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Guilt by Alt-Association: A Review of Enhanced Punishment for Suspected Gang Members

Rebecca J. Marston
University of Michigan Law School

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**GUILT BY ALT-ASSOCIATION:
A REVIEW OF ENHANCED PUNISHMENT FOR SUSPECTED
GANG MEMBERS**

Rebecca J. Marston*

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INTRODUCTION

Nineteen-year-old Alex’s first mistake was wearing blue shoes to school.¹ His second mistake was personalizing his backpack with doodles of his high school’s mascot (a devil), the name of his hometown, and his native Honduran area code (“504”).² Alex’s third and fatal mistake was using a pencil in math class to scribble “504” onto a school-issued calculator.³ Weeks after a three-day suspension for drawing “gang signs” on school property, Immigration and Customs Enforcement (ICE) agents arrested Alex at his house.⁴ He was accused of belonging to the violent street gang “MS-13,” and, ultimately, Alex was deported.⁵

Alex’s story helps to illustrate how deep the public’s fear of gang violence runs—so deep that seemingly benign fashion choices made by a teenager can lead to deportation if they resemble gang

* J.D. Candidate, May 2020, University of Michigan Law School

1. Hannah Dreier, *How a Crackdown on MS-13 Caught Up Innocent High School Students*, N.Y. TIMES: MAGAZINE (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

symbols. Ironically, Alex and his family immigrated to the United States seeking asylum from gang violence back home in Honduras.⁶ Unfortunately, Alex's pending asylum case and lack of a criminal record were overshadowed by the label of "suspected gang member" assigned to him by a school resources officer.⁷

This essay, written in reaction to the University of Michigan *Journal of Law Reform's* 2018 Symposium entitled "Alt-Association: The Role of Law in Combating Extremism" (the Symposium), does not dispute the seriousness of gang-related violence. Rather, it examines ways in which current strategies for combating gang-related crimes are ineffective or problematic and suggests possible reforms. Part One of this essay will describe current methods used in labeling, tracking, and prosecuting gang members, which result in a cycle of enhanced punishment. Part Two will evaluate these practices and reflect on whether enhanced punishment is the best way to reduce gang-related violence, especially given that modern "gangs" have evolved away from the sophisticated and well-defined criminal organizations of the past. Finally, this essay will explore novel solutions for reducing the harms associated with gang activity in affected communities. These solutions will incorporate ideas from the Symposium's "Design Jam," a brainstorming session following the day's panel discussions in which law students, professors, and guest speakers worked in groups to brainstorm effective ways to combat extremism.

The definition of "extremism" is disputed among scholars, activists, and public officials.⁸ For the purposes of this essay, however, "extremism" is meant to describe an ideology that conflicts with the mainstream view of a society and is perceived as radical by those in favor of the majority view. People sharing an extremist ideology may form what others refer to as "extremist organizations" in order to achieve their goals. Acts born out of extremist ideologies often involve violence, but violence is not a necessary practice of extremist organizations. This essay assumes that gangs, including street gangs and prison gangs, fall within the scope of "extremist organizations."

6. See *id.* (describing how gang members in Honduras killed Alex's uncle and two cousins, mugged Alex and his mother, and threatened Alex when he would go to school).

7. See *id.*

8. See Anna Williford, *Blurred Lines: What Is Extremism?*, 52 MICH. J. L. REFORM 937 (2019).

I. CURRENT PRACTICES IN GANG MANAGEMENT AND ENHANCED PUNISHMENT

A. *Defining Gangs, Members, and Affiliates: Who to Label?*

Just as there is a lack of consensus regarding the definition of “extremism,”⁹ scholars and practitioners have had trouble defining the elements that transform a mere group of individuals into a “gang.”¹⁰ Sometimes gangs have complex hierarchies, rituals, symbolism, and rules;¹¹ sometimes a gang is simply a peer clique.¹² Gangs may be classified as street gangs, prison gangs, race or nationality based gangs, and ideology-based gangs.¹³ Often these categories overlap.¹⁴

There are several reasons why a person might decide to join a street gang, not the least of which is for protection,¹⁵ in theory if not in fact.¹⁶ According to sociologist Forrest Stuart:

If you’re a young black man living in a poor neighborhood on the South Side of Chicago, a lot of violence is inescapable. One of the best ways to stay safe is by joining a gang. So your neighborhood becomes moderately safe, but now the neighborhoods surrounding yours are not safe at all.¹⁷

A person may also join a gang because opportunities to make money legally are hard to come by, or they feel pressure from oth-

9. See, e.g., Umich Law, *MJLR Panel 1 Defining Extremism*, YOUTUBE (Apr. 12, 2019), <https://www.youtube.com/watch?v=CbH40AqGakQ>.

10. See, e.g., OFF. JUV. JUST. & DELINQ. PREVENTION, *Types of Gangs*, 1996 NAT’L YOUTH GANG SURV. (1999), https://www.ojjdp.gov/pubs/96natyouthgangsrvy/surv_4.html.

11. COMMONWEALTH OF VA. DEP’T OF STATE POLICE, BLOODS STREET GANG INTELLIGENCE REPORT (Nov. 2008), <https://info.publicintelligence.net/BloodsStreetGangIntelligenceReport.pdf>.

12. See John Hagedorn et al., *Great Cities Inst., The Fracturing of Gangs and Violence in Chicago: A Research-Based Reorientation of Violence Prevention and Intervention Policy*, GREAT CITIES INST. U. ILL. AT CHI. 7 (Jan. 2019), https://greatcities.uic.edu/wp-content/uploads/2019/01/The_Fracturing_of_Gangs_and_Violence_in_Chicago.pdf.

13. *What Is a Gang? Definitions*, NATIONAL INSTITUTE OF JUSTICE (Oct. 28, 2011), <https://www.nij.gov/topics/crime/gangs/pages/definitions.aspx>.

14. See *id.*

15. Eric Klinenberg, *Growing Up with Murder All Around*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/books/review/alex-kotlowitz-american-summer.html> (describing how, in light of unprecedented violence in his neighborhood, “[Thomas] joined a gang, or ‘crew,’ called 7-0 for protection, *de rigueur* for boys on his block, but feared it wouldn’t help”).

16. Carrie Golus, *How to Talk to Gang Members*, CORE (2017), <http://thecore.uchicago.edu/Winter2017/departments/how-talk-gang-members.shtml> (quoting sociologist Forrest Stuart).

17. See *id.*

ers to join. Alternately, associating with a gang may stem from a need to prove hypermasculinity to win respect that is otherwise lacking for individuals in disadvantaged communities.

Law enforcement agencies recognize the threat posed by large and sophisticated criminal enterprises, causing many to effectuate internal databases to keep track of gang activity within their jurisdiction.¹⁸ For example, the Chicago Police Department (CPD) has, for the last several decades, been adding to the Citizen and Law Enforcement Analysis and Reporting database (CLEAR), which includes both suspected and confirmed gang members.¹⁹

The list of criteria used by CPD in trying to distinguish gang members from the general public includes certain tattoos, clothing, hand gestures, social media posts, and social proximity to other known or suspected gang members.²⁰ Officers may also enter individuals into the gang database when they are “self-admitted” gang members. In theory, this means that the officer heard the person say something to the effect of, “I belong to a gang.”

Entering a suspected gang member into the database as a “self-admission” allows police officers to forgo other objective factors that would otherwise be required.²¹ While there are some guidelines for creating new entries in a gang database, the process remains highly deferential to an officer’s discretion.²² This discretionary power may be abused when law enforcement officers are

18. Anne Teigen, *The Controversy Over Gang Databases*, NATIONAL CONFERENCE OF STATE LEGISLATURES: THE NCSL BLOG (Dec. 20, 2018), <http://www.ncsl.org/blog/2018/12/20/the-controversy-over-gang-databases.aspx> (“Jurisdictions that use gang databases see them as important crime-fighting tools, while opponents point to serious flaws and raise concerns about the extent of police surveillance.”).

19. WESLEY G. SKOGAN, SUSAN M. HARTNETT, & JILL DUBOIS, *POLICING SMARTER THROUGH IT: LEARNING FROM CHICAGO’S CITIZEN AND LAW ENFORCEMENT ANALYSIS AND REPORTING (CLEAR) SYSTEM* 66 (2003), <https://www.hsdl.org/?abstract&did=448497>.

20. THE POLICING IN CHICAGO RESEARCH GROUP, *TRACKED AND TARGETED: EARLY FINDINGS ON CHICAGO’S GANG DATABASE* (2018), <http://erasethe database.com/wp-content/uploads/2018/02/Tracked-Targeted-0217.pdf>; see also Craig Pinkney and Shona Robinson-Edwards, *Gangs, Music and the Mediatization of Crime: Expressions, Violations and Validations*, 17 *SAFER COMMUNITIES* 2, 105 (2018) (“Gang members like anybody else use the internet for a number of reasons, which include making remarks or threats to rival gangs, promoting gang culture, recruitment, flaunting illegal substances or weapons.”).

21. See Annie Sweeney & Paige Fry, *Nearly 33,000 Juveniles Arrested over Last Two Decades Labeled as Gang Members by Chicago Police*, CHI. TRIB. (Aug. 9, 2018), <http://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html> (explaining that, contrary to claims made by the Chicago Police Department, most of the youth contacted by advocates denied admitting to police that they were in a gang); see also *Flores v. Foulk*, No. CV 14-00747-MMM (DTB), 2015 WL 5271039, at *1 (C.D. Cal. Mar. 18, 2015) (discussing a California inmate’s testimony that “the number one rule of gang culture, under threat of death, was that gang members did not admit their membership to law enforcement or communicate with the police”).

22. See Annie Sweeney, *Massive Gang Database Kept by Chicago Police Under Fire as Inaccurate, Outdated*, CHI. TRIB. (Apr. 30, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-20180411-story.html>.

encouraged or incentivized to add new names to the gang database.²³

B. *After Labeling: The Cycle of Enhanced Punishment*

“Being in a gang is not a crime,”²⁴ but the rights and privileges of a labeled person are likely to be affected at virtually every stage in the justice system. Namely, labeled individuals may be subjected to police harassment,²⁵ denied the right to carry a concealed weapon, and given mandatory detention for minor violations. They may also be burdened with increased bail or pretrial detention, longer sentences,²⁶ harsher prison conditions,²⁷ and, post-incarceration, “gang injunctions” which limit otherwise legal behavior.²⁸ As in the case of Alex and other non-citizens living in the United States, bearing a “gang” label can also result in deportation²⁹ or denial of Deferred Action for Childhood Arrivals (DACA)³⁰ or a U-visa.³¹ Fi-

23. *Id.* (asserting that “the number of people entered into the database rose sharply — coinciding with a significant spike in street stops under then-police Superintendent Garry McCarthy’s leadership”).

24. Jessica Wildeus, *A Quick Overview of Virginia’s Gang Laws*, TINGEN & WILLIAMS PLLC (Oct. 1, 2018), <https://tingenwilliams.com/2018/quick-overview-virginias-gang-laws/28034> (explaining that, in Virginia, “being in a gang’ is not a crime, although participating in criminal gang activities is”); *see also Inside ICE’s Controversial Crackdown on MS-13*, CBS NEWS (Nov. 16, 2017, 7:37 AM), <https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan> (explaining that because “gang membership is not a crime,” officers in New York based their arrest on a suspect’s unlawful immigration status); Dreier, *supra* note 1 (“Gang affiliation on its own is not a crime, but it can be grounds to detain undocumented immigrants or people legally seeking asylum.”).

25. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that the New York City Police Department’s stop and frisk practices violated the Fourth and Fourteenth Amendments).

26. BUREAU OF JUSTICE ASSISTANCE, *URBAN STREET GANG ENFORCEMENT* 73 (1997) (citation omitted), <https://www.ncjrs.gov/pdffiles/161845.pdf> (advocating for vertical prosecution as “the most productive tool in attaining longer sentences for serious gang and drug offenders”).

27. *Penalties (Including Sentencing Enhancement), Fines, and Damages*, NAT’L GANG CTR. (2018), <https://www.nationalgangcenter.gov/Legislation/Penalties> (listing state statutes with enhanced penalties for gang participation and recruitment in California, Florida, and other states); *see also* Wildeus, *supra* note 24 (explaining that, in Virginia, participation in criminal gang activities carries additional penalties).

28. *What Is a Gang Database?*, LEGAL SERV. FOR PRISONERS WITH CHILD., <https://www.prisonerswithchildren.org/gang-injunctions/> (last visited June 30, 2019) (describing how gang injunctions limit otherwise legal behavior for suspected gang members).

29. *See* Dreier, *supra* note 1.

30. Kathy Brady, Rose Cahn, & Nikki Marquez, *Crimes and DACA Renewals* (Sept. 2017), https://www.ilrc.org/sites/default/files/resources/crimes_and_daca_renewals.pdf.

31. IMMIGRANT LEGAL RESOURCE CENTER, *UNDERSTANDING ALLEGATIONS OF GANG MEMBERSHIP/AFFILIATION IN IMMIGRATION CASES* 9 (2017) [hereinafter *ILRC*], https://www.ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170509.pdf (“If DHS concludes or suspects that a noncitizen is a gang member, it will probably deny that individual an immigration benefit, such as adjustment of status or a U Visa.”).

nally, the consequences from labeling do not vanish when a person completes his³² sentence. The label remains affixed to his identity, and the cycle of enhanced punishment begins again from the top.

The cycle of enhanced punishment for suspected gang members and affiliates begins thus: As soon as an individual is entered into a gang database, his name and “gang status” become searchable by an expansive network of data-sharing partners who have access to the database.³³ This network includes federal and local law enforcement agencies, park ranger stations, licensing boards, ICE, and others.³⁴ A person is unlikely to be notified when added to a gang database, and many have found it difficult or impossible to have their names removed from a gang database once it has been entered.³⁵

Often a person will not know of his gang status until he is denied certain rights and privileges while going about his daily life. For example, someone seeking employment as a security guard may be surprised to learn that his application for a concealed-carry license was rejected by a state licensing board because of his suspected gang affiliation. Inclusion in a gang database may also result in an undocumented person’s inability to benefit from immigration programs like Deferred Action for Childhood Arrivals or a U-visa.³⁶

The decision to revoke these privileges is often outside the purview of law enforcement officers but based on the initial assessment of whichever police officer first labeled the individual.³⁷ Typically there is no investigation into the validity of the alleged gang affiliation, and appeals from these administrative decisions are rarely successful, despite evidence suggesting gang databases con-

32. This essay occasionally refers to hypothetical individuals as “him” or “he,” in part for simplicity and in part because males are predominately those affected by these labeling practices. This is in no way meant to suggest that women are unaffected.

33. *CLEAR Application for Law Enforcement*, CHICAGO POLICE (2019), <https://home.chicagopolice.org/online-services/i-clear-application-for-law-enforcement/> (CPD website boasting data sharing and inviting other law enforcement agencies to become data-sharing partners).

34. MUCKROCK, FOIA - CPD - LIST OF AGENCIES WITH ACCESS TO CLEAR DATA (Jan. 29, 2018), <https://www.muckrock.com/foi/chicago-169/foia-cpd-list-of-agencies-with-access-to-clear-data-48083/#file-174202> (showing 539 agencies with access to CLEAR gang database).

35. Dreier, *supra* note 1 (“People aren’t told if they are listed in a database, and if they don’t actually belong to a gang, it’s virtually impossible to prove it and have their names removed.”).

36. *What is a U-Visa?*, CITIZENPATH (May 16, 2014), <https://citizenpath.com/what-is-u-visa/> (explaining that U-visas are granted to undocumented persons who are victims of crime and cooperate with police).

37. MUCKROCK, *supra* note 34; Brady et. al., *supra* note 30 (DACA renewal); ILRC, *supra* note 31 (U visa eligibility).

tain errors.³⁸ These administrative practices are, of course, meant to prevent dangerous criminals from obtaining weapons or remaining in the country, but they can easily affect innocent people who were unfortunate enough to have been mislabeled by an overzealous police officer.

A labeled individual is more likely to be stopped, frisked, or interrogated by police patrolling neighborhoods or running license plates. It is also conceivable that certain illegal but mostly benign behaviors, like jaywalking or driving with a taillight out, would be more likely to result in a confrontation with police if a quick search reveals that the offender is a suspected gang member. After all, the label is meant to assist law enforcement in their effort to rid the streets of gang activity.³⁹

If a labeled person finds himself facing criminal charges, the smear of being considered a “gang member” or “gang affiliate” will weigh against leniency in punishment at virtually every stage in the justice system. In Chicago, for example, driving on a suspended license—a minor traffic violation which would typically result in a ticket—will land a person in jail if his name comes up in the gang database.⁴⁰

Likewise, gang status may be considered by bond judges in deciding whether to grant bail.⁴¹ Instead of getting out on bond at a proportional price, labeled individuals might be forced to pay more, or remain in pretrial detention if they cannot post bail. Alternatively, an individual who would otherwise be released on bail might be given house arrest if a judge deems him to be a danger to the community.

At the trial stage, judges and juries may also consider an individual’s gang status, meaning that an individual labeled a gang member or affiliate might be more likely to be convicted. Moreover, some jurisdictions endorse “vertical prosecution,” in which certain

38. See, e.g., Jacqueline Serrato, *Chicago Police Admits Gang Database Error that Enabled ICE Raid*, CHI. TRIB. (Dec. 6, 2017, 1:31 PM), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html> (“An immigrant man in Chicago was erroneously placed in the gang database, Chicago Police admitted last week in a letter to U.S. Citizenship and Immigration Services.”); see also Sweeney, *supra* note 22.

39. See *Inside ICE’s Controversial Crackdown on MS-13*, *supra* note 24 (quoting ICE assistant special agent Jason Molina as saying “the whole point of [Operation Matador] is to get these known gang members off the street”).

40. Class Action Complaint at 36, *Chicagoans for an End to the Gang Database v. City of Chi.*, No. 1:18-cv-04242, 2018 WL 5310509 (N.D. Ill. Jun. 19, 2018) (“Mr. Cooper was denied an I-Bond pursuant to CPD policy that states that I-Bonds are not to be issued for verified gang members.”).

41. *Id.* at 37, (“At his bond hearing on June 20, 2017, relying on the CPD’s representations, the judge ordered that Mr. Cooper be put on house arrest and electronic monitoring because of his gang designation.”).

prosecutors are assigned to work solely on gang-related cases.⁴² This suggests that the prosecutor opposite a labeled individual will be uniquely skilled and experienced in convicting gang members. Upon conviction, the sentencing of a labeled individual is often enhanced, either by a judge's discretion or by mandatory statute.⁴³

One might expect that the negative consequences associated with a gang label would end once an individual receives his sentence; however, bearing such a label also has the potential to make an inmate's sentence less tolerable. Many state correctional facilities still subject suspected gang members to indefinite periods of administrative segregation or solitary confinement in an attempt to manage conflicts between rival prison gangs.⁴⁴ This involves placing inmates in administrative segregation, where they may spend up to twenty-three hours a day isolated in a cramped cell, leaving only for one hour of "exercise" that usually involves walking in circles around a slightly larger room.⁴⁵

Upon release from prison, a labeled person is not removed from the gang database. In fact, there is often no way to remove a person's name from a gang database once it has been included. This is problematic because it discourages rehabilitation with a permanent label that can never be overcome, even after time has been served. Of course, this is made worse by the fact that this label might not even be accurate.

A person convicted of participating in criminal gang activity may also find his or her name and photo included in a publicly availa-

42. BARBARA WEBSTER & E. CONNORS, INSTITUTE FOR LAW AND JUSTICE, GANG PROSECUTION IN THE UNITED STATES 2, (1994), http://www.ilj.org/publications/docs/Gang_Prosecution_in_US.pdf ("About a third of prosecutors in large jurisdictions have formed gang units (thirty eight counties or thirty two percent), using vertical prosecution to focus on gang members.").

43. See, e.g., *People v. Savala*, B246215 2015 Cal. App. Unpub. LEXIS 4442, at *19-20 (Jun. 24, 2015) ("The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if . . . [t]he defendant intentionally killed the victim while the defendant was an *active participant in a criminal street gang*. . . and the murder was carried out *to further the activities of the criminal street gang*." (emphasis added); see also CAL. PENAL CODE § 186.22(b)(1) (Deering 2019) (imposing an additional punishment when a defendant commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members").

44. Sean E. Boyd, *Implementing the Missing Peace: Reconsidering Prison Gang Management*, 28 QUINNIPIAC L. REV. 969, 994 (2010) (describing current prison gang management); see also Clint Talbott, *Why Are Gang Members Disproportionately Placed in Solitary Confinement?* COLO. ARTS & SCI. MAG. (Nov. 15, 2016), <https://www.colorado.edu/asmagazine/2016/11/15/why-are-gang-members-disproportionately-placed-solitary-confinement> (quoting criminologist David Pyrooz that "[i]n about a third of the states in the U.S., simply your status of being a gang member is good enough to get you into solitary").

45. *Indefinite Solitary Confinement Ends at San Quentin*, DEATH PENALTY FOCUS <https://deathpenalty.org/blog/indefinite-solitary-confinement-ends-san-quentin/> (describing solitary confinement).

ble Gang Book, like the one updated and published annually by the Chicago Police Department.⁴⁶ These individuals are often convicted of more serious gang-related crimes and are more likely to actually belong to a gang.

Finally, “gang injunctions” issued by courts are used in California and other states to prevent suspected gang members from engaging in otherwise legal behavior.⁴⁷ This might mean that an individual cannot travel through certain neighborhoods, associate with certain people, or wear certain articles of clothing.

II. ANALYSIS OF CURRENT GANG MANAGEMENT METHODS REVEALS A PROBLEMATIC SYSTEM THAT DOES MORE HARM THAN GOOD

The aforementioned consequences of bearing the label of a “gang member or affiliate” together create a cycle of enhanced punishment that perpetuates the problem of mass incarceration for many communities and disproportionately affects certain minority groups.

Many people on these lists who would be subject to enhanced punishment are not actually gang members at all.⁴⁸ But gang member or not, a labeled person will be treated as if they are a criminal under current practices. The vague set of criteria used by law enforcement in trying to identify gang membership or affiliation suggests that a person’s inclusion in a gang database is often left to the discretion of the law enforcement officer who entered him into the database.

Hinting at possible abuse of this discretion is the exorbitant number of “self-admitted” gang members listed in Chicago’s gang database. Currently, ninety percent of people in Chicago’s gang database allegedly “self-admitted” to police that they belonged to a gang.⁴⁹ This has caused some to question whether officers are be-

46. *The Gang Book*, CHICAGO CRIME COMMISSION, <http://www.chicagocrimecommission.org/#gang> (describing Chicago’s gang book and how to purchase it on Amazon).

47. *Getting off a Gang Injunction*, YOUTH JUST. COALITION, <http://www.youth4justice.org/self-defense-legal-rights/getting-off-a-gang-injunction> (last visited June 30, 2019); see also Christopher Bruell, *Gang Injunctions*, in *ENCYCLOPEDIA OF RACE AND CRIME* 313, 313 (Helen Greene & Shaun L. Gabbidon ed., 2009) (“Although a couple of gang injunctions have been granted in Texas and Illinois, the overwhelming majority of injunctions have been obtained in Southern California.”).

48. See Sweeney, *supra* note 22.

49. Sweeney, *supra* note 21 (“Astonishingly, the Police Department told the Tribune that nine out of every 10 adults and juveniles listed in its arrest data had ‘self-admitted’ to being in a gang.”).

ing truthful about the reasons they list for adding someone to the gang database.⁵⁰ If it is true that large numbers of people are not self-reporting their gang affiliations to police, their erroneous admissions into Chicago's gang database may be based on false assumptions or malicious mischaracterizations made by law enforcement for any number of possible reasons, including racial animus or career incentives.⁵¹

When it is impossible to trust whether the information contained in a gang database is accurate, the utility of it as an internal law enforcement tool becomes diminished. However, even if gang labels could be more accurate, the act of associating with an alt-organization may not be something we should punish in order to affect the public policy goal of reducing violent crimes in gang-affected neighborhoods. At the very least, it may be necessary to reexamine current practices to ensure they can pass constitutional muster.

Currently, a class action is pending against the Chicago Police Department alleging violations of the Fourteenth and Fifth Amendments to the Constitution.⁵² The complaint alleges that law enforcement disproportionately labels black and brown young men within certain neighborhoods as members of the local gang, in violation of the equal protection clause of the Fourteenth Amendment.⁵³ And because labeled individuals receive no notice or opportunity to contest their inclusion in a gang database, plaintiffs claim that these practices violate the constitutional right to due process under the Fifth Amendment.

The constitutionality of denying bail based on an alleged gang affiliation has also been challenged.⁵⁴ In his article, Michael Cannel suggests that “[w]hile the right to bail is not absolute, the Supreme

50. See Dreier, *supra* note 1 (“Again and again, judges found that the material — a student cited for a gang tattoo who didn’t have a tattoo; a photo of a group of suspected gang members that did not include the student in question — was far too weak or inaccurate to detain the students.”).

51. Monica Davey and Mitch Smith, *Chicago Police Dept. Plagued by Systemic Racism, Task Force Finds*, N.Y. TIMES (April 13, 2016), <https://www.nytimes.com/2016/04/14/us/chicago-police-dept-plagued-by-systemic-racism-task-force-finds.html>.

52. See Class Action Complaint, *supra* note 40, at 3.

53. See *id.* at 14 (“Under McCarthy’s leadership, the CPD escalated its practice of labeling Black and Latinx people as members of gangs that CPD mapped to the particular neighborhood or block where they encountered the individual (for purposes of this Complaint, Plaintiffs will refer to this practice as ‘block-labelling’).”).

54. Michael Cannel, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027, 1028 (2014) (arguing that the consideration of evidence that a person has been labeled a gang member “unconstitutionally burdens a defendant’s right to a fair trial” at bail hearings).

Court has clarified that fairness is still a fundamental concern at pretrial proceedings.⁵⁵

Under the Eighth Amendment, the constitutionality of solitary confinement in prisons based on a suspected gang affiliation has also been challenged.⁵⁶ The case of *Ashker v. Governor of California* involved a class action comprised of individuals who had been placed in solitary confinement for indefinite and prolonged periods of time, based solely on their suspected gang affiliation. The claim was originally filed by two inmates from California's Pelican Bay State Prison who were thought to be members of the Aryan Brotherhood, a white supremacist prison gang. The class later expanded to include others who had been placed in solitary confinement based on their suspected gang affiliations.⁵⁷ Many class members had been kept in solitary confinement for over ten years each, with little or no contact with other people. It has been suggested that indefinite and prolonged periods of isolation may deprive individuals of the "minimal civilized measure of life's necessities" in violation of the Eighth Amendment.⁵⁸ Whether this isolation is framed as a punishment or a mode of protection, it is a punishment in practice.⁵⁹

In 2015, *Ashker* was settled and the consent decree included a requirement that correctional facilities in California limit segregation of suspected gang members to a defined period of time. It was also agreed that state correctional facilities would transition to a behavior-based system for transferring inmates into solitary confinement, as opposed to the "status-based system" which had allowed many individuals to be confined to cramped quarters for over ten years.

In addition to taking a toll on the well-being of inmates, research suggests that placing suspected gang members into solitary confinement is not the most effective method of punishment.⁶⁰

55. *Id.* at 1051 (citation omitted).

56. *Ashker v. Governor of California*, Civil Action No. 4:09-cv-05796-CW (N.D. California, 2012).

57. *Id.*

58. Uptown People's Law Center, *Davis v. Baldwin*, UPLC, <https://www.uplcchicago.org/what-we-do/prison/davis-v-baldwin.html>.

59. Editorial, *Solitary Confinement Is Cruel and Ineffective*, SCIENTIFIC AMERICAN (Aug. 1, 2013), <https://www-scientificamerican-com.proxy.lib.umich.edu/article/solitary-confinement-cruel-ineffective-unusual/?redirect=1> ("Whatever the reasons, such extreme isolation and sensory deprivation can take a severe, sometimes permanent, toll on emotional and mental health.").

60. Melanie Reed, *Crime and Punishment, A Global Concern: Who Does it Best and Does Isolation Really Work?* 101 KY. L. J. 45, 49 (2015), <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1061&context=klj> ("I argue that the restriction of freedom should be used less often and that particular punishments that tend to isolate the individual are less

Moreover, it has been suggested by scholars that a carceral approach to gang management can actually strengthen the influence that prison gangs have on the outside.⁶¹

Finally, the inability to have one's name removed from a gang database is problematic because it may discourage former gang members from reforming their lives and moving on to become productive members of society. After all, law enforcement will always consider them criminals. Worse, gang members whose names and photos have been published in a "gang book" made available to the public (unlike gang databases, which are only shared with partner agencies) may feel that their inclusion puts them or their families in danger. A person's inclusion in a public gang book puts a target on his back and may contribute to further gang violence and recidivism. This sort of recognition is also a hindrance to finding new employment and leading an honorable, crime-free life.

III. LAW ENFORCEMENT SHOULD DEEMPHASIZE THE FOCUS ON "GANGS" AND BREAK THE CYCLE OF ENHANCED PUNISHMENT AT THE COMMUNITY LEVEL

By widely disseminating unconfirmed gang data, law enforcement agencies have transformed the gang database, an internal investigative tool, into a damning list that can bypass proper procedural due process and create unwarranted problems for individuals. This needs to change. Where the aim is to eliminate gang-related violence in affected communities, experts suggest that a successful approach need not focus on sorting entire communities into 'gang-affiliated' and 'not gang-affiliated.'⁶²

Rather, we should look to communities to see where violence originates and implement social programs aimed at helping individuals resolve interpersonal conflicts. This is due in part to the evolution of gangs away from structured hierarchies with strict rules and toward "horizontal" gangs comprised primarily of peers. Researchers at a conference held earlier this year suggested that, with respect to gang violence in Chicago, "[l]aw enforcement strategies based on conspiracy-related prosecutions of gang leaders and members are out of date and counterproductive to horizontal

effective and, in fact, detrimental, in comparison to other punishments that have a greater possibility of restoring public order and harmony.").

61. See Benjamin Lessing, *Counterproductive Punishment: How Prison Gangs Undermine State Authority*, 29 RATIONALITY & SOC'Y 257, 257 (2017) ("Typical crime-reduction policies that make incarceration likelier and sentences harsher can *increase* prison gangs' power over street-level members and affiliates, a formal model shows.").

62. See Hagedorn et al., *supra* note 12, at 2.

cliques and how they operate.”⁶³ To combat gang-related violence in these neighborhoods, it will be necessary to focus efforts on combating ideas of “hypermasculinity” and making youths feel safe within their neighborhoods.

Gang-related violence can also be better combatted by reforming policies surrounding the management of gangs within prisons. In the Symposium’s Design Jam, one group tasked with designing solutions relating to extremism in the law noted that “[p]risons radicalize people along racial, ethnic, and geographic lines.” This led to a brainstorming of solutions for combatting extremism among inmates which included entry and exit training programs for inmates, more contact visits with family members, and remedial training and better pay for correctional officers.

Enhanced punishment based on gang affiliation does not help reform the individual; it violates principles of proportionate punishment and occurs without proper verification that an individual even belongs to a gang. There are better solutions for reducing gang-related violence within communities, requiring only that volunteers and neighbors work towards creating a paradigm shift that will soothe conflicts and facilitate healthier dialogue.

63. *Id.* at 1.

