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

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## INTRODUCTION

The New York City Police Department (NYPD) is about to follow a number of other urban police departments down the well-worn path of gang policing. It does not take this path because New York City has a significant gang problem. Gangs ranked last and second-to-last among the causes of murder in the two years since the NYPD added the category of “gangs” as a cause of murder to its annual reports.<sup>1</sup> Nor do gang-motivated crimes account for even one percent of the crimes that take place in New York City each year.<sup>2</sup> Indeed, having recently transferred 300 new officers to the Gang Division,<sup>3</sup> the NYPD has more new police officers in the Gang Division than the 264 gang-motivated crimes<sup>4</sup> the NYPD identified in the 2013 fiscal year.<sup>5</sup> With over six hundred police officers dedicated to “Operation Crew Cut,” announced in October 2012, the NYPD has quadrupled its gang division at a time when shootings and homicides are lower than at any time in the four decades since crime statistics have been maintained.<sup>6</sup>

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

The answer to these questions is that the class action challenging the NYPD’s use of stop-and-frisk<sup>7</sup> threatened to foreclose the NYPD’s ability to monitor youth of color in the absence of crime based on appearance and geography. After years of stopping suspicious people in high-crime areas, the NYPD is addicted to profile-based policing. Since 2001, the NYPD has adopted a surveillance-based policing model in which the millions of fruitless stops were a concern only because of the political and legal pressure they created, not because of the violation of rights guaranteed by the Fourth and Fourteenth Amendments. For the NYPD to relinquish the intensive policing of these suspect populations is unthinkable. The NYPD is driven by crime statistics and believes that aggressively policing a particular suspect class, which happens to be defined by race and class, is the reason for crime decline. It does not matter that the crime decline began before stop-and-frisk became the pervasive tactic it is today.<sup>8</sup> Nor is this belief undermined by the fact that crime has declined in cities across the country and around the

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<sup>1</sup> NYPD, *Murder in New York City*, NYC.GOV, 3 (2011) [hereinafter N.Y.C. Murders 2011], [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/2011\\_murder\\_in\\_nyc.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf); NYPD, *Murder in New York City*, NYC.GOV, 3 (2012) [hereinafter N.Y.C. Murders 2012], [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/murder\\_in\\_nyc\\_2012.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf). The other categories are Dispute/Revenge, Drug, Domestic, Robbery/Burglary, Unknown and Other.

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

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

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

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

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

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

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

world regardless of policing strategies.<sup>9</sup>

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

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

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

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

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

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

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

<sup>12</sup> *Id.* at 560.

<sup>13</sup> *Id.* at 660. Moreover, the New York State Attorney General's review of arrests resulting from stop-and-frisk revealed that nearly half of these arrests did not result in conviction. ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 3 (2013), available at [http://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf). Further, about one in six of these arrests were never even arraigned after being either voided by the NYPD itself or declined by the prosecution. *Id.*

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

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

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

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

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

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<sup>15</sup> See *infra* Part IV.A below for description of gang policing.

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

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

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

## I. GANG CRIME AS PRETEXT

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

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

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

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

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

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

#### A. National Crime Trends Versus Reported Gang Threat

To put it mildly, law enforcement reports of a growing gang menace in the United States are in significant tension with the dramatic decline of violent crime across the United States. Between 1993 and 2010, the National Crime Victimization Survey (NCVS) has documented a decline in serious violent crime victimization of 77%.<sup>22</sup> The Federal Bureau of Investigations’ Uniform Crime Reports provide law enforcement figures that similarly document a decline in the rate of violent crime of 51% between 1993 and 2012.<sup>23</sup> According to the NCVS, only 6% of victims of violent felonies between 1998 and 2003 perceived the perpetrator to be a gang member.<sup>24</sup> This perception is consistent with FBI homicide reports, which classify about 5-7% of homicides as gang-related between 1993-2003.<sup>25</sup> Despite claims that gangs are corrupting ever more and ever younger youth, the rates of violence crime among youth under 18 appears to have declined more dramatically than rates for adults during the last decade.<sup>26</sup> This is the case even in a state like California, which reports high numbers of gangs and gang members.<sup>27</sup> In California, juvenile violent offense rates are lower than at any time during the sixty years that statistics have been kept.<sup>28</sup> Indeed, the juvenile crime rates in the 1950s were 2.5 times higher than they were in 2011.<sup>29</sup>

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

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<sup>20</sup> *Id.*

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

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

<sup>23</sup> FBI, UNIFORM CRIME REPORTS, tbl. 1 (2012), available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatacoverviewpdf/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_per\\_100000\\_inhabitants\\_1993-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls) (reporting NCVS statistics reflecting both reported and unreported crime while the UCR provides statistics based on reported crime only).

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

<sup>25</sup> *Id.*

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

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

<sup>28</sup> David Pimental, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 92 (2013); Mike Males, *California Youth Crime Plunges to All-Time Low*, CENTER ON JUV. & CRIM. JUST., Oct. 2012, at 1–4, available at [http://www.cjcj.org/uploads/cjcj/documents/CA-Youth\\_Crime\\_2011.pdf](http://www.cjcj.org/uploads/cjcj/documents/CA-Youth_Crime_2011.pdf) (juvenile violent crime decreased consistently since 1954).

<sup>29</sup> Males, *supra* note 28, at 1.

active gang members—from one million to approximately 1.4 million—between 2009 and 2011.<sup>30</sup> According to the law enforcement sources that provide information to the NGIC, these gang members were responsible for an average of 48% of violent crime in most jurisdictions and as much as 98% of violent crimes in some jurisdictions.<sup>31</sup>

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

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

### *B. New York City Crime and Gang Trends*

New York City, like the entire country, has experienced declining crime in the past two decades. New York has been at the forefront of this trend, boasting crime declines of nearly 80% for violent crime between 1990 and 2014.<sup>35</sup>

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

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

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

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

<sup>31</sup> *Id.* at 9.

<sup>32</sup> FBI, *supra* note 23.

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

<sup>34</sup> LAURISTEN & REZEY, *supra* note 22, at 1.

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

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



a small fraction of that crime is “gang motivated”.<sup>37</sup> A gang-related crime is a crime committed by any gang member or any *suspected* gang member whether or not the crime has anything to do with the gang.<sup>38</sup> A gang-motivated crime is one that is done to benefit a gang or because of gang rivalries within or among gangs.<sup>39</sup> Table 1 provides the number of gang-related and gang motivated crimes as reported in NYPD GangStats reports from 2005 – 2012. The statistics demonstrate that NYPD attributed less than 1% of major categories of felony crimes<sup>40</sup> in New York City to gang members through 2012.

**Table 1: NYPD GangStats 2005-2012**<sup>41</sup>

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

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

**Table 2: NYPD’s “Gang Motivated Incidents”**<sup>44</sup>

FY09	FY10	FY11	FY12	FY13
335	228	303	310	264

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

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

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

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

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

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

<sup>41</sup> GangStat Reports, *supra* note 2.

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

<sup>43</sup> N.Y.C., *supra* note 5, at 4.

<sup>44</sup> *Id.*

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

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

**Table 3: “Gang Motivated” Shootings and Homicides**<sup>47</sup>

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

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

**Table 4: “Gang Related” Shootings and Homicides**<sup>48</sup>

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

<sup>45</sup> N.Y.C. Murders 2011, *supra* note 1, at 3.

<sup>46</sup> N.Y.C. Murders 2012, *supra* note 1, at 3.

<sup>47</sup> GangStat Reports, *supra* note 2.

<sup>48</sup> *Id.*

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

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

**Table 5: Individuals added to NYPD Gang Database 2005-2013**<sup>52</sup>

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

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

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

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

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

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

<sup>52</sup> *Id.*

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

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

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

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

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

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

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

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

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

<sup>55</sup> Sandoval & Moore, *supra* note 49.

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

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

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

Yorkers of color, who faced a heightened risk of being stopped, frisked, and subjected to use of force in violation of both the Fourth and Fourteenth Amendments.<sup>59</sup> A trial date was also set, but with the certification of the class, the NYPD's stop and frisk activity declined for the first time in decades. While the NYPD were on track in the first quarter of 2012 to exceed the 685,000 stops they made in 2011, by the end of the year only 533,000 stops were reported (a 22% drop).<sup>60</sup> In 2013, the number of reported stops plunged to about 190,000.<sup>61</sup>

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

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

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

The use of the gang menace to create a moral panic<sup>68</sup> and increase support for

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<sup>59</sup> *Id.* at 158–78.

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

<sup>61</sup> *Id.*

<sup>62</sup> *Historical New York City Crime Data: Citywide Seven Major Felony Offenses 2000–2014*, NYPD [http://www.nyc.gov/html/nypd/downloads/excel/analysis\\_and\\_planning/seven\\_major\\_felony\\_offenses\\_2000\\_2014.xls](http://www.nyc.gov/html/nypd/downloads/excel/analysis_and_planning/seven_major_felony_offenses_2000_2014.xls) (last visited May 1, 2015).

<sup>63</sup> Beekman, *supra* note 57.

<sup>64</sup> *Floyd*, 283 F.R.D. 153.

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

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

<sup>67</sup> *Id.*

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

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

In a moral panic, the public, the media, and politicians reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals. . . . Although sometimes the targeted enemy poses an imaginary threat (the Salem “witches,” for example), more often a moral panic focuses on individuals who do real harm, such as sexual abusers or members of criminal street gangs. . . . But what distinguishes a moral panic from an effort to deal with a pressing social problem is the gap between the perception of the problem and the reality. In a moral panic, the seriousness of the threat and the number of offenders are greatly exaggerated.<sup>73</sup>

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

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

<sup>69</sup> See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 108–12 (2008) (discussing the passage of Proposition 21 in California based on a moral panic about juvenile crime); John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 *CRIME & JUST.* 365, 376 (1998) (noting the tendency to construct male gangs as deviant during moral panics); Marjorie Zatz, *Chicano Youth Gangs and Crime: The Creation of a Moral Panic*, 11 *CONTEMP. CRISES* 129 (1987); Marjorie Zatz, *Los Cholos: Legal Processing of Chicano Gang Members*, 33 *SOC. PROBS.* 13 (1985).

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

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

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

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

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

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

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

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

### III. THE NYPD'S GANG DEFINITIONS AND DATABASE

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

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

<sup>75</sup> Goldstein & Goodman, *supra* note 3.

<sup>76</sup> See Esposito *supra* note 57.

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

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

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

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

<sup>81</sup> N.Y. CPL §140.50(4) (McKinney 2010).

subsequently dismissed or resolved with no criminal conviction.<sup>82</sup>

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

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

Thus, although the NYPD cannot maintain electronic data on those stopped-and-frisked but not arrested or given a summons, the NYPD gang database allows the NYPD to maintain identifying data, including name, address, and social security number on individuals without even a pretense of reasonable suspicion.<sup>90</sup> Indeed, the NYPD gang database does not require any information regarding criminality whatsoever. The criteria used by the NYPD to “qualify” an individual as an “Identified Gang Member” were provided to the author January 7, 2014, in response to a FOIL request filed on September 2, 2011.<sup>91</sup> The criteria are listed on the Intelligence Division (I.D.S.) Gang Entry Sheet, and an individual can be certified in any of the following three ways:

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

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

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

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

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

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

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

<sup>89</sup> See sources cited *supra* note 85.

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

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



1. An individual will be entered if he/she admits to membership during debriefing OR
2. Through the course of an investigation an individual is reasonably believed to belong to a gang and is identified as such by two independent sources. (Ex. Pct. Personnel, Intell, School Safety, Dept. of Correction, or Outside Agency) ... OR
3. Meets any **Two** below mentioned criteria
  - **Known gang Location**
  - **Scars/Tattoos** Associated w/ Gangs
  - **Gang Related Documents**
  - **Colors** Associated w/ Gangs
  - **Association** w/ Known Gang members
  - **Hand Signs** Associated with Gangs<sup>92</sup>

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

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

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<sup>92</sup> *Id.*

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

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

<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

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

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

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

After each interview, the detectives filed detailed reports about the

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

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

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

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

<sup>104</sup> CMTY. JUSTICE PROJECT, *supra* note 102, at 2–4; Howell, *supra* note 86, at 652.

<sup>105</sup> CMTY. JUSTICE PROJECT, *supra* note 102, at 22.

<sup>106</sup> *Id.* at 10.

<sup>107</sup> *Id.* at 10, 22.

<sup>108</sup> *Id.* at 19.

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

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

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

The existence of parallel databases stemming from collaboration with the NYPD is evident in recent statements by New York County District Attorney’s Office. After tapping the NYPD to designate the 25 worst offenders in each of the 22 precincts in Manhattan, the DA’s Office went on to develop a list of about 9000 individuals of high interest that its Crime Strategies Unit considers the worst of the worst.<sup>113</sup> The fact that the District Attorney averages over 400 persons of interest per precinct, rather than 25, likely reflects the broad collection of data from the surveillance and petty arrests of individuals consistent with Operation Crew Cut. It is worth noting that the number of people on this list is twice as high as the number of all violent felony arrests for 2014.<sup>114</sup> Like the surveillance of Muslim drivers and food vendors arrested for minor offenses who are then debriefed, alleged gang members are also detained and questioned for very minor offenses.<sup>115</sup> Based on this list, the prosecutors

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

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<sup>110</sup> *Id.*

<sup>111</sup> NYPD, *supra* note 33, at 1.

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

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

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

<sup>115</sup> Brown, *supra* note 113.

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

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

#### IV. THE HARMFUL CONSEQUENCES OF GANG SUPPRESSION TACTICS

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

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

###### 1. Police Perceptions of Gang Problems.

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

The gang narrative has the power to distort police perception of the prevalence and violence of gangs and to trigger biases<sup>117</sup> that affect policing. In a careful study of gang units in four western cities (Inglewood, CA, Albuquerque, NM, Las Vegas, NV, and Phoenix, AZ), Charles Katz and Vincent Webb outline some worrisome aspects of gang policing.<sup>118</sup> After following and interviewing police officers from four gang units and their colleagues, these researchers observed a number of disturbing attitudes and trends.

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

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<sup>116</sup> *Id.*

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

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

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

Gang units across the country similarly attribute 48 to 98% of violent crime to gangs<sup>120</sup> even though victim reports attribute only about 6% of violent crimes to gangs.<sup>121</sup>

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

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

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

## 2. Gang Policing Justifies Intensive Policing and Surveillance

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

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

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

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

<sup>122</sup> KATZ & WEBB, *supra* note 118, at 71.

<sup>123</sup> *Id.* at 88.

<sup>124</sup> *Id.*

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

<sup>126</sup> KATZ & WEBB, *supra* note 118, at 83.

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

<sup>128</sup> *Id.* at 75.

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

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

The intensive surveillance extends to following twitter feeds, monitoring Facebook (often by creating fake profiles of attractive young women), and monitoring YouTube videos.<sup>133</sup> Whether the police should be engaged in this level of surveillance of youth for intelligence collection purposes, without any prior showing or justification, is an important question that merits serious consideration and is not one that should be answered in a kneejerk manner based on our fear of gangs. Police lists may be shared with immigration<sup>134</sup> or potential employers<sup>135</sup> and cause substantial collateral damages even in the absence of criminal convictions or arrests.

The potential impact of gang intelligence was demonstrated quite dramatically in a case decided by the New York State Court of Appeals in 2014.<sup>136</sup> In *People v. Johnson*, the defendant was standing on the sidewalk of 140th Street at 7th Avenue near three other men. At least two of them were allegedly members of the local gang, the 40 Wolves.<sup>137</sup> There was no information that the defendant was alleged to be a member of the 40 Wolves.<sup>138</sup> There was no testimony that any of the men had done anything other than stand on the block (where they lived) but the NYPD, nevertheless ordered them to disperse. When one of the men asked why they were being ordered to disperse, all four were arrested for disorderly conduct for failing to obey an order to disperse.<sup>139</sup> In a search-incident-to arrest, drugs were found on the defendant.<sup>140</sup> At the suppression hearing the

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

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

<sup>131</sup> KATZ & WEBB, *supra* note 118, at 274.

<sup>132</sup> Goldstein & Goodman, *supra* note 3.

<sup>133</sup> *Id.*

<sup>134</sup> Jennifer Chacon, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member”*, 2007 U. CHI. LEGAL F. 317, 348 (noting that a substantial portion of alleged gang members swept up by ICE had not been accused of any violent crime); SEC’Y JEH JOHNSON, DEP’T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) (categorizing aliens “not younger than 16 years of age who intentionally participated in an organized gang” along with terrorists and convicted felons as Priority 1 for civil enforcement of immigration laws). Suspected gang membership is also being used to deny relief for DACA (Deferred Action for Childhood Arrival) eligible individuals. Defendants’ Sur-Reply In Opposition to Plaintiffs’ Motion of Preliminary Injunction at 32–33, *Texas v. United States*, No. 1:14-CV-254 (S. D. Tex. Jan. 30, 2015).

<sup>135</sup> CMTY. JUSTICE PROJECT, *supra* note 102, at 20–21 (discussing witnesses who reported being denied employment by law enforcement, probation, and the national guard); see also, N.Y.C. DEP’T OF INVESTIGATION, DOI REPORT REVEALS BROKEN RECRUITMENT SYSTEM AND APPLICATION PROCESS 10–11 (2015), [www.nyc.gov/html/doi/downloads/pdf/2015/jan15/pr01rikers\\_aiu\\_011515.pdf](http://www.nyc.gov/html/doi/downloads/pdf/2015/jan15/pr01rikers_aiu_011515.pdf) (critiquing the Department of Corrections for failure to screen for prior gang association and indicating that DOC is now rejecting candidates based on tattoos that suggest gang membership).

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

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

<sup>138</sup> *Johnson*, 22 N.Y.3d at 1164.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

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

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

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

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

### 3. The Gang Narrative Harms Community Relations

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

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

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

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

<sup>143</sup> *Johnson*, 99 A.D.3d at 473.

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

<sup>145</sup> *Johnson*, 22 N.Y.3d at 1164.

<sup>146</sup> *See supra* notes 61–66 and accompanying text.

<sup>147</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

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

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

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

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

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

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

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

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

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

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

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

<sup>154</sup> Goodman, *supra* note 148.

<sup>155</sup> Press Release, *supra* note 153.

<sup>156</sup> *Id.*

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

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



Manhattan District Attorney's new conspiracy charges.<sup>159</sup>

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

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

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

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

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

<sup>160</sup> Kahn, *supra* note 148.

<sup>161</sup> Kramer, *supra* note 149.

## 1. Gang Formation

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

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

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

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

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

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<sup>162</sup> THRASHER, *supra* note 16, at 10.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Greene & Pranis, *supra* note 19, at 68.

<sup>167</sup> *Id.* at 14.

<sup>168</sup> *Id.* at 15-16.

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

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

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

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

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

The observation that opposition spurs gang development along with the

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<sup>169</sup> *Id.* at 16.

<sup>170</sup> *Id.* at 17.

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

<sup>172</sup> Greene & Pranis, *supra* note 19, at 22.

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

<sup>174</sup> 527 U.S. 41 (1999).

<sup>175</sup> Jeremy Gorner & Jason Meisner, *More than 2 Dozen Gang Members Arrested in Drug Investigation*, CHI. TRIB. (June 12, 2014), [http://articles.chicagotribune.com/2014-06-12/news/chi-more-than-2-dozen-gang-members-arrested-in-drug-investigation-20140612\\_1\\_drug-investigation-dozen-gang-traveling-vice-lords](http://articles.chicagotribune.com/2014-06-12/news/chi-more-than-2-dozen-gang-members-arrested-in-drug-investigation-20140612_1_drug-investigation-dozen-gang-traveling-vice-lords).

<sup>176</sup> CAL. PENAL CODE § 186.22 (West 2014).

<sup>177</sup> Greene & Pranis, *supra* note 19, at 29.

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

## 2. Individual Criminality

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

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

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

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<sup>178</sup> *Id.* at 21, 26.

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

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

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

<sup>182</sup> *See supra* note 159.

cities<sup>183</sup> and the final sample includes 2614 youth.<sup>184</sup> The program has success in that the GREAT program substantially reduced gang membership by 39%.<sup>185</sup> However, the decrease in gang membership is not matched by a decrease in violent crime or general delinquency.<sup>186</sup> The first lesson of the GREAT program should be that deterring gang membership and deterring violent crime are two different things. Each may be valuable, but decreasing gang membership does not automatically reduce crime or violence.

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

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

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

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

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

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

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

<sup>186</sup> *Id.*

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

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

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

<sup>190</sup> *Id.* at 14.

<sup>191</sup> *Id.* at 16.

<sup>192</sup> *Id.* at 17.

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

In similar research analyzing 1,000 youth from the Rochester Youth Development Study of seventh and eighth graders, the effect of juvenile justice intervention was to increase the odds of serious delinquency by a factor of 5.5 by Wave 4.<sup>193</sup> As in the GREAT experiments, the researchers control for initial levels of delinquency and substance abuse. Whether these results stem from the label “juvenile delinquent” or the fact that juvenile justice intervention increases contact with delinquent peers, it is evident that suppression efforts are far more likely to increase delinquency than to reduce it.

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

## V. ALTERNATIVES APPROACHES TO REDUCING GANG CRIME

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

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

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

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<sup>193</sup> Bernburg et al., *supra* note 187, at 80.

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

SNUG initiatives with significant reductions of shootings in Albany and Rochester.<sup>195</sup>

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

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

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

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

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

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

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

<sup>198</sup> Jann Ingmire, *Crime Lab Makes Impact for Chicago Youth*, U. CHI. (Feb. 20, 2014), [http://www.uchicago.edu/features/crime\\_lab\\_makes\\_impact\\_for\\_chicago\\_youth/](http://www.uchicago.edu/features/crime_lab_makes_impact_for_chicago_youth/).

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

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

<sup>201</sup> *Id.* at 3, 35-41.

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

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

## CONCLUSION

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

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

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