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Assumed Dangerous until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings

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ASSUMED DANGEROUS UNTIL PROVEN INNOCENT: THE CONSTITUTIONAL DEFECT IN ALLEGING GANG AFFILIATION AT BAIL HEARINGS

INTRODUCTION

Dusti Proffit, a black, seventeen-year-old male from Schaumburg, Illinois, understands what it means to be assumed dangerous.[1] Proffit, who works at a public library, has been pulled over by police five times within a single year.[2] During one of the stops, the police searched his vehicle and questioned him about guns, drugs, and gang affiliation.[3] His mother fears, though she has no way of verifying, that her son's name is wrongly contained within the Schaumburg police's gang database.[4]

In the late 1980s and early 1990s, media reports in the United States stoked fears of increasing violent crime committed by young offenders.[5] In particular, the ideas that gangs had developed organizationally, "become more violent," and "pose[d] a unique threat" to society gained traction.[6] Despite the fact that youth crime rates in the United States have dropped to nearly their lowest level in three decades, "public concern and media coverage of gang activity has skyrocketed since 2000."[7] This fear has been magnified by policymakers who associate gangs with many of the most pressing law enforcement and national security threats facing the nation.[8] To allay the popular fear of violent crime, policymakers have prioritized suppressing gangs. This law-and-order approach to gangs is highlighted by the fact that the federal and state governments have spent much more money on law enforcement tactics directed toward gangs than on programs aiming to

1. *See* Danielle Gordon, *The Usual Suspects*, CHI. REP., Sept. 1998, at 1, 5.

2. *Id.* at 1.

3. *Id.*

4. *Id.* at 5.

5. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 753 (2001).

6. *Id.* at 758 (quoting Proposition 21, §§ 1(h), 2(b), *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 119 (Mar. 7, 2000)).

7. JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INST., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 3 (2007), *available at* http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

8. *See id.*

prevent youth from joining gangs and improve conditions in the communities most affected by gang violence.[9]

Law enforcement agencies collect and disseminate information as a means to better understand and, ultimately, suppress gang activity. In furtherance of this strategy, agencies in many jurisdictions have created and maintained databases to store information about gang members and gang activity.[10] The information stored in these databases is available to prosecutors to implicate the character of defendants by alleging that they are gang members, which is often relevant to sentence enhancements.[11] Often, a prosecutor will first offer evidence that a defendant is documented as a gang member in a criminal database at the defendant's bail hearing.[12] Doing so generally prompts the judge to impose higher bail, forcing the defendant to remain detained until the case is disposed.[13] This is significant because pretrial detention typically has a profound impact on the ultimate disposition of a case, usually to the defendant's detriment.[14]

The potential for an allegation of documented gang affiliation to impact the outcome of a case is problematic because there are serious questions about the accuracy of the information in gang databases.[15] Critics contend that the lists of suspected gang members in criminal databases are contaminated with the names of persons who are not members of gangs.[16] Further, there is evidence that gang databases disproportionately identify African-Americans and Latinos as gang members, while they are underinclusive of white gang members.[17] Thus, gang databases contain unreliable information that has a substantial effect on the criminal justice system.[18]

In light of this unfairness, the Fourteenth Amendment should prohibit prosecutors from offering at bail hearings evidence that a defendant is documented in a criminal database as a suspected gang member. Consideration of such evidence unconstitutionally burdens a defendant's right to a fair trial.[19] Therefore, if gang membership is relevant to a bail determination, prosecutors should only be permitted

9. GREENE & PRANIS, *supra* note 7, at 3.
10. *See infra* notes 58–69 and accompanying text.
11. *See infra* note 57 and accompanying text.
12. *See infra* note 67 and accompanying text.
13. *See infra* notes 168–188 and accompanying text.
14. *See infra* notes 189–209 and accompanying text.
15. *See infra* notes 82–119 and accompanying text.
16. *See infra* notes 82–119 and accompanying text.
17. *See infra* notes 102–108 and accompanying text.
18. *See infra* notes 168–213 and accompanying text.
19. *See infra* notes 239–273 and accompanying text.

to introduce the corroborating evidence of gang affiliation, without mention of a defendant's documented status in a gang database.[20]

Part II of this Comment discusses the public perception of gangs in the United States and the law enforcement proposals arising from that perception,[21] with a focus on the maintenance and use of gang databases as a law enforcement tool.[22] Part III examines the constitutional implication of an allegation at a bail hearing that a defendant is listed in a criminal database as a gang member.[23] Part IV discusses the impact that prohibiting such allegations at bail hearings would have on the criminal justice process, and Part V concludes.

II. Background

Law enforcement agencies have focused attention and resources on suppressing gangs in response to popularized notions about the extent to which gangs are responsible for violence occurring in American communities.[24] One common product of this response has been the creation of gang databases developed and implemented according to these perceptions of the "gang problem."[25] As a result of agency policies for identifying and monitoring suspected gang affiliates, many individuals have been labeled gang members—and therefore dangerous—after being entered into such databases.[26] This label often follows a person caught in the criminal justice system, possibly implicating the Fourteenth Amendment right to a fair trial.[27]

A. Perception of the "Gang Problem" Versus Reality

While there are many ways to think about and understand gangs, the general public in the United States regards gang activity as an especially dangerous subclass of crime.[28] Associating gangs with many of the more noteworthy forms of crime has helped create a number of myths about gangs and their relation to crime in this country.[29] In a 2007 report about statistics and law enforcement approaches regarding gangs, the Justice Policy Institute provided a list of some of the

20. *See infra* notes 274–292 and accompanying text.
21. *See infra* notes 28–120 and accompanying text.
22. *See infra* notes 61–120 and accompanying text.
23. *See infra* notes 163–273 and accompanying text.
24. Greene & Pranis, *supra* note 7, at 69.
25. Beres & Griffith, *supra* note 5, at 759–60.
26. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas L. Rev. 620, 623–24 (2011).
27. *Id.* at 659.
28. Greene & Pranis, *supra* note 7, at 51.
29. *Id.*

common myths about gangs and crime, including the following beliefs: (1) "[m]ost or all gang members are hardened criminals"; (2) "[g]ang members spend most of their time planning or committing crimes"; (3) "[g]ang members are responsible for the bulk of violent crime"; and (4) "[g]angs largely organize and direct the criminal activity of their members."[30]

While the Justice Policy Institute acknowledges that these myths may accurately describe a select few gangs and gang members, research indicates that the majority of gang crimes are not centrally directed.[31] Rather, when gang crime does take place, it is more typical for individual members or small groups to commit crimes "on an ad hoc basis."[32] The Justice Policy Institute posits that the following set of statements more accurately describes the relationship between gangs and crime than do the popular myths: (1) there are wide divergences in the "seriousness and extent of criminal involvement" of individual gang members; (2) even gang members who are involved in criminal activity "spend most of their time in noncriminal pursuits"; (3) only a small proportion of all crime, including violent crime, is committed by gang members; and (4) when gang members commit crime, it is often "self-initiated and is meant to serve personal rather than gang interests."[33] These assertions are supported by statistics that reveal that gang members commit less than 25% of drug sales, less than 10% of homicides, and less than 7% of violent crimes in the United States.[34] Even these percentages distort the role of gangs, as many of the crimes committed by gang members are intended to benefit the individuals who commit them, and not the gangs they belong to.[35]

These common misperceptions of gangs also fail to account for the distinct subgroups that exist within gangs.[36] While "hard-core" gang members are responsible for most gang delinquency, "affiliates" identify with the gang but are less committed to gang violence.[37] Fringe members—"wannabes"— refrain from getting involved in gang violence entirely, despite claiming gang affiliation, wearing gang colors,

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. GREENE & PRANIS, *supra* note 7, at 61.

35. *Id.*

36. *See* Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 268 (1996).

37. *Id.*

and associating with gang members.[38] According to many researchers, the reality is that "most gang members are more talk than action."[39]

There are many possible explanations for why the public holds such a perception of the role of gangs and their members in the crime and violence problems in this country. "Graffiti, colors, hand signs, and dramatic rivalries" often make gang members "highly visible," which in turn makes gang activity "more memorable and more newsworthy" than other types of crime.[40] Television news outlets embrace gang stories because they are easy to report and generate viewer interest.[41] Law enforcement and the media's reporting on gangs, in which all gang activity is discussed as criminal activity, suggest that gangs are nothing more than criminal organizations.[42] The media often depicts gangs so as to imply that they are "powerful, hierarchical armies," while only faintly acknowledging that this is not the case.[43] Law enforcement and the media also tend to associate the entire gang with "any crime for which an alleged gang member stands convicted, charged, or even suspected."[44] Doing so enforces the idea that every gang member has committed an extensive list of shocking crimes.[45] "[Because] the media has placed its attention exclusively on the violent and criminal behavior of gang members, rather than on other noncriminal aspects of gang membership, public perception of gangs is distorted."[46]

B. Defining Gangs and Gang Crime

For all of the attention that gangs receive, there is no general agreement as to what precisely constitutes a gang.[47] An exact definition depends on the purpose for creating the definition; people who study gangs for different purposes will naturally develop different defini-

38. *Id.* at 268–69.

39. GREENE & PRANIS, *supra* note 7, at 61.

40. *Id.*

41. Kim, *supra* note 36, at 269. One reporter explains that once the police or a witness describe a criminal act as "gang-related," the news organization can report it as such without having to do any more significant investigative work. *Id.* (citing WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 286–87 (1994)).

42. *See* GREENE & PRANIS, *supra* note 7, at 61.

43. Kim, *supra* note 36, at 270.

44. GREENE & PRANIS, *supra* note 7, at 61.

45. *Id.*

46. Kim, *supra* note 36, at 270. Many young people are drawn to gangs because gangs can serve as a source of recreation, physical protection, and group identity. *Id.* at 266–67.

47. GREENE & PRANIS, *supra* note 7, at 9.

tions.[48] One prominent gang researcher, Frederic Thrasher, defines "ganging" as "a normal peer activity for adolescents within a continuum of behaviors that range 'from conventional to wild.'"[49] Other experts posit that criminal activity is essential to defining gangs.[50] Another definition characterizes gangs as "unsupervised peer groups who are socialized by the streets rather than by conventional institutions."[51] The legal definitions in most states tend to focus on intentional criminal activity, saying very little about associational elements specific to gangs.[52]

Under the California Street Terrorism Enforcement and Prevention (STEP) Act, a "criminal street gang" is defined as follows:

> 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 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]

The STEP Act goes on to define "pattern of criminal gang activity" as:

> the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [specified offenses], provided . . . 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.[54]

Many, but not all, of the specified crimes involve violence or firearms.[55] California's definition of a criminal street gang is typical of other states that statutorily define street gangs.[56] As states have emphasized criminal activity in defining gangs, it is not surprising that

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48. *See* Kim, *supra* note 36, at 266. For example, a sociologist's definition of a gang will be different from a law enforcement gang expert's definition because they have different purposes for studying gangs and, therefore, focus on different aspects of gangs. *See id.*

49. GREENE & PRANIS, *supra* note 7, at 9 (quoting John Hagedorn, *Gang Violence in the Postindustrial Era*, 24 CRIME & JUST. 365, 367 (1998)).

50. *Id.*

51. *Id.* (quoting Hagedorn, *supra* note 49, at 367).

52. *Id.*

53. Rebecca Rader Brown, Note, *The Gang's All Here: Evaluating the Need for a National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 306 (2009) (alterations in original) (quoting CAL. PENAL CODE § 186.22(e)–(f) (West 2006)).

54. CAL. PENAL CODE § 186.22(e).

55. The attempt or commission of two enumerated crimes constitutes a "pattern of criminal activity." Among the enumerated crimes are: assault with a deadly weapon or by means of force likely to produce great bodily injury; unlawful homicide or manslaughter; arson; and intimidation of a witness. *See id.* § 186.22(e)(1)–(33).

56. Illinois defines a street gang as "any combination . . . of [three] or more persons . . . that . . . engage[] in a course or pattern of criminal activity." 740 ILL. COMP. STAT. 147/10 (2012). To fall within Colorado's definition of a criminal street gang, an organization must have "members

policymakers have committed to focusing more intensely on gangs, enhancing police activity in high-crime areas, and imposing harsher criminal justice sanctions on alleged gang members.[57]

C. Gang Databases

Fear of violent youth crime in the 1980s and 1990s formed the basis for an approach to crime control that focused on harsh punishments.[58] This fear is why gang suppression tactics have become the most popular approach to dealing with gangs throughout the nation.[59] Common suppression tactics include forming special gang units in police departments, aggressively policing high-crime neighborhoods, and targeting alleged gang members with severe criminal punishments.[60] Many law enforcement agencies create gang databases to facilitate gang suppression tactics.[61] These databases store information that law enforcement officers collect regarding gangs, gang members, and gang activity.[62]

Across the nation, law enforcement agencies and officials have increasingly relied on gang databases in carrying out gang suppression tactics.[63] Generally, databases contain lists of suspected gang members' names, along with other personal information such as individuals' photographs, gang affiliations, gang monikers, addresses, and identifying marks or tattoos.[64] The maintenance of gang databases reflects a law enforcement trend that emphasizes the importance of collecting and disseminating data regarding criminal conduct.[65] The accumulation of information in a database facilitates information sharing between various law enforcement agencies within a region.[66]

[who] individually or collectively engage in or have engaged in a pattern of criminal gang activity." COLO. REV. STAT. § 18-23-101(1)(b) (2012).

57. *See* GREENE & PRANIS, *supra* note 7, at 67.

58. Beres & Griffith, *supra* note 5, at 753–54. Youth crime rates rose in the late 1980s and early 1990s, and the media responded with warnings that a new type of dangerous criminal was emerging in American society. *Id.* at 753. These warnings were embraced by policy makers at the state and national levels who advanced measures to get tougher on crime. *See id.* at 754.

59. Brown, *supra* note 53, at 295. Despite proof that prevention and intervention tactics have been successful, most legislation and government funds (both at the state and national levels) are still directed toward suppressing gang activity. *Id.* Studies of suppression tactics and crime rates in different jurisdictions have shown "divergent trends." *Id.*

60. GREENE & PRANIS, *supra* note 7, at 67.

61. Brown, *supra* note 53;, at 296.

62. *Id.*

63. Beres & Griffith, *supra* note 5, at 759.

64. *Id.* at 759–60.

65. *See* Brown, *supra* note 53, at 298.

66. *Id.* Supporters of increased information sharing across law enforcement agencies argue that the practice helps prevent and suppress crime by promoting awareness of patterns in crimi-

One purpose of gang databases is to enable a prosecutor to allege at a bail hearing that the defendant is documented by a law enforcement agency as a suspected gang member.[67] As will be discussed, doing so can significantly affect the remainder of the criminal justice process for a defendant.[68] The impact such an allegation can have on a case places particular importance on the process by which information is collected and entered into databases and, more importantly, the accuracy of that information.[69]

1. Collecting Information

Most of the information documented in gang databases is collected from individual documentation of field interviews.[70] Individual documentation charts individuals who are known or suspected gang members, and law enforcement officers use the information to identify subsequent gang crimes and impose enhanced sentences on documented individuals who are convicted of crimes.[71] Field interviews are conducted during consensual police stops in which officers make contact with known or suspected gang members.[72] These stops are usually unrelated to any particular incident or investigation.[73] After questioning an individual about his gang affiliation, monikers, and tattoos, the officer will record the information on a field interview card, noting the location of the stop, the vehicles involved, and where the individual lives and attends school.[74]

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nal activity, publicizing best practices, and improving resource allocation. *Id.* "In addition to gangs, law enforcement agencies use databases to track convicted sex offenders and suspected terrorists." *Id.* However, sex offender databases and gang databases differ significantly in that a person "must be charged and convicted of a sex offense in order to be added to the sex offender registry." *Id.* at 299 (citing Adam Walsh Act, Pub. L. No. 109-248, § 111(1), 120 Stat. 587, 591 (2006)). As discussed later, an individual can be entered into a gang database without even being charged with a crime, much less convicted. *See infra* notes 75–81 and accompanying text.

67. *See* Howell, *supra* note 26, at 640–41.

68. *See infra* notes 168–205 and accompanying text.

69. *See infra* notes 185–188 and accompanying text.

70. *See* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 120 (2005).

71. Brown, *supra* note 53, at 302.

72. Wright, *supra* note 70, at 120–21.

73. Brown, *supra* note 53, at 305 (citing Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 497 (2003)).

74. Wright, *supra* note 70, at 121.

2. Criteria for Entry

Law enforcement jurisdictions have criteria used by patrol officers to identify and document suspected gang members.[75] California's criteria for identifying gang members consist of the following indicators and personal characteristics: (1) admission of gang membership; (2) regular association with known gang members; (3) tattoos indicating gang affiliation; (4) clothing or symbols reflective of a specific gang; (5) use of gang-related hand signs or presence in a photograph with known gang members; (6) presence of a person's name on a gang document, hit list, or graffiti; (7) accusation of gang membership by a reliable source; (8) subject of an arrest with identified gang members; (9) correspondence to or from known gang members about gang activity; and (10) responsibility for gang graffiti.[76]

After patrol officers record their observations from consensual stops on field interview cards, they submit the cards to the law enforcement agency's gang unit for review.[77] The gang unit, following jurisdictional criteria for entry, then enters individuals into the database as suspected gang members.[78] While law enforcement agencies create their own requirements for entering an individual's name into a database and designating him as a suspected gang member, officers in some California jurisdictions may enter a person into the California gang database for meeting as few as two of the criteria.[79] Texas provides for similar documentation criteria statutorily, also allowing entry into its gang database for individuals who satisfy any two of the criteria.[80] For example, a person "wearing baggy pants who is seen chatting with a person who is already (rightly or wrongly) in the gang database [could] be added to the database."[81]

3. Inaccuracies

Examples of individuals who, like Dusti Proffit, believe that they were wrongly documented as gang members in police databases illustrate ways in which erroneous documentation can occur and the impact that it can have. In 1993, high school students Quyen Pham, Annie Lee, and Minh Tram Tran were stopped by police while walk-

75. Brown, *supra* note 53, at 306.
76. *Id.* at 306–07.
77. *Id.* at 306.
78. *See id.*
79. *See id.* at 306–07.
80. *See* TEX. CODE CRIM. PROC. ANN. art. 61.02(C) (West 2006 & Supp. 2013).
81. Linda S. Beres & Thomas D. Griffith, *Gangs, Schools and Stereotypes*, 37 LOY. L.A. L. REV. 935, 949 (2004).

ing down a public street in Garden Grove, California.[82] The three girls were heading toward a public telephone to call for a ride home from a café at around seven o'clock in the evening.[83] The police accused the three girls—who were Asian and dressed in baggy clothing—of being gang members.[84] When the girls vehemently denied the accusation, one of the officers told them that "if you walk like a duck and talk like a duck, then you must be a duck."[85] Despite not charging the girls with any crime related to the stop, the police photographed them and documented their physical characteristics, home addresses, and schools they attended.[86] Tran was stopped by police and accused of being a gang member a second time about six months later.[87] Again, she was not charged with any crime.[88]

Similarly, Daniel C., a sixteen year-old student, was placed on his school's gang list for wearing gold and black—the colors of the Latin Kings street gang—to school during his freshman year.[89] According to Daniel, he was not a member of the Latin Kings, but wore the colors in hopes of dissuading other students from harming him.[90] Even though he never wore the colors after being disciplined, his name remained on the school's gang list.[91] Daniel was later summoned to court on a misdemeanor charge after a classmate alleged that Daniel threatened and "harassed" him.[92] At the bail hearing, the prosecutor told the judge that Daniel was identified in the police gang database as a Latin Kings affiliate.[93] The judge set Daniel's bail at $20,000 despite the fact that Daniel denied ever being in a gang, had no criminal record, and showed up voluntarily in court.[94] After the bail hearing, Daniel's attorney conducted an investigation confirming that the complainant in the case was suspended for harassing Daniel, who was actually the victim.[95] Based on this investigation, the judge reduced

82. Doreen Carvajal, *O.C. Girl Challenges Police Photo Policy*, L.A. TIMES, May 20, 1994, at A1.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. Carvajal, *supra* note 82.
89. Howell, *supra* note 26, at 627–28. "Daniel C." is not the real name of the subject of this story, but rather a pseudonym concocted by Professor Howell to protect the teen's identity. *Id.* at 627 n.34.
90. *Id.* at 628.
91. *Id.*
92. *Id.* at 627.
93. *Id.*
94. *Id.*
95. Howell, *supra* note 26, at 627–28.

Daniel's bail to $3,000, which Daniel's parents were able to post after Daniel remained in jail for five days.[96] The charges against Daniel were eventually dropped following a year of litigation.[97]

A few months later, Daniel was arrested again on charges that would eventually be dropped.[98] Again, the prosecutor claimed at the bail hearing that Daniel was a gang member based solely on the inclusion of Daniel's name on the gang database list.[99] The judge set Daniel's bail at $50,000, the amount requested by the prosecutor.[100] This time, Daniel refused to plead guilty and remained in jail for a month on a felony charge that was ultimately dismissed.[101]

a. Racial Disparities

Hispanic and African-American males comprise the overwhelming majority of entries in gang databases,[102] despite estimates from gang researchers that 40% of gang members are white.[103] This phenomenon is illustrated by a 1992 report from the Los Angeles district attorney that contained a list of 58,000 Hispanic gang members and 37,000 black gang members, but only 358 "[m]isc./white" gang members.[104] Similarly, Denver police alleged that "more than two-thirds of the young black males in [Denver] were gang members."[105] The disproportionately high representation of blacks and Latinos in gang databases is unsurprising given that suppression tactics are generally concentrated in inner-city neighborhoods.[106] A study conducted in the late 1990s through 2000 on police–community relations in Washington, D.C., a majority-black city with a majority-black police force, revealed that young black men were three times more likely to be stopped by police than young white men.[107] Aggressive policing of poor inner-city neighborhoods leads to a disproportionately high number of field interviews conducted on minorities.[108] Considering

96. *Id.* at 628.
97. *Id.*
98. *See id.* at 628–30.
99. *Id.* at 628.
100. *Id.* at 629.
101. Howell, *supra* note 26, at 630.
102. Beres & Griffith, *supra* note 81, at 948; *see also* Howell, *supra* note 26, at 621.
103. Howell, *supra* note 26, at 621 (citing GREEN & PRANIS, *supra* note 7, at 37).
104. Beres & Griffith, *supra* note 81, at 948 (citing IRA REINER, OFFICE OF THE DIST. ATTORNEY, COUNTY OF LOS ANGELES, GANGS, CRIME AND VIOLENCE IN LOS ANGELES 110 tbl.I (1992)).
105. *Id.* at 951.
106. *See id.* at 949.
107. Ronald Weitzer et al., *Police–Community Relations in a Majority-Black City*, 45 J. RES. CRIME & DELINQ. 398, 413 (2008).
108. Beres & Griffith, *supra* note 81, at 949.

that field interviews are the initial step in entering individuals into gang databases, the high number of field interviews conducted on minorities helps explain the disproportionately high inclusion of minorities in gang database lists.

b. Flaws in Documentation Procedures

Documentation in field interviews is not performed by anti-gang unit personnel, but rather by patrol officers who generally lack specialized training on how to identify gang members that gang unit officers receive.[109] Considering the vague nature of many of the gang membership indicators, there is ample room to misidentify a person as a gang member.[110] Many local agencies have not implemented procedures that call for field interview cards to be reviewed by gang detectives to ensure that there is sufficient evidence to enter a person's name into the database.[111] Even in instances in which police departments have established review procedures, often those procedures are not followed, contributing to inaccuracies within databases.[112] Despite the possibility of being wrongfully identified and documented as suspected gang members in criminal databases, individuals are not entitled to be notified that they have been documented or to challenge the designation.[113]

"Proper purging procedures" are also important for the accuracy of databases because gang membership is constantly in flux.[114] Most young people who join gangs remain involved in the gang for a year or less.[115] Yet, most agencies are only required to remove inactive gang members from the criminal database lists every two to five years.[116] As with review procedures, agencies often do not comply with purging procedures, neglecting to remove inactive members within the required timeline.[117] There is a lack of external oversight and pressure to fulfill purging requirements because individuals usually do not

109. Wright, *supra* note 70, at 121 (citing Katz, *supra* note 73, at 497).

110. It is easy to see how a person who is not a gang member could nonetheless fall within many of the law enforcement indicators of gang membership. For example, the indicators do not provide guidance to the patrol officer regarding how to distinguish between a person who is deliberately wearing gang colors to signify membership and a person who happens to be dressed in a color commonly associated with a gang. *See supra* notes 80–85 and accompanying text.

111. *See* Brown, *supra* note 53, at 319–20.

112. *See* Wright, *supra* note 70, at 122.

113. *Id.* at 118. Many police departments contend that an individual should not have the right to know whether he is documented as a gang member. *Id.*

114. Brown, *supra* note 53, at 320.

115. GREENE & PRANIS, *supra* note 7, at 79; *see also* Brown, *supra* note 53, at 320.

116. Brown, *supra* note 53, at 320.

117. *Id.*; *see also* Wright, *supra* note 70, at 123.

know that they are documented as gang members.[118] Thus, police are able to retain names in their databases at little or no cost in the hopes that the information will be of some future value.[119] In some instances, grants can create incentives for agencies to maintain databases that are overinclusive by basing funding on an agency's ability to show that it has a serious gang problem in its jurisdiction.[120]

D. Dangerousness as a Bail Consideration

A prosecutor may allege at a bail hearing that the defendant is documented as a suspected gang member because a judge is permitted to consider the threat of danger the defendant may pose to the community if released pretrial.[121] Historically, the risk of flight was the sole basis for denying bail.[122] Congress passed the Bail Reform Act of 1966 to promote pretrial release of defendants.[123] That law "required federal courts to release any defendant charged with a non-capital crime on his or her recognizance or an unsecured appearance bond."[124] The statute provided an exception to pretrial release only if the court had reason to believe that the defendant would not appear in court for trial.[125]

The 1970s and 1980s saw an implementation of a more punitive justice system in the United States in response to concerns raised by statistics regarding recidivism among criminal defendants on conditional release.[126] These fears were reflected in the 1984 Bail Reform Act, which replaced the 1966 Act.[127] The 1984 Bail Reform Act called for consideration of future dangerousness of defendants when determining bail, a factor not contemplated by its predecessor.[128] This concern for the future dangerousness of defendants who could potentially be

118. Wright, *supra* note 70, at 123.

119. *Id.*

120. Brown, *supra* note 53, at 320 (citing Katz, *supra* note 73, at 489).

121. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH & LEE L. REV. 1297, 1330–32 (2012).

122. *Id.* at 1328.

123. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1837, 1976; s*ee also* Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL'Y 42, 59 (2012).

124. Johnson & Johnson, *supra* note 123, at 59.

125. *Id.*

126. Bail Reform Act of 1984 §§ 202–10, 98 Stat. at 1976–87 (codified as amended at 18 U.S.C. §§ 3141–50 (2012)); *see also* Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 141 (2007).

127. Appleman, *supra* note 121, at 1330.

128. *Id.*

released to await trial is still present in the statute governing such decisions.[129] A federal court is prohibited from releasing a defendant if it determines that doing so "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[130] Since the passage of the 1984 Bail Reform Act, most states have followed suit in precluding or limiting pretrial release when a judge determines that release will pose a danger to the community.[131]

Congress did include some due process safeguards in the 1984 Bail Reform Act by entitling a defendant to a hearing before a federal court may require pretrial detention.[132] At such a hearing, the defendant has "the right to be represented by counsel, . . . to testify, to present witnesses, and to cross-examine witnesses."[133] During the hearing, judges are to consider the "nature and circumstances of the offense charged," the strength of the evidence against the defendant, the defendant's personal history and characteristics, and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."[134] If, in considering these factors, a judge determines that no conditions will guarantee the safety of any other person or the community, he must order that the defendant remain detained before trial.[135]

Despite the due process safeguards available to a defendant, there are characteristics of the hearing procedure that inherently limit a defendant's ability to defend one's self against an accusation that he would pose a risk of danger if released.[136] First, judges are given discretion to decide "what constitutes a fair and sufficient pretrial deten-

129. *See* 18 U.S.C. § 3142(b), (e).

130. *See id.* § 3142(b).

131. Appleman, *supra* note 121, at 1330. Forty-five states and the District of Columbia currently allow pretrial detention based on a determination that the defendant is dangerous. *Id.* At least thirty-four have done so by statutory provision. *Id.*

132. *See* 18 U.S.C. § 3142(f).

133. *Id.*

134. *Id.* § 3142(g).

135. *Id.* § 3142(e).

136. *See id.* The hearing is to be "held immediately upon the defendant's first appearance before the [judge]," leaving virtually no time to procure evidence in support of an argument that the defendant does not pose a threat of danger. *Id.* While the defendant can request a continuance, the continuance may not exceed five days. *Id.* During that time, the defendant must remain detained, which prevents him from personally meeting with witnesses and gathering his own evidence. *Id.* Additionally, the prosecutor is not required to notify the defendant that the prosecution may seek pretrial detention based on the defendant's prior behavior, further exacerbating the difficulties the defendant faces. *See* Appleman, *supra* note 121, at 1331.

tion hearing."[137] Another issue with such hearings is that the inquiry into whether a defendant is dangerous often takes into account speculative and unproven factors.[138] The weight of the evidence against the defendant is one factor a judge is required to weigh,[139] but the judge is not required to find that the evidence sufficiently demonstrates a strong possibility that the defendant is in fact guilty.[140] Further, there are issues regarding the reliability of the evidence produced by the government because the criminal trial rules concerning the admissibility of evidence explicitly do not apply to pretrial detention hearings.[141]

Not only does the protocol of a pretrial detention hearing place the defendant at a disadvantage, but the insufficiency of information that is common in such hearings can also work to the defendant's detriment.[142] Such a hearing requires significant investigative work from both the prosecution and the defense, and the practical realities of conducting such investigations often result in a "paucity of evidence" on which the judge can base his decision.[143] Yet, as American society has become increasingly victim-centered and focused on public safety threats, arguments that a defendant is dangerous have a much greater probability of success in court.[144] The natural tendency is for judges, who are not immune to the fears and pressures that grew out of the law-and-order movement, to order the pretrial detainment of defendants without some reasonable assurance that such decisions will not yield adverse ramifications.[145] The insufficiency of the information available often precludes judges from finding the reasonable assurance needed before they are willing to release defendants.[146]

E. The Fourteenth Amendment

Detaining some defendants before trial while releasing others may implicate Fourteenth Amendment concerns. The Equal Protection

137. S. Molly Chaudhuri, *Bail or Jail? The Dangerous Dilemma of Determining Future Dangerousness*, BOS. B.J., Sept./Oct. 1995, at 16, 19.

138. Johnson & Johnson, *supra* note 123, at 60. The nature and circumstances of the offense charged can weigh in favor of detaining a defendant despite the obvious reality that the person has not yet been convicted of the offense. The nature and seriousness of the danger that would be posed by the person's release is a speculative assessment.

139. 18 U.S.C. § 3142(g)(2).

140. Appleman, *supra* note 121, at 1331.

141. 18 U.S.C. § 3142(f).

142. *See* Chaudhuri, *supra* note 137, at 19.

143. *Id.*

144. *Id.* at 18.

145. McCoy, *supra* note 126, at 142 (citing John Goldcamp, *Judicial Discretion and Bail Reform: Lessons from Philadelphia's Evidence-Based Judicial Strategy*, *in* STUDIES IN LAW, POLITICS AND SOCIETY (Austin Sarat ed., 2008)).

146. *See* Chaudhuri, *supra* note 137, at 19.

Clause of the Fourteenth Amendment dictates that "all persons similarly circumstanced shall be treated alike."[147] Additionally, the Fourteenth Amendment's Due Process Clause offers "heightened protection against government interference with certain fundamental rights and liberty interests."[148] Among those fundamental rights and liberties are many of the specific individual freedoms enumerated in the Bill of Rights.[149]

Courts have developed standards for determining the validity of state legislation or other official action that is challenged as violating the Equal Protection Clause.[150] In making such a determination, the courts look to the nature of the distinction made by the policy, the interests the state is puportedly protecting, and the interests of those burdened by the classification.[151] Legislation and official action are generally presumed to be valid and will be upheld if the classification drawn by the policy is "rationally related to a legitimate state interest."[152] However, state policies that classify individuals by race, alienage, or religion are subjected to "strict scrutiny," under which they will be upheld only if they are narrowly tailored to achieve a compelling government interest.[153] Distinctions based on these factors elicit the most exacting scrutiny because they are rarely related to achieving any legitimate state goals and often reflect prejudice.[154]

This equal protection analysis also requires strict scrutiny of state acts that impinge on constitutionally protected personal rights to prevent "invidious discriminations" from being "made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[155] A law that "lays an unequal hand" upon a particular group by infringing on a fundamental right without a compelling justification for doing so makes "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[156] In such cases, the Equal Protection Clause functions similarly to the Due Process Clause, as due process prohibits the

147. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

148. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

149. *Id.* The Supreme Court has extended the Due Process Clause to also protect the "fundamental rights and liberties which are . . . 'implicit in the concept of ordered liberty.'" *Id.* at 720–21 (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

150. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439–40 (1985).

151. Williams v. Rhodes, 393 U.S. 23, 30 (1968).

152. *Cleburne*, 473 U.S. at 440.

153. *Id.*

154. *Id.*

155. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

156. *Id.*

government from any intrusion on fundamental liberty interests "unless the intrusion is narrowly tailored to serve a compelling state interest."[157]

Supreme Court decisions regarding access to judicial processes have reflected concerns for due process of law and equal protection of the laws.[158] In *Griffin v. Illinois*, the Supreme Court acknowledged that the Constitution guarantees a right to a fair trial.[159] Based on that guarantee, the Court held that the Due Process and Equal Protection Clauses precluded the state of Illinois, which provides a right to appellate review, from denying review to criminal defendants who could not afford to purchase their trial transcript.[160] In a similar ruling in *Douglas v. California*, the Supreme Court struck down a California rule of criminal procedure that only provided counsel for indigent criminal defendants' appeal of right if the appellate court, based on a preliminary review of the case, found that the case had merit.[161] In these cases, the Supreme Court found that the Equal Protection Clause was implicated out of concern for "the legitimacy of fencing out would-be appellants based solely on their inability to pay . . . costs," while the "due process concern homes in on the essential fairness of the . . . proceedings."[162]

III. Analysis

An allegation of gang membership can have a prejudicial effect on a bail decision to the detriment of the defendant,[163] which can dramatically affect the course and outcome of a criminal case.[164] Thus, the fairness of a case is dependent on the fairness of the bail proceeding.[165] Because the right to a fair trial is a fundamental right protected by the Fourteenth Amendment, a government action that functions to the defendant's detriment at a bail hearing should be subject to strict judicial scrutiny.[166] Given the tenuous link between gang database criteria and legitimate justifications for imposing exorbitant bail or

157. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

158. M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

159. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion).

160. *Id.* at 19.

161. Douglas v. California, 372 U.S. 353, 357 (1963) (reasoning that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure").

162. *M.L.B.*, 519 U.S. at 120.

163. *See infra* notes 168–188 and accompanying text.

164. *See infra* notes 189–213 and accompanying text.

165. *See infra* notes 189–213 and accompanying text.

166. *See supra* notes 147–162 and accompanying text.

withholding bail completely, alleging documentation of gang membership at a bail hearing violates the constitutional guarantee of a fair trial.

A. The Effect of Gang Membership Accusations on the Right to a Fair Trial and the Presumption of Innocence

The Constitution guarantees all persons a right to a fair trial, which is dependent on the presumption of innocence.[167] An allegation that a defendant is documented as a suspected gang member implicates this guarantee by increasing the likelihood and length of pretrial detention for the defendant, which prejudicially influences the disposition of the case.

1. Gang Membership Accusations and Pretrial Detention

Since "dangerousness" has become a relevant consideration in bail determinations, a prosecutor's accusation at a bail hearing that a defendant is a gang member will often reduce or eliminate the possibility that the defendant will be released on his own recognizance or reasonable bail.[168] The likelihood of release diminishes because the allegation of gang membership arouses a perception of violence,[169] which factors into a judge's determination of dangerousness. This fear is often enough to preempt other more traditional considerations that weigh in favor of releasing the defendant on his own recognizance or reasonable bail.[170]

Professor K. Babe Howell conducted a survey of defense attorneys that illustrates the significant impact that accusations of gang affiliation have at bail hearings.[171] Sixty-four defense attorneys answered questions about the frequency and accuracy of such allegations and the impact they have on bail determinations.[172] Despite some variation in the results, the participating attorneys' responses largely showed that clients who were accused of being gang members were subjected to higher amounts of bail than defendants charged with sim-

167. Estelle v. Williams, 425 U.S. 501, 503 (1976).

168. Howell, *supra* note 26, at 621.

169. *Id.*

170. *See id.* (arguing that an allegation of gang membership "often reduces or eliminates the possibility of release on reasonable bail regardless of the merits of the case, . . . the severity of charges[,] . . . whether or not the defendant has ever been convicted of a crime, and whether or not the arrest is related to a serious crime or alleged gang activity").

171. *Id.* at 631.

172. *Id.*

ilar crimes and with similar criminal backgrounds.[173] The prevalence of allegations of gang membership affecting bail in cases involving only a misdemeanor charge or crimes unrelated to gang activity demonstrates that the allegation itself has a great effect on bail determinations.[174] The survey responses made it clear that an allegation at a bail hearing that the defendant is a gang member often is the reason defendants remain in jail before standing trial.[175]

Professor Howell's survey results are supported by observations of nearly two thousand arraignments in Brooklyn and Manhattan between September 2002 and March 2003.[176] Based on these observations, the New York City Criminal Justice Agency found that the prosecutor's bail request was the only important factor in determining bail amount.[177] Assuming that prosecutors inflate their bail requests based on defendants' documentation as suspected gang members, the documented status contributes to the imposition of higher bail for defendants listed in gang databases.[178] While the researchers found that prosecutors dominated bail decisions, defense attorneys' influence on bail decisions was "negligible."[179]

Given the likelihood that an accusation of gang membership will result in higher bail amounts, statistics regarding the effect of bail on pretrial detention support the respondents' indication that such accusations are frequently the reason defendants remain detained until the case reaches its disposition.[180] The New York Criminal Justice

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173. *Id.* at 634. 90% of respondents had observed a gang affiliation accusation at a bail hearing. *Id.* at 631. Of those, 90% stated that the allegation led to significantly higher bail or remand in felony cases, and about two-thirds stated that it led to higher or significantly higher bail in misdemeanor cases. *Id.* at 633.

174. Only 14% of the respondents indicated that most or all of the cases in which the prosecutor leveled a gang membership accusation involved a gang-related crime. Howell, *supra* note 26, at 633. If a judge imposes higher bail in a case where an allegation of gang membership is made despite the charge being minor and unrelated to gang activity, then the allegation must carry significant weight in the judge's decision. Professor Howell states that it is common not only for gang membership accusations to lead to higher bail in cases where the crimes charged are minor, but also in cases where the charges are more serious but the evidence against the defendant is weak. *Id.* at 626.

175. Sixty percent of respondents indicated that they had represented clients "who would have been released had it not been for the allegation of gang affiliation." *Id.* at 632.

176. *See* MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY: PART 3. CROSS-BOROUGH ANALYSIS 9 (2004).

177. *Id.* at 39.

178. Prosecutors commonly allege at bail hearings that defendants are documented as suspected gang members to justify higher bail. Howell, *supra* note 26, at 632. Therefore, it is safe to assume that the prosecutor would factor the defendant's documented status into the requested bail amount.

179. PHILLIPS, *supra* note 176, at 40–41.

180. *See generally* Mary T. Phillips, *Bail, Detention, & Nonfelony Case Outcomes*, RES. BRIEF (N.Y.C. Criminal Justice Agency, New York, N.Y.), May 2007 [hereinafter Phillips, *Nonfelony*

Agency conducted a study in 2007 to examine how pretrial detention affects case outcomes in New York City.[181] The results of the study indicated that bail, regardless of the amount at which it is set, usually results in some duration of pretrial detention.[182] More precisely, there is a positive correlation between the interval of bail and the length of pretrial detention.[183] In a substantial portion of the cases in New York City in which bail is set, the defendants remain detained for the entire duration of the case.[184] Thus, if the allegation of gang membership does inflate the amount at which bail is set, the effect of that allegation is likely to also extend the duration in which the defendant is detained pretrial—and quite possibly until the case is disposed.

This conclusion is made even more troubling given that 80% of the respondents in Professor Howell's survey indicated that allegations of gang membership had been directed toward defendants who were not gang members, though evidentiary hearings regarding the allegations were rarely held.[185] This fact is highlighted and explained by prosecutors' and judges' heavy reliance on the accuracy of the information contained in gang databases.[186] This reliance, coupled with the general dearth of information available to judges in determining whether a defendant is dangerous, "renders a strain of rough justice"[187] in which an allegation that a person is documented as a gang member in a law enforcement database, with nothing more, can effectively keep a defendant detained before and throughout his trial.[188]

2. Pretrial Detention and Case Outcomes

In addition to the probability that it will lead to higher bail, an allegation at a bail hearing that a defendant is documented in a law enforcement database as a gang member is likely to affect the ultimate

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Case Outcomes]; Mary T. Phillips, *Bail, Detention, & Felony Case Outcomes*, RES. BRIEF (N.Y.C. Criminal Justice Agency, New York, N.Y.), Sept. 2008 [hereinafter Phillips, *Felony Case Outcomes*].

181. Phillips, *Nonfelony Case Outcomes*, *supra* note 180, at 2.

182. *Id.*

183. This is true for felony cases in New York City, *see* Phillips, *Felony Case Outcomes*, *supra* note 180, at 4, and misdemeanor cases in New York City. *See* Phillips, *Nonfelony Case Outcomes*, *supra* note 180, at 2.

184. In felony cases, 31% of defendants held on bail remained in detention until disposition. Phillips, *Felony Case Outcomes*, *supra* note 180, at 2. In misdemeanor cases, nearly half (48%) of the defendants held on bail remained in detention throughout the duration of the case. Phillips, *Nonfelony Case Outcomes*, *supra* note 180, at 4.

185. Howell, *supra* note 26, at 632. Only one-fifth of the respondents reported that gang membership accusations were given evidentiary review. *Id.*

186. *See* Wright, *supra* note 70, at 117.

187. Chaudhuri, *supra* note 137, at 19.

188. *See* Howell, *supra* note 26, at 632.

disposition of the case.[189] There is a substantial correlation between pretrial release and likelihood of later acquittal.[190] Conversely, as was demonstrated in the New York Criminal Justice Agency study, the probability of conviction increases the longer a defendant is detained before trial.[191] Pretrial detention not only affects a defendant's chances of acquittal or conviction, but it also has an impact on the severity of the sentence imposed in the event of a conviction.[192]

The effect of pretrial detention on a case outcome is the natural and logical consequence of taking a defendant out of his normal life and depriving him of his liberty.[193] Defendants who are detained while awaiting trial are confined in jails that are often overcrowded with deplorable conditions, and in some cases, are "more oppressive than the than the jail cells in which our convicted felons reside."[194] These conditions can be particularly oppressive to a defendant accused of being in a gang, as some jails segregate alleged gang members and place them in lockdown for up to twenty-three hours a day.[195] One of the major ways in which pretrial detention may affect the final disposition of a case is by placing pressure on a defendant to plead guilty.[196] Statistics demonstrate that a substantial portion of criminal cases are disposed of with guilty pleas and illustrate the vast number of cases in which this phenomenon may be at work.[197] This pressure to plead

189. *See id.* at 635.

190. McCoy, *supra* note 126, at 143.

191. In felony cases, the CJA study revealed an overall conviction rate of 68%. Phillips, *Felony Case Outcomes*, *supra* note 180, at 5. That rate jumped to 85% for defendants who were detained for longer than a week. *Id.* For defendants who spent less than one day in pretrial detention, the conviction rate in felony cases was only 59%. *Id.* Not only did pretrial detention increase the probability of conviction in felony cases, but it "also lessened the likelihood that the charge would be reduced." *Id.* The study showed that pretrial detention had a similar impact on case outcomes in misdemeanor cases. *See* Phillips, *Nonfelony Case Outcomes*, *supra* note 180, at 5. While the overall conviction rate in misdemeanor cases was 58%, only 50% of defendants released prior to disposition were convicted, compared to a 92% conviction rate for defendants detained to disposition. *Id.*

192. *See* Phillips, *Nonfelony Case Outcomes*, *supra* note 180, at 6–7; *see also* Phillips, *Felony Case Outcomes*, *supra* note 180, at 5–6; McCoy, *supra* note 126, at 147.

193. *See* Chaudhuri, *supra* note 137, at 18; *see also* Howell, *supra* note 26, at 635; Phillips, *Felony Case Outcomes*, *supra* note 180, at 7.

194. Chaudhuri, *supra* note 137, at 18.

195. Howell, *supra* note 26, at 635.

196. *See* Phillips, *Felony Case Outcomes*, *supra* note 180, at 7.

197. In 2009, there were 95,206 total criminal defendants who appeared in federal courts, 86,314 of which were convicted of the offense charged. *Criminal Defendants Disposed of in U.S. District Courts by Offense and Type of Disposition, Fiscal Year 2009*, SOURCEBOOK CRIM. JUST. STAT., http://www.albany.edu/sourceook/pdf/t5242009.pdf (last visited Apr. 28, 2014). There were 83,707 who pled guilty, representing almost 88% of the total number of defendants and nearly 97% percent of the convicted defendants. *Id.* A study of all the persons arrested in New Jersey during a randomly chosen week in 2006 bore out similar statistics at the state level. *See*

guilty is especially acute when a defendant knows that doing so will lead to his release.[198] More than simply affecting a case outcome, pretrial detention can actually be determinative, especially in the case of an innocent defendant who decides to plead guilty rather than sit in jail for several weeks awaiting trial.[199] In addition to placing pressure on a defendant to plead guilty, pretrial detention can affect the outcome of a case by significantly inhibiting the defendant's ability to successfully defend themselves against the charges brought against them.[200] When a defendant is detained awaiting trial, he cannot personally meet with witnesses or collect evidence, and it is much more difficult to take a prominent role in steering the course of his own defense.[201] Further, detention precludes a defendant from obtaining employment in the period leading up to and continuing throughout his trial, which forces a disproportionate number of detained defendants to rely on public defenders rather than retained attorneys.[202] The budgetary constraints most public defenders face often severely limit the investigative services they can offer clients, which undercuts their ability to mount strong defenses.[203]

There are additional reasons that explain why pretrial detention often leads to a more severe sentence for a defendant than he otherwise would have received, regardless of the merits of the case.[204] Understanding that detention can be used as leverage to encourage defendants to plead guilty, prosecutors may be less willing to offer plea bargains after arraignment.[205] The inability to procure gainful employment while detained also burdens a defendant's ability to prove to a judge that he is a productive member of society.[206] Thus the defendant is deprived of an argument by which he might sway the judge to impose a less severe sentence.[207] The effect of pretrial detention on the severity of a sentence can also extend to future cases involving the defendant. When a defendant pleads guilty to minor

McCoy, *supra* note 126, at 147–48. Of the defendants who were detained until their case was disposed, 71% pled guilty. *Id.* at 148. Though 71% in itself represents a substantial majority, its significance is brought even more into focus by the fact that 25% of those detained until disposition of their cases had all their charges dropped. *Id.*

198. Howell, *supra* note 26, at 642–43.

199. *See id.* at 642.

200. Chaudhuri, *supra* note 137, at 18.

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* Phillips, *Felony Case Outcomes*, *supra* note 180, at 7–8; *see also* McCoy, *supra* note 126, at 147; Chaudhuri, *supra* note 137, at 18; Howell, *supra* note 26, at 635.

205. Phillips, *Felony Case Outcomes*, *supra* note 180, at 7.

206. *Id.*; *see also* Chaudhuri, *supra* note 137, at 18.

207. Phillips, *Felony Case Outcomes*, *supra* note 180, at 7.

charges simply to bring his detention to an end, that plea becomes a conviction on the defendant's record.[208] A record containing such convictions can be the basis for a more severe sentence in a later conviction.[209]

By significantly influencing the subsequent course of events in a criminal case to the defendant's detriment, pretrial detention burdens the fairness the defendant is entitled to in the trial process. Fairness is supposed to be protected by the presumption of innocence, which is still "the fundamental precept of the American criminal justice system."[210] Allowing a state to deprive an individual of his freedom before proving that he has committed a crime contravenes the conception of fairness embodied in the presumption of innocence.[211] Thus, even when pretrial detention does not affect the outcome of a case to the defendant's detriment, that defendant still suffers an abridgement of a fundamental right simply from being detained despite never being proven or adjudged guilty.[212] Because an allegation that a person is documented as a gang member in a law enforcement database significantly increases the likelihood of pretrial detention,[213] the allegation itself is a burden on the defendant's rights to a presumption of innocence and a fair trial.

B. Which Level of Scrutiny?

Under a Fourteenth Amendment challenge, the standard by which a state action is scrutinized is integral to the determination as to whether the action is constitutional. Under rationality review, state action is presumed valid, and an action need only be rationally related to a legitimate state interest to be upheld.[214] Under strict scrutiny analysis, however, state action will be upheld only if it is narrowly tailored to achieve a compelling government interest.[215]

1. Invidious Discrimination

The fact that gang databases contain the names of a disproportionately high number of African-Americans and Latinos is insufficient to trigger strict scrutiny in a racial discrimination challenge to the practice of alleging documentation in a gang database at a bail hearing.

208. *See* McCoy, *supra* note 126, at 147.
209. *See id.*
210. Chaudhuri, *supra* note 137, at 18.
211. *See infra* notes 226–229 and accompanying text.
212. *See* Phillips, *Felony Case Outcomes*, *supra* note 180, at 7.
213. *See supra* notes 168–188 and accompanying text.
214. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).
215. *Id.*

While state policies that classify individuals by race are subject to strict scrutiny, a law is not unconstitutional simply because of its racially disproportionate impact alone.[216] For strict scrutiny to apply, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[217] A facially neutral law may be found unconstitutional if it is applied in an invidious manner so as to effectively discriminate on the basis of race, but a law that is "neutral on its face and serv[es] ends otherwise within the power of government to pursue" is not invalid under the Fourteenth Amendment "simply because it may affect a greater proportion of one race than of another."[218]

The policies prescribing the maintenance and uses of gang databases are facially neutral, as the criteria for entering an individual into a database contain no mention of race.[219] Further, prosecutors allege documentation in gang databases in furtherance of the goals of incarcerating dangerous criminals and making communities safer.[220] Although one could argue about the effectiveness of such a policy, a state has the authority to pursue such goals.[221] A challenge that the practice is racially discriminatory would therefore only elicit rationality review.

2. Infringement on Fundamental Rights

While the disparate impact of gang databases on African-Americans and Latinos is insufficient to trigger strict scrutiny, the impact of a prosecutor's allegation at a bail hearing that the defendant is a documented gang member is significant under a constitutional challenge because "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."[222] The presumption of innocence for all criminal defendants is a basic component of the right to a fair trial.[223] Implementing the presumption of innocence requires courts to take notice of factors that could potentially upset the fairness of the

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216. Washington v. Davis, 426 U.S. 229, 239 (1976).

217. *Id.* at 240.

218. *Id.* at 241–42.

219. *See supra* notes 75–81 and accompanying text.

220. *See supra* notes 168–169 and accompanying text.

221. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82 (1946) ("Protection of the safety of persons is one of the traditional uses of the police power of the States.").

222. Estelle v. Williams, 425 U.S. 501, 503 (1976).

223. *Id.*

trial process.[224] Deprivation of the right to bail is one such factor that could eviscerate the presumption of innocence and fairness.[225]

The Eighth Amendment protects the presumption of innocence and the right to a fair trial by prohibiting courts from requiring excessive bail.[226] The guarantee of reasonable bail safeguards the traditional right to be free prior to conviction, which promotes fairness by allowing a defendant to be unhampered in preparing a defense.[227] The Eighth Amendment protection also works to prevent the state from punishing a criminal defendant before the defendant is actually convicted.[228] The presumption of innocence and fairness would be fictions without a right to reasonable bail.[229]

Bail has been predominately used to secure attendance at trial,[230] and courts are required to determine bail based on factors relevant to that purpose.[231] However, the right to bail is not absolute, as the Supreme Court has stated "that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, . . . the Eighth Amendment does not require release on bail."[232] The Eighth Amendment does require that judges only deny bail for the strongest of reasons.[233] While the right to bail is not absolute, the Supreme Court has clarified that fairness is still a fundamental concern at pretrial proceedings.[234] Therefore, the Fourteenth Amendment's strictures must apply to any preliminary proceeding that implicates fairness.[235] A bail hearing is such a proceeding because of

224. *Id.*

225. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

226. U.S. CONST. amend. VIII.

227. *Stack*, 342 U.S. at 4.

228. *Id.*

229. *Id.*

230. Appleman, *supra* note 121, at 1328.

231. *Stack*, 342 U.S. at 5.

232. United States v. Salerno, 481 U.S. 739, 754–55 (1987). The Court upheld the 1984 Bail Reform Act, in which Congress recognized protecting the community from a defendant's future dangerousness as a compelling interest justifying denial of bail. *Id.* at 751–55. The Court stated that pretrial detention under the Bail Reform Act is not penal, but rather regulatory. *Id.* at 747. While this regulation deprives an individual of his strong interest in liberty, public safety from dangerousness is sufficiently weighty to justify the deprivation. *Id.* at 750–51.

233. Harris v. United States, 404 U.S. 1232, 1232 (Douglas, Circuit Justice 1971).

234. *See* United States v. Ash, 413 U.S. 300, 309–11 (1973). The Court acknowledged that there are critical encounters involving the prosecution and the accused in pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 310. Thus, for the purpose of determining an accused's rights, these pretrial events can be considered to be parts of the actual trial. *Id.* The Court used this reasoning to extend the Sixth Amendment right to counsel to all critical stages of the proceedings. *Id.* at 310–11.

235. Estelle v. Williams, 425 U.S. 501, 503 (1976).

the profound effect a bail determination has on the outcome of a given case.[236]

The Fourteenth Amendment's dual guarantees of equal protection of the laws and due process underscore the primary goal of the American judicial system—ensuring that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[237] To effectuate this purpose, state actions that pose a "probability of deleterious effects on fundamental rights call[] for close judicial scrutiny."[238] Alleging that a defendant is a documented gang member at a bail hearing is likely to burden the defendant's right to presumption of innocence and a fair trial by increasing the likelihood of pretrial detention and, therefore, should be reviewed under strict judicial scrutiny.

C. Strict Scrutiny

Under strict scrutiny, a prosecutor's allegation that a defendant is a documented gang member can only survive if it is narrowly tailored to achieve a compelling government interest that justifies the burden it places on the defendant's right to a fair trial.[239] Therefore, it is necessary to assess each government interest such an allegation might advance.

1. The Government's Interest in Securing Attendance at Trial

Securing attendance at trial has served as the traditional justification for requiring bail.[240] But the Eighth Amendment's prohibition on requiring excessive bail mandates that a court fix bail strictly according to standards that are relevant to assuring the defendant appears for trial.[241] If a court requires bail in excess of what is reasonably determined to achieve this purpose, then the defendant's

236. *See* People v. Purcell, 758 N.E.2d 895, 898 (Ill. App. Ct. 2001) (holding that fundamental fairness requires "placing the burden [on] the State to prove [at a bail hearing] that the accused's guilt is evident or that the presumption of such guilt is great" so as to justify denying bail).

237. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

238. *Estelle*, 425 U.S. at 504. The Supreme Court has used the term "close judicial scrutiny" synonymously with the term "strict scrutiny." *Compare* Graham v. Richardson, 403 U.S. 365, 372 (1971) (stating "that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to *close judicial scrutiny*" (emphasis added) (footnotes omitted)), *with* Nyquist v. Mauclet, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting) (stating that "*Graham v. Richardson* . . . was the first case to explicitly conclude that alienage classifications, like those based on race or nationality, would be subject to *strict scrutiny*" (emphasis added)).

239. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

240. Appleman, *supra* note 121, at 1328.

241. Stack v. Boyle, 342 U.S. 1, 5 (1951).

Eighth Amendment right—a right fundamental to the fairness of the trial—has been violated.[242] Given that alleging that a defendant is a documented gang member has a strong likelihood of leading to higher bail,[243] strict scrutiny requires determining whether consideration of the allegation is necessary and narrowly tailored to achieve the interest of securing attendance at trial.

To demonstrate that alleging documentation of gang membership is necessary to the goal of securing attendance at trial, the state would have to introduce evidence proving that individuals documented in law enforcement gang databases are more inclined to jump bail.[244] One method by which a state could make such a showing would be to prove that alleged gang members possess individual characteristics that make them less likely to appear for trial.[245] While a person can be entered into a gang database for meeting a number of criteria, none of those criteria inherently bear on the probability that the person would appear in court for trial.[246]

As an alternative to showing that alleged gang members possess individual characteristics that make them less likely to appear for trial, a state could argue that membership in a specific gang, in and of itself, increases the probability that a person will fail to attend court.[247] However, the Supreme Court has refused to assume, without specific evidence, that a defendant who is a member of a particular association will flee a jurisdiction in obedience to a superior within that association.[248] Because gangs are highly decentralized and unorganized associations,[249] it is unlikely that a prosecutor could present any evidence indicating that a gang pressures members to jump bail.

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242. *Id.*

243. *See supra* notes 168–188 and accompanying text.

244. If a person documented in a law enforcement database is no less likely to appear for trial than a person not listed in a database as a gang member, then consideration of such an allegation as a basis for increasing bail is wholly arbitrary.

245. An allegation of gang membership would be relevant to bail determination if the personal characteristics that lead to documentation in a gang database reflect a lesser probability that a person will appear for trial, such as apathy or disdain toward the criminal justice procedures.

246. *See supra* notes 75–81 and accompanying text. Although a person can be entered into a law enforcement database simply because he has certain tattoos, has been observed wearing particular colors or style of dress, or has been photographed with particular people, it is difficult to imagine that a judge would give any weight to that information in determining what amount of bail will ensure the defendant's appearance for trial.

247. This argument rests on the premise that *membership* in a gang, rather than any characteristic personal to the defendant, inversely affects the probability that a defendant will appear for trial.

248. *See* Stack v. Boyle, 342 U.S. 1, 5–6 (1951).

249. *See supra* notes 31–43 and accompanying text.

In cases in which a defendant faces the possibility of an enhanced sentence because of his alleged gang affiliation, a state may argue that considering his documentation as a suspected gang member is necessary to determine the amount of bail that will reasonably assure presence at trial.[250] While the severity of the sentence the defendant potentially stands to serve may be relevant to determining the amount of bail that would secure his trial attendance, it is a factor that cannot be considered on its own.[251] Rather, a court must also consider the strength of the prosecution's case to assess whether a potentially severe sentence will increase the likelihood that the defendant will not attend trial.[252] Given judges' heavy reliance on gang database lists,[253] despite the serious questions regarding the accuracy of the lists,[254] factoring sentence severity into the bail determination based solely on documentation of gang affiliation discounts the difficulty the prosecutor may face of proving actual gang membership at trial. A less prejudicial and less restrictive means of calculating how a potential sentence enhancement affects the likelihood that the defendant will attend trial is to only allow the prosecution to offer the evidence of gang membership, without introducing the defendant's documented status at the bail hearing.[255] Because the Federal Rules of Evidence—which exclude evidence that is substantially more prejudicial than probative[256]—do not apply in pretrial bail hearings,[257] it is essential to protect a defendant's right to a fair trial against allegations of gang membership documentation at bail hearings under the Fourteenth Amendment's strictures of equal protection and due process.

An allegation that a defendant is listed in a law enforcement database is neither narrowly tailored nor necessary to achieving the interest of ensuring that the defendant attends trial. Therefore, that

250. One could argue that a defendant facing a severe punishment would be more likely to flee the jurisdiction and forfeit bail in an amount that would secure trial attendance than would a defendant facing lesser punishment. As to the defendant facing the more severe punishment, assuring attendance at trial requires raising the amount of bail to the point at which the defendant is no longer willing to forfeit such a large sum of money.

251. *See Stack*, 342 U.S. at 6 (holding that "infer[ring] from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act").

252. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) (holding that "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence").

253. Wright, *supra* note 70, at 117.

254. *See supra* notes 109–120 and accompanying text.

255. The allegation that a person is listed in a gang database is unfairly prejudicial. Prohibiting a prosecutor from alleging a person's documentation would force the judge to determine the probability that the defendant will face an enhanced sentence solely on probative evidence.

256. FED. R. EVID. 403.

257. 18 U.S.C. § 3142(f) (2012).

interest cannot justify the burden the practice places on a defendant's presumption of innocence and right to a fair trial.

2. *The Government's Interest in Protecting the Public from Danger*

A state could also uphold the practice of alleging gang membership documentation at bail hearings if it can show that doing so is necessary and narrowly tailored to keep dangerous defendants from being released back into the community. The Supreme Court held in *United States v. Salerno* that the government has a legitimate and compelling interest in preventing arrested persons from committing crimes.[258] The Court stated that this interest is at its greatest when the state can show that the arrestee presents a danger to the community.[259] However, in *O'Connor v. Donaldson*, the Court held that the government may not confine a nondangerous person.[260] The Court clarified in *O'Connor* that the Constitution does not tolerate depriving a person of his physical liberty based on "[m]ere public intolerance or animosity."[261] Because dangerousness is the only constitutional justification for detaining a defendant pretrial without bail, the inquiry should turn on whether alleging documentation as a suspected gang member is narrowly tailored to achieving the protection of the community from dangerous defendants.

To pass the narrow tailoring requirement, a state would have to prove that documentation in a criminal database as a gang member equates with dangerousness.[262] Many of the criteria governing entry into gang databases are not confined to personal characteristics bearing on an individual's dangerousness.[263] Therefore, for evidence of a defendant's gang affiliation to be interpreted as evidence of dangerousness, a court would have to assume that gang membership, in and of itself, is probative of dangerousness. A judge who infers this makes the same mistake as the general public of falsely assuming that most gang members are hardened criminals who pose a uniquely dangerous threat to their communities. Further, such an assumption requires

258. United States v. Salerno, 481 U.S. 739, 749 (1987).

259. *Id.* at 750.

260. O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

261. *Id.* at 575.

262. Overinclusiveness is fatal to an argument of narrow tailoring. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991) (holding that the Son of Sam law was significantly overinclusive, and therefore not narrowly tailored to achieving the stated government interest).

263. *See supra* notes 75–81 and accompanying text. A person can easily be identified as a suspected gang member because of his style of dress, tattoos, appearance in photographs with suspected gang members, and a number of other factors. Yet, none of those factors indicate that the person is dangerous.

"pil[ing] inference upon inference" to equate gang affiliation with dangerousness, a tactic the Supreme Court rejected in *United States v. Lopez*.[264]

Even if evidence of gang affiliation is probative of dangerousness, inadequate purging procedures render gang database lists overinclusive as a means of demonstrating that a defendant poses a danger.[265] Gang databases often contain the names of former gang members who are no longer active because the requirements for removing names cannot keep pace with the constant fluidity of gang membership, and often purging procedures are ignored altogether.[266] While a state could argue that leaving a gang does not diminish the degree of danger that a former member poses to the community, that argument is contradicted by existing research.[267] The sharp decline in crime that typically takes place after a person leaves a gang shows that databases' inclusion of former members makes them overinclusive for the purpose of determining whether an individual poses a danger to the community.[268] Therefore, protection of the public from dangerous arrestees cannot justify the practice of alleging documentation of gang membership at bail hearings against a Fourteenth Amendment challenge.

3. The Government's Interest in Deterring Gang Membership and Gang Activity

In addition to the typical government interests furthered by bail considerations, a state could argue that considering a defendant's status as a documented gang member is necessary to generally deterring gang membership and gang activity.[269] However, as with other possible state interests, alleging gang documentation is not narrowly tailored to achieve the interest.

Because gang databases erroneously include the names of non-gang members, subjecting defendants documented as suspected gang members to increased bail and pretrial detention—as a means to deterring

264. United States v. Lopez, 514 U.S. 549, 567 (1995).

265. *See supra* notes 109–120 and accompanying text.

266. *See supra* notes 114–120 and accompanying text.

267. *See* GREENE & PRANIS, *supra* note 7, at 47 (stating that research shows gang members only commit higher rates of offenses during the years in which they are actively involved in the gang).

268. *See id.* at 47.

269. The state could argue that an individual would be less likely to join a gang if he knew that the affiliation would increase the likelihood of pretrial detention if charged with a crime. Similarly, the state could contend that a gang member who knew that he would face a high probability of being detained pretrial when charged with a crime would be less likely to engage in criminal conduct for fear of pretrial detention.

gang membership and activity—constitutes an overinclusive classification.[270] There is a substantial possibility that this practice, by leading to higher bail and pretrial detention for a defendant incorrectly documented as a gang member, would burden the right to a fair trial of an individual not intended to fall within the scope of the practice. This is the type of overinclusiveness that dooms policies and state actions under heightened judicial scrutiny.[271] The fact that there are already sentence-enhancing guidelines to punish and deter gang members from committing crimes suggests that alleging gang documentation at bail hearings is not the least restrictive means to accomplish this goal, unless a state could advance specific statistical data proving that the practice has an additional deterrent effect.[272] Furthermore, there is evidence that consideration of such allegations at bail hearings might actually promote gang activity.[273]

Alleging that a defendant is a documented gang member as a justification for raising bail is not narrowly tailored to achieving any compelling state interest. Therefore, the practice should be prohibited as a violation of the Fourteenth Amendment's guarantees of due process of law and equal protection of the laws.

IV. IMPACT

Prohibiting a prosecutor from alleging, or a judge from considering, that a defendant is listed in a gang database would protect the right to a fair trial as guaranteed by the Fourteenth Amendment. While law enforcement agencies could continue to use databases to maintain records and learn more about the problems gangs pose in this country, excluding the lists contained therein of suspected gang members from bail consideration may actually increase the effectiveness of bail denial and sentence enhancements as gang suppression tactics.

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270. *See supra* notes 109–120 and accompanying text.

271. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991) (holding that the Son of Sam law was significantly overinclusive, and therefore not narrowly tailored to achieving the stated government interest).

272. *See* Brown, *supra* note 53, at 322.

273. *See* GREENE & PRANIS, *supra* note 7, at 79 (suggesting that incarceration actually strengthens gang ties). By increasing the amount of bail and likelihood of incarceration, alleging that a person is a documented gang member could increase the chance that that person will remain an active gang member instead of withdrawing from gang activity. *Id.*

A. Upholding the "Fair Trial" Guarantee of the Fourteenth Amendment

While detaining a defendant without bail is justified if a court determines that the defendant poses a threat of danger,[274] fairness should dictate that such a determination be based on evidence that actually reflects on the defendant's dangerous character. Prosecutors and judges heavily rely on the accuracy of law enforcement lists of suspected gang members as the basis for determining defendants to be dangerous and withholding bail.[275] The fairness of heavy reliance on such evidence is called into question by the flaws in the creation and maintenance of such lists.[276] Assuming that a particular defendant listed in a database is actually a gang member, unquestioning reliance on that evidence alone to determine that the defendant is dangerous simply gives effect to the common misperceptions about gangs and gang members.[277] Doing so ignores data suggesting that "[t]he seriousness and extent of criminal involvement varies greatly among gang members."[278]

Rather than rely on the prejudicial impact that an allegation of gang affiliation carries, prosecutors should be required to introduce the tangible evidence that led to an individual's entry onto a gang database list in order to demonstrate that the person is dangerous. Such evidence would better provide defendants a fair opportunity to rebut such accusations and judges the ability to make just determinations.[279] Forcing a prosecutor to state at a bail hearing that the defendant has been observed associating with suspected gang members affords the defendant an opportunity to rebut or destroy the inference that this piece of evidence justifies pretrial detention.[280] Likewise, hearing this specific piece of evidence allows the judge to understand and evaluate the prosecutor's basis for alleging that the defendant is dangerous.[281]

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274. 18 U.S.C. § 3142(b) (2012).

275. Wright, *supra* note 186, at 117.

276. *See supra* notes 109–120 and accompanying text.

277. GREENE & PRANIS, *supra* note 7, at 51.

278. *Id.*

279. *See supra* notes 142–146 and accompanying text (discussing how the paucity of information at a bail hearing often precludes the defendant from rebutting evidence that he is dangerous and the judge from making a fair determination).

280. A defendant can explain why he has been observed associating with suspected gang members while posing no danger himself. But a defendant cannot explain why he is listed in a gang database despite not being a dangerous person if he does not know why he was entered into the database in the first place.

281. Because there is a wide range of reasons for which a person can be entered into a gang database, the judge cannot decide how database documentation is relevant to dangerousness unless he knows the specific reasons a particular defendant was entered into such a database.

Promoting fairness at this preliminary stage of a case will facilitate fairness throughout by permitting pretrial release of nondangerous defendants, allowing the final disposition of cases to turn on the strength of evidence rather than the pressures of pretrial detention.

B. Addressing Racial Disparities

Not only will prohibiting prosecutors from alleging that a defendant is documented in a gang database at bail hearings advance the fundamental right to a fair trial, it would also be a step toward rectifying racial disparities in the criminal justice system. The overrepresentation of certain minority groups—especially African-Americans—in gang databases mirrors the overrepresentation of those same groups in the nation's prisons.[282] Statistics like this make it easy to see why there has long been resentment toward law enforcement in poor, urban, and minority communities.[283] Eliminating a practice that unfairly and disproportionately affects minority defendants would be a measure of progress in eliminating racial inequity and, potentially, restoring credibility to the criminal justice system.

C. Continued Use of Gang Databases as a Law Enforcement Tool

While prohibiting allegations of gang affiliation at bail hearings would promote the right to a fair trial and reduce racial inequity in the criminal justice system, law enforcement agencies should continue to use gang databases as a means of collecting and disseminating information. Forcing a prosecutor to introduce the evidence contained within a gang database regarding a defendant, as opposed to simply alleging that the defendant is listed as a suspected gang member, will incentivize a law enforcement agency to develop better procedures for entering and maintaining information in the database. Upgrading such procedures could include more training for patrol officers regarding how to conduct field interviews and record information,[284] refining the criteria for entering an individual into a database as a suspected gang member,[285] and implementing and complying with stringent purging procedures to keep database lists up to date.[286] As law en-

282. In 2010, the incarceration rate in the United States for black individuals was 2,207 per every 100,000, while it was only 380 per every 100,000 for white individuals. *U.S. Incarcerations Rates by Race & Ethnicity*, PRISON POL'Y INITIATIVE, http://www.prisonpolicy.org/graphs/raceinc.html (last visited May 30, 2014).

283. Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 411 (2010).

284. *See supra* notes 109–113 and accompanying text.

285. *See supra* notes 75–113 and accompanying text.

286. *See supra* notes 114–120 and accompanying text.

forcement agencies improve their systems of collecting and maintaining records, that information can be used to develop legislation and law enforcement tactics that more effectively suppress violent crime, which is policymakers' primary goal with respect to the war on crime.[287]

D. A More Effective Deterrent to Violent Crime

Precluding consideration of gang affiliation documentation at bail hearings may make pretrial detention a more effective tool for reducing violent crime. The underlying goal of anti-gang measures is to address violent crime.[288] Only allowing evidence that reflects on a defendant's violent and dangerous character at a bail hearing will more directly advance the government's interest in addressing violent crime.[289] Meanwhile, eliminating pretrial detention for defendants who are not dangerous—even if they are gang members—will reduce the likelihood that defendants charged with minor offenses are convicted and sentenced to prison.[290]

Keeping more defendants out of prisons will decrease the instances of "trapping" young people in a life of crime.[291] This argument is supported by evidence that the majority of young gang members remain involved for periods of less than a year, but incarceration often "weaken[s] the capacity of . . . individuals to lead law-abiding lives" and strengthens individuals' gang ties.[292] Therefore, bail procedures that provide for pretrial release and increase a defendant's chances of remaining out of prison should increase the likelihood that the defendant will sever any gang affiliation and avoid criminal conduct in the future.

V. CONCLUSION

For all of the deep-seated fears regarding street gangs, there is still much to learn about these organizations. Gang databases can be a useful tool for law enforcement agencies to collect information about the relationship between gangs and criminal activity; however gang members should not be targeted for punishment disproportionate to

287. Beres & Griffith, *supra* note 5, at 753–54; *see also* Brown, *supra* note 53, at 295.

288. Beres & Griffith, *supra* note 5, at 753–54; *see also* Brown, *supra* note 53, at 295.

289. *See supra* notes 263–264 and accompanying text (discussing the fallacy in assuming that evidence of gang membership is evidence of a violent and dangerous character).

290. *See* Phillips, *Felony Case Outcomes*, *supra* note 180, at 5.

291. GREENE & PRANIS, *supra* note 7, at 79 (explaining how "incarcerating the 'wrong' individuals risks trapping youth who would otherwise have outgrown gang activity in a life of crime").

292. *Id.*

the portion of crimes they commit and the share of societal harm for which they are responsible. Targeting gangs should not be done in furtherance of political agendas. Additionally, targeting gangs should not serve to exacerbate racial disparities in the American criminal justice system.

The practice of introducing evidence at bail hearings of defendants' documentation in gang databases not only fosters these regrettable social realities, but it is also unconstitutional. Bail determinations have a profound and detrimental effect on defendants' opportunity to receive fair trials, as pretrial detention can both hamper a defendant's ability to assist in his defense and place significant pressure on a defendant to plead guilty. Given the inapplicability of the rules of evidence at bail hearings, consideration of gang database documentation at this stage of the criminal justice process is fundamentally unfair. The Fourteenth Amendment guarantees the right to a fair trial; therefore, the Fourteenth Amendment should preclude the use of gang databases to undercut that right.

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