Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City

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GANG DATABASES:
RACE AND THE CONSTITUTIONAL FAILURES OF CONTEMPORARY GANG POLICING IN NEW YORK CITY

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"We are very confident that once someone is identified as a gang member, make no mistake—they are a gang member."[1]

INTRODUCTION

Similar to many jurisdictions throughout the United States,[2] the New York City Police Department ("NYPD") has a gang database—a criminal intelligence system utilized by the NYPD to keep track of alleged "gang members" in New York City.[3] And similar to many jurisdictions throughout the United States, the NYPD's gang database has been severely criticized.[4] Opponents of the gang database accuse the NYPD of using it as a tool for racial profiling,[5] mass incarceration,[6] and mass criminalization of

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[1] Olivia Heffernan, *'We've Got One in The Sweep'*, APPEAL (July 30, 2019), https://theappeal.org/weve-got-one-in-the-sweep/ [https://perma.cc/FT3W-59JF] (quoting Dermot Shea, NYPD's chief of crime control strategies in 2017).

[2] *See Gang Related Legislation by Subject: Criminal Intelligence Information Systems (Including Gang Databases)*, NATIONAL GANG CENTER, https://nationalgangcenter.ojp.gov/legislation/intelligenceinformation [https://perma.cc/5B9B-TJZ4] (last visited June 22, 2021).

[3] *See, e.g.*, Michael Scotto, *Activists Rally at City Hall to Get NYPD to Erase Gang Database*, SPECTRUM NEWS (Dec. 12, 2019), https://www.ny1.com/nyc/all-boroughs/news/2019/12/12/activists-rally-at-city-hall-to-get-nypd-to-erase-gang-database [https://perma.cc/BB6A-ZUN3].

[4] *Id.*

[5] *Abuse of Police Discretion Case: NYPD's "Gang" Policing Tactics*, NAACP LEGAL DEF. FUND (Aug. 9, 2018), https://www.naacpldf.org/case-issue/nypds-gang-policing-tactics/ [https://perma.cc/7LZC-7KX7].

[6] TCR Staff, *Does NYPD Gang Database Fuel Mass Incarceration?*, CRIME REPORT (Dec. 17, 2019), https://thecrimereport.org/2019/12/17/nypd-gang-database-fuels-mass-incarceration-report/ [https://perma.cc/ZM9V-LZGF].

Black and Brown young men in New York City.[7] Opponents of the database also take issue with the NYPD's lack of transparency regarding the gang database.[8] It is challenging to identify whether a person is within this database and even more difficult to be removed from it because individuals do not receive any notification when they are added.[9]

The NYPD's use of a gang database isn't the first time it has been accused of racial profiling. Beginning as early as the 19th Century, the NYPD has been criticized for the correlation between its policing tactics and race.[10] Most notably, in the early 2000s there was an increase in the use of stop and frisk tactics by the NYPD.[11] However, Judge Shira Scheindlin, in *Floyd v. City of New York*, found that the NYPD had a "*policy* of indirect racial profiling" of Black and Latinx people through stop and frisk and that the NYPD had been "*deliberately indifferent* to the intentionally discriminatory application of stop and frisk . . . ."[12]

Floyd led to a change in the NYPD's stop and frisk tactics. Following the *Floyd* decision, the number of stops and frisks conducted by the NYPD decreased significantly.[13] By contrast, the NYPD simultaneously expanded its Gang Division during this time, even though gangs were not a significant issue in New York City.[14] A gang database poses detrimental risks to those added because inclusion can lead to being falsely labeled as a "gang member,"[15] "inexplicably harsh charges or excessive

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[7] *Id.*

[8] *Id.*; NAACP LEGAL DEF. FUND, *supra* note 5.

[9] *See infra* Section I.C.

[10] Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 459–61 (2000); Stephon Johnson, *New Report Takes Anti-Gang Initiative 'Operation Crew Cut' to Task*, AMSTERDAM NEWS (Dec. 12, 2019, 10:13 AM), http://amsterdamnews.com/news/2019/dec/12/new-report-takes-anti-gang-initiative-operation-cr/ [https://perma.cc/PE8M-GHHY].

[11] Michael D. White, *The New York City Police Department, its Crime Control Strategies and Organizational Changes, 1970-2009*, 31 JUST. Q. 74, 84 (2014).

[12] Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

[13] Janell Ross, *There's a Lot of Chatter About 'Stop and Frisk.' Here Are the Facts.*, WASH. POST (Oct. 5, 2016, 7:33 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/10/05/theres-a-lot-of-chatter-about-stop-and-frisk-here-are-the-facts/ [https://perma.cc/NF8G-PHXF] (stating that the NYPD is still permitted to conduct stops and frisks in New York City, but the number of stops recorded have drastically declined from 2011 to 2015).

[14] K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 2 (2015).

[15] Madina Toure, *NYPD Faces Scrutiny Over How It Determines Who Is a Gang Member*, OBSERVER (June 13, 2018, 2:59 PM), https://observer.com/2018/06/nypd-federal-gang-raids-database/ [https://perma.cc/GP2V-G99T].

bond,"[16] and deportation by ICE.[17] For these reasons, it is important that "the right people"[18] are placed in a gang database.

Part I of this Note begins with a discussion of *Floyd v. City of New York* and the history of stop and frisk in New York City. The discussion then shifts to the NYPD's focus on gang-oriented policing through "Operation Crew Cut" and its gang database. Part I explains what it means to be in a "gang" in New York City, the criteria for being placed in the NYPD's gang database, how its gang database functions in practice, and the racial makeup of those in its gang database. Part II argues that the NYPD's gang database violates the 14th Amendment's Equal Protection Clause. The correlation between the gang database's disparate racial impact and the historical background of racial profiling in the NYPD helps prove discriminatory intent on the part of the NYPD. Part III argues that the NYPD's gang database also violates the 14th Amendment's Due Process Clause. Since the NYPD provides neither notice nor an opportunity to be heard, the gang database infringes on the liberty of New Yorkers without due process of law. Part IV suggests reforms that can be made to the NYPD's gang database, largely based on California's CalGang legislation, that would fix the constitutional issues pointed out in this Note.

I.   A HISTORY OF RACIAL PROFILING & THE GANG DATABASE

Gang databases are criminal intelligence systems that track alleged gang members within the applicable jurisdiction.[19] In October 2012, the NYPD announced "Operation Crew Cut," a

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[16] Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers Into Instant Felons*, INTERCEPT (Dec. 5, 2018, 9:16 AM), https://theintercept.com/2018/12/05/nypd-gang-database/ [https://perma.cc/B58L-UQPE].

[17] Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 1014 (2018).

[18] *Cf.* Floyd v. City of New York, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (noting that some of the evidence of racial discrimination consisted of the NYPD's unwritten policy of targeting "the right people" to stop and frisk—i.e., young Black and Latinx men).

[19] Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 119 (2005); *see also Gang Related Legislation by Subject: Criminal Intelligence Information and Systems (Including Gang Databases)*, NATIONAL GANG CENTER, https://nationalgangcenter.ojp.gov/legislation/intelligenceinformation#gang-related-legislation-by-subject [https://perma.cc/X7LL-HSH8] (last visited June 22, 2021); Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 1014 (2018).

"war on gangs" across New York City.[20]   Following the implementation of Operation Crew Cut, there was an increase in the use of the NYPD's "secret" gang database.[21]   Interestingly, the NYPD's shift in focus to gangs in 2012 occurred shortly after it was forced to change its practice of stop and frisk.[22]   Therefore, it is appropriate to begin with the effect that the *Floyd* decision had on the NYPD's use of stop and frisk.

A.   *S.D.N.Y. Finds That the NYPD Engages in Racial Profiling Tactics*

"Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops."[23]   Due to allegations of racial profiling, the constitutionality of the NYPD's stop and frisk tactics was brought before the Southern District of New York.[24] *Floyd* focused on data that found 88% of the stops conducted by the NYPD resulted in no further law enforcement action, such as an arrest or a summons.[25]   Additionally, the court found that 83% of people stopped for *Terry* stops were either Black or Latinx,[26] despite New York City's population only being 52% Black or Latinx at the time.[27]   It also found that weapons were only seized in 2.1% of the stops where the suspect was Black or Latinx[28] and that contraband was only seized in 3.5% of the stops where the suspect was Black or Latinx.[29]

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[20] Rose Hackman, *Is the Online Surveillance of Black Teenagers the New Stop-and-Frisk?*, GUARDIAN (Apr. 23, 2015), https://www.theguardian.com/us-news/2015/apr/23/online-surveillance-black-teenagers-new-stop-and-frisk [https://perma.cc/F4QG-3TJ2]; *see also* Howell, *supra* note 14, at 2.

[21] Howell, *supra* note 14, at 4; *see also* Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill De Blasio*, INTERCEPT (June 11, 2018, 10:49 AM), https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/ [https://perma.cc/5NAV-FT7Y].

[22] *See* Howell, *supra* note 14, at 2; Stephon Johnson, *Stop-and-Frisk Makes Way for Operation Crew Cut*, AMSTERDAM NEWS (Sept. 26, 2013, 11:32 AM), http://amsterdamnews.com/news/2013/sep/26/stop-and-frisk-makes-way-operation-crew-cut/ [https://perma.cc/6UL9-LWXP].

[23] *Floyd*, 959 F. Supp. 2d at 558. *Terry* stops are another name for "stop and frisk," named after the case *Terry v. Ohio*, which held stops and frisks to be constitutional. *Id.* at 558, 565.

[24] *Id.* at 556.

[25] *Id.* at 558–59.

[26] *See id.* at 559.

[27] *See id.*

[28] *See id.*

[29] *See id.*

This pattern of racial targeting led to the filing of a class action lawsuit against the City of New York in 2008.[30] The plaintiffs in *Floyd* argued that the NYPD deliberately targeted young men of color in New York City without any objective suspicion of criminal behavior.[31] The trial lasted two months and more than 100 witnesses testified.[32] The data and the testimony informed the court's decision that the NYPD's *Terry* stops were being used as a tool for racial profiling.[33] The court ultimately found that the City was liable for violations of Fourth Amendment rights[34] and Fourteenth Amendment rights.[35] Holding that "[w]hether through the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, targeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men violates bedrock principles of equality,"[36] the court ordered "immediate changes to the NYPD's policies, a joint-remedial process to consider further reforms, and the appointment of an independent monitor to oversee compliance with the remedies ordered in this case."[37] This effectively changed the stop and frisk tactics used by the NYPD.

B.   *The NYPD Begins Focusing on Gang-Oriented Policing*

Floyd was decided on August 12, 2013,[38] just ten months after the NYPD announced Operation Crew Cut. Like stop and frisk, New York City's gang database is operated solely by the

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[30] *Floyd, et al. v. City of New York, et al.*, CTR. CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al [https://perma.cc/2MQ8-B46X] (last modified July 9, 2020).

[31] *Floyd*, 959 F. Supp. 2d at 556.

[32] *Id.* at 575.

[33] The data is referenced in the previous paragraph. The testimony ranged from victims of the NYPD's *Terry* stops practice to NYPD officers. *Id.* at 573–75.

[34] *Id.* at 658 ("Plaintiffs established the City's liability for the NYPD's violation of their Fourth Amendment rights under two theories, . . . *first*, plaintiffs showed that senior officials in the City and at the NYPD were deliberately indifferent to officers conducting unconstitutional stops and frisks . . . .").

[35] *Id.* at 661 ("Plaintiffs have established . . . that the City, through the NYPD, has a *policy* of indirect racial profiling based on local criminal suspect data. *Second*, plaintiffs showed that senior officials . . . have been *deliberately indifferent* to the intentionally discriminatory application of stop and frisk . . . .").

[36] *Id.* at 664.

[37] *Id.* at 667.

[38] *Id.* at 540.

NYPD.[39] The NYPD describes its database as "a necessary tool to combat criminal organizations."[40] According to the NYPD's website, "[s]ince 2014, accuracy and precision of the database has been improved by tighter standards for entry."[41] However, these "tighter standards" still leave some room for inaccuracies:

> People entered in the database today either have identified themselves as gang members to a member of the department or on social media; been named as gang members by two reliable independent sources, or shown a consistent and repeated pattern of gang involvement through their affiliations and their use of colors, signs, tattoos and other indicators. Only gang detectives or intelligence officers can recommend entries to the database, and a supervisor must approve the entry.[42]

It is not clear what constitutes a consistent and repeated pattern of involvement and what it means for someone to reliably identify themselves as gang members on social media. Additionally, there is no requirement of criminal conduct to be identified as a gang member and being in a gang, in and of itself, is not currently a crime.[43] However, the NYPD does define a "gang" as:

> 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*.[44]

Thus, the NYPD's definition of "gang" has a requirement of criminal activity, but one can be included as a 'gang member' in the NYPD gang database without proof of any such criminality. Due to this definition of "gang," being placed in the database comes with an implication of criminal activity. Additionally, the

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[39] N.Y. POLICE DEP'T, *Chief of Detectives Dermot Shea: Criminal Group Database is Vital Tool to Controlling Gang Violence* (June 13, 2018), https://www1.nyc.gov/site/nypd/news/s0613/chief-detectives-dermot-shea-criminal-group-database-vital-tool-controlling-gang-violence [https://perma.cc/9XVJ-9YBB].

[40] *Id.*

[41] *Id.*

[42] *Id.*; *see also* Howell, *supra* note 14, at 15–16.

[43] *See* Howell, *supra* note 14, at 15.

[44] NYPD, PATROL GUIDE PROCEDURE 212-13: REPORTING GANG RELATED CRIMINAL ACTIVITY 1 (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide2.pdf#page=464 [https://perma.cc/Y3NE-4GSU] (emphasis added).

lack of a requirement of criminal activity needed to place an individual in the database can potentially lead to false entries. The NYPD claims that officers are mandated to routinely expunge names from the database every three years and "at important milestone moments" to address the issue of false entries. [45] It is also claimed that "inclusion in the database is not considered proof of any crime or grounds for any arrest or other punitive action. Nor is the information in the database available outside the NYPD."[46] In practice, however, it appears that these claims are incorrect.

C. The NYPD Gang Database Lacks Transparency

The NYPD's gang database effectively "allows the NYPD to maintain identifying data, including name, address, and social security number on individuals without even a pretense of reasonable suspicion."[47] Moreover, the NYPD is allowed to track all of this information without satisfying traditional due process notice requirements.[48] The New York Freedom of Information Law ("FOIL") does require the NYPD to disclose "all records" requested by a member of the public unless the NYPD is protected against disclosure on the matter.[49] Under FOIL, an individual can request the NYPD's file on him or herself.[50] However, at least 350 people who submitted FOIL requests in regards to their placement in the gang database have had their requests rejected by the NYPD.[51] The NYPD responded, "the

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[45] N.Y. POLICE DEP'T, *supra* note 39.

[46] *Id.*

[47] Howell, *supra* note 14, at 15.

[48] *Procedural Due Process Civil*, JUSTIA (" '[A] requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . [N]otice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)), https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html [https://perma.cc/S8FS-C2NW] (last visited June 22, 2021).

[49] N.Y. PUBLIC OFFICERS LAW § 87(2) (McKinney 2020).

[50] *Projects, Units & Initiatives: Community Justice Unit*, LEGAL AID SOC'Y, https://www.legalaidnyc.org/programs-projects-units/community-justice-unit/ [https://perma.cc/K8UN-9CJ7] (last updated Mar. 2, 2020).

[51] Noah Manskar, *NYPD Won't Tell You If They Think You're in A Gang: Legal Aid*, PATCH (Apr. 5, 2019, 4:51 PM), https://patch.com/new-york/new-york-city/nypd-wont-tell-nyers-if-it-thinks-theyre-gang-legal-aid [https://perma.cc/98RS-96N2].

documents could not be released because the information they contain would 'reveal non-routine techniques and procedures.' "[52]

Not only are citizens not entitled to know whether they are in the database, "[t]here is no . . . procedure for challenging inclusion in gang databases."[53] The NYPD can track and keep records of New Yorkers—with no suspicion of criminal activity—without so much as having to notify these individuals of their status in the gang database or without so much as having to give them the opportunity to contest their designation as a gang member. And despite what has been claimed, there is not a requirement or provision for purging names from the gang database as it currently stands.[54]

D.   *The Database Has Major Consequences & Racial Implications*

The consequences of being placed into the NYPD's gang database should not be taken lightly. The NYPD maintains that it does not share the information housed in its database with outside agencies, but that has been proven false in practice.[55] The list has been made available to prosecutors.[56] This leads to inexplicably harsh charges, potential sentence enhancements, potential deportation, and/or excessive bond for individuals who may not be gang-affiliated at all.[57] Being in the gang database also leads to heightened surveillance by the NYPD, the possibility of being subjected to one of the NYPD's gang raids, the possibility of losing one's job, and the possibility of being removed from public housing.[58]

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[52] *Id.* (quoting letter from NYPD).

[53] Howell, *supra* note 14, at 15.

[54] *Id.* at 16.

[55] *See* JOSMAR TRUJILLO & ALEX S. VITALE, GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF 'PRECISION POLICING', 18–21 (2019), https://policingandjustice.squarespace.com/s/2019-New-York-City-Gang-Policing-Report-FINAL.pdf [https://perma.cc/CAQ4-9CYE]; Vaidya Gullapalli, *Spotlight: The Dangers of Gang Databases and Gang Policing*, THE APPEAL (July 3, 2019), https://theappeal.org/spotlight-the-dangers-of-gang-databases-and-gang-policing/ [https://perma.cc/RMA5-XWGT].

[56] Speri, *supra* note 16.

[57] *Id.*; *see also* Gullapalli, *supra* note 55.

[58] *See* TRUJILLO & VITALE, *supra* note 5555, at 13–21. In one case, a Bronx native who was close to finishing his MBA, and had no prior criminal record, faced the death penalty. Gullapalli, *supra* note 55 (describing the misfortune of Kraig Lewis who was erroneously included in the NYPD's gang database due to childhood interactions, and subsequently arrested in one of the NYPD's gang sweeps).

These consequences are especially significant when examining who is most affected by the database. The data shows that the database is demographically skewed.[59] As of June 2019, the NYPD reports that its gang database is 66% Black, 22.4% White Hispanic, and 9.3% Black Hispanic.[60] To put these numbers in context, as of 2019, it is estimated that 22.03% of New York City's population identifies as Black only, 10.68% identifies as White Hispanic, and 2.29% identifies as Black Hispanic.[61] So, whereas only 35% of New York City's population identifies as Black and/or Hispanic, New Yorkers who identify as Black and/or Hispanic comprise 97.7% of the NYPD's gang database.

According to the NYPD, "[t]he racial composition of the database reflects patterns of gang membership, not police biases."[62] However, it seems that the database does not account for all types of "gangs."[63] In general, while gang involvement is more common amongst Black and Latinx males, gang involvement is "substantially more common among white youth than law enforcement statistics estimate, with white gang members accounting for 25% or more of all gang members."[64] Additionally, studies have consistently found that most gang-related murders are committed by white people and, in general, "white people commit the vast majority of violent crimes."[65] Therefore the claim that the racial composition of the database, which is 97.7% people of color, *solely* reflects gang membership is likely inaccurate, and it is more likely that what is truly being reflected is police bias.

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[59] *See* Howell, *supra* note 14, at 17.

[60] Michael Tashji & Niamh McDonnell, *New York City Bill That Would Tweak Gang Database Gets Heated Hearing*, JUV. JUST. INFO. EXCH. (July 1, 2019), https://jjie.org/2019/07/01/new-york-city-bill-that-would-tweak-gang-database-gets-heated-hearing/ [https://perma.cc/FS87-4QWW].

[61] Racial Demographic Estimates for New York City, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/newyorkcitynewyork? [https://perma.cc/7TFT-K6DN] (last visited June 22, 2021).

[62] *See* Nick Pinto, *NYPD Added Nearly 2,500 New People to Its Gang Database in the Last Year*, INTERCEPT (June 28, 2019, 11:15 AM), https://theintercept.com/2019/06/28/nypd-gang-database-additions [https://perma.cc/HE7E-CWLQ] (summarizing tesimony given by Oleg Chernyavsky, the head of legislative affairs for the NYPD).

[63] The Proud Boys—a white, far-right, self-declared chauvinist group that identifies as a gang—are not in the database. *See id.*

[64] Howell, *supra* note 14, at 16.

[65] Stephan, *supra* note 19, at 1016.

With the NYPD facing a trial based on racial profiling and unconstitutional stops in 2012, the NYPD may have found a new justification for the intensive policing of young men of color in New York City.[66] With the pretext of gang crime and the public misconception that "gang membership alone is a proxy for violent criminality,"[67] the NYPD seems to have developed a policing tactic that is race-based in practice, race-neutral on its face, and "avoids both public and judicial scrutiny."[68] And, in keeping this database, the NYPD is depriving many New Yorkers of their procedural rights.

II. THE DATABASE INFRINGES ON EQUAL PROTECTION RIGHTS

The Equal Protection Clause prohibits, among other things, intentional race-based discrimination. The Second Circuit has outlined three ways to prove intentional discrimination that violates the Equal Protection Clause[69]: (1) there is a law or policy that "expressly classifies persons on the basis of race";[70] (2) there is a facially neutral law or policy that has been applied in an intentionally discriminatory manner;[71] or (3) there is a facially neutral statute or policy that has an adverse effect and was motivated by discriminatory animus.[72]

There is rarely direct proof of discriminatory intent, and, therefore, courts have allowed circumstantial evidence to prove discriminatory intent.[73] Courts have found that "[t]he impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point."[74] Another form of circumstantial evidence that courts have allowed is the historical background of the actor.[75] That is, courts can consider past racial animus or discrimination conducted by the

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[66] Howell, *supra* note 14, at 12.

[67] *Id.* at 5.

[68] *Id.* at 4.

[69] Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000); Floyd v. City of New York, 959 F. Supp. 2d 540, 570–71 (S.D.N.Y. 2013).

[70] *Brown*, 221 F.3d at 337; *Floyd*, 959 F. Supp. 2d at 570.

[71] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); *Brown*, 221 F.3d at 337; *Floyd*, 959 F. Supp. 2d at 570–71.

[72] Vill. of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977); *Brown*, 221 F.3d at 337; *Floyd*, 959 F. Supp. 2d at 571.

[73] *Floyd*, 959 F. Supp. 2d at 571.

[74] *Id.* (quoting *Arlington Heights*, 429 U.S. at 266).

[75] *Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

same actor when analyzing discriminatory intent under the Equal Protection Clause.[76] Using racial impact as the starting point, this section examines the racial discrepancies present in the database and the NYPD's gang policing tactics. After analyzing the impact, this section concludes by analyzing the historical background of the NYPD and its practices of racial targeting.

A.   *There Is a Disparate Impact on Communities of Color*

Disparate impact refers to the "unnecessary discriminatory effect on a protected class caused by a practice or policy . . . that appears to be nondiscriminatory."[77] There are two components to examine when looking at disparate impact. The first is the data. The database is demographically skewed, directly effecting Black and Latinx communities in New York City.[78] The second component is the actual impact. The gang database has a discriminatory effect on the people in Black and Latinx communities in New York City.[79] Those subjected to the gang database are subjected to harassment, hyper-policing, enhanced bail, employment issues, housing issues, and risks of deportation.[80]

1.   The Database Is Demographically Skewed

Gang membership has long been associated with racial and socioeconomic status.[81] Specifically, it has been largely associated with Black and Latinx people.[82] It is not merely a coincidence that, as the *Floyd* court was deciding whether the NYPD's stop & frisk practices had an intentional and unconstitutional disparate impact on Black and Latinx people,

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[76] *See* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016) (noting that the North Carolina legislature requested and received racial data regarding how citizens vote and subsequently created a bill that targeted many of the ways that African Americans were found to vote).

[77] *Disparate Impact*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/disparate%20impact [https://perma.cc/4FXW-MA2K] (last visited June 22, 2021).

[78] *See supra* Section I.D.

[79] TRUJILLO & VITALE, *supra* note 55, at 6.

[80] *Id.* at 13–21.

[81] *Frequently Asked Questions About Gangs*, NATIONAL GANG CENTER, https://www.nationalgangcenter.gov/about/FAQ [https://perma.cc/23S7-2YF7] (last visited June 22, 2021).

[82] *Id.*

the NYPD shifted its focus to surveilling activity largely associated with Black and Latinx people.

Under *Yick Wo v. Hopkins*, the fact that the database is nearly 98% people of color[83] is evidence of biased enforcement.[84] *Yick Wo* dealt with an 1880 ordinance in the city of San Francisco that required all laundries in wooden buildings to hold a permit issued by the city's Board of Supervisors.[85] The board had total discretion over who would be issued a permit.[86]   Although workers of Chinese descent operated about 75% of the city's laundry businesses, only one Chinese owner was granted a permit.[87]   The Supreme Court of the United States then concluded that, despite the impartial wording of the law, the board's biased enforcement violated the Equal Protection Clause.[88] According to the Court, even if a law is impartial on its face, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the [C]onstitution."[89]

The NYPD suggests that the racial breakdown of its database is proportionate to New York City crime statistics,[90] but this suggestion ignores one of the most glaring issues with the gang database: there is no requirement of criminal activity.[91] A citizen can be added to the database "for standing on the corner and wearing a red T-Shirt."[92] It seems counterintuitive, then, that there should be a correlation with crime statistics when there are individuals added for non-criminal reasons. Additionally, if the NYPD is not required to target crime or criminals to enter someone into the database, and additions to the database are subject to extreme police discretion,[93] then that raises the question: what is the NYPD targeting? "This practice of subjecting people to police action based on the same rates as

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[83] *See supra* note 60 and accompanying text.
[84] *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[85] *Id.* at 366.
[86] *Id.*
[87] *Id.* at 356.
[88] *Id.* at 373–74.
[89] *Id.*
[90] Stephan, *supra* note 19, at 1027.
[91] *See* Howell, *supra* note 14, at 15; Stephan, *supra* note 19, at 1027.
[92] Stephan, *supra* note 19, at 1027.
[93] *Id.*

racially disproportionate criminal suspect data for non-criminal criteria at the discretion of police is the exact finding" the *Floyd* court held violated the Constitution.[94]   Using non-criminal criteria to track alleged gang members and, in turn, creating a database that is nearly 100% Black and Latinx looks like racial targeting.

2.   The Impact

Being placed in a gang database and labeled as a gang member does not come without consequences.   Those placed in the gang database are subjected to harassment, hyper-policing, enhanced bail, employment issues, housing issues, and risks of deportation.[95]   While the number of stops in New York City has decreased since *Floyd*, street-level contact with police remains constant in "gang" communities.[96]   Under Operation Crew Cut, police have chosen to put more focus on those individuals "deemed gang-involved."[97]   More policing can lead to more arrests and deeper forms of harassment by the police.[98]

These problems follow these individuals into the courtroom. Often, allegations of gang affiliation have led to higher bail or denial of bail.[99]   The label of "gang member" comes with perceived notions of criminality and danger.[100]   It is also thought to bare on one's "character, reputation, habits and mental condition."[101]   Due to their placement in the database, individuals have been fired from their jobs and excluded from public housing, and the database has also been used as a pretext to initiate removal proceedings against noncitizens.[102]   The NYPD's gang database directly impacts the lives, both inside and outside of the criminal justice system, of Black and Latinx people in New York City in a disparate way.

B.   Historical Background

Disparate impact is not enough to prove an equal protection violation,   there   must   also   be   discriminatory   intent.

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[94] *Id.*; Floyd v. City of New York, 959 F. Supp. 2d 540, 660–61 (S.D.N.Y. 2013).

[95] TRUJILLO & VITALE, *supra* note 55, at 13–21.

[96] *See id.* at 13–15.

[97] *Id.* at 2, 14.

[98] *Id.* at 13.

[99] *Id.* at 15.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 18–21.

Discriminatory intent may be proven circumstantially through information such as historical background. What matters for the purpose of historical background in an equal protection analysis is the historical background of the actor. Here, the relevant actor is the NYPD. However, at the onset of this analysis, it is important to note that the relevant actor being the NYPD provides an obstacle to the claim. The personnel of the NYPD is consistently changing with each hiring class and, as result, this could mean that the NYPD that engaged in racial profiling in the past may not be the same NYPD engaging in anti-gang policing tactics today. However, it is relevant that Raymond Walter Kelly served as the New York City Police Commissioner between January 1, 2002, and January 1, 2014, under Mayor Bloomberg.[103] Commissioner Kelly headed the NYPD both in the early 2000s, during the height of stop and frisk in New York City, and in 2012, when the NYPD announced Operation Crew Cut.[104]

1. The NYPD Has A History of Racial Profiling

It is common knowledge that the NYPD has had a difficult history with policing in Black and Latinx neighborhoods.[105] Between 2014 and June 2019, more than 2,000 complaints were filed against the NYPD for racial profiling.[106] The effects of perceived racial profiling by the NYPD were not only felt by Black & Latinx citizens unassociated with the NYPD. Racial profiling is a practice that is systematically embedded within the NYPD.[107] It is both explicit and implicit. The *Floyd* court found that during the stop and frisk era, "the City's highest officials . . . turned a blind eye" to the racial discrimination

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[103] *Raymond Kelly*, UNITED TALENT AGENCY (Jan. 8, 2020, 8:18 AM), https://www.unitedtalent.com/speaker/raymondkelly/ [https://perma.cc/5U9J-HM5N]; *NYPD Historical and Current Research: Police Commissioners*, LLOYD SEALY LIBRARY (July 27, 2020, 11:29 AM), https://guides.lib.jjay.cuny.edu/nypd/Commissioners [https://perma.cc/8CPQ-3894].

[104] Johnson, *supra* note 10.

[105] Debbie Almontaser, *The NYPD's Ugly History of Racial Profiling*, GUARDIAN (Jan. 30, 2012), https://www.theguardian.com/commentisfree/cifamerica/2012/jan/30/nypd-ugly-history-racial-profiling [https://perma.cc/Z45D-5T3R].

[106] Cindy Rodriguez & WNYC Staff, *Nearly 2,000 Complaints of NYPD Racial Profiling Since 2014–And the Department Found Nothing Wrong*, GOTHAMIST (June 26, 2019, 10:37 AM), https://gothamist.com/news/nearly-2000-complaints-of-nypd-racial-profiling-since-2014mdashand-the-department-found-nothing-wrong [https://perma.cc/RF5H-QS8Y].

[107] *See* Conor Friedersdorf, *The NYPD Officers Who See Racial Bias in the NYPD*, ATLANTIC (Jan. 7, 2015), https://www.theatlantic.com/national/archive/2015/01/the-nypd-officers-who-see-racial-bias-in-the-nypd/384106/ [https://perma.cc/PTQ8-3KPD].

occurring in conjunction with stop and frisk.[108] "In their zeal to defend a policy that they believe to be effective, they . . . willfully ignored overwhelming proof that the policy of targeting 'the right people' is racially discriminatory . . . ."[109] These biases and prejudices still exist within the NYPD today.[110]

2. There Are Similarities Between Stop and Frisks and Operation Crew Cut

Critics of the NYPD's gang database have highlighted the similarities between the NYPD's stop and frisk practices and the database.[111] The most notable similarities are the racial discrepancies and the disproportionate effects that the practices have on communities of color. Under stop and frisk, out of the 4.4 million stops made by the NYPD between January 2004 and June 2012, eighty-three percent of the people stopped were either Black and/or Latinx;[112] at the time, New York City's population was only fifty-two percent Black and/or Latinx.[113] The *Floyd* court also noted that the NYPD's practice of stop and frisk led to community resentment towards the NYPD, particularly within communities of color.[114] It took a toll on those stopped.[115] People of color often felt singled out by the police, even though most of them had done notthing to attract police attention.[116] And communities of color felt alienated by the police.[117] The data and the effects played a significant part in the court finding that the NYPD "has a *policy* of indirect racial profiling"[118] and "that senior officials . . . have been *deliberately indifferent* to the intentionally discriminatory application of stop and frisk . . . ."[119]

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[108] Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

[109] *Id.*

[110] *See, e.g.*, Ali Watkins, *2,495 Reports of Police Bias. Not One Was Deemed Valid by the N.Y.P.D.*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/2019/06/26/nyregion/nypd-bias.html [https://perma.cc/T5PZ-L8F9].

[111] Jeff Coltin, *Why Everyone Is Suddenly Talking About the NYPD Gang Database*, CITY & STATE N.Y. (June 13, 2018), https://www.cityandstateny.com/articles/policy/criminal-justice/why-everyone-suddenly-talking-about-nypd-gang-database.html [https://perma.cc/NE9J-G9K3].

[112] *Floyd*, 959 F. Supp. 2d at 558–59.

[113] *Id.*

[114] *Id.* at 556–57.

[115] *Id.* at 557.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 660.

[119] *Id.*

Under Operation Crew Cut, the gang database has risen to 18,084 people by June 2019[120]—nearly 98% of them being Black and/or Latinx.[121]   Similar to stop and frisk, there is a public concern that some communities—communities of color—are surveilled more than others.[122]   The gang database has been criticized by civil rights activists for disproportionately targeting Black and Latinx youth.[123]   Many have referred to the gang database as the "successor to the much-maligned practice of stop-and-frisk."[124]   The NYPD has faced public backlash over its "inaccurate labeling of youth—especially youth of color—as gang members . . . ."[125]

There has additionally been a focus placed on the effects of the gang database on communities of color. Citizens are being incriminated "simply because they were wearing the wrong color, living in a 'bad area' or were hanging out with their friends 'on the wrong corner.' "[126]   Like with stop and frisk, the gang database and its effects are causing communities of color to feel alienated by the police.[127]   The lawful conduct of New York City citizens can result in unwanted attention from the authorities, and being falsely labeled as a gang member can have serious consequences.[128]   The NYPD's history of racial profiling, the similarities between the effects of stop and frisk and the gang database, and the temporal proximity between *Floyd* and Operation Crew Cut suggests that there is some discriminatory intent in the maintenance of the NYPD's gang database.

III. THE NYPD'S GANG DATABASE VIOLATES THE DUE PROCESS CLAUSE

The basic procedural requirements courts provide to an individual to avoid a deprivation of rights are notice and the

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[120] Pinto, *supra* note 62.

[121] *See supra* note 61 and accompanying text.

[122] Pinto, *supra* note 62.

[123] Coltin, *supra* note 111.

[124] *Id.*

[125] Toure, *supra* note 15.

[126] *Id.* (quoting Queens Councilman Donovan Richards, chairman of the New York City Council's Committee on Public Safety).

[127] Floyd v. City of New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013); *see also* Hazel Sanchez, *Critics, Community Leaders Question Use of NYPD's Gang Database*, CBS N.Y. (June 13, 2018), https://newyork.cbslocal.com/2018/06/13/nypd-gang-database/ [https://perma.cc/MBQ7-CG9E].

[128] *See, e.g.*, Sanchez, *supra* note 127.

opportunity to be heard.[129] The individual must be notified that he or she will soon be deprived of a right he or she is entitled to, and the individual must be allowed the opportunity to dispute the deprivation.[130] Due to a lack of notice as well as a lack of an opportunity to be heard, the NYPD's gang database lacks Procedural Due Process.[131] "The essential due process question is whether the marginal benefit of introducing additional procedures to eliminate errors and protect the liberty interests involved exceeds the marginal cost of introducing these procedures with the possible effect of sacrificing some of the impact they may have had in deterring gang crime."[132] When evaluating Procedural Due Process claims, the court does a balancing test between the private interest, risk of erroneous deprivation, the costs of additional safeguards, and the government interest.[133]

In the case of the NYPD's gang database, when an individual requests to learn whether he or she is in the database through the Freedom of Information Act, his or her request is often denied.[134] The documentation process requires very little participation by the individual, diminishing the opportunity to prevent erroneous entry.[135] There is currently no procedure in place or opportunity for an individual to request that his or her name is removed from the gang database.[136] And, despite the NYPD's claim, there are significant consequences associated with being in the NYPD's gang database.[137] For all of these reasons, the NYPD's gang database currently violates the 14th Amendment's Due Process Clause. To illustrate the extent of this constitutional violation, the next section analyzes the protected interest at risk and evaluates the reality of adding procedural safeguards through a *Mathews* analysis.

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[129] JUSTIA, *supra* note 48.
[130] *Id.*
[131] *See supra* Section I.C.
[132] Wright, *supra* note 19, at 131.
[133] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).
[134] *See supra* Section I.C.
[135] Howell, *supra* note 14, at 16; *see also supra* Section I.C.
[136] *See supra* Section I.C.
[137] *See supra* Section I.D.

A. The NYPD's Gang Database Infringes Upon A Protected Interest

The Due Process Clause is designed to prevent deprivation of "life, liberty, or property, without due process of law."[138] Being placed in the database increases surveillance by the police,[139] increases the possibility of being swept in a NYPD gang raid,[140] and can lead to inexplicably harsh charges or excessive bail,[141] among the other things previously mentioned. Placement in the NYPD's gang database does not implicate reputation alone.[142] Rather, it creates a reputation that increases harassment, hyper-policing, and possible deportation, as well as increases the likelihood of loss of employment and public housing and being subjected to the criminal justice system.[143]

When evaluating procedural due process, "[t]he constitutional issue . . . turns upon whether documentation significantly *alters an individual's status* as a matter of state law or merely causes stigma to reputation."[144] The Supreme Court in *Paul v. Davis* explained:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases *does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause*.[145]

Being labeled as a "gang member" in New York City alters an individual's status within New York City's criminal justice, employment, public housing, and immigration systems. "Immigration authorities use the label to justify deportation. Prosecutors use it to ask for higher bail and to keep people on Rikers Island before they have been convicted. Judges consider

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[138] U.S. CONST. amend. XIV, § 1.

[139] TRUJILLO & VITALE, *supra* note 55, at 13.

[140] *Id.* at 6.

[141] *Id.* at 15–18.

[142] *See* Paul v. Davis, 424 U.S. 693, 708–09 (1976).

[143] TRUJILLO & VITALE, *supra* note 55, at 13–21.

[144] Wright, *supra* note 19, at 133.

[145] *Davis*, 424 U.S. at 701 (emphasis added).

it when imposing sentences, even for nonviolent offenses."[146] The NYPD documenting an individual as a suspected or known gang member is enough to trigger some due process protections because it can affect an individual's entire livelihood. Accordingly, there needs to be procedures in place to avoid depriving potentially innocent people of rights vital to any individual's survival.

B. *The Mathews Analysis Weighs in Favor of Adding Procedural Safeguards*

When a cognizable interest is infringed upon, states must set forth procedures that meet the Constitution's due process standard.[147] The Supreme Court created the framework for this analysis in *Mathews v. Eldridge*. Under *Mathews*, courts must balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional safeguards; and (3) the government's interest and any administrative burdens that additional procedural safeguards would pose.[148] The *Mathews* analysis here favors increasing procedural safeguards for individuals placed in the NYPD's gang database.

1. The Private Interest

The private interest affected by the official action is the property interest previously discussed. It's an interest against criminal mislabeling that can affect an individual's livelihood. New Yorkers have a legitimate private interest in not being falsely labeled as gang members. There is an interest in keeping this information from being used by immigration authorities for deportation purposes.[149] There is an interest in not wanting a false label of being a gang member to affect an individual's bail.[150] There is an interest in not wanting that false label to be considered by employment or housing agencies.[151] Moreover, placement in the NYPD's gang database is not idiosyncratic. It is not a one-time event. The effects of being placed in the database will continue until an individual is purged from the database,

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[146] Toure, *supra* note 15.

[147] *See* Wright, *supra* note 19, at 137.

[148] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[149] *See* TRUJILLO &VITALE, *supra* note 55, at 20–21.

[150] *See id.* at 15–16.

[151] *Id.* at 18–20.

and that is if that individual will even be purged from the database. An individual could potentially remain in the NYPD's gang database for the duration of his or her life, and his or her livelihood could be affected for the duration of his or her life. That is why there is a significant private interest here. The Supreme Court has "frequently recognized the severity of depriving a person of the means of livelihood."[152] Placement in the NYPD's gang database can potentially affect one's housing, job, immigration status, and freedom.

2.   Risk of Erroneous Deprivation

Under the second prong of the *Mathews* analysis, both the current and suggested procedural safeguards must be evaluated.[153] A court must balance the risk of erroneous deprivation present in the NYPD's current procedures against the probable value of additional safeguards.[154] Beginning with the risk of erroneous deprivation, the NYPD's gang database has been described as a "secret" list by critics. In fact,

> [t]he NYPD is facing increasing backlash over a lack of transparency about the process by which it determines who is included in its gang database, as well as its gang policing tactics amid concerns over inaccurate labeling of youth—especially youth of color—as gang members based on vague criteria.[155]

It is argued "that the risk of such consequences being thrust upon *innocent* individuals is 'too great' when information about how and why people are labeled gang members is withheld from the public."[156]

The NYPD has sought to minimize erroneous deprivation by articulating two paths to inclusion in the gang database. However, despite the articulation of these paths, there still exists a high probability of erroneous entries. According to the NYPD:

> The first path requires that one of the following take[s] place: a self-admission of gang membership to a member of the NYPD, being identified as a gang member by two "independent and reliable sources" or social media posts admitting to membership in a gang.

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[152] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985).

[153] *Mathews*, 424 U.S. at 335.

[154] *Id.*

[155] Toure, *supra* note 15.

[156] *Id.* (emphasis added) (describing arguments made by Councilman Donovan Richards).

> The second path . . . requires two of the following to be
> true: frequent presence at a known gang location; possession of
> "gang-related documents"; association with known gang
> members; social media posts with known gang members while
> possessing known gang paraphernalia; scars and tattoos
> associated with a particular gang; frequent wearing of the colors
> and frequent use of hand signs linked to specific gangs.[157]

Aside from the individuals who "self-identify" as gang members, there is no participation from the individual in the documentation process. Lack of participation from the individual, in general, increases the likelihood of erroneous entry into the database. This is because placement in the gang database is based on what the NYPD thinks it knows from social media, outside sources, or the everyday "behavior" of the individual in question.[158]

Due to the lack of transparency, lack of participation from the individual, and extreme discretion afforded to the NYPD, there is a high risk that a New Yorker will be erroneously added to the gang database. The individual would potentially be subjected to the loss of housing, jobs, immigration status, and freedom without any notice or any opportunity to be heard.[159] The analysis does not end there. "The *Mathews* balancing analysis requires one to consider not only the risk of erroneous deprivation, which is very high, but also the 'probable value, if any, of additional or substitute procedural safeguards.' "[160] One way to describe the cost-benefit analysis when adding procedural safeguards is as:

"Increase in Accuracy X Claimant's Interest > Burden on Government."[161]

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[157] *Id.*

[158] *Id.*

[159] The ability to provide notice and an opportunity to be heard are feasible procedural safeguards. As discussed in Part IV of this Note, California has successfully implemented both a notice requirement and procedures for hearings regarding an individual's placement in its CalGang database. *See infra* Part IV. Additionally, Illinois' Inspector General has suggested notice and an opportunity to be heard to improve some of the issues with Chicago's gang database. CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL, REVIEW OF THE CHICAGO POLICE DEPARTMENT'S "GANG DATABASE", 3 (2019), https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf [https://perma.cc/PBT4-6NUA].

[160] Wright, *supra* note 19, at 138 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[161] *Id.* at 139.

As discussed above, the probability of risk of erroneous deprivation is quite high and the private liberty interest at risk is significant.[162] These risks together must be weighed against the costs of additional procedures. "[T]he complete absence of procedural safeguards in the documentation process and input from the affected party suggests that additional safeguards would have a dramatic effect on the accuracy of the gang database."[163]

Safeguards, such as providing notice to individuals and offering them the opportunity to be heard and challenge their designation as an alleged gang member, would substantially improve the accuracy of the NYPD's gang database. It would allow innocent people to purge themselves from the database, instead of relying on NYPD officials to do it. This is not a trivial or marginal benefit. It is a simple and voluntary means of protecting the liberty of those who rightfully should not be in the gang database. It would also help to increase the community's faith in the NYPD's gang database because it affords greater transparency. For all of the above reasons, the probable value of requiring notice and the opportunity to be heard is significant. Together, this prong of the *Mathews* analysis weighs in favor of an increase in procedural safeguards.

3.   The Government's Interest

The next step in the analysis is to determine the burden that would be imposed on the NYPD if more procedural safeguards were required.   *Mathews* requires that courts weigh the government's interest in the current procedures.[164] The calculus of the government's interest "must account for the administrative burden associated with adding a particular procedure."[165]   It follows logically to begin with the NYPD's interest in their gang database in general, and how further procedural safeguards would affect that interest. Here, the NYPD does have some legitimate interest in its current procedures. According to the NYPD, the gang database "is a 'precision policing' tool, focused on

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[162] *See supra* Sections III.A, III.B.1.

[163] Wright, *supra* note 19, at 139; *cf.* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 32–33 (1981) (determining that there was no error when the trial court failed to appoint counsel for the mother, because the mother did not show much interest in obtaining custody of her son).

[164] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[165] Wright, *supra* note 19, at 139.

'finding and arresting the few who weaken the fabric of our neighborhoods through violence and intimidation.' "[166]   The NYPD's "goal is to make sure that everyone who is in the database is actually a gang member," and the NYPD acknowledged that "[s]aturating the database with non-gang members limits its usefulness."[167]   The NYPD has also argued that, "telling young people they are thought to be affiliated with a gang would hamper investigations."[168]

The NYPD has legitimate interests in decreasing neighborhood violence and in not wanting to have their investigations "hampered."   However, imposing procedural protections would hardly impose upon these interests. "Whatever impact gang databases have on crime rates, a hearing requirement would not compromise the [agency's] ability to share information, analyze the data to inform their resource allocation decisions, and facilitate prosecution by presenting the data in court."[169]   Requiring that the NYPD give notice and provide an opportunity to be heard does not infringe on their interest in reducing crime.   It would likely help the NYPD maintain an accurate gang database—one of its stated goals.

The Supreme Court has held that when the risk of deprivation of a protected interest is "unacceptably high," the government must provide the individual with "notice of the factual basis for his classification, and a fair opportunity to rebut [those] factual assertions."[170]   In this case, while requiring notice and a hearing may increase the NYPD's administrative costs, these changes are practical, feasible, and constitutionally mandated.   Increased administrative costs do not outweigh the liberty interest risks posed by the gang database in its current implementation.   Whatever costs may be associated with providing notice and an opportunity to be heard, they are minimal compared to the risks of loss of housing, jobs, immigration status, and freedom.[171]   Moreover, these procedural safeguards would promote the NYPD's stated goals of the gang database.   It would make it more precise and, therefore, more

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[166] Pinto, *supra* note 62 (quoting Oleg Chernyavsky, the Head of Legislative Affairs for the NYPD).

[167] Toure, *supra* note 15 (quoting Dermot Shea, the NYPD's Chief of Detectives).

[168] Pinto, *supra* note 62.

[169] Wright, *supra* note 19, at 139; s*ee infra* Part IV for discussion of the ideal hearing requirement.

[170] Hamdi v. Rumsfeld, 542 U.S. 507, 532–533 (2004).

[171] *See* Trujillo and Vitale, *supra* note 55, at 13–21.

useful. Thus, the *Mathews* test weighs in favor of the NYPD providing notice and the opportunity to be heard.

IV. THE GANG DATABASE SHOULD BE CONTROLLED BY STATUTE

The Inspector General should do a full investigation, and, following that investigation, the gang database should be regulated by statute. The statute should reflect the findings of the investigation and focus on correcting the current constitutional errors that exist with the current database. After the NYPD's Inspector General conducts an investigation and discloses his findings, New York should implement a statute similar to the one implemented in California. There are four key components in California's Fair and Accurate Gang Database Act of 2017[172] that should be included in any New York City legislation concerning the NYPD's gang database: (1) all criteria and relevant definitions concerning gangs are written within the act; (2) the act confers oversight power to the California Department of Justice ("DOJ") to deter abuse of discretion; (3) the act mandates a notice requirement; and (4) the act includes a means of challenging one's inclusion on the database.[173] Each is discussed below.

First, all criteria and relevant definitions concerning gangs should be written within any legislation developed for the NYPD's gang database. California's Fair and Accurate Gang Database Act lists and defines the terms "criminal street gang,"[174] "gang database,"[175] "law enforcement agency,"[176] and

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[172] Fair and Accurate Gang Database Act of 2017, Cal. Assemb. B. 90, Chap 695 (Cal. 2017).

[173] *Id.*

[174] "Criminal street gang" is defined as "an ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of crimes . . . who have a common identifying sign, symbol, or name, and whose members individually or collectively engage in or have engaged in a pattern of definable criminal activity." CAL. PENAL CODE § 186.34(a)(1) (West 2018).

[175] "Gang database" is defined as "any database accessed by a law enforcement agency that designates a person as a gang member or associate, or includes or points to information, including, but not limited to, fact-based or uncorroborated information, that reflects a designation of that person as a gang member or associate." *Id.* § 186.34(a)(2).

[176] "Law enforcement agency" is defined as

a governmental agency or a subunit of a governmental agency, and its authorized support staff and contractors, whose primary function is detection, investigation, or apprehension of criminal offenders, or whose primary duties include detention, pretrial release, posttrial release,

"shared gang database."[177]   Currently, only "gang" is publicly defined by the NYPD.[178] Any legislation pursuant to the NYPD's gang database should include these definitions to alleviate some of the transparency issues that it currently suffers from.   The public would have notice about who the NYPD is targeting.

Second, any legislation regarding the NYPD's gang database should confer oversight to outside agencies. Oversight should be defined as regulatory supervision to maintain the database and prevent any abuse of discretion. California's Fair and Accurate Gang Database Act requires the California DOJ to administer and oversee CalGang.[179]   The DOJ "may enforce a violation of state, federal or regulation with respect to a shared gang database or a regulation, policy, or procedure established by the department . . . ."[180]   Previously, the CalGang Executive Board administered and oversaw the CalGang database, similar to the way the NYPD currently administers and oversees the NYPD gang database.[181] Now, the California DOJ governs the use of the CalGang database.[182]

In addition to giving the DOJ administration and oversight power, the Attorney General established the Gang Database Technical Advisory Committee ("GDTAC") "to advise the department in promulgating regulations governing the use, operation, and oversight of shared gang databases."[183]   It is the committee's job to provide advice to the DOJ on standardized training.[184]   The GDTAC has one main goal: to build consensus and provide "the public a seat at the table."[185]   Under the DOJ

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correctional supervision, or the collection, storage, or dissemination of criminal history record information.

Id. § 186.34(a)(3).

[177] "Shared gang database" is defined as "a gang database that is accessed by an agency or person outside of the agency that created the records that populate the database." *Id.* § 186.34(a)(4).

[178] *See supra* note 44 and accompanying text.

[179] CAL. PENAL CODE § 186.36 (West 2018).

[180] *Id.* § 186.36(u).

[181] *Id.* § 186.36(b).

[182] *Id.*

[183] Office of the Attorney General, *Gang Database Technical Advisory Committee: CalGang and Shared Database Regulations*, CALGANG, https://oag.ca.gov/calgang/gdtac [https://perma.cc/V8VR-K5W8] (last visited June 22, 2021).

[184] CAL. PENAL CODE § 186.36(o) (West 2018).

[185] Dep't of Just., *AB 90 Overview & Committee Goals and Objectives*, https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ab90-overview.pdf [https://perma.cc/VYN3-65RU] (last visited June 22, 2021).

and GDTAC, there are outside individuals responsible for regulating CalGang, there are departments outside of police departments with oversight over CalGang, and there is an opportunity for public involvement.[186] There should be similar oversight required by the NYPD. It would function to help prevent corruption, abuse of discretion, or intentional racial targeting done in connection with the NYPD's gang database. Oversight would help provide accountability and potentially increase some of the community's faith in the database.

Third, any legislation regarding the NYPD's gang database should require that notice be provided to those entered into the database. Under California's Fair and Accurate Gang Database Act, notice "shall describe the process for the person . . . to contest the designation of the person in the database. The notice shall also inform the person of the reason for his or her designation in the database."[187] The notice requirement is nothing more than a letter that tells the person why they are a suspected gang member and how they can challenge their inclusion in CalGang. It is simple and procedurally effective. Like CalGang, the NYPD's gang database should include a notice requirement as well. It is recognized that the NYPD has concerns about including a notice requirement because notice may "harm" ongoing investigations. One way to alleviate this concern would be to modify the notification requirement so that notice is always required "unless providing that notification would compromise an active criminal investigation or compromise the health or safety of the minor."[188] Including this short provision protects both sides' interests and goals.

Lastly, there should be an opportunity to be heard. As indicated in the notice requirement, CalGang affords a process for challenging an individual's placement in CalGang:

> [T]he person designated or to be designated as a suspected gang member, associate, or affiliate . . . may submit written documentation to the local law enforcement agency contesting the designation. The local law enforcement agency shall review the documentation, and if the agency determines that the person is not a suspected gang member . . . the agency shall remove the person from the shared gang database. The local law enforcement agency shall provide the person . . . with

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[186] Office of the Attorney General, *supra* note 183.
[187] CAL. PENAL CODE § 186.34(c)(2) (West 2018).
[188] *Id.* § 186.34(c)(1).

written verification of the agency's decision within 30 days of submission of the written documentation contesting the designation. If the law enforcement agency denies the request for removal, the notice of its determination shall state the reason for the denial. If the law enforcement agency does not provide a verification of the agency's decision within the required 30-day period, the request to remove the person from the gang database shall be deemed denied. The person . . . may petition the court to review the law enforcement agency's denial of the request for removal and order the law enforcement agency to remove the person from the shared gang database . . . .[189]

The statute outlines the individual's ability to provide written objection to the inclusion, and if that is denied, provides the opportunity to be heard in court to challenge their placement in the database.[190] If applied to New York, this would give individuals ample opportunity to purge themselves out of the gang database. Together with the notice requirement, this will alleviate many of the critiques on transparency issues and help to achieve a more accurate gang database by limiting erroneous entries.

CONCLUSION

The NYPD's gang database has two significant issues. The first issue is that the database may be a vehicle for racial profiling. The second issue is that it lacks the proper procedures to prevent individuals from being unconstitutionally deprived of property interests. If the database is being used as a tool for racial profiling, it is unconstitutional under the 14th Amendment's Equal Protection Clause. The correct remedy would be to abolish the database until the NYPD can maintain it

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[189] *Id.* § 186.34(e).

[190] Law enforcement is required to prove that the individual is an active gang member by "clear and convincing evidence." Should law enforcement fail to meet their burden, the individual should be removed from the gang database. Kelly Davis, *Few People Have Successfully Removed Themselves from State Gang Database*, VOICE OF SAN DIEGO (Dec. 9, 2019), https://www.voiceofsandiego.org/topics/public-safety/few-people-have-successfully-removed-themselves-from-state-gang-database/ [https://perma.cc/8LEJ-HL8B]. In 2017, there were 16 requests for removal made to law enforcement agencies but only one was granted. DEP'T OF JUST., ATTORNEY GENERAL'S ANNUAL REPORT ON CALGANG FOR 2017, 1, 2 (2017), https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2017.pdf [https://perma.cc/Z3K2-NB4Z]. In 2018, there were 53 requests made and 11 of them were granted. *Id.*

in a way that is actually race-neutral. However, intent of racial discrimination is difficult to prove, and, therefore, Equal Protection violations are difficult to prove. While the racial discrepancy of the database—with 98% of those included being Black and/or Latinx—is stark, it is not enough by itself to prove discriminatory intent. Although the NYPD does have a history of racial profiling, without more evidence of the NYPD's current intent to target only Black and/or Latinx individuals in New York City, a challenge to their gang database on Equal Protection grounds is unlikely to succeed.

If the NYPD is going to continue to maintain its gang database, there needs to be reforms. First, the NYPD's Inspector General should conduct a full investigation of the NYPD's gang database. The Inspector General should review the NYPD's policies on gangs, observe NYPD gang trainings, interview NYPD personnel regarding gang policies and the gang database, analyze the NYPD's gang-related data and reports, and examine external agencies' access to the NYPD's gang database. Following the full investigation, the Inspector General should create a report and disclose his findings to the public. Based on the findings made by the Inspector General, the NYPD's gang database should be controlled by statute. Its statute should mirror that of California's and contain provisions that define all relevant terms and list the criteria for being placed in the database, confer the power of oversight to an outside governmental agency, provide automatic notice of inclusion in the database, and provide a method of challenging one's inclusion in the database. With these proposed changes, the NYPD could have a constitutionally sound database that achieves its goal of precision policing.