committee to build on the momentum it generates today by reforming the NYPD gang database and so-called "perp walks" by taking up the next, crucial task of passing the POST Act.

¹⁶ See MASSACHUSETTS SENATE, *Bill S.1385*, <https://malegislature.gov/Bills/191/S1385>.

¹⁷ Oakland, California and Seattle, Washington have enacted similar police oversight laws without deteriorating public safety. *See id.*



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

Yung-Mi Lee – Supervising Attorney, Criminal Defense Practice

Presented before:

The New York City Council Committee on Public Safety Hearing on

**Ints. 0567-2018, 0635-2018, 1244-2018, 1553-2019, 1548-2019, & T2018-2223, & Res.
0866-2019**

June 27, 2019

My name is Yung-Mi Lee and I am a Supervising Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 30,000 clients in Brooklyn every year. I thank Chairperson Donovan Richards and members of the Committee on Public Safety for holding this hearing on consequential legislation about which we have very serious concerns.

BDS Opposes T2018-2223 – A Local Law to amend the administrative code of the city of New York, in relation to providing notice to minors included in the criminal groups database

BDS urges the Council not to advance this legislation and meet with advocates and experts working on so-called gang enforcement, including people who have been swept up in raids, public defenders, academics, community members, and others.

On June 13, 2018, my colleague Rebecca Kinsella testified before this Committee on the New York Police Department's (NYPD) so-called gang takedown efforts. In that testimony, BDS called for the abolition of the NYPD's gang database, or "criminal group database," which is only the latest form of profile-based policing, or what many call Stop & Frisk 2.0. We also called for a reallocation of resources to fund Cure Violence programs and, more generally, to support rather than profile marginalized families and communities. Instead, T2018-2223, which appears to be well-intended, would entrench gang designations in the law and create an extremely limited and possibly ineffectual process for New Yorkers to determine whether they have been included in this database and, only then, petition to the NYPD to be removed, subject to the complete discretion of the Department which originally included them.

Extremely Limited “Gang Label” Notification Provision

It is possible that, under this legislation, the NYPD would have no greater obligation toward transparency that exists in the status quo. The legislation would require the NYPD to notify New Yorkers who are 17 and under whom they have entered into the gang database “unless providing such notification would compromise an active criminal investigation or the department has specific reason to believe that providing such notification would compromise the health or safety of the minor or another person.” This language is similar to language the NYPD already uses in rejecting FOIL requests regarding placements in the database and the legislation provides for no new avenue to challenge a denial.

Extremely Limited Mechanism to Contest the “Gang Label”

This legislation allows only those who are 17 and under *and* who have received the aforementioned notice from the NYPD to then contest their gang designation. The NYPD would then have complete discretion to reject the petition, with no evidentiary standard. This provision would create a more narrowly available mechanism of relief than what currently exists under the law, namely filing an Article 78 challenge, which New Yorkers of any age may pursue. There are significant obstacles to successfully challenging one’s gang designation, but they are not overcome by this legislation.

Codifying the Racialized Gang Label

There is currently no definition of a gang in the law. Any definition would very likely be overbroad and discriminatory in its impact, as the term itself is racialized and counter-productive. This legislation would define gangs as “formal or informal” groups of three or more people who commit a crime and, for example, follow the same clothing trends. Given the expansiveness of our criminal legal system, this definition could include nearly anybody, but we know that predominately Black and Latinx people would be targeted, particularly if this definition is later used in sentencing enhancement legislation or additions to the penal law.

The Bigger Picture

Kraig Lewis was living in Connecticut, nine credits away from his MBA. Then he and 119 others were swept up in what law enforcement hailed as the largest gang takedown in New York City history. But he was not actually part of a gang—just one of many fallacies since exposed. Kraig’s story was featured in an April 2019 article and an accompanying documentary in *The Intercept*, which were released on the same day CUNY School of Law Professor Babe Howell and doctoral student Priscilla Bustamante published a report on the Bronx 120 raid.^{1,2} The article also featured Nicholas Bailey, who had been arrested on robbery charges just after turning 18. The judge in his case gave him a second chance—a diversion program with no jail time—and sealed his case. He thrived for 5 years until federal law enforcement used this sealed case as a predicate to include him in the Bronx 120 raid and prosecution. Then he was sentenced to 6 years in prison. (This raid was conducted jointly by federal agencies, including Immigration and Customs Enforcement (ICE), and local and state

¹ Alice Speri, *The Largest Gang Raid In NYC History Swept Up Dozens Of Young People Who Weren’t In Gangs*, *The Intercept*, Apr. 25, 2019, available at <https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/>.

² Professor Babe Howell & Priscilla Bustamante, Report on the Bronx 120 Mass “Gang” Prosecution (CUNY School of Law 2019), available at <https://bronx120.report/>.

law enforcement.) In both of these cases, and in countless others, young New Yorkers were coerced to plead guilty to felonies, erecting lifelong barriers that will continue to haunt them and their families and communities.

In a press release, federal prosecutors highlighted several murders they linked to the alleged gang members. But, in reality, more than half of the 120 were charged with federal conspiracy based solely on drug offenses—mostly for selling marijuana. Only six were charged in connection with the murders. Also, three people had already been convicted in state court for those murders, one of whom was re-prosecuted in the federal conspiracy case, apparently to give more weight to the broader conspiracy case. In fact, more than half of the people swept up in the "gang raid" were not even alleged by prosecutors to be gang members.

Prior research has found gang allegations nearly exclusively impact Black and Latinx people. Nearly 66% of those added to the NYPD's gang database between Dec. 2013 and Feb. 2018 were Black and 33% were Latinx.³ This legislation would require annual reporting of this data. Yet important questions would remain, including: How does one get entered into the database? How does one get out? Do federal agencies, including ICE, have access to this database? Who else is granted access? Most importantly, is there any evidence of the efficacy of this approach? Gang databases engender mass surveillance, extremely harsh treatment in the criminal legal system, and ultimately increased marginalization, which do not improve public safety.

As one resident quoted in *The Intercept's* article notes, his community was not the war zone described by law enforcement. Yet violence does occur. That is why communities across the city are developing their own solutions, like Cure Violence programs. That is why New York City must abolish its gang database.

BDS Opposes Int. No. 1244-2018 - A Local Law to amend the administrative code of the city of New York, in relation to prohibiting certain unsolicited disclosures of intimate images

Certainly, it is inappropriate to 'Airdrop' or otherwise send unsolicited intimate images. However, it is our position that the criminalization of this act is more likely to ensnare young people than it is to deter this type of behavior. For those who engage in this behavior, sending Airdrop images may be akin to a prank phone call. For those who receive them, it can be annoying and upsetting, but not so pernicious such that it should be criminalized. Adding this crime will likely lead to racially disparate enforcement and a series of devastating consequences. At a time when we are working towards eliminating minor criminal charges and closing Rikers Island, the New York City Council should not be looking to add or increase criminal charges. We have learned that creating crimes does not deter behavior and instead destabilizes people's lives, families and communities. In the alternative, we suggest that the

³ Alice Speri, *New York Gang Database Expanded By 70 Percent Under Mayor Bill De Blasio*, *The Intercept*, June 11, 2018, available at <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>.

City Council invest in an education campaign to teach people how to change their privacy settings to prevent the receipt of unsolicited images.

BDS Opposes Int. No. 1553-2019 - A Local Law to amend the administrative code of the city of New York, in relation to prohibiting unfinished frames or receivers

The mere possession of a “piece” of a firearm, such as the receiver of a firearm, is not currently illegal because it is not an “operable” weapon. New York State law is clear that a firearm is not a weapon unless it is operable. This is why every prosecution for Criminal Possession of a Firearm includes an operability test and an operability report, when the firearm is collected. The receiver of a firearm cannot discharge a bullet without the addition of other parts of a firearm. This legislation seeks to prohibit possession of any individual part of a firearm, i.e. “any material that does not constitute the frame or receiver,” which would greatly expand the scope of the law in a manner that criminalizes what could be innocent behavior.

Int. No. 1553 would provide an avenue for the prosecution of New Yorkers in the arena of firearm possession even when what they possess cannot actually be used as such. New Yorkers who possess inoperable firearms, such as relics, antiques, or even broken pieces of firearms would be subject to arrest and prosecution. People are often unaware of the items contained in their basements, storage areas, or even closets, which have been used from one generation to the next.

Lastly, the legislation does not require any specific intent element, such that possession of the receiver or unfinished receiver must be done with the specific intent to produce or manufacture a “Ghost Gun” for it to be illegal. This legislation essentially prohibits and criminalizes the possession of metal. As such we are opposed to Int. No. 1553-2019. We are similarly opposed to the required reporting of police seizure of a “frame or receiver” or “unfinished frame or receiver” in Int. 1548-2019.

BDS Supports Int. 0635-2018 - A Local Law to amend the administrative code of the city of New York, in relation to prohibiting staged perp walks

There are many ways in which people who are arrested are publicly humiliated during the course of their criminal cases. Their names and faces are printed on the front pages of newspapers distributed across the country, often alongside dehumanizing and hateful headlines. Record sealing following the disposition of their cases cannot undo this harm, even if they are found to be fully innocent. BDS supports this legislation to prohibit staged perp walks, and commends its sponsor, Councilmember Dromm, though we note that its impact will be limited by the broader lack of accountability for police and prosecutors, which must change for this and other protections to be effective.

We thank the Council for the opportunity to speak on these issues and hope you will view BDS as a resource as we continue to work together.

If you have any question, please feel free to reach out to Jared Chausow at jchausow@bds.org.

Testimony to the NY City Council Committee on Public Safety

Alex S. Vitale

Professor

Department of Sociology

Coordinator

Policing and Social Justice Project

Brooklyn College

June 27, 2019

Last year advocates gathered before this committee to send a strong message that the NYPD's use of a "gang database" is deeply problematic and needlessly harms those placed on it, while undermining the long term health and safety of communities.

The NYPD has yet to provide a clear and comprehensive explanation for who is on this database, why they were placed there, and what purpose the database serves. Despite this lack of transparency, we have learned many disturbing things about the database:

- Over 95% of those on it are people of color.
- Up to 8% are juveniles.
- The criteria for inclusion appear vague and overbroad.
- People have been denied the right to know if they are on the database.
- Being on the database can lead to denial of bail and enhanced criminal charges by DAs.
- Being on the database can lead to intensive and repeated interrogations.
- People's social media profiles are regularly searched, people are pressured to provide passwords during interrogations, and NYPD officers assume fake identities in order to gain access to otherwise private information.
- It can trigger inclusion in sweeping gang conspiracy cases without any evidence of serious criminal activity.
- It could make deportation proceedings more likely.
- It has been used to deny people employment in City government.

The bill before you today fails to adequately address any of these problems. While it calls for the possibility of notification involving juveniles, the language in the bill leaves this at the discretion of the NYPD, which means that it is unlikely to change their practices or result in any actual notifications.

I appreciate the desire of the committee members and staff to address some of our concerns, but this bill does not do that, and therefore, I cannot support it. A much more comprehensive approach to the database is needed that could include eliminating its use altogether. Several jurisdictions around the

country have ended the use of such databases or significantly restricted their role and provided much greater due process protection than are contained in this bill.¹

Before such a comprehensive bill could be produced, however, we need a great deal of additional information about the nature of the database and how it is utilized. We have spent the last 2 years urging the Office of the Inspector General for the NYPD to undertake such as investigation and it is my hope that an investigation along these lines is currently underway.

Similar investigations in other cities have uncovered wildly inaccurate information, racial bias in the formation of the database, and abusive and illegal practices based on the information in the database.

A report by the Chicago Office of the Inspector General found that the Chicago Police Department's database was filled with inaccuracies, was shared with immigration officials, and "potentially undermines public confidence in the Department's legitimacy and effectiveness in the service of its public safety mission."²

An audit of the Cal Gang database by the California State Auditor found wild inaccuracies in the database including the presence of infant children and raised concerns regarding fundamental privacy protections.³

A review of the UK's Gangs Matrix system by Amnesty International found similar privacy issues based on evidence that data was shared with other government agencies affecting people's access to basic government services and employment.⁴

Therefore, I urge the committee to withdraw this bill and upon the completion of the OIG investigation, to meet with advocates working on this issue to develop both a comprehensive response to the database that builds on best practices nationally and an overall reevaluation of how the City of New York responds to the very real problems of youth violence in our communities. We need additional investment in non-punitive community based interventions such as Cure Violence initiatives, family supports, housing stability, and high quality health services including trauma counseling, not more criminalization of young people.

Thank you.

¹ "Portland Police to Halt, Purge all Gang Designations." *The Oregonian*. September 8, 2017. https://www.oregonlive.com/portland/2017/09/portland_police_to_halt_purge.html, "Cook County Unplugs Gang Database," *Chicago Sun Times*. January, 24, 2019. <https://chicago.suntimes.com/2019/1/24/18350228/cook-county-unplugs-gang-database-but-critics-still-have-concerns>, "California Law Enforcement Agencies Will Soon Have New Rules for Classifying Gang Members, Sharing Gang Databases," *Los Angeles Times*. October 12, 2017. <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-law-enforcement-agencies-1507851642-htm1story.html>

² "Review of the Chicago Police Department's 'Gang Database,'" City of Chicago Office of Inspector General. April 2019. <https://www.documentcloud.org/documents/5816977-OIG-CPD-Gang-Database-Review.html>

³ "The CalGang Criminal Intelligence System," California State Auditor. August 2016. <http://www.voiceofsandiego.org/wp-content/uploads/2016/08/CalGangs-audit.pdf>

⁴ "Met Police Using 'Racially Discriminatory' Gangs Matrix Database," Amnesty International. May 9, 2018. <https://www.amnesty.org.uk/press-releases/met-police-using-racially-discriminatory-gangs-matrix-database>

Testimony in Opposition to T2018-2223

Submitted by Vidal Guzman



Chairman Richards and Members of the New York City Council Committee on Public Safety,

My name is Vidal Guzman, thank you for the opportunity to speak today. I am here today to express strong opposition to **T2018-2223**, based on my lived experience as a former gang member, a Native New Yorker from Harlem now a community organizer with JustLeadershipUSA.

A lot of my friends have been caught up in gang raids. Friends that I grew up with have gotten 20 years at just 16 years old. I was incarcerated with them and I know they feel society has given up on them. I've never met a so-called "criminal," I've only met human beings that society has given up on before they can express their full potential. The gang database is Stop and Frisk 2.0 and it is a sign the city has given up.

But our communities can't give up. We understand young people need resources and empathy in the critical teen and young adult years – this is when we take the most risk because our brains are developing and we don't really grasp risk or consequences until the age of 25. When a white kid with resources gets in trouble, they are bailed out and have access to therapy; when Black and Latinx kids get in trouble – we get put into the school to prison pipeline which now includes the database.

I understand that the intent of your bill is to limit harm and build transparency and accountability. While this proposal lacks the impact we need, we are encouraged that you want to do something about it – we ask that you listen to people harmed by the war on gangs which has been a systemic targeting and dehumanization of young Black and brown people.

Impacted communities, experts on surveillance, human rights advocates, and defender organizations demand that people must be immediately notified if they are now or have ever been on the NYPD gang database – and we demand the city erase and abolish the gang database.

This proposal would allow for the NYPD to continue to undermine the safety of our communities. To begin with, only kids 18 years old or younger would be informed that they are in the database – this is unfair as people of all ages are impacted. In addition, if the NYPD determines they do not want to notify someone they are in the database—they have the power to deny notification. That is not full transparency. Lastly, while the change would allow people to argue against being in the gang database, the decision-making power lies solely with the NYPD.

Given the miscarriage of justice with the #Bronx120 raid and the fact that the NYPD has put more than 42,000 people on this secret list – **if this committee is serious about justice, fairness, due process, and the safety of young people** – you must erase and abolish the database. As [Alice Sperti wrote in The Intercept last year](#)¹, "the NYPD's definition of what constitutes a gang is broad, vague, and disconnected from evidence of criminal activity." With this list, the NYPD violates our due process rights and protections, and they are not accountable to the communities they harm. 1,388 minors have been profiled, some as young as 13 years old.

#halfby2030

JustLeadershipUSA

1900 Lexington Ave., New York, NY 10035

1440 G St NW, Washington, DC 20005

347.454.2195

 justleadershipusa.org

 @JustLeadersUSA

 JustLeadershipUSA

 @JustLeadershipUSA

I must also make this clear: young people involved in gangs are human beings and are deserving of due process and for their First Amendment right of free association to be protected, along with living free of persecution.

You have an opportunity to erase the database and as we have submitted to this committee before, this Committee and the Council as a whole must push the Mayor to reduce the NYPD's budget of \$5.6 billion dollars, (and 6.1% of the City's budget), allocating those funds towards the services and resources that the NYPD can never provide, and in doing so, take the boldest step he can towards a safer, fairer, and more progressive City.

Young people need basic life skills programs to learn for example, how to tie a tie and prepare for an interview. We need affordable housing for when we come home from jail or prison. We need Peace Centers run by violence interrupters to help heal neighborhoods and mediate for peaceful resolution. We need no-fee community centers, sports and mentoring programs.

The #CLOSErikers campaign asked people in our communities what kinds of investments would create true safety in their communities, and shaped these into our [#buildCOMMUNITIES platform](http://bit.ly/buildCOMMUNITIES)(bit.ly/buildCOMMUNITIES). In those conversations, people spoke about investments in education, public health, economic development, youth services, housing, and more. They did not, however, express a belief that policing or gang raids or gang databases make us safe.

We value young people and safe communities. The surveillance and criminalization of young people has to stop. **ALL of this has harmed and traumatized** youth, families, moms, communities, and generations of people. The solution is to erase the database, end gang raids and criminalization, and #buildCOMMUNITIES so that young people can thrive.

Sincerely,

Vidal Guzman
Community Organizer
JustLeadershipUSA

¹ Speri, Alice. NEW YORK GANG DATABASE EXPANDED BY 70 PERCENT UNDER MAYOR BILL DE BLASIO. June 11 2018. <http://bit.ly/2X4qfH7>

#CLOSErikers Campaign
Oscar Hernandez

Greetings,

My name is Oscar Hernandez and I am a former member of the trinitarios. I am here today to express a deep disturbance i face daily due to still having affiliation with the NYC gang data base.

Its been over 10 years that i left my gang affiliation behind. I haven't had any arrests since. So my question is, why am i still on the NYC gang data base? Why am i still till This day being harassed and disrespected by those who swore to protect and serve? Why after changing my life around like so many others around me, i still face the harsh reality of being labled as a gang member.

What we need in our communities is to invest in employment and economic development, and more educational and community programs for Our youths. We should end the gang data base that just targets black and latino men.



#buildCOMMUNITIES PLATFORM

JANUARY 2019



For the members of JustLeadershipUSA and our partners, our demand to #CLOSErikers has always been tied to a vision for shifting funds to investments that will build communities. We reject the reliance on a race- and poverty-based system of policing and punishment that characterizes the current failed approach to ‘safety’ on a city, state, and national level. We know that true safety is fostered in well-resourced communities, and that New York City is undoubtedly capable of providing that support to our communities. New York City is often touted - by the Mayor and others - as services and resource-rich. It is true that resources exist, but the struggles of too many New Yorkers show us clearly that what we have now is still not enough. Certainly, services and resources at the community level have never been funded at the levels that law enforcement agencies are (and long have been).

Here, we have drawn on the work and vision of over 60 partners and advisors from more than 30 partner organizations and groups, along with more than 200 individuals representing families and communities worst impacted by incarceration. Our conversations about these investments started with thinking about the money that will be saved by closing Rikers -- \$540 million per year, as estimated by the [Lippman Commission](#). However, we quickly recognized that it is not only the Department of Corrections that is over-resourced, but all elements of law enforcement, including the New York City Police Department, the New York City Department of Probation, and our courts. Our City pumps over \$7.3 billion dollars annually into these agencies and charges them with solving problems they will never be equipped to address. And in doing so, our City applies law enforcement solutions to problems of public health, poverty, and inequality. It is a square peg in a round hole. It will never work. It hasn’t worked.

We are proud and excited to present this #buildCOMMUNITIES platform as a roadmap for New York City to make a bold shift from the status quo to a city that lives our values of equity and justice by acknowledging the vast resources that decades of mass incarceration have extracted from Black, Brown, and poor communities, and starting *today* to address that legacy by investing in all of the things that we know work to create *true* safety.

Process

This platform was built by a collaboration of directly impacted people and communities, as well as a range of partner organizations and advisors. We are grateful to all of them for their invaluable contributions to this vision.

- From June to July 2018, over 50 members of more than 30 partner organizations (formal and informal) met in eight issue-based subcommittees (*Employment & Economic Development; Housing; Mental Health & Counseling; Substance Use; Conflict Mediation & Alternative Accountability; Education & Schools; Youth, Family & Recreational Services; Health, Wellness & Environmental Justice*), and offered insight in additional subcommittee meetings. These partners include:
 - Arab American Association of NY
 - Bronx Defenders*
 - Brooklyn Movement Center

- Brotherhood/Sister Sol*
- Center for Alternative Sentencing and Employment Services
- Center for Educational Equity
- Center for Health Equity, New York City Department of Health & Mental Hygiene
- Center for Justice at Columbia University
- Children’s Defense Fund
- College and Community Fellowship
- Community Access
- Community Service Society of New York
- Cooperative Economic Alliance of New York City
- Corporation for Supportive Housing
- CUNY School of Public Health
- DriveChange*
- Drug Policy Alliance
- Dyslexia Plus Task Force
- Getting Out and Staying Out
- Grand Street Settlement
- Harm Reduction Coalition*
- John Jay College, From Punishment to Public Health*
- Legal Action Center
- Legal Aid Society, Prisoners Rights Project
- Naturally Occurring Cultural Districts of New York
- Neighbors in Action*
- New Economy Project
- New York City Employment and Training Coalition
- New York City Environmental Justice Alliance
- New York City Network of Worker Cooperatives
- New York Harm Reduction Educators
- New York Lawyers for the Public Interest, Disability Justice Program
- New York Lawyers for the Public Interest, Environmental Justice*
- Open Society Foundations
- Safe Horizon
- St. Ann’s Corner of Harm Reduction
- Supportive Housing Network of New York
- United Community Centers
- Urban Justice Center Mental Health Project*
- VOCAL-NY
- West Side Commons*

**Indicates an organization that convened a subcommittee*

- From June to August 2018, 210 individuals joined in assemblies in eight communities most impacted by mass incarceration (*Bed-Stuy/Crown Heights, Stapleton, Jamaica, Brownsville/East New York, Hunts Point, Mott Haven, Tremont, Harlem*). Partners who hosted these assemblies include:
 - Brooklyn Movement Center
 - East Harlem Health Action Center
 - Grand Street Settlement, Unity Plaza Community Center
 - Mott Haven Reformed Church
 - Neighborhood Benches
 - New York Public Library, Stapleton Branch
 - The Point CDC

- JLUSA's membership of formerly incarcerated people and their loved ones have for years amplified the need for community reinvestment. They weighed in formally and informally with their ideas and vision throughout this process.
- In Fall 2018, a working group convened to review all of the input gathered through this process, and synthesize it into a set of clear and urgent demands for reinvestment from the City government. This working group and set of co-authors includes:
 - Ashley Viruet, The West Side Commons
 - Darren Mack, JLUSA and #CLOSErikers launching member
 - Halimah Washington, JLUSA member
 - Marco Barrios, JLUSA member
 - Marsha Jean-Charles, Brotherhood/Sister Sol
 - Megan French-Marcelin, JLUSA
 - Monica Novoa, JLUSA
 - Rosa Jaffe, Urban Justice Center Mental Health Project
 - Sarita Daftary-Steel, JLUSA
 - Shana Russell, Humanities Action Lab at Rutgers University
 - Theresa Sweeney, JLUSA and #CLOSErikers launching member
 - Vidal Guzman, JLUSA and #CLOSErikers launching member

In the following pages, we outline our demands for investments in the areas of Public Health, Housing, Employment & Economic Development, Education & Schools, Community Programs & Services, and Conflict Transformation & Alternative Accountability, as well as ways in which the Structure of Investments must be transformed.

Illustrations by Crystal Clarity



PUBLIC HEALTH

Invest in the well-being of our communities to address ill health exacerbated by systemic racism, poverty, discrimination, criminalization, and gentrification.

Our bloated criminal punishment system reflects a historical and continuing lack of investment in the health and well-being of people and communities. While our public health system and institutions are starved for resources, we use incarceration to ‘treat’ mental health needs, substance dependency, physical health needs, and violence. Punitive responses will never address the root causes of these issues. Punitive responses are not even effective in ‘managing’ or ‘containing’ these problems, as interaction with our dehumanizing criminal punishment system leads to further deteriorating of mental and physical health.

Demands

1. Provide free, quality, community-based mental health services that are preventative and responsive to mental health crises. Services should be provided both in brick-and-mortar centers (like community trauma or healing centers), and in ways that proactively reach the community through canvassing, training, and awareness raising. Mental health treatment and services must be provided outside of the carceral system, and should prioritize peers (people with lived experience) and local community members in paid roles.
 - a. Build the two diversion centers already planned, and provide additional funding for a minimum of two centers in each borough.
 - b. Sustain funding for peer-run mental health Crisis Respite Centers, and provide funding for at least six more centers, spread across New York City.
 - c. The City can utilize existing, vacant Department of Health buildings, or invest in existing community-based organizations, to develop the above-mentioned centers.
 - d. Include [ThriveNYC](#) funding in the baseline City budget, and increase transparency to share data on which neighborhoods are receiving these services.
 - e. Expand investment in [Mobile Crisis Teams](#), at a sufficient level to enable them to replace the police as first-responders to calls involving mental health crises.
2. Expand effective housing options for people with acute mental illness and other supportive housing needs [see ‘Housing’ section for more detail].
3. Support and expand prosocial programs like clubhouses with supportive employment, which do not require individuals to be in active recovery.
4. Further invest in harm reduction.
 - a. Fully fund the implementation of Local Law 225 to provide naloxone training to shelter staff and residents.
 - b. Pass and fully fund Intro 1190 to provide Medication-Assisted Treatment (MAT) in NYC shelters.
 - c. Fund mobile medical teams to provide MAT to people living on the streets.
 - d. Establish at least one safer injection site in each borough, and limit law enforcement interaction around them.
 - e. Continue and expand support for community education campaigns to de-stigmatize substance use, people who use substances, treatment, and harm reduction services. Include education across a spectrum of safer use, managed use, and abstinence. Also include education on the details of the [911 Good Samaritan Law](#).
 - f. Create funding streams to promote focus groups and one-on-one interviews with participants/clients of harm reduction and treatment programs (and other people who use drugs), to learn what they need in order to avoid law enforcement interaction and build trust with community members and providers.
 - g. Create funding streams specific to harm reduction programs, including funding that allows for the hiring and professional development of directly impacted people.
 - h. Expand funding to harm reduction services (including health hubs), on-demand treatment services, and community healthcare clinics.

- i. Expand, improve, and destigmatize methadone clinics and reduce law enforcement interaction around them. Support initiatives that help methadone clinics to be seen as clinical providers, such as including them in referral networks and health-resource directories.
 2. Invest in workforce development to appropriately staff all supportive or treatment facilities, including recruiting Black and brown leaders in the healthcare industry.
 - a. Negotiate with payers (State Medicaid and insurance companies) to reimburse for the work of community health workers at a higher rate.
 - b. Support initiatives to provide Black and brown leaders with the necessary education and training to attain leadership positions in the healthcare industry.
 2. Provide access to low- or no-cost healthcare at a community level, offering a holistic range of services including mental health, sexual health, dental health, wellness (including mindfulness and mediation), and preventative services.
 - a. Expand [Neighborhood Health Action Centers](#), including the three pending (in Central Harlem, Morrisania, and Bedford-Stuyvesant), and establish one each in Queens and Staten Island as well.
 - b. Expand school-based wellness centers.
 - c. Invest in mobile health clinics, and more & improved hospitals throughout the City.
 2. Remove and address environmental burdens.
 - a. Redesign the water treatment system so the South Bronx plant can be relocated on Rikers Island.
 - b. Invest money to build a large anaerobic digester to work in tandem with water treatment plant, expanding City's capacity to process organic waste without burdening any community. No other waste-to-energy facility should be sited at Rikers Island other than the anaerobic digester.
 - c. Build a marine transfer station at Rikers, and modernize Hunts Point Marine Transfer Station, so barges can bring organic waste directly from Hunts Point market, and from other municipal marine transfer stations, to Rikers Island without use of trucks.
 - d. Expand existing composting on Rikers Island.
 - e. Build a solar farm on Rikers Island.
 - f. Where land in the South Bronx is made available by closing The Boat and relocating its water treatment plant, invest in developing this land as parks or green space that adds to physical activity opportunities and overall wellness.
 - g. In all living wage green jobs created by these initiatives, prioritize hiring residents of communities most impacted by mass incarceration and most excluded from employment.
 2. Better access to fresh food, water, and health promoting resources.
 - a. Further invest in community gardens by halting all sales of gardens for private development, expanding supports available through the New York City Parks Department's [Green Thumb Program](#) (infrastructure, supplies, and technical assistance), and establishing a land trust to purchase land for active gardens that are operating on privately owned land.
 - b. Expand economic assistance and incentive programs for bodegas and family owned stores to offer healthier options, such as establishing a subsidized delivery service to help small stores source healthier options.

What's Working

[The Arab American Association of NY's Mental Health Services](#) program is operated in collaboration with Connections to Care (C2C) Program. C2C, part of [ThriveNYC](#), partners with community-based organizations to provide culturally and linguistically sensitive mental health services. All AAANY staff are trained on Mental Health First Aid, Screening, Motivational Interviewing and Psychoeducation, and paired with trained mental health providers at NYU Lutheran to address mental health needs beyond the capacity of staff.

VOCAL-NY's Care Coordination services connect people who use drugs to health and wellness services that they need and deserve. They offer referrals to trustworthy, respectful providers for services: HIV, STI and hepatitis C testing and treatment, housing placement and assistance, insurance enrollment, food pantries and soup kitchens, drug treatment including methadone and suboxone, medical services, mental health services, and legal services. By providing caring, individualized support from a team of people with training and lived experience (including staff, social workers, peers, and partners in medical institutions) VOCAL has helped many people lead more stable lives and avoid contact with the criminal legal system. It has meant that they have the ability to accompany people to court and advocate for programs that would actually benefit them; to walk people through the process of applying for NYC's housing lottery; and when someone is taken into Department of Corrections custody, to contact Correctional Health Services and advocate for them. With more funding, they could expand their team to ensure that case managers work with no more than 30 clients, and to bring on team members who specialize in helping people access specific services.



HOUSING

Invest in safe, stable, and dignified housing as a human right for all New Yorkers.

Stable housing is a critical pillar of a stable life, yet in New York City, it is increasingly out of reach. Discrimination and skyrocketing housing costs have combined to make it nearly impossible to find housing in the private market, while lack of investment and oversight at all levels of government have made subsidized or regulated housing increasingly hard to secure and to live in comfortably. Worse yet, the working class people of color who endured decades of disinvestment, abandonment, and extraction of human and financial resources through mass criminalization and incarceration, are now being priced out of their neighborhoods as inequitable development projects accelerate across the City. This has produced the worst homelessness crisis since the Great Depression. In addition to being dehumanizing, homelessness is incredibly expensive. We must commit to making the kinds of proactive investments in *true* affordable housing that will enable all New Yorkers to find stable homes and stay in them.

Demands

1. Create, preserve, and maintain true affordable housing.
 - a. Invest in crucial improvements in NYCHA, including fixing elevators and lighting, upgrading heating equipment, and addressing lead contamination.
 - b. Double the number of permanent affordable housing units set aside for homeless New Yorkers in the Mayor's [Housing New York 2.0 Plan](#), from 15,000 to 30,000, with 24,000 of these units created through new construction. This plan set forth in the [House Our Future NY](#) campaign will require the City to build roughly 2,500 new units of homeless housing each year between now and 2026.
 - c. Expand construction of housing which is not owned by for-profit entities, and without restrictions that exclude people with prior convictions.
 - i. Fund the Community Land Trust Citywide Budget Initiative, to provide start-up funding to a group of organizations to establish and manage community land trusts.
 - ii. Create a housing trust fund with a dedicated revenue stream to support the creation and preservation of permanently affordable housing for the lowest income New Yorkers. This fund could be supported by a dedicated revenue stream generated by increasing the property taxes on vacant and luxury properties.
 - b. Affordability levels should reflect the Area Median Income of the neighborhood in which the buildings exist (not the City as a whole or the NY metro area).
 - c. Develop programs to restore vacant properties to active uses that contribute to the supply of affordable housing for low-income New Yorkers, as called for in the [Housing Not Warehousing Act](#).
 - d. Every development, new or renovated, regardless of subsidies, should have a portion of low-income housing available
2. Expand and improve services that help people to stay in their homes, such as representation in housing court, rental assistance and arrears programs, and programs to help property owners make repairs & prevent foreclosure
3. For people with mental health needs and substance dependencies, prioritize long-term Supportive Housing
 - a. Develop all Supportive Housing using a Housing First approach to quickly and successfully connect individuals and families experiencing homelessness to permanent housing without preconditions and barriers to entry, such as sobriety, treatment, or service participation requirements.
 - b. Allocate funding to accelerate the development of units under the [15/15 Supportive Housing Initiative](#) to at least 1,500 per year
 - c. Fund at least 1,000 [Justice-Involved Supportive Housing Units](#), which, through the use of City funds, will not be subject to the homelessness chronicity requirements of units funded by Department of Housing and Urban Development. For this funding to be most effective, the City

must increase funding levels for scatter-site housing, or provide for central-site housing, as the current vouchers are insufficient to find housing in the private market

- d. Expand housing options for runaway and abandoned youth, by allocating funding to accelerate the development of the 1,700 supportive housing units for youth through the 15/15 Supportive Housing Initiative.
- e. Allocate increased funding to expand training for staff to use harm reduction, trauma-informed and motivational interviewing approaches in supportive housing residences, so that providers do not screen out higher-needs individuals in the interview stage, and also increase oversight of the interview and screening process for supportive housing clients.
- f. Allocate increased funding to attract and retain staff in supportive housing residences.
- g. Provide funding and training for 24-hour crisis-response staff at supportive housing sites to prevent unnecessary calls to 911 and involvement of police. We must invest in facilities with the capacity to serve clients refusing to take medication and actively demonstrating aggressive and violent behaviors.
- h. Include childcare and income supports as part of supportive housing arrangements.

What's Working

Through their [integrated housing model, Community Access](#) provides permanent supportive housing that mixes families with low income and people with mental health concerns. The model they pioneered brings together different populations, including individuals with psychiatric disabilities, families with low income, veterans, and youth aging out of foster care. The supportive services provided, like counseling, and a range of wellness resources - such as urban farming, exercise and cooking classes, discounted bike-share, and pet adoption - are available to all residents of the building. Community Access currently has units in 21 buildings, with three more in development. Together, there will be 1,732 total tenants; of that 1,140 are tenants with a mental health diagnosis. Eventually, seven properties will have a mix of singles and families, including all the properties currently in their development pipeline. The buildings operate on a Housing First model, and do not require that applicants meet requirements like being substance-free, or taking medications. Their oldest integrated housing project, in the East Village, provides an example of the personal and community stability. Of the original 28 families that moved in in 1993, 17 are still there. Community Access maintains a robust tenant advisory group that advises senior staff and creates tenant-led initiatives.

The **Mutual Housing Association of New York (MHANY)** program began as a response to squatters that occupied vacant, city-owned sites in the East New York neighborhood of Brooklyn, where the community was confronting an epidemic of landlord abandonment, withdrawal of city services, and illegal evictions by landlords. The Department of Housing Preservation and Development created the program to dispossess abandoned buildings and turn illegal squatters into legal homesteaders. Through negotiations with the squatter population, the city created a separate entity called MHANY and sold the properties to it. MHANY retained land titles to existing sites, and had the legal right to transfer ownership to homesteaders that had worked on the rehabilitation of buildings they occupied. Under HPD rules, homesteaders that chose to sell their property received a limited portion of the resale price. To encourage long-term affordability, MHANY has the first option to purchase the unit and then resell it to a household on the waiting list at a restricted sale price. In addition to the vacant buildings, HPD provided technical assistance, permanent financing, and a portion of construction financing to MHANY cooperatives.



EMPLOYMENT & ECONOMIC DEVELOPMENT

Invest in programs that support people to achieve economic independence and stability, especially for the people who have been most excluded from opportunities to generate income and build wealth.

In neighborhoods subject to racist policing practices and mass criminalization, vast numbers of people are unemployed, underemployed, and not in the workforce at all. Research has shown that at least 27 percent of formerly incarcerated people are persistently unemployed as a result of structural barriers such as occupational licensing restrictions as well as pervasive racial discrimination. Where Black and brown communities are concerned, levels of unemployment for people with criminal convictions is closer to 40 percent. Communities ravaged by mass criminalization are the same communities that continue to suffer not just from higher rates of unemployment, but lack of access to apprenticeships, employment with meaningful benefits, and wages that ensure the capacity to not simply live check-to-check but build stability within their family and community. Where racial wealth gaps persist and are in many places growing, communities are now subject to further disinvestment and displacement. To maintain and build healthy communities, neighborhoods that have historically been most marginalized from the economy must have pathways into living wage employment and entrepreneurship with real opportunity for mobility.

1. Help New Yorkers to enter skilled trades and living wage, sustainable employment through paid workforce development, including but not limited to training for new roles as mental health workers, credible messengers and other roles needed to expand critical social services and reduce reliance on the criminal justice system; and training for jobs in tech, in healthcare, and green jobs that could be created on Rikers [see Public Health recommendations].
 - a. Implement and fully fund Career Pathways for all New Yorkers
 - b. Embed workforce training into all economic development initiatives
 - c. Streamline oversight of the workforce system
 - d. Make tax credits to new industries contingent on offering set-asides of at least 15% for members of the local community.
 - e. Set aside a portion of all City jobs for people with barriers to employment like a prior conviction, unstable housing, or attendance at underperforming schools.
 - f. Provide funding to cover fees for occupational licenses.
 - g. Provide all workplaces with resource guides and posters to help employees connect to services they may need to be consistent in their jobs, like reduced-price MetroCards, free mental and physical health services, applications for HousingConnect, and more.
2. Establish a Universal Summer Internships and Youth Jobs program, to expand summer job opportunities to accommodate all young people who want to work, while improving the structure and effectiveness of the program.
3. Expand supports for small businesses, particularly focused on historically excluded people and communities in particular.
 - a. Increase funding for the Worker Cooperative Business Development Initiative, and add this funding into the baseline City budget. Provide specific funding for a targeted approach to support formerly incarcerated people to start and join cooperatives.
 - b. Support small businesses by paying 30% of their employment taxes.
 - c. Help people with barriers to employment to attain business permits and licensing, including providing workshops and grants for associated fees.

What's Working

The [Worker Cooperative Business Development Initiative](#), established with support from City Council in 2014, offers innovative ways to address economic and social inequality in New York

City. Worker cooperatives are businesses that are run and operated by the people who work in them (worker-owners). Worker cooperatives allow New Yorkers to build businesses together, therefore allowing all the workers to gain access to upward mobility and better working conditions. The initiative funds a network of more than a dozen organizations to help New Yorkers to start cooperatives, to grow and sustain existing cooperatives, to convert existing businesses to cooperatives, to access financing support, and to navigate their legal needs. This initiative, most recently funded at \$3.5 million per year, has helped to triple the number of jobs in cooperatively owned businesses, many of them owned by women of color.

GOSOWorks, is a program of Getting Out and Staying Out, and helps young men with a history or risk of justice-system involvement to connect to meaningful employment, while also assessing the individuals' capacities and strengths, and addressing their developmental needs and emotional well-being. GOSOWorks has established partnerships with a number of business and institutions, which benefit not only GOSOWorks participants, but also their families and their communities. They also can greatly benefit employer partners. Because GOSO prepares participants well for the workplace, provides them with continued support after they are employed, and encourages them to continue to pursue their education and training, they become outstanding employees, ready to grow with the challenges of the job. GOSOWorks' staffing solutions free, but our Internship-to-Employment (I2E) program can subsidize participants' employment for up to 240 hours. GOSOWorks currently partner with a range of employers including restaurants and bakeries, like Ovenly, Maman, Dos Toros, and The Ravioli Store; non-profits like CAMBA, CDSC, Hour Children, and The Horticultural Society of New York; and businesses like Intersection, ERH Contracting, and ABC Worldwide Stone.



EDUCATION & SCHOOLS

Invest in education and schools as spaces for students, families, and the broader community to access education for success and for liberation, to connect to the resources they need, and as places where transformative and restorative justice is taught and practiced.

One of the most direct ways to reinvest in our communities is to reinvest in our schools and education. Only in so doing may we restore to directly impacted neighborhoods and families the preparation, supports, and access needed to secure their futures. History has shown that both educational achievement and college completion are critical to ending cycles of oppression negatively impacting our communities. Rather than expecting marginalized students to successfully navigate a biased education system and cheering the few that miraculously do, we must make schools places where *all* youth learn in their varied ways *and* get the supports they need to thrive. In doing so, we have the opportunity to change the primary institution of socialization - our schools. Failure to reinvest in education and schools is a choice to continue to harm those directly impacted by criminalization, incarceration, and dehumanization.

Demands

1. Enhance structural supports and connections to key services.
 - a. Increase the ratio of social workers to students to at least 1:250, while assessing ways to provide a higher ratio in schools with large high-needs populations such as students with disabilities, homeless students, or English Language Learners.
 - b. Increase staffing ratios for therapists, career advisors, mentors, resource liaisons, health services, and attorneys.
2. Implement and resource transformative and restorative justice initiatives to replace punitive justice, with a focus on processes informed by students.
 - a. Commit \$70 million annually (equivalent to only 18% of the NYPD school safety budget) to implement transformative and restorative practices in schools with particularly high suspension rates.
 2. Revamp school curriculum.
 - a. Implement culturally responsive curriculum (culture and gender affirming, Rites of Passage), and recruit and train teachers who can relate to and address needs of students. This could be achieved with a \$60 million initial investment.
 - b. Expand and improve curriculum to support preparation for meaningful and living wage careers including trades education, access to technology and tech careers, and college preparation. The city should invest \$15 million to support existing Student Success Centers, to establish these centers in 40 new high school campuses and to implement year-round College Bridge programs.
 - c. Integrate more non-traditional education, including out-of-classroom learning experiences up through high school.
 2. Draw on City resources (in addition to State reforms) to make equitable resources available to all NYC schools.
 - a. Provide essential school supplies for all students.
 - b. Renovate school buildings to be structures that are welcoming and nurturing.
 - c. Increase the number of teachers in classrooms and create smaller classroom sizes.
 2. Support additional enrichment programming.
 - a. Allocate increased funding to support extended hours programming including access to libraries and librarians; arts programming; financial literacy; sports; and student-led programs in which youth support each other to avoid and manage risk and conflict.
 2. Expand investments to provide free, public, quality higher education at CUNY
 - a. Work with the state to allocate the \$812 million needed to make CUNY free for all students.
 2. Make reparative investments for justice-impacted youth and families.

- a. Ensure what is provided for students in schools is also provided for youth who are incarcerated or out-of-school.
 - b. Fund scholarships for children of incarcerated parents.
2. Create more opportunities for students and families to have a meaningful voice in their schools.

What's Working

The [Center for Court Innovation's Restorative Justice in Schools](#) initiative has implemented restorative justice programs in five New York City high schools aimed at strengthening relationships school-wide. In partnership with New York City's Department of Education, the project operates in schools with elevated suspension rates whose students overwhelmingly come from communities of color. Using [restorative justice](#) practices, the program works with school staff and students to build relationships, to address conflicts, and to reduce exclusionary discipline. A dean at one school, the Urban Action Academy, noted not just a large drop in suspensions in their first year with the program, but also a shift in the way that students interact and the respect they demonstrate for each other. Researchers from the Center for Court Innovation are currently conducting a more in-depth evaluation of the initiative's effectiveness through a randomized controlled trial, assessing whether it improves overall school climate and culture and reduces inequities.

In 2015, NYC made an investment of \$23 million in new funding for [Arts Education in schools](#). Funds were allocated to hire 120 new arts teachers at middle and high schools that are underserved, improve arts facilities across the City, and foster partnerships with some of the City's cultural institutions. The investment would increase access to arts education for thousands of students with new classes and activities in music, dance, visual arts and theater. Further funding could expand the program reach for a greater portion of NYC's 1.1 million public school students.



COMMUNITY PROGRAMS & SERVICES

Support and expand resources that all of NYC's diverse residents can access in their communities to relax, learn, thrive, and lead.

In order to best support individuals and their communities, investments must be made in accessible, wrap-around services that fulfill the needs and hopes of the specific community where those programs and services take place. Services should focus on the health and well-being of all community members inclusive of age, race, sexuality, gender, ability, education, employment status, immigration status, and other factors that are often used to exclude people, intentionally or unintentionally. To support the people in our City who have been most marginalized, not just to survive but also to thrive, we have to consider the type of investments that can improve quality of life, bring people together, and bring them joy. Investing in New Yorkers' ability to live their fullest lives and in the leadership of residents to build community together, we can support safety and stability in our neighborhoods.

Demands

1. Make public transportation accessible to everyone.
 - a. Fully fund the Fair Fares, reduced price Metrocard program, including single-ride and pay-as-you-go fares, and implement fare capping.
 - b. Make all student metrocards unlimited, so that students can participate in after school activities beyond the current timeframe (8pm) and beyond one additional ride a day. Students who live near their schools should also get metrocards so they can participate in programming in other neighborhoods.
2. Support universal child care that works for working families.
 - a. Expand afternoon hours beyond the existing UPK and 3-K programs.
 - b. Implement salary parity for all early childhood educators, through compensation in alignment with those in the Department of Education, as called for in Resolution 0358.
 - c. Provide support for parents who seek training and parenting resources.
2. Invest in public libraries to expand educational and recreational services.
 - a. Add an additional \$16 million into the baseline City expense budget to more adequately fund six-day service and programs in NYC's three library systems, and increase capital funding for urgent facility maintenance.
 - b. Expand services like ESL classes, computer skills training, TASC (formerly GED) preparation, and career counseling.
 - c. Offer expanded free resources through libraries, like meeting space and printing.
 - d. Expand the diversity of library offerings, including programs and materials in multiple languages, increasingly representative of NYC communities.
 - e. Invest in learning centers focused on activism & social justice.
2. Establish creative spaces & cultural hubs in communities for all creative disciplines.
 - a. Increase funding to expand creative spaces & cultural hubs that are accessible to the entire community, and support and sustain community institutions that serve as creative spaces & cultural hubs, such as libraries, schools, museums, small businesses, and community organizations.
2. Invest in youth leadership training, Rites of Passage/identity development (inclusive of LGBTQ and gender non-conforming youth) and other non-traditional programs that support youth to have a voice in community institutions.
 - a. For these programs to be most effective, they cannot be subject to the requirements of the Department of Youth and Community Development's current COMPASS programs, which allocate a maximum cost-per-participant that is insufficient for running quality programs.
2. Invest in community-led community centers, recreational parks, and community spaces with accessible facilities for the entire community, and especially those 18-26 years old.

- a. Provide funding for community-driven research projects to assess local neighborhood needs and strengths and for the development of neighborhood specific community centers.
- b. Utilize and re-develop vacant or underutilized buildings for community uses.
- c. Help non-profits to buy their own buildings and support incubators sites for the development of new non-profits.
- d. Expand hours, diversity and quantity of programming, and locations of Parks and Recreation Centers, including expanding service in the Bronx, Brooklyn, and Queens to establish at least one center per 125,000 residents.
- e. Expand and improve parks with facilities for young children, working public bathrooms, and upgraded sports facilities.
- f. Create more spaces for mentoring and peer mentoring.
- g. Support positive events to help people connect with their neighbors out in the community (block parties, street festivals, etc).
 2. Expand access to City agencies, legal services, and civic engagement in neighborhood based facilities.
 3. Increasing funding allocations to several of the City Council's NYC Initiatives, including Digital Inclusion, Anti-Poverty Funding, Young Women's Initiative, and Anti-Violence Youth Programs.

What's Working

Inclusive Services at Brooklyn Public Library (BPL) provides unique programs for children and teens with and without disabilities. Fostering an inclusive environment, the libraries open their doors to all children, parents, caregivers and educators. Dedicated equipment makes the library experience accessible to children with different abilities. Cube chairs, mats for floor play, positioning cushions, and adaptive toys, are available. Inclusive Services is located in five barrier-free libraries in Brooklyn, and with further funding, could be expanded to more of the BPL's 60 branches.

The Brotherhood/Sister Sol's Rites of Passage Program (ROP) is designed to empower youth through discovery and discussion of history, culture, social justice and the political forces surrounding them. In partnership with secondary schools and within the community, The Brotherhood/Sister Sol (BroSis) develops chapters, each consisting of 10 to 18 youth members and two adult Chapter Leaders. The Chapter Leaders facilitate weekly sessions and serve as mentors, supporters, confidantes, counselors, teachers, and more. They build trusting relationships and offer guidance to the chapter members as they face the challenges of young adulthood.

During the intensive four- to six-year ROP process, members learn to think critically and act ethically through workshops, cultural excursions, community service opportunities, retreats, college trips, and in engaging in the multitude of other programming at BroSis. Each chapter develops a Mission Statement and collectively defines what it means to be a sister/brother, woman/man and leader. Members also create individual Oaths of Dedication—personal testimonies to how they will live their lives with which the create pathways through which to live their lives on their own terms. The BroSis curriculum for all programming is structured around twelve curriculum focus issues, incorporating topics such as Pan African and Latinx History, Dismantling Sexism and Misogyny, LGBTQ Justice, Environmental Justice, Political Education, Sexual Education & Responsibility, and Educational Achievement and more.

The impacts of this collective work are clear. In NYC the general high school graduation rate is 70%; while research has found that the graduation rate of Black and Latino boys is 34%. Over 40% of Black men between the ages of 18-65 in New York City are unemployed. 90% of BroSis alumni have graduated from high school, 95% either graduated from high school or earned their

GED and 95% are working full time or enrolled in college. Harlem's teen-aged pregnancy rate is 15% – but BroSis members have a rate of less than 2%.



CONFLICT TRANSFORMATION & ALTERNATIVE ACCOUNTABILITY

Support communities to manage conflict so that it does not escalate to harm, and when harm has happened, to intervene with models that focus on restoration rather than punishment.

We can and must do much more to prevent the kinds of conflict and harm that we *can* prevent through investments in all of the areas we have named above. We must also recognize that conflict and harm will still occur, and we must develop models for responding that do not rely on violence and punishment (which continue the cycle of trauma and harm), but rather on interventions that aim to address and make amends for the harm that was caused, involving all parties in creating a solution. While this may be a more compassionate way to deal with people who have caused harm, that is not main reason to pursue it. We need to invest in all levels of alternative programs (diversion, alternatives to incarceration, violence interruption, mediation, and restorative justice) because they work. On the contrary, our system of punishment - with the deprivation it relies on, and the trauma it fosters - has not made us safer.

Demands

1. Invest in the capacity of communities to respond to conflict, prevent violence and harm, and to address and heal from it in sustainable ways.
 - a. Support or develop community mediation, trauma and healing centers in all of the neighborhoods most impacted by mass incarceration, with a particular attention to needs of youth, use of arts-based therapy, and engagement of peers in providing programming. Integrate within these centers restorative justice initiatives. To be truly safe community spaces, these centers must have no affiliation with the police.
 - b. Create paid opportunities for community members to learn and apply skills related to social-emotional support and civic engagement, such as conflict de-escalation techniques for themselves, their family and their neighbors.
 - c. Increase programming for trauma-informed healing work for those who have been violent or have been affected by violence.
 - d. Increase funding for the Anti-Gun Violence Youth Employment Program and increase support for mentorship of young people.
2. Invest in the capacity of government agencies and workers to better respond to harm and violence, and promote healing.
 - a. Provide trainings for government workers and government funded programs in trauma-informed care.
 - b. Train employees throughout the ranks of government agencies in restorative justice philosophies and practices. This work requires a paradigm shift, so training is important at all levels of government.
2. Expand investment in diversion and alternatives to incarceration (ATI). The Lippman Commission has recommended a \$270 million annual investment in diversion and ATI programs.
 - a. Sufficiently expand investment in diversion and ATI programs to eliminate all City sentences (sentences of less than 1 year).
 - b. Include programs for those with domestic violence charges, focused on addressing root causes of intimate partner violence.
 - c. Prioritize programs which use a trauma-informed approach and are proven to provide those involved not just with an alternative sentence, but with skills and resources to lead more stable lives.
2. Support alternative models of responding to community violence and fostering safety
 - a. Expand funding for Cure Violence® programming to include civic engagement, mobilization, political education, and creation of youth public health workers. Each site should be funded at 1.5 million for services, not including the cost of space.

- b. To be trusted and effective in their communities, these programs must have no affiliation with the police.

What's Working

[The Women's Prison Association's JusticeHome](#) is a trauma-informed, gender-responsive, community and home-based alternative to incarceration program for women of all experiences. It is designed for women who have been charged with a felony and are facing a minimum of six months' incarceration, and aims to support them so they can stay in their communities rather than serve time in jail or prison. The JusticeHome team works with participants to enhance stability and overall well-being by addressing specific needs that may have contributed to criminal justice involvement. JusticeHome strongly believes in honoring each participant's resilience, strengths, and voice. The program team works collaboratively with every participant to create an individualized change plan to help identify needs and achieve goals. The program has led to increased stability for approximately 100 women and their families, and costs much less than incarceration, at \$10k-\$20K per participant per year. In the lifetime of the program, 90% of our graduates have remained free of future involvement with the legal system. The program is currently in the process of expanding to also serve women with misdemeanor charges.

[Make It Happen](#) (MIH) is a program of Neighbors in Action, and is part a program funded by the Office of Victims of Crime and run in partnership with the Center for Court Innovation's Domestic Violence department. Its mission is to give young men between the ages of 16 and 24 who have experienced violence, the tools necessary to overcome traumatic experiences, and enable them to succeed in spite of those experiences. Make It Happen is a trauma-informed and culturally competent program that provides mentorship, intensive case management, clinical interventions and supportive workshops. Participants are challenged to think about how their definition of manhood is intertwined in trauma and gender roles. Through group workshops and client-driven individual sessions, people are able to recognize and process their own trauma. Make It Happen also works to engage traditional victim service providers on the needs of male crime victims, with the goal of making victim services compensation available to young men of color who have been victims of crime. Since the program's inception in 2012, Make It Happen has served close to 400 young men in and around Brooklyn. Within the past two years, MIH has developed a peer mentor program called CHAMPS (Community Healers And Mentors for Personal Success). To date, Make It Happen has 16 CHAMPS that provide informal supportive services to middle school students. Participants have said that the program helps them to better understand and express their feelings.

STRUCTURE OF INVESTMENTS

Restructure the methods by which funds are distributed in order to better support grassroots groups and avoid replicating systems of oppression.

Grassroots groups constitute the social fabric of local communities in NYC. They know best how to meet the needs of people who the City and larger organizations are often less effective in reaching, and they reflect the culture and ideals of the neighborhoods they work in and with. Yet the mechanisms of City investment have for decades put these groups at a disadvantage. Future investments must be made in a way that recognizes and supports the brilliance of these groups, reflects a belief in the knowledge and wisdom that communities and residents have about their own needs and solutions, and demonstrates commitment to meet people where they are at.

1. Establish a staffed and funded oversight committee or committee to decentralize funding decisions, improve inclusion in City services, address structural racism in City agencies, and improve accountability. The committee(s) would be tasked to
 - a. Oversee how justice reinvestment funds are spent.
 - b. Ensure that funds better reach grassroots organizations and community leaders, including through organizations led by and accountable to the people they exist to serve: Black and brown people, women, NYCHA residents, youth, elderly, non-native English speakers, the differently-abled, mental health recipients, people who use drugs, and LGBTQ people.
 - c. Advise the City on structure of Request for Proposals to remove potential barriers for grassroots organizations.
 - d. Support small organizations to build capacity.
 - e. Develop a plan for all executive and leadership-level staff at City agencies and publicly funded social service agencies to participate in anti-racism and racial justice training.
 - f. Assess the City's cut taken from State funds to identify opportunities to direct more resources to the groups delivering programming.
 - g. Institute real enforceable consequences to deter City agencies from late payment of contracts that strain small organizations and harm communities.
 - h. Recommend ways to make City agencies more flexible in the way they provide services, for example, offering video appointments.
2. Improve flexibility and effectiveness of funding.
 - a. Funding structures should support quality not quantity. Cost per participant models must be completely revamped to account for the full cost of providing quality services, and with consideration for what types or program structures best serve communities and the specific people & groups organizations serve.
 - b. Eliminate the delays in payment for City contracts faced by many non-profits that serve the most marginalized New Yorkers. Assign a specific timeframe to each City agency with a role in contract oversight for their contract review work, and create a public-facing tracking system to allow vendors to monitor the progress of their contract through each stage of the contract process.
 - c. Provide sufficient funding and technical assistance to help grantees implement language justice principles and effectively serve undocumented people.
 - d. Establish mechanisms for groups without 501c3 status to apply for and receive funds.
2. Make funds and services more accessible to the people and communities that have been most criminalized, most marginalized and most divested from. Pay [reparations](#) to entire impacted communities, in addition to individuals.

Participatory Budgeting is a democratic process in which community members directly decide how to spend part of a public budget. It's based on the idea that the people who live in a community best know its needs. Through Participatory Budgeting in NYC (PBNYC), community members directly decide how to spend at least \$1,000,000 of the public budget in participating Council Districts (currently, 32 districts). Community members can propose and vote on projects like improvements to schools, parks, libraries, public housing, and other public or community spaces. After ideas are submitted, community volunteers, called Budget Delegates, work to turn ideas into real proposals for a ballot, with input from city agencies. Through a public vote, residents then decide which proposals to fund. People can vote for projects if they live in the district and are at least 11 years old or are in 6th Grade (immigration status is not considered). There's a PBNYC Citywide Committee — made up of individuals, community organizations, and Council Members — which helps guide the process and supports PB across

the city. The Committee proposes rules for the process each year, which are formalized into a Rule Book adopted by the City Council. For the time being, PBNYC only deals with capital money, and a fairly limited portion of the total City budget.

The [Colorado Criminal Justice Reform Coalition](#) (CCJRC) has made major strides in securing investments for the communities that have been most criminalized, and also charting a new path for *how* those investments will be made to best support those communities and their own leaders and institutions. In 2013, the tragic murder of Tom Clements, the executive director of the Colorado Department of Corrections, represented a crucial turning point. Executive Director Clements had come to Colorado from Missouri to implement a reform agenda in corrections policy. Colorado leadership and legislators initially contemplated reactive and punitive measures to reduce the likelihood of a similar tragedy, but CCJRC and several community reentry organizations saw an opportunity to continue the reform work started by Executive Director Clements. CCJRC worked to highlight the importance and impact of community-led public safety strategies and to ensure budget priorities aligned. Since 2014, CCJRC has passed three bills that will invest over \$50m in communities for new community-led, community-centric safety strategies. Furthermore, each grant program is being run by an intermediary – not a government agency. The Latino Coalition for Community Leadership, two community foundations, and two Community Development Financial Institutions are managing the various grant programs created through these investments. Through this model, Colorado’s justice reinvestment strategy has prioritized using existing infrastructure in the communities and driving the money much deeper into community ownership.

Endnotes

1. From <http://budget.council.nyc>, Budget Explorer. Accessed January 15, 2019. Budgets included in this figure, Expense budgets for: Department of Corrections - \$1,414,245,650, NYPD - \$5,507,748,709, Department of Probation - \$101,019,182, District Attorneys - \$337,247,752.
2. One such a program is Howie the Harp, a peer-run program that trains people with mental health recovery experience to work in Human Services. Since 1995, HTH has been led by people of color who ensure that cultural competence is maintained among staff and participants.
<https://www.communityaccess.org/our-work/educationajobreadiness/howie-the-harp>
3. Currently 267 Justice-Involved Supportive Housing (JISH) units have been promised - only 120 of which have been funded
4. HUD chronicity exclusions force all individuals returning to the community from jail or in-patient hospital stays of more than 90 days to wait another 12 months in the shelter system until they are eligible for the higher level of services available through supportive housing.
5. From NYU Furman Center, Directory of NYC Housing Programs,
<http://furmancenter.org/coredata/directory/entry/mutual-housing-association-of-new-york>
6. As recommended by the Community Services Society's report, "Extending the High School Year through Universal Summer Jobs for New York City Youth," February 2016,
<http://lghhttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Summer%20jobs%20web%203.pdf>
7. As called for by the Urban Youth Collaborative in their report, "The \$746 Million a Year School-to-Prison Pipeline," April 2017,
http://populardemocracy.org/sites/default/files/STPP_layout_web_final.pdf
8. As called for by the Urban Youth Collaborative in "The \$746 Million a Year School-to-Prison Pipeline"
9. As called for by the Urban Youth Collaborative in "The \$746 Million a Year School-to-Prison Pipeline"
10. As called for by the Urban Youth Collaborative in "The \$746 Million a Year School-to-Prison Pipeline"
11. As called for by Make CUNY Free Again, Accessed Jan 15, 2019 <http://www.free-cuny.org/the-case-for-a-free-cuny/>
12. As called for by Riders' Alliance and the Community Service Society, Accessed January 15, 2019 <http://www.cssny.org/campaigns/entry/transit4all>
13. <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3509896&GUID=56E3F2BC-A88E-4E99-921A-265203357BB7&Options=&Search=>
14. <https://www1.nyc.gov/site/dycd/services/after-school/comprehensive-after-school-system-of-new-york-city-compass.page>
15. <https://www1.nyc.gov/site/peacenyc/interventions/crisis-management.page>
16. http://home2.nyc.gov/html/ceo/html/initiatives/yml_violence.shtml
17. Following the recommendations of City Comptroller Scott Stringer's report, "Running Late: An Analysis of NYC Agency Contracts," May 2018, <https://comptroller.nyc.gov/reports/running-late-an-analysis-of-nyc-agency-contracts/>

TESTIMONY

The New York City Council
Committee on Public Safety

Re: A Local Law to amend the administrative code of the city of New York, in relation to providing notice to minors included in the criminal groups database.

NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

The Bronx Defenders
360 East 161st Street
Bronx, NY 10451

The Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

June 27, 2019

Dear Chairperson Richards and Councilmembers of the Committee on Public Safety:

My name is Liliana Zaragoza, and I am an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. (LDF). I want to thank Chairperson Richards for holding this critical hearing and submit the following testimony.

I. Introduction

LDF is the nation's first and foremost civil rights and human rights law organization. Since its founding nearly eighty years ago, LDF has worked at the national, state, and local levels to pursue racial justice and eliminate structural barriers for the Black community in the areas of criminal justice, economic justice, education, and political participation.¹ As part of that work, LDF has also forged longstanding partnerships with local advocates, activists, and attorneys to challenge and reform unlawful and discriminatory policing in New York City. In 2010, LDF, with co-counsel the Legal Aid Society and the law firm Paul, Weiss, Rifkind, Wharton & Garrison, LLP, filed *Davis, et al. v. City of New York, et al.*, on behalf of plaintiffs challenging the New York City Police Department's (NYPD) policy and practice of unlawfully stopping and arresting New York City Housing Authority (NYCHA) residents and their visitors for trespass without the requisite level of suspicion.² In 2015, the *Davis* plaintiffs reached a settlement with the City that included full participation in the federal court monitoring of the NYPD that the court ordered in *Floyd, et al. v. City of New York*, the historic lawsuit that successfully challenged the NYPD's unconstitutional stop-and-frisk policies and practices.

The Bronx Defenders is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. The Bronx Defenders provides innovative holistic client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to low-income people in the Bronx. Its staff of over 300 represents approximately 28,000 individuals each year. In the Bronx and beyond, The Bronx Defenders works to transform how low-income people are represented, and to reform the system they face.

The Center for Constitutional Rights (CCR) works creatively to advance and defend the constitutional and human rights of social justice movements and communities under threat and helps them build power. CCR is committed to dismantling systems of oppression and fighting for justice through litigation, advocacy, and narrative shifting. CCR is lead plaintiffs' counsel in *Floyd, et al. v. City of New York*.

Last year, almost to the day, LDF and CCR testified before this Committee to share our concerns regarding the NYPD's gang enforcement strategies. As we testified then, the NYPD maintains a gang database (or "criminal groups database") that indiscriminately designates

¹ LDF, *About Us*, <https://www.naacpldf.org/about-us/> (last visited June 26, 2019).

² LDF, *Davis v. City of New York*, <https://www.naacpldf.org/case-issue/davis-v-city-new-york/> (last visited June 26, 2019).

thousands of New Yorkers as members of gangs or local street “crews”; disproportionately confers such affiliation on Black and Latinx New Yorkers; lacks transparency; and provides no due process protections to those individuals indiscriminately included in the database. This remains true today.

Indeed, “[t]he NYPD’s gang database leaves thousands of New Yorkers of color vulnerable to heightened police harassment or scrutiny, and it’s unclear whether the NYPD has any legitimate reason for targeting them.”³ For that reason, in August 2018, LDF and CCR sued the NYPD for information requested under the New York Freedom of Information Law (FOIL) and which the NYPD denied without basis.⁴ While we were ultimately successful, shedding light on this secretive database should not require months of negotiation, filing administrative appeals, and filing suit. Transparency regarding the gang database should be the norm, not the public’s burden.

While we thank the City Council for holding this hearing, we remain troubled by the NYPD’s gang enforcement practices, including its reliance on the gang database, and the bill under consideration today (T2018-2223). Instead of eliminating the City’s reliance on an inherently discriminatory gang database, the proposed local law would further entrench the database by codifying its existence and the NYPD’s definition of a “gang” with little, if any, real protections.

Indeed, the modest notice requirement for minors would impact fewer than 10% of those listed in the database. And those 10% who are minors will receive little protection since the notice and the final determination of inclusion in the database are within the sole discretion of the NYPD with no oversight. While we applaud efforts aimed at increasing Departmental transparency and accountability, subsection (d) of the proposed bill, particularly in the context of the bill at large, is insufficient.

In sum, the provision under consideration today fails to adequately remedy the constitutional concerns we raised last year, cementing the gang database as the Department’s “stop-and-frisk 2.0.” We renew those concerns today and urge the City Council to eliminate this constitutionally untenable database; study and invest in community-based programs shown to reduce the violence that the NYPD’s database and gang enforcement tactics purport to address; and reaffirm its commitment to constitutional, race-neutral policing by holding the NYPD accountable for its gang policing strategies.

The City Council must reaffirm its commitment to constitutional, race neutral policing policies and practices. That goal cannot be accomplished by passing this bill as currently drafted.

³ Marne Lenox, *NYPD Hasn’t Come Clean on its Gang Database*, N.Y. DAILY NEWS, (Aug. 8, 2018, 4:05 PM), <https://www.nydailynews.com/new-york/ny-oped-nypd-lies-gang-database-20180808-story.html>.

⁴ Graham Rayman, *Exclusive: Civil Rights Groups Sue NYPD for Gang Database Guidelines*, N.Y. DAILY NEWS, (Aug. 7, 2018, 3:40 PM), <https://www.nydailynews.com/new-york/ny-metro-civil-rights-gang-database-lawsuit-20180807-story.html>; see also Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill de Blasio*, THE INTERCEPT, (Jun. 11, 2018, 10:49 AM), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>.

II. The NYPD's Gang Policies and Practices Are "Stop-and-Frisk 2.0."

The NYPD's operation of gang policing and practices is akin to the unconstitutional, racialized policing tactics challenged in *Davis and Floyd*. Masquerading as "precision policing," the NYPD's gang database is the functional equivalent of the Department's racially discriminatory and unconstitutional stop-and-frisk policing tactics. The Department's aggressive, vastly over-inclusive, military-style gang raids primarily have targeted public housing residents, the overwhelming majority of whom are Black and Latinx.

The NYPD has used the gang database to justify the mass raids of public housing developments and to target social-media surveillance on the same population of New York City residents that suffered the indignity of its unconstitutional and racially discriminatory stop-and-frisk practices. While a small number of people arrested in gang takedowns are believed to have committed violent or otherwise serious offenses, most are accused of only low-level misconduct—where misconduct exists at all.⁵ Indeed, criminal conduct is not a prerequisite to entry into the gang database or being identified as a gang member.⁶ But the ramifications of such designation are serious for any New Yorker and range from reputational harm to life-altering prosecution and lengthy imprisonment stemming from mass conspiracy indictments.⁷

While police stops under stop-and-frisk may have decreased (and the extent of that decrease is unknown given the documented problem of underreporting of stops),⁸ the number of individuals identified as gang members in New York City has skyrocketed. This is not a coincidence. The boys and young people of color subjected to the degradation of unlawful stops and frisks are now stigmatized as dangerous gang members. Over the past five years, the NYPD has designated more than 17,000 individuals as gang members.⁹ Significantly, more than 99% of these alleged gang members are people of color, while white individuals comprise only 0.8% of the database. Yet 31.8% of New York City residents are white, 29.2% are Hispanic or Latino, and 22% are Black.¹⁰ These statistics strongly suggest that the NYPD continues to engage in police practices that use race as a proxy for crime.

⁵ Ben Hattem, *How Massive Gang Sweeps Make Growing Up in the Projects a Crime*, GOTHAMIST (Oct. 24, 2016, 11:02 AM), http://gothamist.com/2016/10/24/gang_sweeps_public_housing.php#photo-1; see also Babe Howell & Priscilla Bustamante, *Report on the Bronx 120 Mass "Gang" Prosecution* 11, Apr. 2019, <https://bronx120.report/the-report/> (indicating that 38% of the individuals indicted following the "Bronx 120" raid—45 of 117 individuals—had no prior criminal history); *id.* at 9 (indicating that 44% of those ultimately indicted as a result of the Bronx 120 raid of Eastchester Gardens had gang membership).

⁶ K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 UNIV. DENVER CRIM. L. REV. 1 (2015).

⁷ See Howell & Bustamante, *Report on Bronx 120*, *supra* note 5.

⁸ Fourth Report of Independent Monitor at 24-25, *Davis v. City of New York*, No. 1:10-cv-00699 (Nov. 18, 2016), ECF No. 362.

⁹ Speri, *New York Gang Database Expanded*, *supra* note 4.

¹⁰ 2016 American Community Survey Estimates 1-Year Estimates for NYC & Boroughs, U.S. CENSUS BUREAU, <https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc->

III. The Proposed Bill Does Not Remedy Serious Concerns About the NYPD's Gang Policies and Practices.

A. *Entrenching Reliance on the Gang Database and Codifying the NYPD's Definition of a "Gang"*

In testimony submitted to the City Council last year, LDF and CCR raised concerns regarding the secretive, extra-legal nature of the NYPD gang database. In answer to that call, this body now considers a bill which would bring the database out of the shadows, but which would, ironically, codify the gang database into formal existence and accept the NYPD's flawed definition of the term "gang."

Critically, the definition of the term "gang" in the proposed bill is copied almost verbatim from the NYPD Patrol Guide on "Reporting Gang-Related Criminal Activity." Exhibit A. Not only does this proposed bill's definition of "gang" accept the NYPD's definition to the exclusion of input from concerned citizens, the proposed definition conflicts with the criteria for admission into the gang database and the reality of how the gang database works. Whereas the proposed bill suggests, as defined, that "the commission of one or more criminal acts" must be an animating principal or "primary activit[y]" of a "gang," the criteria for admission into the database reflects no such requirement. *See supra* at 3. This disconnect between the bill and the reality of individuals designated as "gang" and "crew" members highlights the need for robust discourse and consistency about what properly constitutes a "gang" and how that definition affects official gang-related policies throughout City agencies, including the NYPD.

B. *Failure to Remedy Discriminatory Impact on Black and Latinx New Yorkers Due to Sweeping Criteria for Database Admission*

The substantive provisions of the bill under consideration today focus on minors impacted by the NYPD gang database. While the NYPD's targeting and monitoring of New York City's youth under the auspices of gang policing is deeply troubling, the database's racially disproportionate sweep and unchecked subjectivity is no less troubling. Yet the proposed bill fails to address these and other constitutionally suspect aspects of the gang database.

First, the NYPD's gang enforcement practices, as evident from the database, almost exclusively target people of color. Even though white residents comprise 31.8% of New York City's population, they represent *under* 1% of the NYPD's gang database.¹¹ The existence of an almost-exclusively Black and Latinx gang database not only invites racial profiling of communities of color by the NYPD, it also perpetuates pernicious stereotypes of Black and Latinx youth and young adults as criminals, gang members, and "thugs."

[population/acs/demo_2016acs1yr_nyc.pdf](#) (estimating based on one-race populations that 31.8% of New York City residents are white, 29.2% are Hispanic or Latino, and 22% are Black).

¹¹ K. Babe Howell, *Gang Policing*, *supra* note 6, at 16 (noting of database entries, 48% were Black and 42% were Latino; only 1% of the individuals added to the NYPD's gang database were white).

Second, the gang database raises numerous individual due process concerns extending beyond the lack of notice to minors. Among them are the vague and overinclusive contours of the criteria for admission to the gang database—defects that enable the introduction of police officers’ bias and provide inadequate notice to at-risk New York City residents.

In 2013, the NYPD disclosed that it may certify an individual as a gang member if she meets two of the following six criteria: (1) spends time in a gang-prone location; (2) has scars/tattoos associated with gangs; (3) has gang-related documents; (4) wears colors associated with gangs; (5) associates with known gang members; and (6) uses hand signs associated with gang members.¹² Notably, inclusion in the gang database does not require criminal activity.¹³

These criteria are equally as emblematic of innocence as they may be of gang membership. Yet they provide the Department with unfettered discretion to identify and certify any young person in predominantly Black and Latinx neighborhoods as gang members. Last year we offered the example of a 16-year-old high school student who has never committed a crime, has no control of her residence in a gang-prone neighborhood, and happens to know “gang-affiliated” people living in her neighborhood—innocent facts that may lead to her inclusion in the database. But this example is not limited to young people. A 45-year-old father or a 25-year-old cousin may similarly have no control over their residence or the family members and neighbors around them. Indeed, at last year’s hearing, NYPD Chief of Detectives Dermot Shea conceded that Chairperson Richards could be identified as a gang member by simply wearing red colors while standing at a corner store.

The NYPD’s gang membership criteria can easily serve as pretextual justifications for surveilling and monitoring large swaths of individuals who engage in innocent and lawful behavior. The proposal under consideration today does nothing to address these issues. Nor does the proposed legislation provide any redress or remedy to the 92% of the individuals who will not be notified of their inclusion in the gang database and who remain subject to a substantial risk of racial profiling and individual due process violations.

C. Failure to Provide Meaningful Notice to the Limited Beneficiaries

The proposal under consideration today zeroes in on one of the gang database’s many grave individual due process concerns: the lack of notice regarding inclusion in the database or a mechanism by which to contest such designation. But this limited notice and process mechanism may be a hollow victory, even if passed.

At face value, today’s proposal regarding notice and process stands to benefit around 8.3% of the individuals in the NYPD gang database (about 1,400 of the approximately 17,000 New Yorkers in the database). However, even this impact stands to be severely undercut by the exception to the notice requirement and deficiencies in the process to be provided. Critically, under the provision at issue, the NYPD would be required to “provide written notice to any minor under

¹² *Id.*

¹³ *Id.*

the age of 18 who has been entered into the criminal groups database . . . *unless* providing such notification would compromise an active criminal investigation or the department has specific reason to believe that providing such notification would compromise the health or safety of the minor or another person.” T2018-2223 (N.Y.C. 2019). Because the instant gang policing regime has been characterized by mass indictments, which have included in their sweep individuals guilty of no or low-level crimes, *see supra* at 2, the reach of the “active criminal investigation” exception may swallow the rule. This risk is especially substantial given that the NYPD has complete discretion to make this determination and is not required to base its determination on credible and articulable facts.

In addition, even if a minor and her family or attorney is notified of her inclusion in the database and the basis for that inclusion, the proposed bill places the burden on the minor child and her family to contest the designation. Not only does this framework rear the presumption of innocence over guilt on its head, it also requires minors and their families to overcome an asymmetry of information and contest an inherently overbroad, vague, and subjective set of criteria for admission in the database. Moreover, the proposed legislation offers no process for—or even a right to—an appeal, thereby creating substantial risk of delay and obfuscation.

IV. The Proposed Public Reporting of Gang Database Information Is Essential But Must Be Expanded.

In light of grave concerns regarding the database, LDF and CCR served the NYPD with two FOIL Requests seeking records concerning the NYPD’s gang policing tactics in December 2017 and February 2018. The Requests sought information about whether and how the NYPD protects New Yorkers from arbitrary designation as gang members. The NYPD responded to the Requests and provided *some* minimally responsive information but refused to disclose the vast majority of the requested records. We successfully received the requested information in October 2018, eight to ten months later and only after filing suit over the NYPD’s unfounded refusal.

For this reason, although subsection (d) of the proposed bill is only a small first step toward transparency and accountability, we do not oppose that subsection’s requirement to report certain gang database metrics to the City Council and to report the information on an annual basis on the NYPD website. But, so long as the NYPD continues to employ the gang database, the City Council should expand upon this section and require full transparency and disclosure of information along additional demographic, geographic, and other lines regarding the NYPD’s secretive database.

V. Conclusion

The NYPD’s gang policing strategy—like its unconstitutional stop-and-frisk and trespass enforcement policies and practices—unduly exposes a disproportionate number of people of color to a host of injustices in our criminal justice system. Individuals who are wrongly presumed to be gang members face heightened police surveillance; elevated aggression during police encounters; enhanced bail recommendations; elevated charges; and, for some, loss of housing and the threat of

deportation.¹⁴ These concerns, and the stories you have heard and will continue to hear today, are familiar to communities of colors throughout the City. Decades of ineffective and unconstitutional stop-and-frisk enforcement have become the NYPD's policing legacy. We must not allow history to repeat itself by solidifying a stop-and-frisk 2.0.

We welcome the opportunity to meet with City Councilmembers to discuss this topic in greater depth, but meaningful reform requires, in the first instance, full transparency from the NYPD. Today, we ask that the New York City Council:

- Create a process to amplify the voices of, and solicit input from, affected community members to gain a greater understanding of the issues described today.
- Ensuring and urging the completion of a thorough, formal investigation by the Office of the Inspector General (OIG) for the NYPD into the NYPD's gang policing practices and hold forums on the OIG findings prior to introducing legislation.
- Consider eliminating the gang database as an imprecise method of policing that harms communities of color, or engaging in discussions with LDF, CCR, The Bronx Defenders, other advocates, and community members for remedying the constitutional harms inherent in the database.

¹⁴ See, e.g., Hannah Dreier, *He Drew His School Mascot – and ICE Labeled Him a Gang Member*, PROPUBLICA (Dec. 27, 2018), <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/>; Jacqueline Serrato, *Chicago Police Admits Gang Database Error that Enabled ICE Raid*, CHI. TRIB. (Dec. 6, 2017, 1:31 PM), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html>; Sean Garcia-Leys, Meigan Thompson, & Christyn Richardson, *Mislabeled: Allegation of Gang Membership and Their Immigration Consequences*, UCI SCH. OF L. IMMIGR. RTS. CLINIC (Apr. 2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf>

Exhibit A



PATROL GUIDE

Section: Command Operations		Procedure No: 212-13	
REPORTING GANG-RELATED CRIMINAL ACTIVITY			
DATE ISSUED: 03/18/19	DATE EFFECTIVE: 03/18/19	REVISION NUMBER:	PAGE: 1 of 4

PURPOSE To establish and define the procedures required of uniformed members of the service for reporting gang-related/motivated criminal activity of suspected gangs or gang members.

DEFINITIONS For the purpose of this procedure, the term "gang" and "crew" are interchangeable and the same protocol will be followed for gang and/or crew members using the following definitions:

GANG - Any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities, the commission of one or more criminal acts (including drug dealing), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

GANG-MOTIVATED INCIDENT - Any gang-related incident that is done primarily:

- a. To benefit or further the interests of the gang, or
- b. As part of an initiation, membership rite, or act of allegiance to or support for a gang, or
- c. As a result of a conflict or fight between gang members of the same or different gangs.

GANG-RELATED INCIDENT - Any incident of unlawful conduct by a gang member or suspected gang member. All gang-motivated incidents are, by definition, also gang-related incidents.

GANG-RELATED INTELLIGENCE - Information about a gang, suspected gang, an individual gang, or suspected gang member. This includes information about gang meetings, recruiting attempts by gangs, plans by persons affiliated with a gang to organize or take part in public events, "community" events (as defined by a gang), intelligence obtained from social media networks, as well as any information useful in developing profiles and intelligence about gang activities.

PROCEDURE Upon becoming aware of gang-related intelligence, learning of a possible gang-related or gang-motivated incident, or upon making an arrest of a suspected or identified gang member for any offense:

UNIFORMED MEMBER OF THE SERVICE

1. Take immediate action as necessary.
2. Notify the patrol supervisor.
3. Enter information in **ACTIVITY LOG (PD112-145)**, if appropriate.
4. Contact the Detective Borough Wheel concerned immediately, 24 hours/7 days a week.
 - a. Provide all pertinent information to Detective Borough Wheel member accepting the report.



Testimony of

The Legal Aid Society

Before the Committee on Public Safety- In relation to providing notice to minors

included in the criminal group database.

June 27, 2019

Presented by:

Victor Dempsey .

Community Organizer, Community Justice Unit

Criminal Defense Practice

Prepared with the Criminal Defense Practice

Special Litigation Unit

The Legal Aid Society submits this testimony to the Committee on Public Safety to share our perspectives on why the proposed law to amend the administrative code of the city of New York, in relation to providing notice to minors included in the criminal groups database, is insufficient to address the broader problems of having a database and being labeled gang-involved. We thank Chair Richards for the opportunity to address this important topic.

The NYPD Gang Database is an Over-inclusive and Inaccurate Tool of Law Enforcement that Disproportionately Targets Black and Brown Youth.

The Legal Aid Society's Community Justice Unit (CJU) works in all five boroughs providing legal services to New York City's Cure Violence program in all of the most over-policed neighborhoods across the city. Our pro-active presence in the community gives us a unique opportunity to know what is happening on the ground before somebody is arrested and dealing with a legal emergency. This also allows us to speak with youth and community members whose neighborhoods have been subjected to NYPD gang takedowns. Since the announcement of the NYPD's "Operation Crew Cut"¹ in 2012, there has been an increase in gang takedowns across New York City that involve arresting large groups of people who are charged with conspiracy crimes.² Operation Crew Cut made it explicit for detectives to maintain surveillance over the social media platforms of the people that they have suspected of being gang-involved. Under Operation Crew Cut, the number of people in the gang database climbed to 42,334 as of February 2018.³

¹ Howell, K. Babe, "Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing" (2015). *CUNY Academic Works*. http://academicworks.cuny.edu/cl_pubs/65

² Id.

³ Alice Speri, The Intercept, *New York Gang Database Expanded by 70 Percent Under Mayor Bill De Blasio*, available at, <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>

The Current NYPD Criteria for Inclusion in the Database is Vague, Arbitrary and Over-Inclusive

The NYPD gang database labels people as gang involved by relying on overly broad criteria that disproportionately targets Black and Brown youth. Details about the NYPD gang database came to light last year during a public hearing by the New York City Council Committee on Public Safety. At that hearing, Chief Shea of the NYPD testified about the criteria and techniques the NYPD uses to designate individuals as gang members for inclusion in the gang database. Chief Shea said that there are two ways that people will be entered in the gang database.⁴ The first way occurs if an individual “admits” to membership in a gang, including on social media platforms where the person has photographs, colors or language and symbols frequently used by a criminal group. The second path involves meeting at least two of the following broad criteria: (1) frequent presence at a “known gang location,” (2) possession of “gang-related documents,” (3) association with “known gang members,” (4) social media posts with “known gang members while possessing known gang paraphernalia,” (5) “scars and tattoos” associated with a particular gang, or (6) frequent “wearing of colors” and “use of hand signs” associated with a particular gang. As a result, a teenager who lives in public housing and copies his peers by showing hand signs in a Facebook photo, with no connection to any criminal activity, can be included in the database for life with no due process protections.

The NYPD Gang Database Does Not Have Any Constitutional Safeguards

Once an individual is included in the Gang Database, there are no procedures in place to safeguard even their most basic due process rights. Individuals do not receive notification when

⁴Shea, Chief Dermot. “Statement of Chief Dermot Shea on NYPD’s Gang Enforcement Strategies.” Testimony, The New York City Council Committee on Public Safety, New York, NY, June 13, 2018.

they are added to the Gang Database, and there is no formal process to challenge the designation or request removal from the list. At the same time, the individuals listed in the Gang Database face severe collateral consequences, including: heightened police surveillance, enhanced criminal charges and bail recommendations, heftier sentences, housing eviction, and/or the risk of deportation.

Surveillance and criminalization of youth and social media realities.

The reality is that most of us are using social media in some way or another. For many young people, the online world and the offline worlds are no longer separate worlds. In the present system, there is too much bias in the interpretation of relationships and statuses that will land youth in the gang database. This mass criminalization, based on social media behavior, occurs in a context for young people where being known and connected is an important part of their lives. Youth are also not aware of all the consequences associated with digital usage and how this is used as evidence against them. Once a person is labeled as gang involved, harsher consequences result, as they will face higher scrutiny from the police, higher bail, loss of employment, loss of housing and/or the risk of deportation.

No transparency on the technology of NYPD policing methods used for surveillance.

There are currently no transparency policies that would provide transparency and inform the public about the technology that the NYPD uses to keep surveillance over people. Additionally, we do not have any legislative oversight on the surveillance that is used by the NYPD. Currently, other agencies are also using social media of youth without any regulations on how that is being negatively used against them.

The Legal Aid Society's Do It Yourself Freedom of Information Law (FOIL) Initiative

In the Community Justice Unit, we have launched the Do It Yourself FOIL initiative to assist community members with finding out if they have been included in the NYPD gang database. We did this to empower people and give them a way to have some transparency around their inclusion in the database. After helping out over 350 people submit FOIL requests and conducting workshops across New York City, we have gained some important insights. To begin with, the vast majority of New Yorkers do not know that there is an NYPD gang database, that the police are surveilling their social media, and that they can be included without any requirement of wrong doing or criminality. More importantly, we are convinced that the FOIL process is an inadequate and cumbersome way for people to find out if they have been included in the database. All of the 350 plus requests we have filed have been outright denied by the NYPD . In that denial, the NYPD cites a boilerplate FOIL exemption that says that the records will not be disclosed because they reveal “non-routine investigative techniques.”⁵ We also get a similar non-response in our appeal determinations. ⁶ The Council should understand how the proposed bill would continue these similar problems for minors that are contesting their inclusion. Thus, a notice requirement will be ineffective in addressing the problem of leaving too much discretion in the hands of the police. Under current law, when given discretion, the NYPD denies everyone access to this information.

In addition, the notice requirement should cover everyone and not just minors. Everyone who is in the Gang Database should be able to receive a notice and be given the opportunity to challenge an improper designation. The consequences of a mistaken listing are

⁵ N.Y. Public Officers Law § 87(2)(e)(iv), <https://www.dos.ny.gov/coog/foil2.html#s87>

⁶ Exhibit I.

too serious to allow this secret process to continue for those who are just over the age of majority.

Litigation against the NYPD for failure to disclose gang-database records.

Our recent litigation against the NYPD, based on our DIY FOIL campaign, revealed documents that list when a person will be deactivated from the gang database. Based on those documents, the following are reasons why a person will be deactivated:

- Criminal group member is deceased (unless such information is needed for investigatory purposes or sensitive information)
- No police contact or arrests for three years
- Deemed by Boro Gang Squads or Field Intelligence officers that said individual is no longer a member of a Criminal Group
- Each individual as per ECMS has an automated evaluation on their 18th, 23rd and 28th birthday where they will either continue in their criminal group or be deactivated based on criteria
- An individual who is currently in custody in city, state or federal detention will not be stricken from a criminal group.⁷

The above reasons for deactivation of a person from the gang database make it so that people will remain there for things that are not related to gang-related crime or associations. For example, if somebody is listed on the database and is re-arrested within those three years, then the person will not qualify to be deactivated, even if that arrest had nothing to do with a gang. This is too broad and it shows why any regulation and oversight of the gang database

⁷ Exhibit II.

should include everyone and not just minors and it should also trigger an automatic process with an accompanying hearing.

The New York City Council's Proposed Int. in relation to amending the administrative code of the city of New York, in relation to providing notice to minors included in the criminal groups database.

We have serious concerns about this bill proposed by The New York City Council because it will only help a small segment of the people impacted by the gang label. The proposed bill is insufficient to address the broader collateral consequences of being labeled a gang member. We would additionally suggest that the City Council call on the NYPD to actually abolish the gang database.

The below are reasons that the bill is insufficient to protect against the gang-label:

The criteria to keep someone on the database is broad and ensures that people of color will be targeted. In section "b" of the bill, minors under the age of 18 would receive notice of being entered into the database unless the notice would compromise an ongoing criminal investigation or risk the safety of the minor or another person. Under the provision, the discretion is with the police to decide whether any notice is given at all and determine the length of the ongoing criminal investigation. Additionally, the notice requirement should automatically trigger a process for removal because in the current format the minor has to petition for this.

In section "c," the person receiving the notice must commence the process of removal. This should be an automatic process and not one that shifts the burden to the minor.

Moreover, after the NYPD determines whether to remove the person or not, there is no process for an appeal of that denial decision. A hearing would provide a better opportunity to find out what information was used to classify the person as gang-involved because as described above the NYPD will have too much discretion to deny the request and leave the petitioner in the same predicament.

In the definition of terms of this bill, the term “gang” is taken directly from the NYPD patrol guide, which is problematic because it is a broad definition that can later be referred to when prosecuting someone as gang-involved.⁸

This notice requirement only covers minors who are under 18 and not anyone else. As per a FOIL request from Professor Babe Howell from 2018, 92% of the gang database is over 18 years old and 99% is people of color. Given what we know about the loose standards for entry into the database, everyone should be able to challenge an improper designation.

Therefore, this bill is too limited in its scope and it should include notice to everyone. The reasons to keep someone activated in the database are so broad that people can remain there for life regardless of their associations or involvement with gangs. The bill leaves too much discretion in the hands of the police and the process to challenge inclusion of minors should not put the onus on the minor. Lastly, New York City should follow the example of places like Chicago and Portland that have moved to abolish their gang databases after they learned that their gang databases were filled with inconsistencies, racial disparities, and mistakes.⁹

⁸ NYPD Patrol Guide, Section 212-13, 2019.

⁹ City of Chicago Office of Inspector General, *Review of The Chicago Police Department's "Gang Database"*, (“More specifically, CPD’s gang information contains incomplete and contradictory data. OIG’s analysis of data from CPD’s Gang Arrest Cards found numerous instances in which individuals are listed with blank or conflicting Identification Record numbers, birthdates, and other classifications.”) available at, <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf>

The Legal Aid Society

The Legal Aid Society is the nation's oldest and largest not-for-profit legal services organization. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's law reform/social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 1,900, including more than 1,100 lawyers working with over 700 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. The Legal Aid Society operates three major practices — Criminal, Civil and Juvenile Rights. The Society's Pro Bono program coordinates volunteer help from law firms, corporate law departments and expert consultants.

The Society's Criminal Defense Practice is the primary public defender in the City of New York. During the last year, our Criminal Defense Practice represented over 230,000 indigent New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice the Society represents people accused of crimes from their initial arrest through the post-conviction process. Many thousands of our clients with criminal cases in Criminal Court and Supreme Court are teenagers who are treated as if they are adults. The Criminal Defense Practice has a specialized unit of lawyers

and social workers dedicated to representing many of our youngest clients prosecuted in the criminal system.

The Society's Community Justice Unit provides legal services and advice in specific catchment areas in each of the five boroughs providing anti-violence services through the Council-funded CureViolence model. This public health model, originated as CeaseFire in Chicago, responds to gun violence with services in the community including mediation, social services, violence interrupters, and education. The model works on the theory that conflicts addressed by credible messengers from the community prevents further violence.

Exhibit I



POLICE DEPARTMENT
LEGAL BUREAU
F.O.I.L Unit, Room 110C
One Police Plaza
New York, NY 10038

Marvin Posada
199 Water Street
6 Floor
New York, NY, 10038

November 9, 2018

FOIL Request #: FOIL-2018-056-11611
Your File # [REDACTED]

Dear Sir or Madam:

This is in response to your request received by this office on November 7, 2018 in which you requested access to certain records under the New York State Freedom of Information Law (FOIL).

In regard to the documents(s) which you requested, I must deny access to these records on the basis of Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures.

You may appeal this decision or any portion thereof. Such an appeal must be made in writing within thirty (30) days of the date of this letter and must be forwarded to: Sergeant Jordan S. Mazur, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, NY 10038 or emailed to foilappeals@nypd.org. Please include copies of the FOIL request and this letter with your appeal.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard Mantellino".

Richard Mantellino
Lieutenant

New York City Police Department (NYPD)



POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038
FOILAppeals@NYPD.org

June 29, 2018

Anthony Posada
The Legal Aid Society
199 Water Street
New York, New York 10038

RE: FREEDOM OF INFORMATION LAW
REQUEST: FOIL-2018-056-03028
Re: [REDACTED]

Dear Mr. Posada:

This letter is in response to your letter dated June 26, 2018 appealing the determination of the Records Access Officer made on June 19, 2018 regarding records requested from the New York City Police Department. Your request, made pursuant to the Freedom of Information Law, was originally received by the FOIL unit on June 15, 2018 and subsequently denied pursuant to Public Officers Law Section 87(2)(e)(iv).

Your appeal on behalf of [REDACTED] requests that the undersigned "reply to [your] original request" which is for "all records relating to myself that were used, stored, shared and maintained to classify me as a gang member or associate in the gang membership database." Included with your appeal is a notice of appearance confirming the representation of [REDACTED] by the Legal Aid Society.

In addition, your appeal provides identifying information for [REDACTED] including his date of birth and home address. Accordingly, a diligent search was conducted for records responsive to your request, however, [REDACTED] is not documented in the database as of this writing. Therefore, there are no records responsive to your request as there are no existing records related to [REDACTED] that were ever used, stored, shared and maintained to classify him/her as a gang member or associate in the gang membership database.

Furthermore, were [REDACTED] ever listed in the database at any time, the criteria for his/her inclusion would not have – and does not currently – include the review, analysis or use of any Department records related to the individual; rather, the criteria for activation onto a group list is based on a variety of investigative methods, the disclosure of which would reveal non-routine criminal investigative techniques or procedures [§87(2)(e)(iv)]. For further information regarding the criteria for inclusion in the database, please refer to enclosed transcript of the public testimony provided to the City Council by Chief Dermot Shea on June 13, 2018.

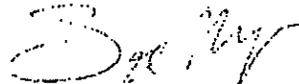
COURTESY • PROFESSIONALISM • RESPECT

Regarding the above point, to the extent that you include the I.D.S. Gang Entry Sheet as evidence of the fact that Department records are, in fact, used to classify individuals as "gang members", some clarification is required. First, the form is not currently used and has not been used for several years. Nonetheless, to the extent that the form was used, such use was strictly for administrative purposes (i.e., for recording the results of an investigation which ultimately determined that a person was to be entered into the database and subsequently transferring the information from the hard copy into the database) and not as a means of actually "classifying" a person as a gang member or associate in the gang membership database. As you can see in the section of the form titled "Criteria", any classification of an individual as a "gang member" is/was based upon either self-admission, reasonable belief of membership plus identification by two independent sources, or any two of the mentioned criteria. The classification was not, and is not currently, based on any records related to the individual but based on an investigation that revealed the existence of the applicable criteria for inclusion.

Accordingly, because [REDACTED] is not listed in the Criminal Group Database, and because even if he/she was, it would not be as a result of any Department records related to him/her, there are no records maintained by this Department that are responsive to your request.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Sincerely,



Jordan S. Mazur
Sergeant

Records Access Appeals Officer

c: Committee on Open Government

Exhibit II

CRITERIA FOR ADMISSION INTO CRIMINAL GROUP

The following criteria is mandatory for admission into a Criminal Group:

Option A (only need one)

- Voluntary admission
- Posts on their own social media website indicating membership such as photographs, colors or language and symbols frequently used by a criminal group

Or

- Through the course of an investigation an individual is reasonably believed to belong to a criminal group and is identified as such by two independent sources.

Option B (must have at least two)

- Known group location
- Gang related documents
- Association with known group members
- Social media sites associated with a criminal group including pictures
- Scars / Tattoos associated with a group
- Colors
- Hand signs

DEACTIVATIONS OF CRIMINAL GROUP MEMBERS

Criminal group member is deceased (*unless such information is needed for investigatory purposes or sensitive information*)

No police contact or arrests for 3 years

Deemed by Boro Gang Squads or Field intelligence officers that said individual is no longer a member of a Criminal Group

Each individual as per ECMS has an automated evaluation on their 18th, 23rd and 28th birthday where they will either continue in their criminal group or be deactivated based on criteria

An individual who is currently in custody in city, state or federal detention will not be stricken from a criminal group.



Report on the Bronx 120 Mass “Gang” Prosecution



**Babe Howell and
Priscilla Bustamante**

APRIL 2019

www.bronx120.report

ABOUT THE AUTHORS

Babe Howell is a Professor at CUNY School of Law.

Priscilla Bustamante is in the process of obtaining a PhD in Critical Social Psychology at the Graduate Center at CUNY.

Both authors focus on the impact of policing on communities.

ACKNOWLEDGMENTS

This report was written and researched with support from Vital Projects at Proteus. The authors thank Annemarie Caruso, Fred Magovern, Julia Perez Rosales, Jenny Roberts, and Naree Sinthusek for their feedback on drafts of this report. We thank the attorneys who took the time to answer questions relating to the federal process. The authors would also like to thank family and community members affected by various mass indictments for inspiring this work and Alex Vitale for proposing the project. Fred Magovern provided critical technical assistance to organize data for this report and for the website. Special thanks to Paul Gagner for his patient and meticulous design work. Any errors in the reproduction or interpretation of the data are the responsibility of the authors.

SEE MORE ONLINE

An interactive data set is available online along with this report at:

www.bronx120.report

TABLE OF CONTENTS

Summary	2
Introduction	4
Methodology and Limitations	6
Conspiracy: A Brief Introduction	7
The Defendants: Who are the 120?	9
GANG MEMBERSHIP	9
RACKETEERING ENTERPRISE AFFECTING INTERSTATE COMMERCE, OR INDIGENT DEFENDANTS?	10
CRIMINAL HISTORY	11
RACE	13
AGE.	14
The Charges: What are the 120 accused of doing?	15
THE ORIGINAL CHARGES: RICO, NARCOTICS, FIREARMS BUT NOT MURDER, NOT ASSAULT, NOT ROBBERY, NOT VIOLENCE	15
115 of 120 DISPOSITION CHARGES: RICO, NARCOTICS, POSSESSION OF FIREARM	16
PREDICATE ACTS FOR RICO AND DRUG CONSPIRACY CHARGES	16
THE MURDERS.	17
CONCLUSION RELATING TO OVERBREADTH OF THE BRONX 120 INDICTMENTS	17
The Outcomes: What happened to the 120?	18
SENTENCES	18
FELONIES VERSUS MISDEMEANORS	19
REPEAT PROSECUTION FOR PAST CONDUCT.	19
THE TRIALS	21
The Process: What process characterizes mass gang indictments?	23
THE RAIDS.	23
PRE-TRIAL DETENTION, BAIL, AND “RELEASE” IN GANG CASES	23
INDICTMENT SPECIFICITY	26
SOCIAL MEDIA	27
SPEEDY TRIAL WAIVERS, DISCOVERY AND PROTECTIVE ORDERS	27
Conclusion	29
Recommendations	30

SUMMARY

In recent years, takedowns of gangs and crews in New York City have led to mass prosecutions of multiple defendants for conspiracy and RICO (Racketeering Influenced Corrupt Organization Act)¹ conspiracy charges. While the takedowns are generally accompanied by intensive media coverage, information about the charges, process, and allegations against individuals caught up in these takedowns is not readily accessible.

This report looks into the largest of the mass gang prosecutions, the takedown of the Bronx 120 in April of 2016. This prosecution was brought by the United States Attorney's Office for the Southern District of New York when the office was headed by Preet Bharara.

The report seeks to answer two central questions and proposes additional research relating to a third question.

First, were those swept up in the Bronx 120 takedown “the worst of the worst” or was the indictment overbroad?

Second, was the process afforded each defendant charged in the Bronx 120 takedown consistent with the fundamental principles of our criminal justice system?

Third, are there concerns about the use of gang RICO and conspiracy indictments that merit further research?

The conclusions of this report are as follows:

The Bronx 120 mass indictments are clearly overbroad.²

- 35 defendants were convicted of RICO or narcotics conspiracy based on marijuana sales
- Short sentences suggest that over a third of defendants were not considered serious offenders
 - 22 of the defendants received time served (excluding cooperators)
 - 3 defendants received nolle prosequis (declined prosecutions)
 - 18 of the defendants were sentenced to terms of less than 2 years
- 50 - 60 defendants were not alleged to be gang members
- 80 defendants were not convicted of violence
- Only 40 of the defendants appear to have prior felony convictions
- Nearly half of the defendants had previously been prosecuted for the same conduct that formed the basis for their inclusion in the mass indictments

Fair process is not afforded in these mass indictments.

- Nearly all defendants are held without bail or subjected to house arrest
- Indictments do not specify the alleged conduct, so defendants and defense counsel cannot effectively advocate for release or prepare for trial
- Individuals are prosecuted a second time for conduct that has been subject to prior adjudication in state courts
- Mass indictments fail to safeguard the public's interest in transparency and speedy trials

The Bronx 120 mass indictments suggest that additional research is needed to answer the following questions:

- Why are individuals who are not gang members included in gang prosecutions?
- Why are individuals who have not engaged in violence included in gang prosecutions?
- What criteria are gang units and prosecutors using to build these cases?
- Do these mass indictments produce wrongful convictions by way of either pleas or trials?
- What alternatives to building large cases against underprivileged youth of color are available?

INTRODUCTION

The Bronx 120 Raid

In the pre-dawn hours of April 27, 2016, nearly 700 officers in riot gear descended upon Eastchester Gardens and the adjoining neighborhood along White Plains Road in the Bronx. The officers were from the NYPD, ATF, DEA, and Homeland Security. Helicopters hovered overhead as armed SWAT teams used battering rams to execute no-knock warrants. They were arresting defendants charged in twin conspiracy indictments. The defendants and the raid have come to be known as the Bronx 120 for the 120 defendants named in the indictments. Preet Bharara, then-United States Attorney for the Southern District of New York, announced that the raid was believed to be the “largest gang takedown in New York City history.”³

The Context: Increasing Use of Mass Gang Indictments

While the Bronx 120 was the largest “gang takedown” in New York City history, it was just one of many gang conspiracy cases resulting from collaboration between the NYPD and local and federal prosecutors in New York City. In the past several years, prosecutors in New York City have collaborated with law enforcement to obtain mass gang indictments based on conspiracy charges.⁴ In particular, the New York County District Attorney’s Office under Cyrus Vance Jr. and the Southern District of New York’s United States Attorney under Preet Bharara and his successors have pursued these indictments.⁵ Like the federal indictments state “gang takedowns” culminate in pre-dawn raids accompanied by significant media coverage. After the helicopters, SWAT teams, TV cameras, and press disperse, headlines accompanied by photos of black and brown men in handcuffs announce that a local crew or gang is responsible for terrorizing a New York City neighborhood and has been rounded up for prosecution. After the initial spate of news coverage, information about the outcomes or processing of these mass indictments is not easily accessible.

Both the NYPD and prosecutors have characterized gang conspiracy cases as targeting “the worst of the worst.” As the January 2016 Police Commissioner’s Report states:

“We decided to go after the worst of the worst,” Deputy Chief Catalina [commander of the NYPD Gang Division] said. “To use the intelligence we have gathered to figure out who they are and how to target them.”

As gang members and perpetrators have grown younger and younger, fewer of them are involved in drug trafficking, which had been the traditional avenue to arresting violent gang members. Now the gang division builds violence conspiracy cases, finding the evidence from social media, jailhouse calls, confidential informants, and other sources to lay out the pattern of past violent acts and tie the pattern to multiple gang members.

“The violence conspiracy case has been a game changer,” Deputy Chief Catalina said.⁶

Or as a Chief Assistant District Attorney in the Manhattan DA's office put it:

“When we first start, a crew might have hundreds of people in it. We then start to narrow, and we focus, like a laser, the worst of the worst,” says Chief Assistant District Attorney Karen Friedman Agnifilo. “We are very careful to make sure that we have evidence that we can prove at trial, that these weren't just kids who like to hang out with the gang [but] members who are really a part of the violence.”⁷

The Inquiry

While prosecutors and police claim these raids target violent crew members, an examination of the charges, procedures, and factual basis for these assertions is warranted for several reasons. First, are those swept up in these mass takedowns truly “the worst of the worst” or are the takedowns overbroad? Second, even for those alleged to have engaged in the most serious offenses, is the process afforded each defendant charged by way of mass indictment consistent with the fundamental principles of our criminal justice system? Finally, are there concerns about the use of gang RICO and conspiracy indictments that merit further research?

METHODOLOGY AND LIMITATIONS

To begin to answer some of these questions, this report relies on the available public court records from the mass indictments. The Bronx 120 Raid has been prosecuted by the United States Attorney of the Southern District of New York in federal court. The raid resulted in two mass indictments of 120 defendants – *United States v. Burrell*⁸ and *United States v. Parrish*.⁹

The publicly available information relating to these indictments include the indictments themselves, docket entries, orders, transcripts, memos, judgments, and other documents relating to these cases.

There are certainly limitations related to this methodology. First, the federal records provide relatively rich but variable level of detail regarding the conduct, background, and criminal history of the defendants. The probation report, which contains full criminal history and criminal conduct information, is a sealed document, but often defense and prosecution sentencing memos provide substantial information regarding alleged conduct. Additionally, federal prosecutors sought and obtained protective orders that prevent defendants and their attorneys from sharing the discovery materials (evidence and witness statements) related to these charges. Finally, the Executive Office of the United States Attorneys issued a “full denial based on exemptions” of Professor Howell’s Freedom of Information Act (FOIA) request for the racial breakdown of the Bronx 120 defendants and information about evidence seized in connection with the raids in October 2018.¹⁰

Nonetheless, information related to bail conditions, appointment of counsel, pleas, trials, and sentences are available for nearly all federal defendants. The transcripts and submissions relating to these cases provide a rich basis to begin the analysis of these takedowns. As of April 1, 2019, 116 of the original 120 cases had concluded. Analysis of the public records for these completed prosecutions provides a reasonable basis to reach preliminary conclusions to the questions posed by this report.

CONSPIRACY: A BRIEF INTRODUCTION

In federal and state “mass takedown” indictments, defendants generally face conspiracy charges, whether ordinary or RICO conspiracy. While a full explanation of conspiracy law is well beyond the scope of this report, this overview provides readers with a brief introduction to the aspects of conspiracy doctrine that make it such a powerful tool for the prosecution. Conspiracy has famously been dubbed “the darling of the modern prosecutor’s nursery.”¹¹

As a substantive matter, proof of conspiracy does not require proof that a person committed a particular target crime, was present at the time of the crime, or even knew of the crime. Instead, to prove conspiracy, the prosecution need only prove the existence of an “agreement to commit a target crime,” and that some party to the agreement committed an overt act in furtherance of the agreement.¹² The agreement need not be explicit, but can be inferred from conduct or circumstantial evidence.¹³ Thus, although in theory the prosecution must prove beyond a reasonable doubt an “agreement to commit a crime,” they need not prove that crimes were ever discussed, planned, or specifically agreed to, instead, they can point to commission of crimes as proof of agreement.¹⁴

For prosecutors the procedural and evidentiary advantages of conspiracy charges are particularly significant with regard to proof of prior crimes. In a typical case where an individual is charged with a crime, the rules of evidence preclude introduction of many prior convictions, crimes, or bad acts, unless they relate to credibility. For example, if a defendant is charged with robbing a person at a particular time and place, proof that he robbed someone else or sold marijuana previously is likely to be excluded as highly prejudicial. The question is whether the prosecution can prove beyond a reasonable doubt that at the specific time, date, and place alleged, the defendant robbed the specific victim. If video, forensics, eyewitness testimony, physical evidence, or confessions related to the specific crime are insufficient to prove the specific charges beyond a reasonable doubt, then the accused should be acquitted. Additionally, proof of the crimes of other individuals would be excluded as irrelevant.

In contrast, if a defendant is accused of a conspiracy to commit robbery, evidence of every robbery any member of the group has ever committed, as well as knowledge that the group committed other crimes, can be admitted at trial to support the inference that joining or associating with the group shows the agreement and the intent to agree to commit robbery. Showing that a defendant was nowhere near the scene of the actual robbery would be no defense. Further, proof that the defendant robbed someone else several years prior would be relevant and admissible to show that the defendant would be willing to join in a conspiracy agreement to commit robbery.

Although conspiracy charges do not require proof that any crime has been committed, prosecutors generally submit evidence of completed crimes for each defendant to prove conspiracy charges. The danger in these mass indictment cases is that procedural and evidentiary rules allow proof of wide-ranging criminal conduct over long periods of time, even when a previous prosecution would normally preclude retrial on the crimes.¹⁵ The single defendant is faced with the prospect of defending against allegations relating to all the crimes committed by the defendant himself as well as dozens of co-conspirators over a span of years.

Moreover, because conspiracy or RICO conspiracy charges have elements that are different from the target crime, double jeopardy does not preclude trial for a conspiracy to commit an offense to which an individual has already pleaded guilty (or for that matter been acquitted or granted some form of

leniency).¹⁶ Many of the defendants in the federal mass gang prosecutions face conspiracy charges relating to conduct for which they have already pleaded guilty and served time, or even for cases that were resolved without criminal convictions.

Finally, because the statute of limitations does not begin to run until a conspiracy ends, conduct that would be well beyond the statute of limitations in a non-conspiracy case can still be admissible as both evidence of the conspiracy and as evidence of substantive offenses in the scope of the conspiracy.¹⁷

The evidentiary rules also permit statements of any co-conspirator made in furtherance of the conspiracy to be offered for the truth of the matter asserted, an exception to the usual rules regarding hearsay. In a world of social media posting, Facebook braggadocio, Instagram likes, Snapchat stories, and YouTube videos all provide fodder that allows statements of alleged “co-conspirators” to be used without the benefit of cross-examination. When groups of youths are charged, the volume of social media discovery can easily overwhelm appointed counsel.

As Supreme Court Justice Jackson explained in 1949, the challenges for the individual defendant facing conspiracy charges in a mass indictment are daunting:

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the midst of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.¹⁸

Judge Jackson explains that “the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes serious threat to fairness in our administration of justice.”¹⁹

Despite warnings relating to the potential for abuse and unfairness of conspiracy charges, their use has been tolerated and continues. Conspiracy charges have been used with increasing frequency in New York in “gang takedowns.”

THE DEFENDANTS: WHO ARE THE 120?

Turning to the Bronx 120, the first question that we sought to answer was: “Who were the defendants?” Were they the “worst of the worst”?

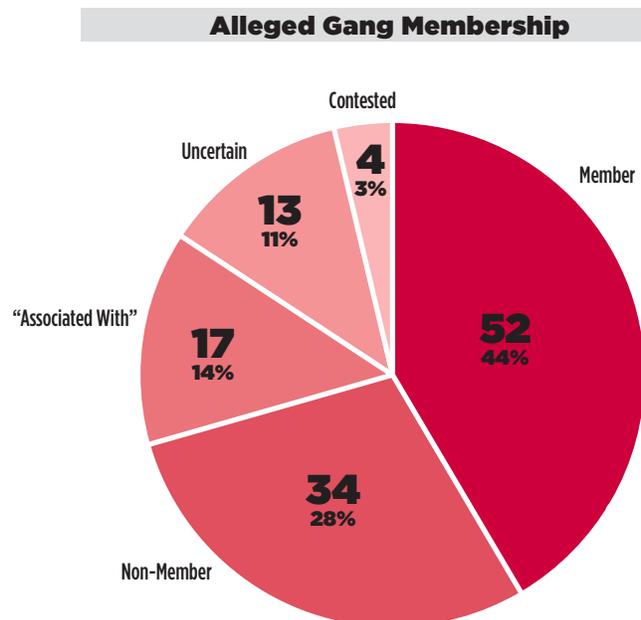
Were they members of a gang? Were they really masterminds of a criminal enterprise with an effect on interstate commerce?²⁰ What had they done in the past?

GANG MEMBERSHIP

One of the most startling revelations of the review of the Bronx 120 prosecutions is that half of those swept up in the largest gang raid in the history of New York were not affirmatively alleged to be members of either of the two rival gangs allegedly targeted by the mass indictments. The prosecutor’s sentencing submissions and statements affirmatively state that 34 of those subjected to the raid and arrested as part of the RICO case were not gang members. An additional 17 individuals are characterized as “associates of” or “associated with” the two rival gangs. In a government memo for the trial of C.A.,²¹ the prosecution makes clear that “associated with” does not mean “gang member.” The prosecution states that C.A. is “associated with” but “not a gang member.” Prosecutors also stated at his trial that he was not a gang member. Like many others, C.A.’s association was allegedly selling marijuana in gang territory with gang members’ permission. Thus, in addition to the 34 who are not members of the gangs, another 17 are “associated with” the gangs but not gang members.

Fewer than half of the individuals taken in the Bronx raids and prosecuted by way of mass indictments are affirmatively characterized as “members” of the two rival gangs that were the target of the takedowns. 4 of these defendants contested the gang membership allegation in their sentencing submissions or other statements to the court. 5 other defendants are alleged to be affiliated with other gangs that are not linked to the indictments.

For 13 of the defendants, there are no allegations one way or the other relating to gang membership and little in terms of a record. Many of these defendants received very short sentences early in the process. This treatment supports the conclusion that they were either non-gang members or gang members who had little to no involvement in violent conduct.



Thus, 51 of the defendants swept up in “the largest gang takedown in New York City history”²² were affirmatively not alleged to be gang members. For another 13 there is no clear allegation relating to gang membership. Their dispositions suggest they were not gang members. Fully half the defendants who were swept up in these raids were not alleged to be members of the gangs.

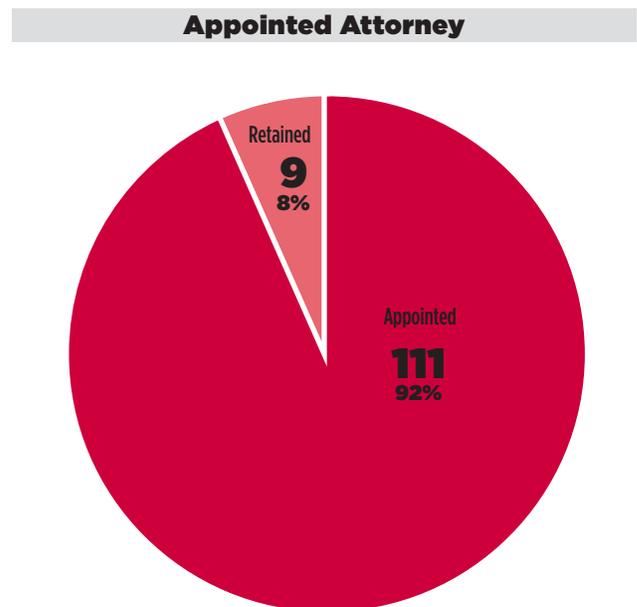
RACKETEERING ENTERPRISE AFFECTING INTERSTATE COMMERCE, OR INDIGENT DEFENDANTS?

RICO, The Racketeering Influenced Corrupt Organization Act,²³ was designed as a powerful tool to combat organized crime, particularly when such crime infiltrated the legitimate economy – extracting protection money from local businesses, corrupting unions and controlling jobs, and manipulating markets. Congress armed federal prosecutors with the RICO Act not to fight local street crime, but to root out wealthy, criminal enterprises that could hide criminality in legal enterprises or informal associations, retain the most sophisticated legal teams, and avoid prosecution using ill-gotten wealth.

In contrast to the well-resourced “criminal racketeering enterprise” that was the target of RICO as initially conceived, the 120 defendants named in the April 2016 indictment are nearly all indigent. All but three defendants were initially assigned counsel from the Criminal Justice Act Panel, which provides representation to individuals charged in federal court who cannot afford to pay a lawyer.²⁴ There is no record of any objection to the assignment of counsel to these defendants based on indigence. Eventually, only nine of the defendants were able to hire private counsel.

Of the Bronx 120 defendants, the vast majority grew up in the Bronx and were arrested in the Bronx, either in public housing or in the adjacent neighborhood. The sentencing memos that provide background for each defendant tell stories of deprivation, homelessness, families torn apart by immigration removals, incarceration, unmet health needs, and untreated trauma. They also tell stories of individuals who strive within these constraints to obtain employment and education, and often had employment prior to the April 2016 raid.

The appointment of counsel and the undisputed narratives of deprivation that characterize the defendants in the Bronx 120 demonstrate that RICO was used in this case not to target sophisticated white-collar criminals, corruption, or crime syndicates, but against vulnerable, marginalized, and under-resourced individuals.²⁵



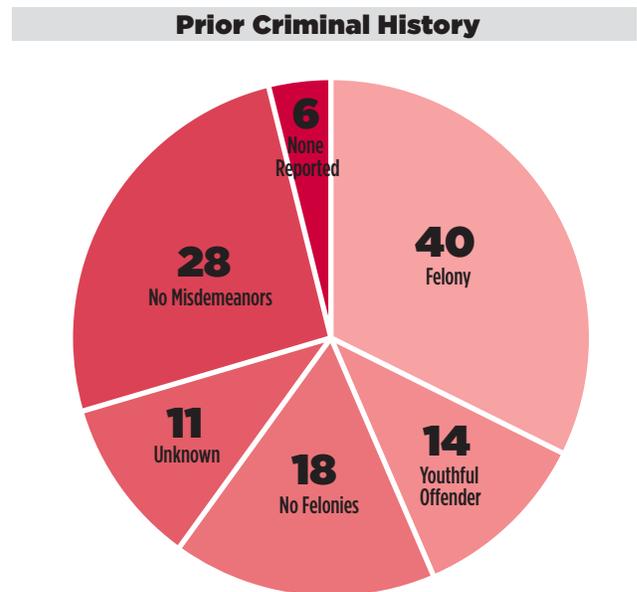
CRIMINAL HISTORY

One of the questions that inspired this project was whether these alleged gang members were, indeed, the “worst of the worst.” Bharara alleged that for nearly a decade prior to this mass indictment, rival gangs were wreaking untold havoc in the Bronx. New York City is heavily policed, and the era covered by the indictment included the peak of Stop-and-Frisk (with 685,000 reported stops in 2011).²⁶ “Broken Windows” policing²⁷ was also at its height. What were the records of the Bronx 120 defendants? Did their criminal histories earn them a place among the “worst of the worst”?

The publicly available records provide only a partial answer to this question. The probation department generates a Pre-Sentence Report (PSR) for each defendant and the PSR provides the full criminal history, or lack thereof, for each defendant. However, PSRs are sealed and not available to the public. Sentencing memos from the defense and prosecutors often include the criminal history. Defense memos may argue for a low sentence based on lack of criminal history. Government memos may concede a lack of criminal history, or make arguments based on arrests in the absence of convictions, which seems a tacit acknowledgment of the lack of actual criminal history. Where a criminal history exists, defense memos may provide context for prior convictions. Government memos may describe prior criminal history in connection with sentencing recommendations.

Review of the sentencing memos and other relevant statements relating to criminal history of the defendants provides information for 100 of the Bronx 120 defendants. Of these, only 40 had prior felony convictions. 12 had previous youthful offender adjudications²⁸ (about half involving violence and half non-violence) and 2 were previously adjudicated juvenile offenders.²⁹ 18 had misdemeanors only – no felonies. 28 had no record of any criminal convictions whatsoever (coded as “no misdemeanor”).

The 17 cases in which sentencing memos did not clearly state whether or not there was a prior criminal record, defendants fell into two categories. First, there were 8 individuals who received very short or “time served” sentences, or non-prosecution agreements. Short sentences seem to reflect agreement that these eight individuals had no significant criminal history. Second, 8 in this group received quite long sentences or faced mandatory minimums. In these cases, there was little discussion of criminal record because even a lack of criminal history was unlikely to make any difference given the mandatory minimums or serious charges involving murder. The defendants who fell into this category received sentences ranging from 60 to 327 months. Finally, the last of the 17 for which criminal history is unclear has yet to take a plea or submit a sentencing memo.



The cooperating witnesses are not included in the chart above. Based on testimony from the two cases that went to trial, most likely had prior criminal convictions.

One of the most troubling aspects illuminated by the competing submissions on prior criminal history and predicate acts was the use of conduct adjudicated in family courts or by youthful offender treatment. Youthful offender treatment is meant to provide young offenders a second chance. Even when prior misconduct was remote and defendants had seemed to turn their lives around after being provided that second chance in the state courts, their youthful conduct was the basis for new felony convictions and new punishment.

N.B.'s story: A Second Chance Denied

The judge looks down from her bench at the defendant standing before her. She sees trouble: a young man, a teenager who just turned 18, brought in for serious charges – two robberies. She also sees hope. The defense and the prosecution agree that this young man should be given a second chance. She has the discretion to provide Youthful Offender status to the eighteen-year-old, despite the severity of the charge.

This discretion is one thing that makes the judge's job so important, particularly in New York, where even 16 and 17-year-olds were then treated as adults. This discretion was even more important in the Bronx, where so many defendants, like N.B. standing before her, are born with two strikes against them.

If she gives him a second chance, if he rises to the challenge, together they could turn his life around. He will face consequences for his offenses, but also be rehabilitated and go forth as an adult with no criminal record. She has hope and she acts on it.

N.B. is given the chance to avoid prison by completing a demanding program offered by The Fortune Society, which meets five days a week and involves intensive counseling and education. The program is hard on him, he struggles, he messes up, but he keeps trying.

N.B. is nineteen, and thriving. Proud to have completed the Fortune Society program, he gets a job at Burger King, and plans on obtaining his GED. Life is full of promise. Then, one day, while he waits outside his childhood friend's home, an SUV with tinted windows pulls up. His friend steps outside, and N.B. watches as his friend is shot in the head and the SUV tears away. N.B. cradles his friend in his arms as the ambulance arrives. His friend dies moments later.

Traumatized by the loss of his friend, and terrified to leave his own home, N.B. loses his job. He cannot focus on getting his GED. He cannot bring himself to go outside. He suffers. Time goes by.

With the help and support of his mother and family, N.B. lands a job at a nursing center in Connecticut and then a job in Yonkers in rehabilitation. He wakes up every morning at five a.m. to travel a circuitous route to avoid neighborhood conflict. He is healing, striving to make a life for himself. He meets a

young woman, an aide at a group home for the developmentally disabled. They move in together. They start making plans for a family. N.B. is twenty-two.

On April 27, 2016, agents from the FBI knock on N.B.'s door and put him in handcuffs. His girlfriend thinks she is having a nightmare. N.B. is remanded to jail, charged with 119 others from his Bronx neighborhood. He cannot go home. He sits in jail, for a year and three months.

N.B. has not committed any new crimes; he's been out of trouble since the January 2011 robbery. The raid, and the federal prosecution of him, is based on conduct from before he turned his life around. There is no way to fight back. There can be no winning at trial, because he already pled guilty when he was eighteen.

He pleads guilty to the RICO charge based on the same two robberies for which the judge gave him a second chance five years before the raid.

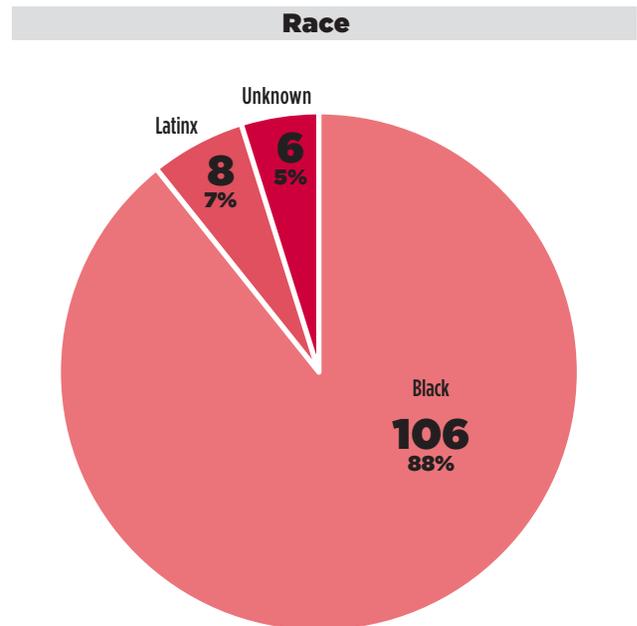
On July 11, 2017, a federal judge rejects N.B.'s lawyer's request for time served and sentences N.B. to 72 months in prison, saying that a gun was displayed in the 2010 robbery when N.B. was 17. N.B. is twenty-three. Years after he is given his second chance with the promise that he would enter adulthood without a criminal record, the federal prosecutor and judge imprison him for six years and give him a felony record for the conduct that was the basis of the Youthful Offender adjudication. The promises made to an eighteen-year-old, who showed that hope could win out, are ignored.

Although we did not have the benefit of probation reports or criminal history rap sheets for each defendant, it appears that about one-third of the defendants had a prior felony record.

RACE

Data regarding race of the defendants is not part of the official public record.³⁰ For those who are sentenced to federal custody, Bureau of Prison (BOP) prisoner lookup provides race information. However, the BOP lookup classifies individuals as either Black or White, and classified all those with Latinx surnames as white. In our observations of this case, we did not observe any white defendants.

Based on sentencing submissions (which often provided race information), observations, BOP lookup, and Latinx surnames, the below chart provides an initial assessment of race.

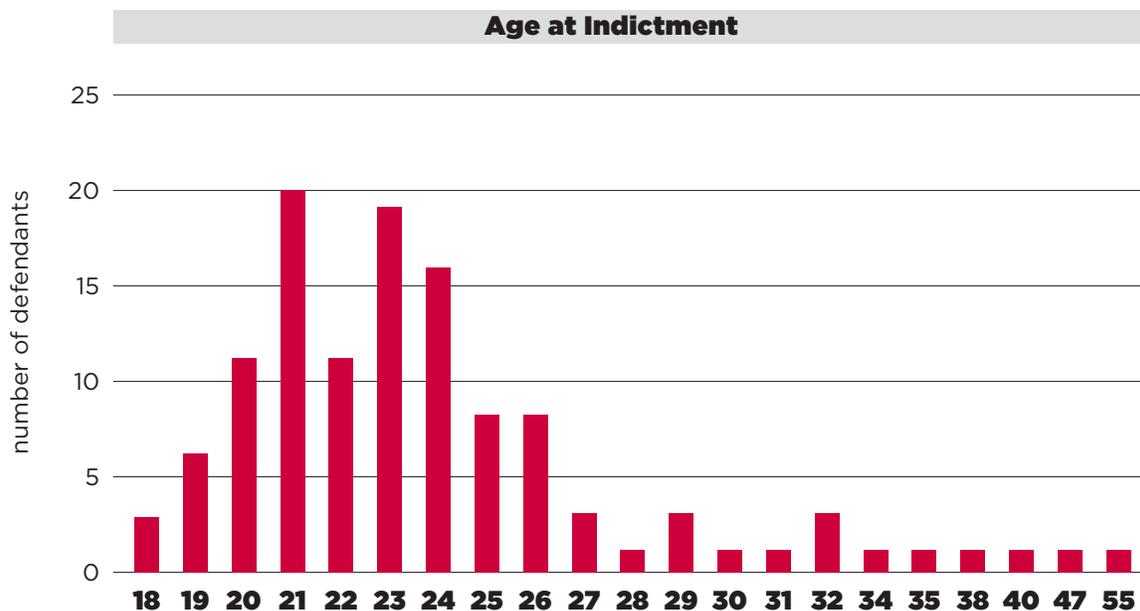


AGE

The average age of the Bronx 120 defendants at indictment was 25 years old.³¹ There were 10 defendants who were over 30 at the time of the indictment. The oldest of these was 55. None of these 10 were affirmatively identified as a member of the rival gangs.

110 of the defendants were thirty years of age or younger, with an average age of 23. Because the conspiracy allegedly went back to 2007, these 110 defendants' average age was only 14 when prosecutors claimed that a RICO conspiracy was formed. This age is one at which individuals cannot vote, sign a contract, marry, or even buy a cigarette, and yet they were charged with conspiracy to engage in racketeering activity. Of course, individuals can join an existing conspiracy years after it begins, but many of the Bronx 120 were quite young even at indictment.

At indictment, the youngest charged defendants were 18 and the oldest was 55 years of age. The chart below shows the age of defendants on the date they were indicted. They were indicted for a conspiracy that dated back nine years.



THE CHARGES: WHAT ARE THE 120 ACCUSED OF DOING?

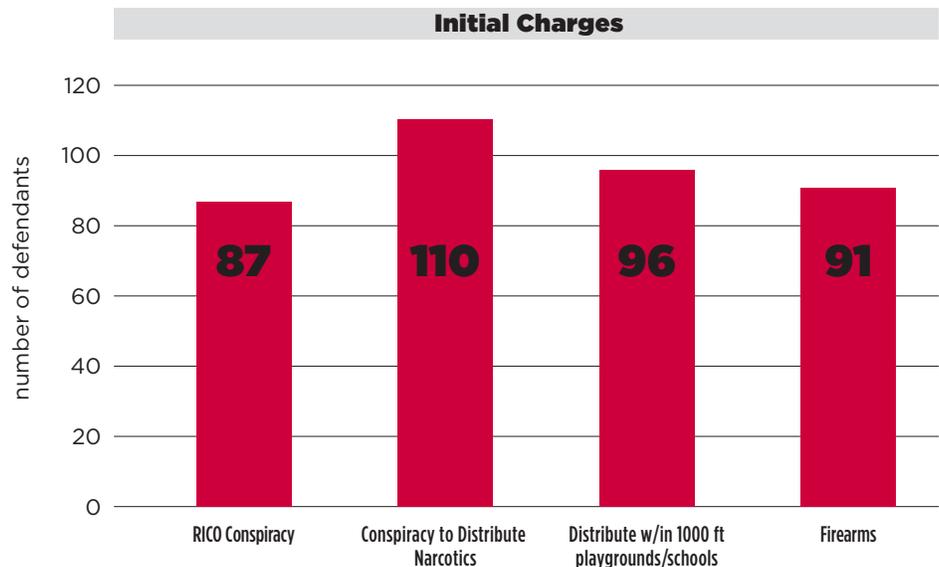
THE ORIGINAL CHARGES: RICO, NARCOTICS, FIREARMS BUT NOT MURDER, NOT ASSAULT, NOT ROBBERY, NOT VIOLENCE

In the press conference just after nearly 700 officers raided Eastchester Gardens and the adjoining neighborhood along White Plains Road with SWAT teams, tanks and helicopters at dawn, then-U.S. Attorney for the Southern District of New York, Preet Bharara, took to the podium to say:

Today we announce what is believed to be the largest gang takedown in New York City history. We have charged 120 defendants in two rival Bronx street gangs with racketeering, narcotics, and firearms offenses. In addition, the charges include allegations of multiple murders, attempted murders, shootings and stabbings, committed in furtherance of federal racketeering conspiracies.³²

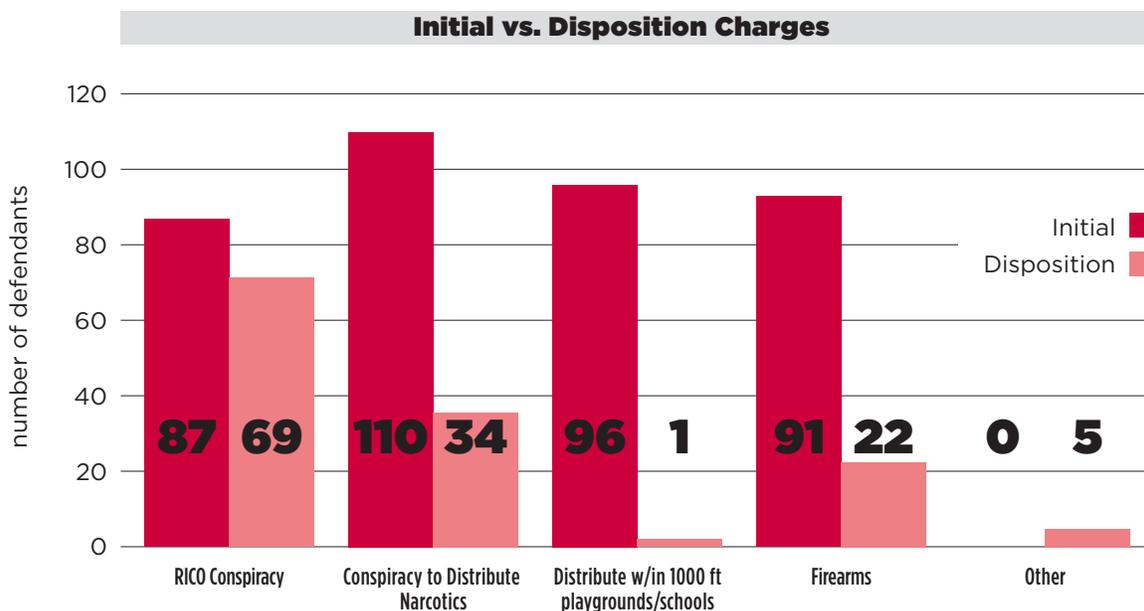
The statement is accurate but misleading. One would have to read this statement carefully and together with the indictments themselves to understand its import. The 120 defendants arrested in this gang takedown were not charged with murders, shootings, stabbings, or any violence. Instead, allegations of violence were included in the indictments but no individuals were actually charged with these offenses.³³ Allegations of violence were included to paint the 120 defendants with a broad brush, to garner public support, and to make splashy news headlines. They created a juggernaut that resulted in the mass denial of bail described below and compromised basics of due process that safeguard both individual defendant's and the public's interest in speedy, fair, and public proceedings.³⁴

The federal indictments themselves are relatively narrow and concise. The four charges in the twin indictments included RICO conspiracy,³⁵ two narcotics charges,³⁶ and a charge of possession or use of a firearm in connection with the RICO or narcotics charge.³⁷ The firearm charge was broad, stating defendants "knowingly did use and carry firearms, and, in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, including firearms that were discharged on multiple occasions."³⁸ None of the charges in the indictments unsealed on April 27, 2016 accused any particular individual of particular acts of violence. Some of the defendants were indicted on all four charges, some on only one. The Initial Charges chart shows the breakdown of initial charges.



115 OF 120 DISPOSITION CHARGES: RICO, NARCOTICS, POSSESSION OF FIREARM

All but a handful of the cases were resolved based on three of the four initial charges.³⁹ 69 of the 120 defendants were convicted of Count 1 – the RICO conspiracy charge. 34 defendants were convicted of Count 2 – Conspiracy to Distribute Narcotics. Only 22 of the 120 were convicted of Count 4 – the firearm charge. The disposition numbers add up to more than 120 because some defendants pleaded to or were convicted of multiple charges.



PREDICATE ACTS FOR RICO AND DRUG CONSPIRACY CHARGES

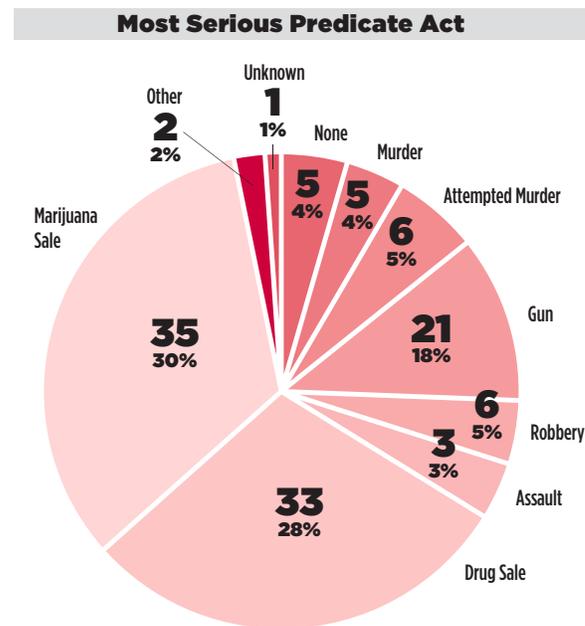
Both the RICO Conspiracy and Conspiracy to Distribute Narcotics charges contain additional complexity. For each RICO conviction there were allegations of “predicate acts,”⁴⁰ some violent and some non-violent (including marijuana sale). Conspiracy to Distribute Narcotics included both marijuana sales (typically a misdemeanor under New York law) and other drug sales (most often cocaine in crack form).

Information about the specific conduct or predicate acts that were the basis for each conviction is found in the plea allocution transcripts and often repeated in sentencing memos or at the sentencing hearing.

The predicate acts chart (excluding 3 cooperators) shows that the vast majority of defendants were not convicted based on conduct related to the “multiple murders, attempted murders, shootings and stabbings” alluded to in Bharara’s press release and the indictments.

Instead, nearly one-third of the defendants (35) were convicted based on selling marijuana as part of either the RICO conspiracy or the narcotics conspiracy. Another 33 defendants' most serious charge was drug sale (other than marijuana). Only one-third of the defendants were charged with any type of violence or firearm possession.

Put another way, nearly two-thirds of the Bronx 120 were not convicted of violence or firearm offenses.



THE MURDERS

Although the Bronx 120 indictments did not specifically charge anyone with murder, there were five murders referenced in the indictment that led to the raids and the arrest of the Bronx 120 defendants. The indictment did not state who was responsible for the killings, nor alert the court of those who were not alleged to be involved in the killings.

Six individuals were eventually accused of four of the homicides. Three of these individuals were already under prosecution by state authorities before the Bronx 120 raids. One of them had already served more than 6 years of a 14-year sentence in state prison for the killing of Sadie Mitchell in 2009. Some of the defendants resolved the murder charges by pleading to RICO conspiracy with murder as a predicate act. One went to trial and was indicted in a superseding indictment on a murder charge. One was a cooperator and is excluded from the chart above.

114 individuals were not charged with murder.

CONCLUSION RELATING TO OVERBREADTH OF THE BRONX 120 INDICTMENTS

While the indictments alleged some violent conduct, charging all 120 defendants in mass indictments does not seem justified. About half of those indicted were not members of either of the crews allegedly targeted. Most did not have significant criminal records. Moreover, over half of the defendants were convicted based upon drug sales (some on behalf of RICO conspiracy and others as part of a conspiracy to distribute narcotics), and only one-third were convicted based on gun or violence-related charges.

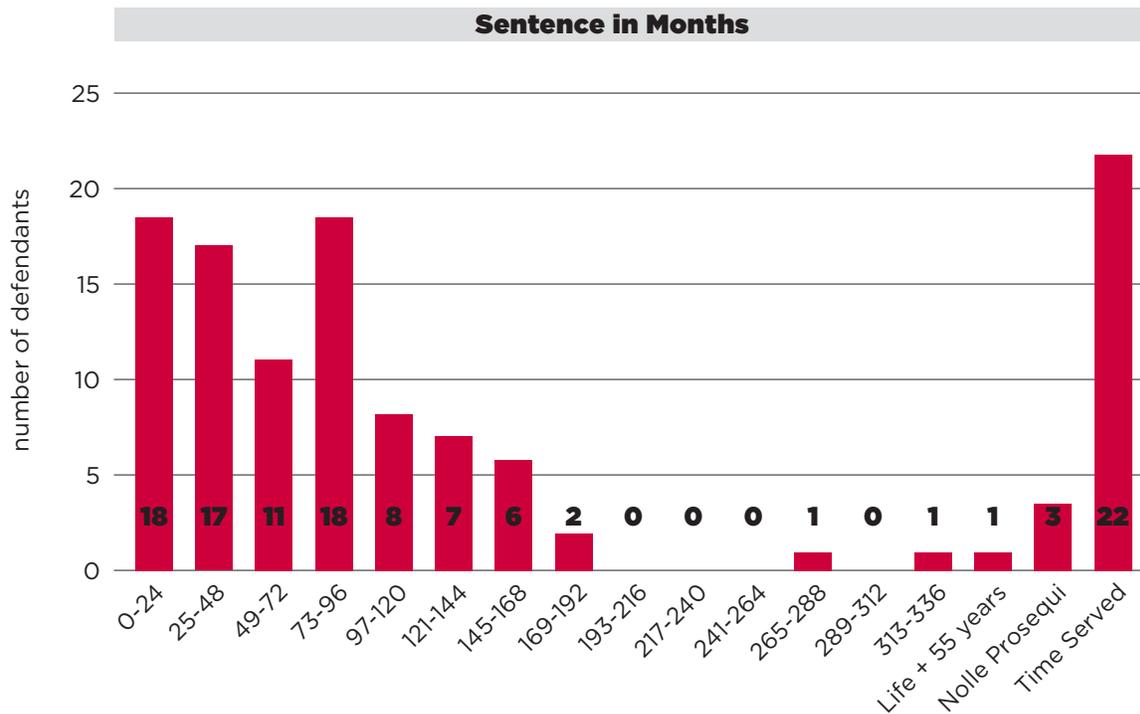
THE OUTCOMES: WHAT HAPPENED TO THE 120?

SENTENCES

The broad range of sentences in these mass indictments provides strong support for the conclusion that the raids and indictments were overbroad, sweeping in defendants that not even the prosecution believed to be “the worst of the worst.”

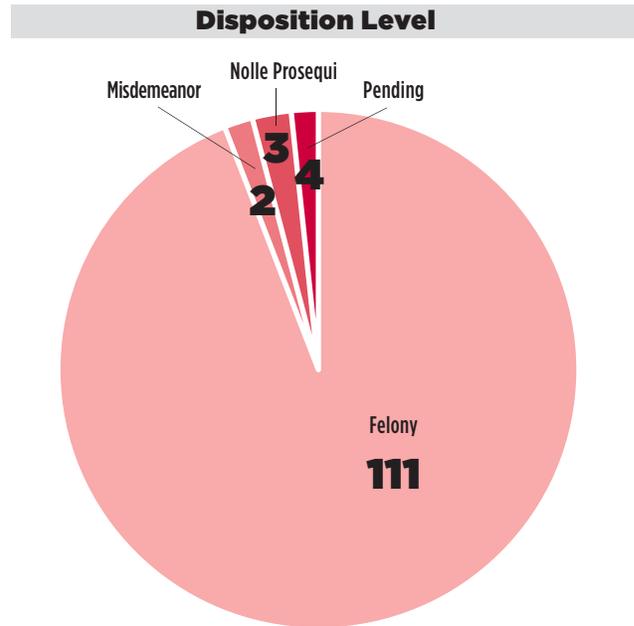
22 defendants received sentences of time served (average time served was 5.9 months) and 3 received nolle prosequi (declined prosecutions). Another 18 received a sentence of less than two years. As discussed above, 35 of the defendants were convicted based on their role selling marijuana.

The chart below contains dispositions for 115 defendants, excluding two pending cases and three cooperators.



FELONIES VERSUS MISDEMEANORS

Despite the relatively low sentences and the accusation of low-level sales levied against many of the defendants, nearly every defendant was required to plead to a felony. Only 3 of the 120 defendants received decisions whereby prosecution was declined. Two were allowed to plead to misdemeanors. The 35 accused of selling marijuana (typically a misdemeanor at state law) were all required to plead to federal felonies. Conspiracy and federal sentencing law allows aggregation of the amount of marijuana that all the defendants sold during the span of the conspiracy (120 defendants over nine years). As a result, most individual defendants had to plead to participating in a conspiracy to sell more than 50 kilos of marijuana.



REPEAT PROSECUTION FOR PAST CONDUCT

In many of the cases, the conduct alleged as predicate acts for the RICO Conspiracy charge or cited as proof for the conspiracy to distribute narcotics or to possess a gun in furtherance of either of these two charges was conduct that had been subject to previous prosecution or decisions not to prosecute.⁴¹

Where defendants were charged with drug distribution, government sentencing memos cited not only convictions for possession or sale of drugs, but also charges relating to arrests with no convictions, or to low-level non-criminal offenses (“violations”) that resulted in only community service or fines.

Those charged with engaging in predicate acts of violence often faced charges that related to previous pleas (as was the case of N.B. above), arrests without convictions, and arrests with convictions for which time had already been or was being served. Others were removed from state proceedings where they were awaiting trial.

We arrived at this conclusion by comparing the statements in sentencing memos, particularly the statements about prior criminal history and those relating to predicate acts for the particular pleas, and the statements in plea allocutions. Additionally, some defendants asked for and received credit for time served in other cases, indicating that the conduct was the same or related. In other cases, sentencing allocutions clearly referred back to prior convictions.

J.B.'s Story – Double Jeopardy Abused

J.B. was responsible for the death of Sadie Mitchell in 2009. He was 18, and belonged to the local crew, BMB – the Big Money Bosses. He shot a gun to scare off a rival who was chasing him, not at the rival but to scare him. The bullet entered the window of Sadie Mitchell and killed the 92-year-old woman as she watched TV in her living room.

Her death was pointless and senseless, the kind that makes headlines and haunts our dreams.

J.B. was promptly arrested. He was prosecuted and pleaded guilty to manslaughter and criminal possession of a weapon. He was sentenced to 14 years in state prison.

7 years later, J.B. was brought from state prison to federal court as part of the Bronx 120 mass indictment to answer for the very same conduct. When the case was resolved, J.B. was convicted of the RICO Conspiracy charge and sentenced to 12.5 years to run concurrent to the 14 years based primarily on the same conduct – the death of Sadie Mitchell.

Why would the federal prosecutor re-prosecute J.B. for the same conduct? How can this even be legal?

There are high profile cases that illustrate why repeat prosecution for the same conduct in different jurisdictions is allowed despite general rules against “double jeopardy” in our criminal justice system. For example, federal civil rights violations were brought against the police officers acquitted on state charges for the vicious beating of Rodney King. This year, Paul Manafort was indicted on state charges for conduct underlying the federal convictions because he may get a presidential pardon for the federal convictions. The purpose of these prosecutions is not that the defendants should be punished twice, but that they should be punished.

But J.B. had already been punished once. He was serving a 14-year sentence under which the teenager would not be released until he was nearly thirty. And the federal prosecution added not a single year to that sentence.

In many ways J.B. was lucky. Unlike N.B. and many other defendants who were given substantial additional sentences and first felony convictions, he received another felony conviction but no extra prison time.

But why re-prosecute J.B.? The prosecution was not about J.B.. It was about Sadie Mitchell, and bringing her story – the 92-year-old victim killed in her home – back into the narrative to justify the mass raids and prosecutions. Never mind that 114 of the 120 were not alleged to be involved with any killing, and that the vast majority were not even alleged to have discharged a gun.

In total, it appears that the evidence to support the charges against nearly half of the Bronx 120 was based on prior arrests and proceedings in state courts. An individual charged with selling marijuana on behalf of a RICO conspiracy, who had several arrests or convictions for possession or sale of marijuana, would face sentencing memos or trials in which evidence relating to this prior conduct could be used to prove the “predicate acts” in furtherance of the conspiracy.

The extent to which conduct that had not resulted in convictions was used to support the new charges and to argue for harsher sentences was surprising.⁴² Defense attorneys routinely accept “adjournments in contemplation of dismissal” and pleas to violations for minor misconduct, assuring those arrested that they will not have a criminal record. When helping young people who are on the wrong path, the New York State courts provide second chances in the form of programming and youthful offender treatment which results in a sealed record and is not a criminal conviction.⁴³

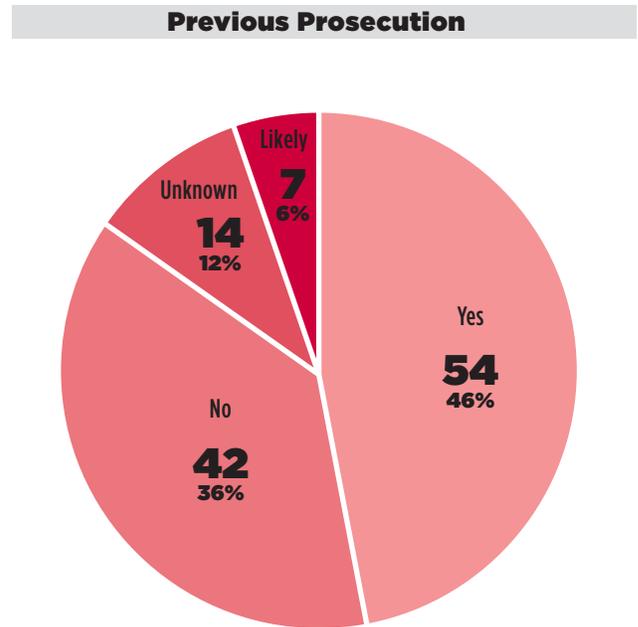
A great deal of advocacy on the part of defense counsel, well-considered exercises of discretion by courts or prosecutors, and lack of reliable evidence may all justify non-prosecution or non-criminal charges. Still, the Bronx 120 indictments show us that any contact with the criminal justice system, any charges levied against a defendant, can be later offered in bail appeals or sentencing submissions. These contacts and charges will be used by the prosecution to argue for detention and higher sentences, even in the absence of a criminal conviction.

Defense attorneys, judges, and prosecutors in state courts must re-examine the system of pleas and dismissals in light of these consequences. State legislators may wish to revise sealing provisions in relation to arrests that do not result in prosecution and prosecutions that do not result in criminal convictions.

THE TRIALS

Nearly three years after the Bronx 120 takedown, all but four cases have concluded. Each defendant faced a maximum sentence of either 20 years or life. With the exception of the two declined prosecution cases, all but two defendants pleaded guilty.

There were only two trials. These defendants, C.A. and D.T., occupied opposite ends of the spectrum in terms of the severity of the conduct attributed to them. C.A. was not a gang member and was accused of selling marijuana with permission of the gang and to benefit them and with possessing a firearm in connection with marijuana sales. D.T. was accused of being a member of BMB, aiding and abetting murder, and committing other acts of violence.



The prosecution conceded that C.A. was not a gang member. Instead, they claimed that C.A. sold marijuana to BMB, on BMB territory, with BMB permission and at a discount to benefit BMB. C.A. said he sold marijuana for himself. Additionally, the prosecution alleged that C.A. possessed a gun in connection with the narcotic sales or RICO conspiracy. There was no DNA or fingerprint evidence linking the gun to C.A., but he had previously pleaded to an “attempted possession charge” in state court. A police officer was the only witness to say C.A. possessed the gun. C.A. said it belonged to the other occupant of the car.

This officer had a substantiated Internal Affairs Bureau complaint, a substantiated Civilian Complaint Review Board complaint, and six civil suits for charges such as wrongful arrest, malicious prosecution, and excessive use of force that the city had settled. The jury for C.A.’s trial convicted C.A. of all charges. They never knew of the police officer’s record. The government sought and the court granted an order barring defense questioning on the substantiated complaints and the settled civil cases. The only evidence that linked C.A. to the gang was the testimony of a cooperating witness, an old photo with a friend, and a Facebook chat (that C.A. was not involved in) that could be interpreted as the cooperator and another person chatting about getting marijuana from C.A..

D.T. was on the opposite end of the spectrum. In addition to robbery and firearm discharge, D.T. was charged as an accomplice to murder for allegedly handing M.M. a gun with which M.M. shot Keshon Potterfield. There was no doubt from his YouTube rap videos that he was a member of BMB and no doubt that he’d been in trouble before. However, once again, much of the evidence related to the murder hung on the testimony of cooperators (in this case 4 cooperators). The lyrics of his rap songs were interpreted as confessions. The NYPD officer who claimed to have recovered a gun from D.T. also had a record of settled civil suits of which the jury was unaware. He used the twitter handle “@obamahater55,” through which he shared racist content.

Each defendant went to trial alone, but the jury was regaled with descriptions of the violent gangs that they associated with. In each case, the lynchpin witnesses were cooperators buttressed by police officers with records of misconduct that were hidden from the jury. Each was convicted of all the serious charges against them. C.A. received a mandatory minimum for the gun he denied possessing. D.T. received a life sentence plus 55 years, while the actual shooter was sentenced to 327 months (27.25 years) on a plea to the RICO charge with murder as a predicate act.

THE PROCESS: WHAT PROCESS CHARACTERIZES MASS GANG INDICTMENTS?

The “mass gang takedown” indictment shifts the administration of criminal justice in a way that is both unnecessary and dangerous. This section briefly raises four troublesome aspects of the process related to gang prosecutions. The lack of defense counsel objections to these aspects of the prosecutions suggests that they may reflect accepted practices in the federal court system but also suggests that these topics should be added to the list of areas for criminal justice reform.

THE RAIDS

When the indictments of the Bronx 120 were unsealed, 700 officers from the NYPD, ATF, DEA, and Homeland Security all gathered to execute a pre-dawn raid in the Bronx Eastchester Garden and the adjoining neighborhood. With no-knock warrants in hand and helicopters above, fully armed SWAT teams dressed in raid gear used battering rams to break down doors, ordered family members to the floor at gunpoint, and dragged out their quarry.

As discussed above, two-thirds of the targets were not charged with violence. Many of those charged with the worst conduct weren’t even there – they were already incarcerated and awaiting trial or serving sentences. The prosecution had been building these cases for months and the Gang Units had been following these individuals for two years. They knew where they went and where they lived. They could have just as easily waited outside, picked people up at work, at school, or in the neighborhood.

A recent two-part series in the New York Times reports that 81 civilians and 13 law enforcement officers died in SWAT operations between 2010 and 2016.⁴⁴ The city of Houston has decided to stop using “No-Knock” warrants altogether due to the outsized risks.⁴⁵ In the case of the Bronx 120 raids, a man plunged to his death in the Bronx on April 27, 2016 when he climbed out the window to evade police.⁴⁶

Risk of death is not the only unnecessary harm related to militarized raids inflict. Each defendant was part of a family and part of a community. The fear and trauma inflicted on family members and communities by a military-style pre-dawn raid is not justified by the charges.

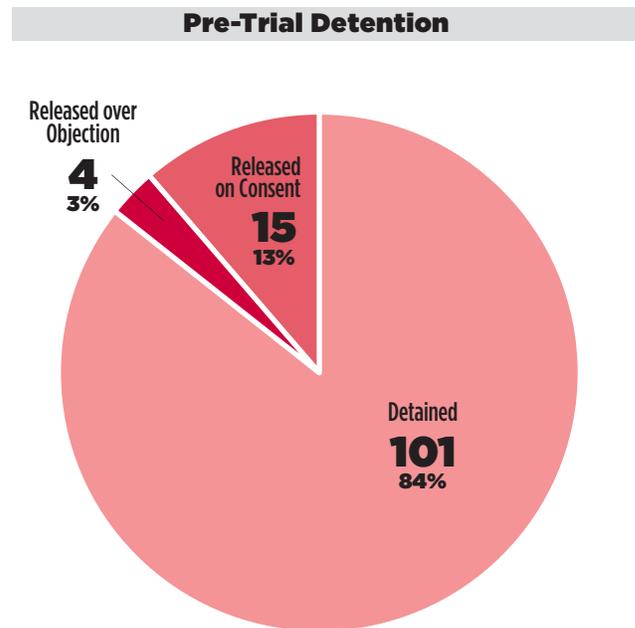
PRE-TRIAL DETENTION, BAIL, AND “RELEASE” IN GANG CASES

The Eighth Amendment prohibits excessive bail, yet the Bail Reform Act of 1984 allows pre-trial detention “when the accused posed a danger to the public or particular members of the public”⁴⁷ or a particular risk of flight.⁴⁸ The Bail Reform Act of 1984 creates a statutory “rebuttable presumption” of flight or dangerousness and allows pretrial detention without bail when charges include narcotic offenses carrying potential sentences of ten years or more, or a firearms charge under 18 U.S.C. 924(c).⁴⁹ Where the predicate act for a RICO charge is murder pretrial detention without bail is also permitted.⁵⁰ All four of the charges in the twin mass indictments carry a “presumption” in favor of pre-trial detention.

Pre-trial detention under these provisions is the equivalent of “remand” in New York State court. No amount of money can gain the defendant’s release.

The mass gang indictment takes full advantage of the Bail Reform Act. Without the consent of the government, it was nearly impossible to obtain pre-trial release. Of the 120 defendants, 101 were remanded without the possibility of bail until their cases were resolved. Of the 19 who were released, only 4 were released over the government’s opposition.

The majority of the defendants did not attempt to challenge the pretrial detention determination. Of the 31 who challenged their pre-trial detention without consent of the government, only 4 were successful. 6 obtained favorable initial rulings permitting their release which were appealed by the government and overturned. 20 of those detained without bail had no prior felony convictions. 19 of those who challenged detention and were denied bail were eventually convicted only for narcotics distribution, either marijuana (9) or other narcotics (10).



K.L.’s Detention Saga

K.L. was beating all the odds. He had studied hard through college, as a collegiate scholar-athlete, playing basketball, running track and making the Dean’s List. In 2013, he graduated with a bachelor’s degree in criminal justice. He decided to enroll in an MBA program, and was excelling at it, all while paying it back to his community in Bridgeport, Connecticut, organizing fundraising events for breast cancer awareness. He coached a kids’ basketball team and created and organized a “Stop the Violence” basketball tournament aimed at raising awareness of gun violence in inner city communities. He became assistant coach of the university’s basketball team, and served as chairman of the university chapter of UNICEF, organizing events on their behalf. And through it all, he was raising a young son, who he proudly took to meet his fellow students and teammates.

In his final semester of grad school, on track to receive his MBA, K.L. was arrested. The government argued that he should be detained without bail, even though he had no criminal record, and had never been in trouble.

The Magistrate Judge agreed he should be released at his initial appearance. But the government appealed and the graduate student with no criminal record was detained “as a danger to society.” So K.L. sat in jail.

The semester went on, and ended without him. His classmates graduated, and walked the stage to receive their diplomas. K.L. sat in jail.

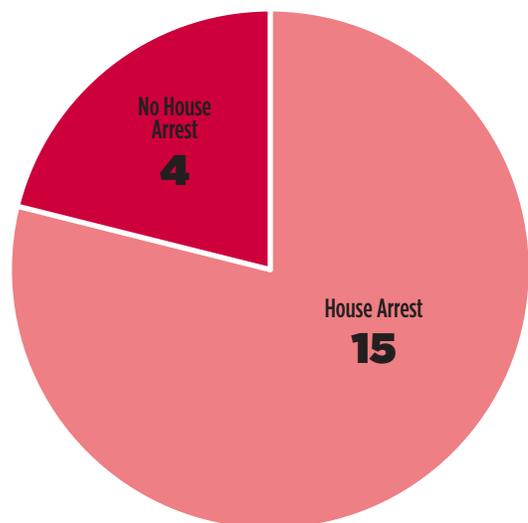
The kids he coached played their final games, went away to school, moved on with their lives. K.L. sat in jail.

His 6-year-old son went to school without his dad to walk him there. He celebrated birthdays and milestones. He didn’t understand why his dad was gone. K.L. sat in jail.

K.L. is out now. He was given a sentence of time served. But his life is not the same. He remembers seeing a friend stabbed in the neck while he was in jail. He remembers missing his son’s birthdays. He remembers how full of potential his life was, before the arrest. His future is not the same. Not with a felony conviction.

The Bronx 120 defendants who were “released” were released under stringent conditions including house arrest, electronic monitoring, and strict supervisions. Not a single defendant was released on recognizance; that is, with no conditions other than to return to court for court appearances and abide by the law. These conditions meant 15 of the 19 individuals who were released were not at liberty to go to school to watch their children’s sports team, sit in the park on a sunny afternoon, or visit a friend or neighbor. Even defendants who were released were generally incarcerated for some time before release. Only two defendants were able to meet the conditions imposed for release on the first day. Others were detained for a week to four months before achieving release. These detentions and conditions result in the loss of employment and other hardships.

Release Conditions



The “Lucky” Ones

L.W. was one of the lucky few. Not only was he released, but he was released over the government’s opposition. The magistrate judge who heard his bail application learned that he worked two jobs and had no criminal record. The conditions of release, however, included home confinement. L.W. was detained for 21 days before he could meet the conditions of his release. During his home confinement, L.W. lost both jobs. Eight months later, when he was finally relieved of home confinement, L.W.’s former employer would not take him back because of the pending case. At the end of the case, he was sentenced to time served, and like all but 4 of the defendants, emerged with a felony record. Like many other defendants, the conduct alleged was marijuana sale.

A.M. was even luckier. The government agreed that he should be released. He was not even subjected to house arrest. It took him less than two weeks to meet the bail conditions. In the meantime, he lost his job at the rehabilitation center that gave him the flexibility to both serve as his son’s primary caretaker (his wife was a live-in nursing aide) and to support the family. On May 5, the day before his release, his mother passed away.

Although pre-trial detention and excessive bail is a problem in nearly every court, state or federal, in the United States, the federal courts have services that have rendered bail unusual and unnecessary in many low-level and non-violent cases. The mass gang prosecution of the Bronx 120 defendants allowed Bharara’s office to advocate for pre-trial detention and intensive supervision for even low-level and non-violent defendants. The prosecutor used a narrative of violence and an extraordinarily general indictment to play on judicial fears. As a result, the prosecutor obtained nearly complete control over all 120 defendants from the day the indictment was unsealed.

INDICTMENT SPECIFICITY

As mentioned above, the indictments in the Bronx 120 mass gang prosecutions provide no individualized specifics relating to time, dates, or alleged conduct. At early court appearances, the prosecution was given nearly six months to provide defendants with an “enterprise letter,” providing specific allegations as to each defendant’s conduct. Meanwhile the defendants, many of whom had been arrested in the raid, and most of whom were incarcerated without the possibility of release, faced serious felonies carrying maximum sentences of 20 years for some and life for others. Indictments that do not provide information make it impossible to prepare a defense. Additionally, lack of information means that those who are not alleged to be gang members or to have engaged in violence cannot effectively advocate for pre-trial release or even dismissal of charges based on lack of probable cause.

SOCIAL MEDIA

Like the broad allegations in the generalized indictments, the prosecution presented social media evidence collected from a handful of the Bronx 120 defendants' Facebook and YouTube accounts at the start of nearly every sentencing memo, even when the accounts referenced had nothing to do with the particular defendant being sentenced. For each defendant, prosecutors submitted verbatim the same summary of social media activity of several defendants who posted about gang rivalries and norms against cooperating with law enforcement. YouTube music videos made by a few defendants rapping about drug sales, gun possession and/or gang affiliation were also presented in sentencing submissions for every defendant charged, as evidence of their affiliation with criminal activity. Similarly, government letters arguing for detention for those requesting bail mentioned social media evidence from other defendants in the Bronx 120 to show their affiliation with gang violence.

Overall, YouTube rap videos featured only 14 individuals out of the 120. But these videos were presented as not only further evidence of these individuals' culpability, but also evidence that the Bronx 120 composed a violent enterprise. Facebook posts, photos and messages were also presented as evidence of gang affiliation for 30 people. In some of these cases, a photo of a defendant with friends who were alleged to be gang members, or a post about an alleged gang member was used to show proof of gang allegiance. And for 14 defendants, social media evidence in general was mentioned, though not specified, either during plea or sentence hearings or in court documents.

Although the memos submitted by the government generally referenced the same few posts, the government executed over 100 search warrants on Facebook and Instagram relating to the case. At initial conferences they indicated that for each Facebook return "paperwork can range into the tens of thousands, or even in a couple of instances, hundreds of thousand of pages per account."⁵¹

The use of social media to prove affiliation, association, enterprise and guilt creates dual problems for fair process in the criminal justice system. First, so much of what is posted on social media lacks indicia of reliability – people boast, brag, like, and repost to conform to social pressure. What may be meant as a joke or recognized as a lyric to a favorite rap song is instead interpreted by outsiders as inculpatory. Photos with peers and music videos recorded as artistic endeavors were used as proof of particular crimes and of association in furtherance of a criminal enterprise. Second, the volume of postings put individual defense counsel and defendants at an enormous disadvantage. Detained defendants could not access the information easily to interpret it for their lawyers.

SPEEDY TRIAL WAIVERS, DISCOVERY AND PROTECTIVE ORDERS

In order to manage these massive indictments, the prosecution requested and the judges granted repeated exclusions of time for speedy trial purposes. An initial five month exclusion through October of 2016⁵² was followed by an exclusion of speedy trial time through November 6, 2017 (18 months after the case was filed) because "this case is so unusual and complex due to the number of defendants, the nature and

scope of the prosecution, and the volume of discovery, that it would be unreasonable to expect adequate preparation for trial within the limits of the Speedy Trial Act.”⁵³

These decisions reflect the court’s determination that “the ends of justice outweigh the interest of the public and the defendant in a speedy trial.”⁵⁴

It is true that no defendant objected to the waiver of speedy trial requirements, but it is important to consider these waivers in context when one considers voluntariness. Each defendant is facing either a maximum sentence of 20 years or life, and each lawyer has little idea what the evidence is against their client. They are at the mercy of the government and rocking the boat by objecting to waivers of speedy trial time could hurt their clients. Without discovery and a sense of how strong or weak the cases are, it would be the foolhardy attorney who stands alone to insist on speedy process in a case involving 60 defendants.

Moreover, no discovery is available at arrest. When initial discovery does become available it includes tens of thousands of social media posts which risk overwhelming defense attorneys.

Additional and critical discovery (the prior statements and reports of witnesses who will testify against a defendant) is available in the federal system only pursuant to 18 U.S.C. §3500, the Jencks Act, and not until the eve of trial. In the two cases where trials were held, and this material produced, it was produced only subject to protective orders that prohibited sharing discovery and required its return and destruction after trial.

It is not only the defendants who have an interest in specificity in charging documents, speedy disposition of criminal cases, and transparency relating to process and evidence. Where the government bundles together dozens of defendants (and even when it does not), the public has its own interest in the orderly administration of justice.

The interest of both the defendants and the public is implicated where pre-trial detention, lack of discovery, and waiver of speedy trial creates pressure to plead to get out of jail. Though many of these sentences are relatively short, each one represents a huge investment in incarceration, and each comes with another investment in post-release supervision. The costs in lost earnings, lost parenting time, and lost education during incarceration for dozens of individuals not implicated in violence are immeasurable, as is the impact on the communities from which they come. These defendants are members of the public, and their families and communities are members of the public, the state and the country. Imposing felony convictions and imprisonment based on mass indictments means that the individuals, their families, their communities, this state, and the country will be paying for these prosecutions long into the future.

.

CONCLUSION

The Bronx 120 mass indictments are overbroad.

- 35 defendants were convicted of RICO or narcotics conspiracy based on marijuana sales
- Short sentences suggest that over a third of defendants were not considered serious offenders
 - 22 of the defendants received time served (excluding cooperators)
 - 3 defendants received nolle prosequis (declined prosecutions)
 - 18 of the defendants were sentenced to terms of less than 2 years
- 50 to 60 defendants were not alleged to be gang members
- 80 defendants were not convicted of violence
- Only 40 of the defendants appear to have prior felony convictions
- Nearly half of the defendants had previously been prosecuted for the same conduct that formed the basis for their inclusion in the mass indictments

Fair process is not afforded in these mass indictments.

- Nearly all defendants are held without bail or subjected to house arrest
- Indictments do not specify the alleged conduct, so defendants and defense counsel cannot effectively advocate for release or prepare for trial
- Individuals are prosecuted a second time for conduct that has been subject to prior adjudication in state courts
- Mass indictments fail to safeguard the public's interest in transparency and speedy trials

The backgrounds of the defendants provide stories of deprivation, untreated trauma and mental health issues, and abandonment. What is remarkable, as one reads through the many depressing sentencing memos, is that so many of these 120 were not in more trouble. So many had no criminal records. So many were not charged with violence in connection with these gangs. So many had dreams and were pursuing them. They made music, the lyrics of which were used against them in bail applications, sentencing submissions, and trials. They moved from the streets of their youth to distance themselves from the violence, seek employment, and build families. There are 120 individual stories that may never see the light of day, and 120 lives forever changed. Some of these defendants appear to have committed serious offenses but many others did not.

In conclusion, the Bronx 120 indictments appear not only to be overbroad and unfair, but they seem profoundly unwise. Prosecutors can use mass conspiracy indictments to round up local crews and gangs and to erase the difference between bad actors and their friends and peers. But they should not. Even the privileged among us would not choose to be held criminally responsible for the conduct of fraternity brothers, high school friends, or even drama club or math team members. Bad decisions and conforming behavior are the norm for adolescents and young adults, but many avoid engaging in violent conduct and others can be helped to develop non-violent responses. Conspiracy is a powerful tool but should not be leveled against the least powerful among us; instead, our goal should be constructive interventions and individualized justice with full due process of law.

RECOMMENDATIONS

The overbreadth of the indictments, denial of pre-trial release, lack of discovery, speedy trial waivers, and high sentence exposure leads to very real concerns about the fairness and accuracy of the convictions. The fact that many swept up in the raids and prosecution were neither gang members, nor charged with violence, raises questions about the criteria that gang units and prosecutors were using to levy accusations against individuals. Across the country, gang units have been responsible for some of the largest scandals in policing history, including the Rampart scandals in Los Angeles.⁵⁵ In New York City, gang unit officers have more misconduct complaints (and settlements) than patrol officers.⁵⁶

Given these concerns, steps should be taken to avoid similar prosecutions and to investigate other gang takedowns.

General recommendations relating to mass indictments in gang cases:

- Discontinue the use of RICO for loosely organized crews and gangs, since the purpose of RICO is to address sophisticated organized crime;
- Discontinue the use of state conspiracy charges against crews because they arise from the same over-inclusive collaborations as the Bronx 120 indictment;
- Strike mass indictments that fail to specify individual conduct as inconsistent with due process;
- Grant release on recognizance or reasonable bail to defendants in mass gang indictments absent risk of flight;
- Do not re-prosecute for conduct or predicate acts that have already been adjudicated in state court;
- Amend RICO to require a jurisdictional minimum for the impact on interstate commerce of an amount greater than \$10 million a year to prevent RICO from being used to bring ordinary street crimes into federal court;
- Provide Cure Violence resources, jobs, social services, and support to communities and individuals at risk rather than conducting year-long surveillance and bringing mass takedowns.

Specific recommendations for convictions based on gang takedowns

- Create a conviction integrity unit to review these convictions;
- Consider reparations for family members harmed and traumatized by the raids;
- Investigate the gang units that helped prosecutors frame these mass indictments to find out how and why non-gang members and non-violent individuals with minimal roles were implicated in these alleged conspiracies.

The Bronx 120 mass indictments suggest that additional research is needed to answer the following questions:

- Why are individuals who are not gang members included in gang prosecutions?
- Why are individuals who have not engaged in violence included in gang prosecutions?
- What criteria are gang units and prosecutors using to build these cases?
- What are the risks of close collaboration between gang units and prosecutors?
- Do these mass indictments produce wrongful convictions by way of either pleas or trials?
- What alternatives to building large cases against underprivileged youth of color are available?

ENDNOTES

- ¹ The Racketeering Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961–1968. For a useful very brief summary of the RICO Act, see *RICO: An Abridged Sketch*, Congressional Research Service Report, May 18, 2016; available at https://www.everycrsreport.com/files/20160518_RS20376_1e908ea0a5add8fb01c9942bf17282262e40f72.pdf.
- ² I use “overbroad” here in the ordinary non-legal sense, to mean too widely applied, not in the constitutional sense of an overbroad statute that infringes on First Amendment conduct, although the use of association and expression to establish these cases may have a chilling effect on First Amendment conduct as well.
- ³ Preet Bharara Press Conference USAOSDNY, *120 Members Of Street Gangs In The Bronx Charged In Manhattan Federal Court*, YOUTUBE (Apr. 27, 2016), <https://perma.cc/7LNR-9PJC>.
- ⁴ There were 40 “takedowns” in 2016, and 41 as of July 28, 2017. David Goodman, *Trump Takes Aim at ‘Pathetic Mayor.’ De Blasio Thinks He Knows Who He Means*, New York Times, July 28, 2017. See also, NYPD Gangs & Crews of New York PowerPoint p. 45 (41 case takedowns in 2017 and 498 arrests) available at <https://www.documentcloud.org/documents/4499937-NYPD-Gang-Presentations.html#document/p1>.
- ⁵ The head prosecutors are identified because mass indictments reflect decisions made at the highest level of the prosecutors’ office.
- ⁶ *The Police Commissioner’s Report*, 44 (Jan. 2016), available at <https://www1.nyc.gov/assets/nypd/downloads/pdf/publications/pc-report-2016.pdf>.
- ⁷ Ben Popper, *How the NYPD is using social media to put Harlem teens behind bars: The untold story of Jelani Henry, who says Facebook likes landed him in Rikers*, The Verge (Dec. 10, 2014.) available at <https://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison>.
- ⁸ *United States v. Burrell*, S2 15 Cr. 95 (S.D.N.Y. 2016).
- ⁹ *United States v. Parrish*, S1 16 Cr. 212 (S.D.N.Y. 2016).
- ¹⁰ FOIA request dated 10/2/18, tracking number EOUSA-2019-000093. “Full Denial Based on Exemptions.”
- ¹¹ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

- ¹² This is a very general description of conspiracy doctrine. Conspiracy law may vary from state to state. It is beyond the scope of this report to cover the complexity of this doctrine. See NYPL Art. 105 for New York conspiracy law and 18 U.S.C. § 1962(d) for RICO Conspiracy.
- ¹³ *Glasser v. United States*, 315 U.S. 60, 80 (1942).
- ¹⁴ *Id.*
- ¹⁵ For an explanation of the relative merits of conspiracy versus RICO charges by a former United States Attorney, see Dwight Holton, *Trump Investigations and the RICO vs Conspiracy Puzzle*, Just Security, Mar. 14, 2019. Available at <https://perma.cc/62NQ-8ZLX>.
- ¹⁶ The Double Jeopardy Clause of the 5th Amendment provides that “no person shall be subject for the same offense to be twice put in jeopardy of life or limb” and protects against a second prosecution for the same conduct after either acquittal or conviction and multiple punishment for the same offense.
- ¹⁷ While there is no statute of limitations on murder, the statute of limitations for most felonies in New York is 5 years, and for misdemeanors (such as marijuana sale) 2 years.
- ¹⁸ *Krulwicht v. United States*, 336 U.S. 440, 453 – 454 (1949)(Jackson, J. concurring).
- ¹⁹ *Id.* at 445-46.
- ²⁰ Despite the purpose of RICO, case law has permitted the “interstate commerce” element to be satisfied by minimal impact.
- ²¹ Although this report is based on public records, the authors have opted to refer to defendants by their initials to preserve their privacy as much as possible.
- ²² Preet Bharara Press Conference USAOSDNY, *120 Members Of Street Gangs In The Bronx Charged In Manhattan Federal Court*, YOUTUBE (Apr. 27, 2016), <https://perma.cc/7LNR-9PJC>.
- ²³ RICO Act *supra* n. 1
- ²⁴ For information about eligibility for representation by the Criminal Justice Act Panel, see Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act, 5 (2017) available at <http://www.nysd.uscourts.gov/file/forms/current-criminal-justice-act-plan>.
- ²⁵ A review of the judgments of conviction show imposition of minimum fines (either \$100 or \$200) on every defendant and no other fines.
- ²⁶ For historical data on stop-and-frisk, see *Stop-and-Frisk in the de Blasio Era*, New York Civil Liberties Union, 6 (Mar. 2019); available at <https://www.nyclu.org/en/stop-and-frisk-data>.
- ²⁷ Broken Windows policing refers to aggressive policing focused on low level misconduct and offenses to public order.
- ²⁸ New York Criminal Procedure Law, Art. 720.
- ²⁹ New York Criminal Procedure Law, Art. 722.
- ³⁰ A request for race demographics was denied. FOIA request dated 10/2/18, tracking number EOUSA-2019-000093.
- ³¹ The SDNY released a statement providing the age of every defendant in years on April 27, 2016 when it unsealed the indictment and made related media statements. See Press Release, Preet Bharara, United States Attorney Southern District of New York, (April 27, 2016), <https://perma.cc/SLV7-F4WF>.
- ³² Press Conference *supra* at n. 21.
- ³³ Indictments available at bronx120.report.
- ³⁴ Prosecutors with the SDNY asked for suspension of speedy trial requirements for the 120, and demanded secrecy for all discovery materials, denying the public the right to understand the proceedings and defense counsel adequate opportunity to prepare.
- ³⁵ 18 U.S.C. 1962(d).
- ³⁶ 21 U.S.C. 846; 21 U.S.C. 860.
- ³⁷ 18 U.S.C. 924(c).

- ³⁸ Parrish indictment, paragraph 19, pp. 23-24. Burrell, paragraph 18, pp. 24-25. For those who displayed or discharged a weapon the plea allocution and disposition sentence reflected these facts, but the initial indictment did not distinguish between those who “used” firearms in furtherance of the conspiracy by possessing them and those who displayed or discharged firearms.
- ³⁹ The “other” disposition charges include two misdemeanor charges, an assault on a federal officer, and several slightly different charges levied against the two defendants who went to trial. The “other” charges were added by superseding indictments or informations.
- ⁴⁰ To prove a RICO criminal enterprise, a pattern of racketeering activity involving two or more predicate offenses or acts is required. The list of predicate offenses includes both state and federal crimes. See *RICO: An Abridged Sketch*, supra n. 1.
- ⁴¹ The Double Jeopardy Clause of the Fifth Amendment has been interpreted not to bar repeat prosecution in a different jurisdiction (the “dual sovereignty test”) or where new charges contain different elements than prior convictions (the Blockburger test”). See, *United States v. Lane*, 260 U.S. 377, 385 (1922)(dual sovereignty test); *Blockburger v. United States*, 284 U.S. 299 (1932)(elements test).
- ⁴² A white paper by a federal prosecutor helps to explain how and why the prosecutor would even access non-criminal contacts. When targeting a crew, that paper directs prosecutors to pull all police incidents relating to targets “whether they are suspects, witnesses, or victims. No exception. . . . Convictions, acquittals, dismissals, no charges – they all should be pulled.” K. Tate Chambers, *Developing a Step-by-Step Application of the New Orleans Strategy to Combat Violent Street Crews in a Focused Deterrence Strategy*, Central District of Illinois.
- ⁴³ New York Criminal Procedure Law §720.35.
- ⁴⁴ Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, New York Times, Mar. 18, 2017; and Kevin Sack, *Murder or Self-Defense if Officer is Killed in Raid*, New York Times, Mar. 18, 2017.
- ⁴⁵ Mihir Zaveri, *Houston to End Use of ‘No-Knock’ Warrants After Deadly Drug Raid*, New York Times, Feb. 19, 2019.
- ⁴⁶ Ashley Southall and Nate Schweber, *Man Wanted for Robbery Plunges to Death During Gang Roundup*, New York Times, Apr. 27, 2016.
- ⁴⁷ Charles Doyle, *Bail: An Overview of Federal Criminal Law*, CONGRESSIONAL RESEARCH SERVICE, July 31, 2017. Available at <https://fas.org/sgp/crs/misc/R40221.pdf>.
- ⁴⁸ The Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156.
- ⁴⁹ 18 U.S.C. §3142(e)(3)(A),(B).
- ⁵⁰ Doyle supra n. 47 at 24.
- ⁵¹ Transcript of May 2, 2016 conference in *United States v. Burrell*, 10:00, p. 9, lines 19-21.
- ⁵² Order dated May 2, 2016.
- ⁵³ Order dated January 30, 2017.
- ⁵⁴ Transcript supra n. 50 at p. 28, lines 19-21.
- ⁵⁵ For information on the Rampart Scandal, see, Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 Loyola of L.A. L. Rev. 545 (2001), available at <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?httpsredir=1&article=2262&context=llr>; and Joe Domanick, *Blue: The LAPD and the Battle to Redeem American Policing* (2015).
- ⁵⁶ Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, New York Times (Mar. 6, 2019).

SEE MORE AT WWW.BRONX120.REPORT



Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

**Testimony of the New York Civil Liberties Union
before
The New York City Council Committee on Public Safety
regarding
Int. 1244-2018**

Thursday, June 27, 2019

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony regarding Int. 1244-2018, in relation to prohibiting certain unsolicited disclosures of intimate images.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, through an integrated program of litigation, legislative advocacy, public education and community organizing. The expressive and due process rights of every New Yorker are fundamental to our democracy, and protected by the both the New York Constitution and the United States Constitution. The NYCLU has long been a leader in the fight to ensure every person’s ability to enjoy the assurance of these fundamental rights in the State of New York.

Int. 1244-2018 (by Member Borelli) proposes to criminalize “unsolicited disclosures of intimate images.” Specifically, this legislation would make it a misdemeanor offense to send such imagery “by electronic device” “with the intent to harass, annoy or alarm another person[.]”

The NYCLU opposes this legislation on the grounds that it is likely to both criminalize and chill protected expression, and that its application is likely to be so overbroad as to infringe upon the due process rights of those against whom it might be charged.

As written, the proposed offense does not provide adequate notice of the conduct one should avoid to preclude arrest. As a result, it threatens to violate the due process rights of New Yorkers, and to capture and chill First Amendment protected expressive conduct. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”¹ This requirement of clarity is particularly stringent when a criminal law interferes with expressive conduct, because of the acute risk of self-censorship.²

In addition, courts have consistently “struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’ – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”³ Here, the proposed offense relies entirely upon an intent element that both state and federal courts have repeatedly assailed, specifically in the context of unwanted communications and expressive conduct: the intent to “harass, annoy, or alarm.”⁴ As the United States Supreme Court has noted, “[c]onduct that annoys some people does not annoy others.”⁵ Statutes that rely on either a putative speaker’s intent to annoy or offend, or upon an intended receiver’s annoyance or offense, are frequently found unconstitutionally vague.⁶

¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

² See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (“government may regulate in the [First Amendment] area only with narrow specificity”); see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997) (noting “severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful” speech).

³ *U.S. v. Williams*, 553 U. S. 285, 304 (2008).

⁴ See, e.g., *People v. Golb*, 23 N.Y.3d 455 (2014); *People v. Dietze*, 75 N.Y.2d 47 (1989); *People v. Dupont*, 107 A.D.2d 247, 253 (1st Dept 1985); *Vives v. the City of New York*, 305 F.Supp 2d 289, 299 (“where speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined”); see also *Vives*, 405 F.3d 115, 123-124 (2d Cir. 2004); *Schlager v Phillips*, 985 F.Supp 419, 421 (S.D.N.Y. 1987) (statute found “utterly repugnant to the First Amendment of the United States Constitution and also unconstitutional for vagueness”).

⁵ *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

⁶ See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); 582 U.S. ____ (2017) (“We have said time and again that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U. S. 576, 592 (1969)). See also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988); *Coates*, 402 U. S. at 615; *Bachellar v. Maryland*, 397 U. S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox v. Louisiana*, 379 U. S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello v. Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

What’s more, the proposed definition of a proscribed “intimate image” is itself insufficiently narrow to avoid capturing protected expression that does not rise to the level of impropriety assumed in the statute, let alone unprotected obscenity. Likewise, it is also insufficiently narrow to ensure that the average New Yorker would understand the bounds of behavior that could be subject to criminal penalty.

Any proposed offense which acts as a content based prohibition of protected, non-obscene expression is “presumptively invalid,’ and the Government bears the burden to rebut that presumption.”⁷ To survive, a proposed law must satisfy strict scrutiny.⁸ Thus, it must be narrowly tailored to promote a compelling government interest that cannot possibly be served through a less restrictive alternative.⁹ This measure cannot withstand such scrutiny because it is overbroad, fails to vindicate any state interest in protecting the receiver of a communication, and is substantially more burdensome than effective alternatives.

The New York Civil Liberties Union opposes this misguided legislation, and urges Council Members to reject it.

⁷ *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000)).

⁸ *Playboy*, 529 U.S. at 813.

⁹ *Id.*; see also *Ashcroft v. American Civil Liberties Union*, 542 U.S.654, 670 (applying strict scrutiny to a “harmful to minors” ban).

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 1653 Res. No. _____
 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Nathalie Arzu

Address: 2742 Dewey Ave Apt # 30 Bronx NY

I represent: MOMs Demand Action

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Kraig Lewis

Address: _____

I represent: _____

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
 in favor in opposition

Date: 06/27/19

(PLEASE PRINT)

Name: Oscar Hernandez

Address: 5920 Norman St

I represent: _____

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. _____ Res. No. _____
 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Vidal German

Address: _____

I represent: JLUSA

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. T2018-2223 Res. No. _____
 in favor in opposition

Date: 6/27/2019

(PLEASE PRINT)

Name: Liliana Faragoza

Address: _____

I represent: NAACP Legal Defense Fund; Center for Constitutional Rights,

Address: 40 Rector St., 5th floor Bronx Defender

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. _____ Res. No. _____
 in favor in opposition

Date: 6-27-19

(PLEASE PRINT)

Name: Assistant Chief James Essig

Address: _____

I represent: NYPD

Address: 1 Police Plaza, NY, NY 10038

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6-27-18

(PLEASE PRINT)

Name: Executive Director OLEU Chernygausk

Address: _____

I represent: NYPD

Address: 1 Police Plaza, NY, NY 10036

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Yung-Mi Lee

Address: _____

I represent: Brooklyn Defender Services

Address: 177 Livingston Street, Brooklyn

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/27/19.

(PLEASE PRINT)

Name: Marie Delus

Address: 1833 E. 52nd Street. Bldg 11274

I represent: Moms Demand Action For GunSense in

Address: America. Nationwide

Please complete this card and return to the Sergeant-at-Arms

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/27/19

(PLEASE PRINT)
Name: Alex Vitale
Address: 168 Sterling Pl. #2L Brooklyn 11217
I represent: Policing & Social Justice Project
Address: Brooklyn College

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 1548 & 1553 Res. No. _____

in favor in opposition

Date: 6/27/19

(PLEASE PRINT)
Name: DAVIN PUCINO
Address: 301 E 49th St Apt 26, New York, NY 10017
I represent: Giffords
Address: 223 W 38th St #90, New York, NY 10018

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/27/19

(PLEASE PRINT)
Name: Fawziyah Siddiqui
Address: 30-61 48th Street
I represent: Girls for Gender Equity
Address: 25 Chapel Street

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 674 + 9an9dotebase Res. No.

in favor in opposition

Date:

(PLEASE PRINT)

Name: Albert Cano

Address:

I represent: surveillance + tech oversight project

Address: 40 West 51st +

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. Res. No.

in favor in opposition

Date: 6/27/15

(PLEASE PRINT)

Name: PROF. BABE HOWELL

Address: CUNY SCHOOL OF LAW 2 Court Sq.

I represent: RESEARCH / LIC

Address: 2 Court Sq. LIC, NY 11101

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. Res. No.

in favor in opposition

Date:

(PLEASE PRINT)

Name: Victor Dempsey

Address: 199 water st

I represent: Legal-Aid Society

Address: 199 water st.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

not sure yet if I'm in favor in opposition *I need to hear what is going on*
Date: 6/27

(PLEASE PRINT)

Name: Diane "Malikah Moomin" Pinkston

Address: 1505 Park Ave apt #11C

I represent: Malikah's Keepers unincorporated

Address: 1505 Park Ave apt #11C

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Taylorann Murphy

Address: 54 Boerum St.

I represent: Legal Aid Society

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Kraig Lewis

Address: 3058 Grace Ave

I represent: Legal Aid Society

Address: _____

Please complete this card and return to the Sergeant-at-Arms