CONSPIRACY: CONTEMPORARY GANG POLICING AND PROSECUTIONS

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“Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.”1

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INTRODUCTION

Contemporary gang policing is marked by four widespread practices: (1) adding people to gang databases based on non-criminal criteria, without notice or opportunity to challenge this classification;\(^2\) (2) intense surveillance of those added to gang databases, especially over

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social media,\(^3\) in order to build cases against them and secure secret indictments;\(^4\) (3) military-style gang raids to make arrests;\(^5\) and (4) sweeping conspiracy prosecutions.\(^6\)

These practices have been deeply criticized in recent years both because inclusion on gang databases has been used to justify deportations, even absent criminal charges,\(^7\) and because the Black Lives Matter movement has brought attention to the extreme racial disparity of who is added to gang databases and thus targeted for gang policing and prosecutions.\(^8\) Across the nation, over ninety percent of people

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\(^6\) See Speri, *supra* note 4; discussion infra Section I.F.4.


added to gang databases are Black9 or Latino, most with no serious criminal record,10 while studies suggest that at least twenty-five percent of gang members are white,11 and openly violent white supremacist gangs avoid this intense policing.12 In New York City (NYC), ninety-nine percent of the people included in the New York Police Department’s (NYPD) gang database are Black or Latino and only one percent are white.13 In Chicago, nearly ninety-six percent of the people included in the Chicago Police Department’s gang database are Black or Latino, and a majority of those included have never been arrested for a

9 Consistent with best practices, the word “Black,” “[w]hen speaking of a culture, ethnicity or group of people,” is capitalized throughout this Note. Lori L. Tharps, The Case for Black with a Capital B, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html [https://perma.cc/G4Z7-2GBH] (“Linguists, academics and activists have been making this point for years, yet the publishing industry—our major newspapers, magazines and books—resist making this simple yet fundamental change.”). The word “white” is not similarly capitalized for reasons explained by the author Touré:

“Black” constitutes a group, an ethnicity equivalent to African-American, Negro, or, in terms of a sense of ethnic cohesion, Irish, Polish, or Chinese . . . . Most American whites think of themselves as Italian-American or Jewish or otherwise relating to other past connections that Blacks cannot make because of the familial and national disruptions of slavery.

TOURE, WHO’S AFRAID OF POST-BLACKNESS?: WHAT IT MEANS TO BE BLACK NOW ix (2011).


11 Howell, supra note 2, at 16 (“[C]riminologist 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.”).


13 Khan, supra note 10.
violent offense or weapons charge.14 In Mississippi, one-hundred percent of the people arrested under the State’s gang law from 2010 through 2017 were Black, despite Mississippi’s own Association of Gang Investigators saying that fifty-three percent of “verified gang members” are white.15

Historically, gang policing and prosecutions varied widely from city to city and state to state.16 But the 1999 Supreme Court decision in City of Chicago v. Morales altered gang policing in many jurisdictions, making it more uniform nationwide.17 Morales also marked a development in the constitutional vagueness doctrine18—which requires that criminal laws give people adequate notice of what conduct is criminalized and restrains the discretion of law enforcement19—and which has been intimately connected with gang policing for generations.20 Until Morales, every time the Court held that a statute violated the vagueness doctrine, it concluded that the statute violated both prongs of the doctrine: (1) failing to give the public adequate notice of what conduct was criminalized; and (2) allowing for too much discretion in enforcement.21 In Morales, the Court held for the first time that a law was void for vagueness for violating one prong but not the

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17 Strosnider, supra note 4, at 124–43 (“One might therefore argue that the Court is accomplishing through the arbitrary enforcement prong of the vagueness doctrine what it cannot do through equal protection itself because of the high hurdle of the discriminatory purpose requirement.”).
18 Id. at 112–27 (discussing the separation of the two prongs of the vagueness doctrine in Morales).
21 Strosnider, supra note 4.
other—holding that Chicago’s gang loitering statute gave police too much discretion, but not that it failed to give the public adequate notice of what conduct was criminalized. At least one scholar has argued that this is part of the Court’s a pattern of using the discretion prong of the vagueness doctrine to address potential equal protection violations without a showing of discriminatory intent, which is required to prove that a facially neutral policy or custom violates equal protection under Supreme Court precedent, and which is a difficult burden for plaintiffs to meet.

Contemporary gang policing, as described above, can be viewed as tailored to avoid the vagueness failings identified in Morales in two ways. First, creating gang databases and targeting only those included in them seems to follow a suggestion in Morales that the statute might have been constitutional if it applied only to people believed to be gang members. Second, increasing surveillance of alleged gang members and charging them with existing crimes rather than crimes predicated on discretionary police determinations—in the case of Morales, determinations of who was “gang loitering”—seems to follow a suggestion that the statute in Morales would have been constitutional if it applied only to conduct that was independently harmful. But the legality of contemporary gang policing has been called into question nonetheless, especially for failing to give adequate notice or an opportunity to contest being added to gang databases. At least one

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22 Id. at 113–14.
23 City of Chicago v. Morales, 527 U.S. 41, 60–64 (1999); id. (O’Connor, J., concurring); id. (Breyer, J., concurring).
24 Strosnider, supra note 4, at 127–43.
25 See discussion infra Section I.E.
26 Morales, 527 U.S. at 62–63 (stating that the statute might have been constitutional if applied only to persons believed to be criminal gang members); id. at 66 (O’Connor, J., concurring) (same).
27 Id. at 62–63 (majority opinion) (stating that the statute would have been constitutional if it had applied only to loitering with an apparently harmful purpose of effect); id. at 67 (O’Connor, J., concurring).
jurisdiction has even taken steps to remedy this.29 However, this Note argues that these reforms fail to fully remedy the legal concerns they set out to address and do not even begin to grapple with the more serious constitutional failings of contemporary gang policing—specifically, vagueness and equal protection.

Part I of this Note reviews gang policing before Morales, explains the vagueness, equal protection, and policy and custom doctrines that helped shape gang policing, and details the practices of contemporary gang policing. Part II argues that contemporary gang policing violates equal protection under the innovative showing of discriminatory intent found in Floyd v. City of New York,30 and that contemporary gang policing violates both prongs of the vagueness doctrine when viewed in its totality—at least where it is proscribed by statute. Part III notes that the vagueness doctrine has historically been applied only to statutory law and proposes that the doctrine be extended to non-statutory policies and practices with the force of law in order to address both the equal protection and vagueness failing of contemporary gang policing, even where the practice is not proscribed by statute. Part III also argues that instead of attempting to reform contemporary gang policing, municipalities should shift the resources used on gang policing to community programs that have proven to be more effective at addressing gang crime.


I. BACKGROUND: GANG POLICING AND THE LAW

A. Gang Policing Before Morales

Before Morales, different U.S. cities took widely varied approaches to gang policing. NYC had virtually no gang-specific police units and no laws targeting gang activity. NYC primarily targeted gangs with community programs such as youth services, recreation, and employment. During this time, gang-related crime in NYC consistently decreased and was far lower than in other cities that had responded to gang violence with intense policing. NYC implemented gang policing in earnest only after Morales, but it did not do so in response to an increase in gang-related crime. The NYPD doubled the size of its Gang Division in 2012, but there was no spike in gang-related crime at the time, and gang-related crime accounted for less than one percent of overall crime. As City University of New York School of Law Professor Babe Howell demonstrates, NYC’s true motivation for ramping up its gang policing was likely its realization that its stop-and-frisk program would soon be held unconstitutional. The announcement that the NYPD would double the size of its Gang Division came just five months after the class of plaintiffs suing NYC over stop-and-frisk in Floyd v. City of New York was certified—almost guaranteeing the practice would be held unlawful. As one form of policing that targeted communities of color was being held unconstitutional, NYC simply shifted to another form of policing that targeted communities of color. And in gang policing, the NYPD chose

31 See Greene & Pranis, supra note 16, at 13–14; Truman, supra note 4, at 688 (“Some states . . . have made substantial and troubling departures from the California model.”).
32 See Greene & Pranis, supra note 16, at 15 (noting that non-police “street workers” who organized athletic programs and mediated disputes between gangs were NYC’s “primary strategy to combat violence among street gang members”).
33 Id.
34 Id.
35 See Howell, supra note 2, at 7–10.
36 Id. at 10–14 & n.66.
37 Id. at 10–14.
39 Howell, supra note 2, at 10–14.
40 Id.
a form of policing whose constitutionality had been rigorously tested in other cities post-\textit{Morales}.

Foremost among those cities was Los Angeles (L.A.). In 1988, L.A. responded to one gang-related murder by hiring hundreds of new police officers and investing millions of dollars in law enforcement programs targeting gangs. Later that year, L.A. passed the Street Terrorism Enforcement and Prevention Act (the STEP Act), which created laws that applied exclusively to gang activity. The STEP Act was structured similarly to the federal Racketeer Influenced and Corrupt Organizations Act (RICO Act), and much of contemporary, post-\textit{Morales} gang policing has in turn been patterned on the STEP Act. Notably, the first Los Angeles Police Department (LAPD) operation after the 1988 murder resulted in the arrest of over 1,400 minority youth, many of whom were released without charges, and gang crime increased after passage of the STEP Act.

Before \textit{Morales}, Chicago’s gang policing fell somewhere between L.A.’s and NYC’s lack thereof. L.A.’s laws and practices facially targeted alleged gang members only (though there is ample evidence that many non-gang members were arrested under the laws and police practices as well). By contrast, Chicago’s gang laws and police practices targeting gangs facially applied to both alleged gang members and non-gang members. Here, although arguably not as intense as L.A.’s gang

\begin{itemize}
\item \textbf{41} See discussion \textit{infra} Section I.D.
\item \textbf{43} \textit{CAL. PENAL CODE} §§ 186.20–186.33 (West 2018).
\item \textbf{44} Truman, \textit{supra} note 4, at 686 (“Similar in structure to the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the STEP Act creates a new substantive crime of participation in criminal street gang activity.”).
\item \textbf{45} Strosnider, \textit{supra} note 4, at 107 (“Ten states have comprehensive or omnibus statutory schemes dealing with gangs, many of them patterned after California’s STEP Act or federal racketeering law.”).
\item \textbf{46} \textit{CHEVIGNY}, \textit{supra} note 46, at 40.
\item \textbf{47} City of Chicago v. Morales, 527 U.S. 41, 62–63 (1999) (“The ordinance applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them.”).
\end{itemize}
policing, Chicago’s gang policing ran into problems with the vagueness doctrine.52

B. Vagueness Doctrine

The Supreme Court has repeatedly held that criminal laws that do not give fair notice of what conduct is punishable violate the Due Process Clause of the Fifth and Fourteenth Amendments, and are thus unconstitutionally vague.53 In fact, the Court has held that the vagueness doctrine is “the first essential of due process of law”54 and that a person of average intelligence must be able to understand what conduct is prohibited by law55 or that law can be held void for vagueness.56

In the Supreme Court’s jurisprudence, this vagueness doctrine has developed two prongs: (1) the law itself must provide actual notice to the public about what conduct is criminal and (2) the law must not allow for too much discretion in enforcement.57 Notably, the discretionary enforcement prong extends to the discretion of prosecutors as well as police.58

For generations, the two prongs appeared to be two explanations for the vagueness doctrine, not two independent reasons that a statute

52 Id. at 60–64 (majority opinion).
54 Connally, 269 U.S. at 391.
55 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").
56 Id.
57 Kolender, 461 U.S. at 357–58 ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (internal citation omitted); Smith v. Goguen, 415 U.S. 566, 572–73 (1974) ("[T]he doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'").
58 Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) ("[A vague law] furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'") (internal citation omitted).
could be found void for vagueness.\textsuperscript{59} Even through \textit{Morales}, Justice Scalia contended that the two prongs were inextricably intertwined—that if a law gives law enforcement too much discretion, it necessarily does not give the public adequate notice of what conduct is punishable.\textsuperscript{60} Critically, the \textit{Morales} majority held otherwise.\textsuperscript{61} It found that the statute gave the police too much discretion, but it did not find that the statute did not give the public adequate notice of what conduct was criminalized. Yet, it nevertheless struck down the statute for being unconstitutionally vague.\textsuperscript{62} This made it clear that the two prongs are distinct—that a law can violate one but not the other, and that even if a law does violate one but not the other, the law still violates the vagueness doctrine.\textsuperscript{63} This also firmly established that arbitrary enforcement is an independent concern of the vagueness doctrine.\textsuperscript{64}

Two more elements of the vagueness doctrine are critical to its application to gang policing: (1) laws need not impinge on a constitutionally-protected right to be unconstitutionally vague\textsuperscript{65} and (2) under- and over-inclusiveness are strong evidence of unconstitutional vagueness.\textsuperscript{66} As to the first, the Court has held that laws that impinge on other constitutionally-protected activity must be even less vague than

\textsuperscript{59} Strosnider, \textit{supra} note 4, at 113 (stating that the second prong was long a "silent partner").

\textsuperscript{60} \textit{City of Chicago v. Morales}, 527 U.S. 41, 95 (Scalia, J., dissenting) ("[T]he vagueness that causes notice to be inadequate is the very same vagueness that causes 'too much discretion' to be lodged in the enforcing officer.").

\textsuperscript{61} \textit{Id.} at 60–64 (majority opinion) (holding that the ordinance violated the second prong but not the first, and was nevertheless void for vagueness).

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} In \textit{Morales}, a plurality held that loitering was a constitutional right. 527 U.S. at 53 (plurality opinion). But the majority did not. \textit{Id.} at 60 (majority opinion). And the ordinance was still struck down by the majority. \textit{Id.} at 64. In dissent, Scalia noted that "there is not the slightest evidence for the existence of a genuine constitutional right to loiter." \textit{Id.} at 84 (Scalia, J., dissenting); \textit{see also} Kolender v. Lawson, 461 U.S. 352, 353 (1983); Lanzetta v. State of New Jersey, 306 U.S. 451, 456–58 (1939) (striking down a law that made it a crime "to be a member of any gang consisting of two or more persons").

\textsuperscript{66} \textit{Morales}, 527 U.S. at 62 (majority opinion); \textit{Kolender}, 461 U.S. at 358.
those that do not, but laws that do not impinge on independent constitutional rights can nevertheless violate the vagueness doctrine.

As to under- and over-inclusiveness being strong evidence of unconstitutional vagueness, although the vagueness doctrine is generally used to strike down the written text of criminal statutes, the decisions doing so tend to condemn under- and over-inclusive enforcement of those laws. For example, the Morales Court found that the criminal gang-loitering ordinance was being used to arrest people for innocuous behavior, and that the text “perverse[ly]” omitted all purposefully dangerous gang loitering. Decisions striking down laws for unconstitutional vagueness often encourage lawmakers to draft laws to restrict the discretion of law enforcement officers. This factor has led scholars to argue that the Court uses the vagueness doctrine to remedy apparent equal protection violations when there is no showing of discriminatory intent. This Note will extend this logic to argue that courts should apply the vagueness doctrine to non-statutory municipal policies and customs as well as statutory laws.

Finally, a history of the vagueness doctrine and gang policing would not be complete without noting that the two have long been intertwined. One of the Supreme Court’s earliest vagueness doctrine cases related to one of the country’s first gang policing measures. In that case, the Court made a ruling that is still good law today and is critical to contemporary gang policing. It held that laws criminalizing merely being in a gang are unconstitutional because they violate the vagueness doctrine.

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67 Smith v. Goguen, 415 U.S. 566, 573 (1974) (“Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.”).

68 Id.

69 Morales, 527 U.S. at 62; Kolender, 461 U.S. at 358.

70 Morales, 527 U.S. at 62–63.

71 Id. at 62; Kolender, 461 U.S. at 358.

72 Strosnider, supra note 4, at 104 (“[T]he second prong of the vagueness doctrine—dealing with arbitrary and discriminatory enforcement—has come to serve as a de facto equal protection guarantee as to public-order statutes implicating race.”).

73 See discussion infra Section III.A.


75 Id. at 452–55.

76 Id. at 452, 458 (striking down a law that made it a crime “to be a member of any gang consisting of two or more persons”). Absent an element of independent criminal conduct,
In addition to its place in the Supreme Court’s vagueness jurisprudence, *Morales* is critical to this analysis of contemporary gang policing, as it brought some of the modern tactics of gang policing before the Court for the first time. The Chicago ordinance at issue in *Morales* made it a crime to not follow a police order to disperse from “gang loitering.” Gang loitering was defined as loitering in a public place “with no apparent purpose” with one or more people reasonably believed to be a criminal street gang member. The ordinance instructed the police to determine who was a gang member. A subsequent police department directive gave officers criteria for determining who was a criminal street gang member, including personal knowledge, witness testimony, admission, or the display of distinctive colors, tattoos, signs, or other markings. When police determined that a group was loitering “with no apparent purpose,” and that at least one person in that group was a gang member, the ordinance instructed the police to give a dispersal order, and if the group failed to disperse, to arrest everyone in the group for criminal gang loitering.

The city of Chicago argued that the arrest was ultimately for failing to disperse, a crime that was constitutionally valid to punish. But the Court held that the statute effectively criminalized the conduct that led
to the dispersal order—gang loitering—and that determining what constituted loitering was left entirely to police discretion.\textsuperscript{85} Although much has been made of the fractured decision in \textit{Morales}, the outcome was clear: a majority of the Court held that the gang loitering law was unconstitutional under the second prong of the vagueness doctrine for giving police too much discretion;\textsuperscript{86} the plurality would have held that the statute was void for vagueness under both prongs of the doctrine for also failing to give the public adequate notice of what conduct was criminalized;\textsuperscript{87} and the dissents would have held that the law did not violate either prong of the vagueness doctrine.\textsuperscript{88} Notably, the criteria used by the Chicago Police to allege gang membership did not save the ordinance from violating the vagueness doctrine, and these criteria are substantially the same criteria used by police throughout the United States to add people to gang databases in contemporary gang policing.\textsuperscript{89}

Critical to the application of \textit{Morales}, the majority suggested two possible changes that may have made the law constitutional, with varying degree of certainty. First, the Court said that the ordinance would undoubtedly be constitutional if it “applied only to loitering that had an apparently harmful purpose or effect.”\textsuperscript{90} Second, the majority said that the ordinance would “possibly” be constitutional if it applied only to criminal gang members.\textsuperscript{91} In concurrence, Justices O’Connor and Breyer went further, saying that the ordinance would definitely be constitutional if it applied only to criminal gang members.\textsuperscript{92} But in dissent, Justice Scalia said that this would be patently unconstitutional:

\begin{itemize}
\item \textsuperscript{85} Id. at 61–62 (“[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The ‘no apparent purpose’ standard for making that decision is inherently subjective because its application depends on whether some purpose is ‘apparent’ to the officer on the scene.”).
\item \textsuperscript{86} Id. at 60.
\item \textsuperscript{87} Id. at 56–60 (plurality opinion).
\item \textsuperscript{88} Id. at 73–98 (Scalia, J., dissenting); id. at 98–115 (Thomas, J., dissenting).
\item \textsuperscript{89} See sources cited supra note 2.
\item \textsuperscript{90} \textit{Morales}, 527 U.S. at 62 (majority opinion) (“[T]he ordinance) would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members.”).
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id. at 68 (O’Connor, J., concurring).
\end{itemize}
If “remaining in one place with no apparent purpose” is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members alone. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.93

Scalia’s rationale is consistent with the Supreme Court’s early decision on vagueness and gang policing, which held that merely being in a gang cannot be a crime.94 Since the Supreme Court had held that criminalizing mere gang membership is unconstitutional,95 and the police in Morales were effectively criminalizing whatever criteria they used to determine if they should give a dispersal order—as the majority said96—that criteria could not constitutionally be alleged gang membership.97

With this proposal for making the ordinance constitutional persuasively dismissed, the only other proposal made by the majority was that the ordinance would be constitutional if it criminalized only acts that “had an apparently harmful purpose or effect.”98 Indeed, Justice Scalia argued that the ordinance was lawful because loitering “with no apparent purpose” clearly meant loitering with a harmful purpose, which would justify police giving an order to disperse to “preserve the public peace and safety.”99 As Justice O’Connor noted, such activity is already illegal under disorderly conduct laws that present no such constitutional issues.100 The majority’s first proposal for making the ordinance constitutional was essentially to criminalize a specific, harmful act, which would ostensibly already be captured by other, non-gang-specific laws.101

93 Id. at 97 (Scalia, J., dissenting) (emphasis in original).
95 Id. at 457–58 (1939).
96 Morales, 527 U.S. at 62 (majority opinion).
98 Morales, 527 U.S. at 62.
99 Id. at 93–98 (Scalia, J., dissenting).
100 Id. at 67–68 (O’Connor, J., concurring).
101 Id.
D. The Application of Morales

In applying Morales, courts repeatedly have held that using the Chicago Police’s criteria to determine gang membership as a predicate to police action violated the vagueness doctrine, even when codified by statute.¹⁰² In NAACP Anne Arundel County Branch v. City of Annapolis, the U.S. District Court of Maryland held that the “making [of] hand signals associated with drug related activity” as a predicate to being given a dispersal order violated the vagueness doctrine.¹⁰³ In Hodge v. Lynd, the U.S. District Court of New Mexico held that wearing clothing perceived to be gang-related as a predicate to a dispersal order violated the vagueness doctrine.¹⁰⁴ In Johnson v. Athens-Clarke County, the Georgia Supreme Court held that using a person’s presence in a “known drug area” as a predicate to police action violated the vagueness doctrine.¹⁰⁵

In all of the above cases, the courts found that the statutes at issue violated both prongs of the vagueness doctrine,¹⁰⁶ indicating that lower courts are still willing to find that statutes that give police too much discretion also do not give the public adequate notice of what conduct is criminalized.¹⁰⁷

In NAACP Anne Arundel County Branch v. City of Annapolis, the court also found that the statute impinged on an independent constitutional right—the First Amendment’s right to free speech.¹⁰⁸ This shows that at least some of the criteria used to allege gang membership as a predicate for police action in Morales are constitutionally protected.

In all of these cases, the courts also pointed to both under- and over-inclusiveness—the fact that the laws were not capturing related dangerous activity but were capturing innocuous activity—as strong

¹⁰³ NAACP Anne Arundel, 133 F. Supp. 2d at 808.
¹⁰⁴ Hodge, 88 F. Supp. 2d at 1244–45.
¹⁰⁵ Johnson, 529 S.E.2d at 616–17.
¹⁰⁶ NAACP Anne Arundel, 133 F. Supp. 2d at 808; Hodge, 88 F. Supp. 2d at 1245; Johnson, 529 S.E.2d at 616–17.
¹⁰⁷ See, e.g., NAACP Anne Arundel, 133 F. Supp. 2d 795; Hodge, 88 F. Supp. 2d 1234; Johnson, 529 S.E.2d at 616–17.
¹⁰⁸ NAACP Anne Arundel, 133 F. Supp. 2d at 801.
evidence that the laws violated the vagueness doctrine.\textsuperscript{109} However, some have argued—including Justice Scalia in dissent in \textit{Morales}—that States have the power to criminalize any action that is not independently protected by the Constitution, and that discriminatory enforcement should be challenged on an as-applied basis only,\textsuperscript{110} raising the question of why courts do not dismiss individual convictions in cases where the defendant was engaged in protected activity but leave the statutes intact. This has led at least one scholar to argue that the Court is using the arbitrary enforcement prong of the vagueness doctrine to strike down practices it could not through equal protection.\textsuperscript{111}

\textbf{E. Vagueness Doctrine and Equal Protection}

Long before \textit{Morales}, Justice Thurgood Marshall made it clear that one purpose of the vagueness doctrine is to prevent discriminatory enforcement.\textsuperscript{112} In describing the second prong of the vagueness doctrine—in what is probably the Court’s most thorough, cogent explication of the vagueness doctrine to date—Justice Marshall wrote that “a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an \textit{ad hoc} and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”\textsuperscript{113} At least one scholar has argued that a fear of such discriminatory enforcement lay behind the \textit{Morales} decision itself, noting that the arresting officer said he was suspicious of the Hispanic teens for being present in a white neighborhood.\textsuperscript{114} And in applying \textit{Morales}, lower courts have been extremely explicit about this concern.\textsuperscript{115}


\textsuperscript{111} Strosnider, \textit{supra} note 4, at 124 (“[T]he Court is accomplishing through the arbitrary enforcement prong of the vagueness doctrine what it cannot through equal protection . . . .”).


\textsuperscript{113} \textit{Id}.

\textsuperscript{114} Strosnider, \textit{supra} note 4, at 121 (“[T]he officer who arrested Morales admitted his suspicions were sparked when he observed Hispanic teens hanging out on a corner in a predominately white neighborhood.”).

\textsuperscript{115} See, e.g., \textit{Leal v. Town of Cicero}, No. 99 C 0082, 2000 WL 343232, at *3 (N.D. Ill. Mar. 31, 2000) (“Without . . . guidelines, the public is at risk of having a police officer treat two individuals differently though they are engaged in the same conduct. For example, when the
One reason parties and the courts may utilize the vagueness doctrine instead of equal protection is that the Court’s equal protection jurisprudence has created an extremely high threshold for finding that a facially race-neutral state action violates equal protection. Proving an equal protection violation has been notoriously difficult since Washington v. Davis and Arlington Heights. Washington v. Davis rejected the idea—which was being applied by some lower courts—that an equal protection violation could be proven with extreme disproportionate impact alone, and Arlington Heights squarely stated that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” Disproportionate impact may still, however, be considered evidence of discriminatory intent in a totality of the circumstances analysis. But since Davis and

police officer requests the Latino youth standing on the street corner to ‘move on,’ but does not make the same request of the white adult male standing at the corner, the Latino youth is at risk of arrest while the white adult male is not.”).

119 Davis, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”); see also Arlington Heights, 429 U.S. at 264–65 (“Our decision last Term in Washington v. Davis made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact.”) (internal citation omitted).
120 Arlington Heights, 429 U.S. at 265. To be sure, Arlington Heights maintains that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” Id. at 266. But, outside of cases about subject matter to which the Court already applies heightened scrutiny, such as jury composition, the Court has uniformly disclaimed finding equal protection violations based on disproportionate impact alone, without doing a totality of circumstances analysis. Equal Protection of the Laws, JUSTIA, https://law.justia.com/constitution/us/amendment-14/06-equal-protection-of-the-laws.html [https://perma.cc/5QJE-SVTG] (last visited Sept. 19, 2018).
121 Davis, 426 U.S. at 242 (“Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”).
Arlington Heights, for a plaintiff to prove that a facially race-neutral law violates equal protection, the plaintiff must show that at least one of the motivating factors for the action causing the disproportionate impact was discriminatory intent.122

In the criminal justice context, the Court has held that even extreme disproportionate impact—absent evidence of discriminatory intent—does not suffice.123 In United States v. Armstrong, the Court held that a showing that eighty-eight percent of people being prosecuted for federal crack cocaine charges were Black—while sixty-five percent of people who used crack cocaine were white—was insufficient to prove even a prima facie case of discriminatory prosecution.124 The government argued that it was targeting gang members, not people of color, and on remand, the Ninth Circuit held that alleged gang membership is a permissible race-neutral reason for the government to target people for drug enforcement, even if gang membership is not an element of the crime.125 This demonstrates how difficult it is to challenge racially disproportionate policing and prosecutions under equal protection alone. In an age when virtually no criminal laws contain racial classifications on their face, this has nearly foreclosed equal protection challenges absent evidence of discriminatory intent.126

However, this may have changed with Floyd v. City of New York, in which plaintiffs proved that NYC’s stop-and-frisk program violated equal protection based on racial discrimination with an innovative showing of intent127—a showing that may be applicable to other criminal laws and police practices, including contemporary gang policing.

122 Arlington Heights, 429 U.S. at 265–66 (holding that proving an equal protection violation requires proof that “discriminatory purpose” was a “motivating factor” in the challenged action).


124 Cf. id. at 479–80 (Stevens, J., dissenting).

125 United States v. Turner, 104 F.3d 1180, 1183–84 (9th Cir. 1997).

126 Armstrong, 517 U.S. at 479–80 (Stevens, J., dissenting); Riopka, supra note 116, at 104–05.

1. Discriminatory Intent—The Floyd Innovation

NYC’s stop-and-frisk program disproportionately impacted people of color.\textsuperscript{128} Eighty-three percent of those stopped-and-frisked were Black or Latino.\textsuperscript{129} The court found that this was the result of NYPD directing its officers to target “the right people,” which in practice meant targeting people based on racially disproportionate criminal suspect data.\textsuperscript{130} However, stops were based not on criminal activity—or even reasonable suspicion of criminal activity—but vague, non-criminal criteria such as “furtive movements,” which officers defined in wildly different ways.\textsuperscript{131} The court held that intentionally transposing the racial proportions of the criminal suspect data onto the general population, based on vague, non-criminal criteria, showed racially discriminatory intent, stating that, “[t]he Equal Protection Clause does not permit race-based suspicion.”\textsuperscript{132} Coupled with its disproportionate impact on people of color, the court held that this discriminatory intent established that the NYPD’s facially race-neutral stop-and-frisk program constituted an equal protection violation, even under \textit{Washington v. Davis}.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{128} \textit{Id.} at 559 (“In 52\% of the 4.4 million stops, the person stopped was [B]lack, in 31\% the person was Hispanic, and in 10\% the person was white. . . . New York City’s resident population was roughly 23\% [B]lack, 29\% Hispanic, and 33\% white.”).
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 561 (“[T]he evidence at trial revealed that the NYPD has an unwritten policy of targeting ‘the right people’ for stops. In practice, the policy encourages the targeting of young [B]lack and Hispanic men based on their prevalence in local crime complaints. This is a form of racial profiling. While a person’s race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals. The Equal Protection Clause does not permit race-based suspicion.”). “Under the NYPD’s policy, targeting the ‘right people’ means stopping people in part because of their race.” \textit{Id.} at 662.
\item \textsuperscript{131} \textit{Id.} at 578 (“Furtive Movements’ is vague and subjective. In fact, an officer’s impression of whether a movement was ‘furtive’ may be affected by unconscious racial biases.”).
\item \textsuperscript{132} \textit{Id.} at 561.
\item \textsuperscript{133} \textit{Id.} at 660–61 (“Racial profiling constitutes intentional discrimination in violation of the Equal Protection Clause if it involves any of the following: an express classification based on race that does not survive strict scrutiny; the application of facially neutral criminal laws or law enforcement policies ‘in an intentionally discriminatory manner’ or a facially neutral policy that has an adverse effect and was motivated by discriminatory animus. The City’s policy of targeting ‘the right people’ for stops clearly violates the Equal Protection Clause under the second method of proof, and, insofar as the use of race is explicit, the first.”) (internal citations omitted).
\end{itemize}
Importantly, *Floyd* rested on the fact that the non-criminal criteria used as a predicate to police action was too vague, affording police too much discretion, as in *Morales*. *Floyd* also noted that, while the NYPD disproportionately stopped people of color, white people were more likely to possess both drugs and firearms when stopped,\(^{134}\) meaning the practice was both under- and over-inclusive—strong evidence of a constitutional violation both here and in *Morales*.\(^ {135}\)

Unlike in *Morales*, in *Floyd*, there was no statute at issue, and thus the constitutional challenge came in a very different form than the vagueness challenge in *Morales*.\(^ {136}\) In *Morales*—as in all vagueness claims to date—the constitutionality of a written statute was challenged.\(^ {137}\) In *Floyd*, the constitutionality of a non-statutory policy or custom was challenged\(^ {138}\) in a *Monell* claim for civil liability under the theory that it was a “policy or custom” with the force of law, even though it was not a written law.\(^ {139}\)

2. Policy or Custom

Under *Monell v. New York City Department of Social Services*, municipalities can be held civilly liable for deprivations of rights under 42 U.S.C. § 1983.\(^ {140}\) However, they can only be held liable when the deprivations are the result of a policy or custom with the force of law.\(^ {141}\) A statutory law qualifies as a policy with the force of law.\(^ {142}\) But so do other non-statutory policies and customs.\(^ {143}\) There are multiple ways to

\(^{134}\) *Id.* at 559 (“Weapons were seized in 1.0% of the stops of [B]lacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites. Contraband other than weapons was seized in 1.8% of the stops of [B]lacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.”).


\(^{136}\) *Floyd*, 959 F. Supp. 2d at 659.

\(^{137}\) *Morales*, 527 U.S. at 62.

\(^{138}\) *Floyd*, 959 F. Supp. 2d at 659.

\(^{139}\) *Id.* at 564, 659–60.

\(^{140}\) Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690 (1978) (“Local governing bodies, therefore, can be sued directly under § 1983 . . . .”).

\(^{141}\) *Id.* at 691 (“Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”).

\(^{142}\) Nichols v. Village of Pelham Manor, 974 F. Supp. 243, 258 (S.D.N.Y. 1997) (“It is almost self-evident that plaintiff’s claim against the Village for his arrest under an unconstitutional statute supports municipal liability under *Monell*.”).

establish that non-statutory policies or customs carry the force of law under Monell. Three that were discussed in Floyd are also pertinent to this Note.

First, an official policy—even if unwritten—is sufficient to establish a policy or custom with the force of law. In Floyd, the court held that, under Monell, “the NYPD’s policy of conducting stops based in part on criminal suspect data, of which race is a primary factor,” constituted an official policy—even though it was not a statutory law or even a written policy—because it was so “permanent and well established.”

Second, a policymaker’s “deliberate indifference” to a subordinate’s action is sufficient to establish a policy or custom with the force of law under Monell. In Floyd, the court found that a showing that the NYPD had received notice that its stop-and-frisk practices unconstitutionally discriminated against people of color in 1999—and failed to remedy it—constituted deliberate indifference sufficient to establish that the discriminatory policy or custom had the force of law.

Third, a practice “so persistent and widespread as to practically have the force of law” is sufficient to establish a policy or custom with the force of law under Monell. In Floyd, the court found that thirty-six percent of 200,000 stops being made without reasonable suspicion constituted a practice of stopping people without reasonable suspicion so persistent and widespread as to be a policy or custom with the force of law.

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144 Id.
145 Monell, 436 U.S. at 690.
146 Floyd v. City of New York, 959 F. Supp. 2d 540, 562, 660–61 (S.D.N.Y. 2013); Monell, 436 U.S. at 691 (“Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970))).
147 Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 126–27 (2d Cir. 2004) (Sotomayor, J.) (“Moreover, because a single action on a policymaker’s part is sufficient to create a municipal policy, a single instance of deliberate indifference to subordinates’ actions can provide a basis for municipal liability.”).
150 Floyd, 959 F. Supp. 2d at 660 (“The NYPD’s practice of making stops that lack individualized reasonable suspicion has been so pervasive and persistent as to become not only a part of the NYPD’s standard operating procedure, but a fact of daily life in some New York City neighborhoods.”).
When courts find that non-statutory policies or customs violate the Constitution, they do not hold them “void” the way courts hold statutes found to violate the vagueness doctrine to be “void.” There are other remedies for non-statutory policies and customs with the force of law that violate the constitution. One such remedy is enjoining the municipality from continuing its unconstitutional policy or custom. In this way, a policy or custom found unconstitutional is held void similar to statutes found unconstitutional. And laws that violate the vagueness doctrine deprive people of “the first essential of due process.” Yet the vagueness doctrine has only been applied to statutory laws, not to non-statutory policies and customs with the force of law.

F. Contemporary Gang Policing

After Morales and its application by lower courts, gang policing and prosecutions began to follow the same pattern across the country. This subsection will detail how each part of this policing and prosecution plays out on the ground by surveying news and cases nationwide.

1. Gang Databases

In what can be seen as an attempt to follow the recommendation from Morales that gang policing target only gang members in order to be constitutional, contemporary gang policing targets people in gang databases—databases filled with people who the police allege are gang members.
The legal footing for these gang databases is far from uniform. Only twelve states have given law enforcement a statutory mandate to use gang databases. Some give minimal guidance about what criteria should be used to add people, while others leave it to the complete discretion of the police. In states where the legislature has given no affirmative statutory authority to create and utilize gang databases, police departments demonstrably do so anyway, at their complete discretion. For example, the largest police department in the country—the NYPD—has no statutory mandate to maintain its gang database. Further, only one state has any statutory mechanism to challenge being on a gang database or to be removed from a gang database. In most jurisdictions, the public cannot even find out if they are included on gang databases. In NYC, writer and activist Josmar Trujillo sought to find out if he was on the NYPD’s gang database through a freedom of information request. The NYPD denied his request, claiming that telling him whether he is on the gang database would “reveal criminal investigative techniques or procedures.” In some states, everything about gang databases is specifically exempt from freedom of information requests.

156 Id. (documenting that Arizona, California, Colorado, Florida, Georgia, Illinois, Minnesota, North Dakota, South Carolina, Texas, Virginia, and Washington are the only states with legislation relating to gang databases).
157 Wright, supra note 28.
158 See, e.g., Howell, supra note 2, at 16 (exposing the NYPD’s secret gang database).
159 Id. at 14–18.
160 Gang-Related Legislation by Subject: Gang Databases, supra note 155 (documenting California as the only state with legislation relating to challenging inclusion on gang databases).
162 Trujillo, supra note 161.
163 Id.
Across the country, the criteria used to enter people into gang databases is nearly identical to those used by the Chicago Police in Morales, such as wearing “gang colors,” being seen in “gang locations,” associating with “known gang members,” having “gang tattoos,” making “gang hand symbols,” or admitting gang affiliation. These criteria are non-criminal, and at least some fall within the bounds of constitutionally protected activity. Police departments openly admit that they use gang databases to track alleged gang members even before there is suspicion of criminal activity. In a New York City Council hearing, Council Member Donovan Richards asked NYPD Chief of Detectives Dermot F. Shea if “standing on the corner in a red T-shirt would be enough to get him entered into a gang database.” Detective Shea replied that “[i]t is possible.” He also confirmed that there is no formal mechanism for notifying people that they have been included in the gang database, or for allowing them to challenge their inclusion.

This extreme discretion has led to extreme racial disparity. In NYC, ninety-nine percent of the people included in the NYPD’s gang database are Black or Latino and only one percent are white, while the mostly white “Proud Boys,” who publicly state that their highest level of membership is reserved for members who commit violence “for the ‘cause,’” are not tracked in the NYPD’s gang database at all. In Chicago, nearly ninety-six percent of the people included in the Chicago Police Department’s gang database are Black or Latino, a majority have never been arrested for a violent offense, drug charge, or weapons

165 See sources cited supra note 2.
166 See discussion supra Sections I.C–D.
167 Jacobs, supra note 2 (“Increasingly, police create gang databases for intelligence purposes—indeed independent of conviction, arrest, or even a criminal investigation.”).
169 Id.
170 Id.
171 See sources cited supra note 10 and accompanying text.
172 Khan, supra note 10.
charge, and the gang database includes at least 33,000 juveniles, over 300 of whom are twelve or younger, and 163 people over the age of seventy, including political activists such as Black Panthers. In California, eighty-five percent of the people included in the California gang database are Black or Latino, including forty-two people added when they were one year old or younger. Police records indicated that twenty-eight of these children under one year old admitted to being gang members. In L.A., a full forty-seven percent of Black men between the ages of twenty-one and twenty-four were in the LAPD’s gang database. In Mississippi, one-hundred percent of people arrested under the State’s gang law from 2010 through 2017 have been Black, despite the Mississippi Association of Gang Investigators saying fifty-three percent of “verified gang members” are white.

Contrary to this vast racial disparity in gang databases, studies have consistently found that at least twenty-five percent of gang members are white, that white people commit a majority of gang-related murders (fifty-three percent), and that white people commit the vast majority of violent crimes, in general. Recent investigations have even found

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175 Policing in Chi. Research Grp., supra note 14; Mijente, supra note 10.
178 Id.
179 Winton, supra note 10.
180 Id.
182 Ladd, supra note 15.
183 Howell, supra note 2, at 16 (“[C]riminologist 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.”).
185 Id.
that white supremacist gangs, openly organized to commit violent crimes, still attract little attention from law enforcement.\textsuperscript{186}

Audits, lawsuits, and studies have also revealed that many people are erroneously included in gang databases.\textsuperscript{187} Across the United States, communities have complained about the lack of notice given as to who is added to gang databases and why, the discretion afforded police in adding people, the police adding people erroneously, and the racial disparity of those added.\textsuperscript{188} These concerns have been magnified by evidence that some government agencies tasked with overseeing police practices are actually utilizing the gang databases of the police departments they are supposed to be monitoring.\textsuperscript{189} Public defenders have complained that police have absurdly listed their clients as being in two or more competing gangs,\textsuperscript{190} and in at least one such case, police ultimately admitted that the person was never in either gang but only

\textsuperscript{186} Thompson, Winston & Bond Graham, \textit{supra} note 12.


\textsuperscript{190} Peter (@shadowfuzz), TWITTER (June 30, 2018, 11:06 AM), https://twitter.com/shadowfuzz/status/1013091375351582720 [https://perma.cc/3VU6-NYX3].
after he was nearly deported.\textsuperscript{191} Even former police officers have begun raising alarms that gang databases are “racist and error-ridden.”\textsuperscript{192}

Despite this, police consistently insist they are adding “the right people” to gang databases, using almost the exact language that the NYPD used to justify the racially disproportionate impact of its unconstitutional stop-and-frisk practices.\textsuperscript{193} NYPD Chief of Detectives Dermot F. Shea defended the racial disparity of the NYPD’s gang database by saying that it closely tracks the rate of people involved in violent crime in NYC,\textsuperscript{194} effectively parroting the NYPD’s justification for targeting people of color for stop-and-frisk. This led to the practice being held unconstitutional for violating equal protection.\textsuperscript{195}

When police add people to gang databases based on non-criminal criteria and inclusion is often erroneous, racially biased, and without correlation to criminal record or likelihood to commit crime, the consequences are profound.\textsuperscript{196} Being included on a gang database can immediately make people ineligible for jobs\textsuperscript{197} and housing,\textsuperscript{198} subject to

\textsuperscript{191} Peter Waldman, Lizette Chapman & Jordan Robertson, Palantir Knows Everything About You, BLOOMBERG (Apr. 19, 2018), https://www.bloomberg.com/features/2018-palantir-peter-thiel (“[Catalan-Ramirez had] been listed in the local gang database twice—in rival gangs. [He] spent the next nine months in federal detention, until the city of Chicago admitted both listings were wrong and agreed to petition the feds to let him stay in the U.S.”).


\textsuperscript{195} Floyd v. City of New York, 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013) (“[T]he City emphasized in its opening arguments that ‘[B]lacks and Hispanics account for a disproportionate share of . . . crime perpetrators,’ and that ‘90 percent of all violent crime suspects are [B]lack and Hispanic.’ When these premises are combined—that the purpose of stop and frisk is to deter people from carrying guns and that [B]lacks and Hispanics are a disproportionate source of violent crime—it is only a short leap to the conclusion that [B]lacks and Hispanics should be targeted for stops in order to deter gun violence, regardless of whether they appear objectively suspicious.”).

\textsuperscript{196} See sources cited supra note 28 and accompanying text.

\textsuperscript{197} Rummell, supra note 188 (“[C]onsequences include ‘heightened police surveillance, elevated aggression during police encounters, enhanced bail recommendations, elevated charges, enhanced sentencing recommendations, and, for some, loss of housing and the threat
increased bail and enhanced charges, and more likely to get deported, raising independent due process concerns. This Note will also show that inclusion on a gang database functions as a predicate to police action, like the determination of “gang loitering” in Morales.

In the immigration context, Immigration and Customs Enforcement (ICE) can access all local, shared gang databases, and use inclusion in these databases to justify deportations, even absent any criminal charges. The federal government is pouring money into states for them to expand their own databases. In addition, ICE maintains its own gang database, the contents of which it claims are exempt from public review. At least three federal judges have halted...
deportation proceedings premised on alleged gang membership, holding that ICE was asserting gang membership based on no evidence. As one court noted, “The [warrant] in this case, which zeroes in on Petitioner’s clothing and social associations, noting in particular that his ‘clothing and accessories are indicative of gang membership,’ does not approach ‘probable cause.’ Such administrative warrants raise serious due process and Fourth Amendment questions when used in this way.” Yet a new study documents that this practice is widespread across the country and highlights particularly egregious examples, such as ICE adding someone to its gang database for wearing a blue T-shirt that was actually part of the student’s school uniform. Both federal and state governments have been sued over their gang databases being used in immigration proceedings.

2. Surveillance and Secret Indictments—Conspiracy and RICO

In addition to the immediate effects of ineligibility for jobs, higher bail if arrested, stiffer charges if indicted, longer sentences if convicted, and harsher confinement if incarcerated, being on a gang database is used to justify heightened surveillance, which leads to inclusion in sweeping conspiracy and RICO indictments. In this respect, being added to a gang database can be seen as a predicate to police action, like the determination that a person was loitering in Morales.

205 Lopez v. Sessions, No. 18 Civ. 4189 (RWS), 2018 WL 2932726, at *14 (S.D.N.Y. June 12, 2018); Medina v. U.S. Dep’t of Homeland Sec., 313 F. Supp. 3d 1237, 1250 (W.D. Wash. 2018) (“Most troubling to the Court, is the continued assertion that Mr. Ramirez is gang-affiliated, despite providing no evidence specific to Mr. Ramirez to the Immigration Court in connection with his administrative proceedings, and offering no evidence to this Court to support its assertions four months later.”); John Riley, Federal Judge Orders Release of LI Teen from Immigration Custody, NEWSDAY (May 4, 2018, 8:58 PM), https://www.newsday.com/long-island/immigration-ice-1.18393938 [https://perma.cc/WN79-6UBJ].

206 Lopez, 2018 WL 2932726, at *14 (internal citation omitted).


209 See sources cited supra note 28.

210 See sources cited supra notes 3–4 and accompanying text.
After police add people to gang databases, they intensely surveil them, especially over social media, including by creating fake social media accounts and “friending” people, then adding their friends to gang databases based on photos and interactions with people’s posts. The NYPD has admitted that communicating with the wrong person on social media is enough to get someone placed on a gang database and that it uses the leads in its gang database to build criminal cases. Prosecutors link people to alleged gang crimes based in part on these connections and interactions and get secret indictments for dozens or even hundreds of people for conspiracy to commit relatively few crimes, some of them crimes of attempt, and some of them crimes for which people are already serving time. This practice is possible because conspiracy charges allow prosecutors to indict and even convict people for crimes based on tenuous, alleged support of those crimes, such as lending someone a cell phone. In gang conspiracy indictments, social media posts are often described as overt acts in furtherance of conspiracy to commit murder. For example, in the 2015 “Money Ave” indictment of 67 alleged gang members in Manhattan on charges of conspiracy to commit attempted murder.

211 Behrman, supra note 3, at 320–23; Broussard, supra note 3.
212 Behrman, supra note 3, at 322–23, 330; Broussard, supra note 3.
213 Offenhartz, supra note 168.
215 Speri, supra note 4.
218 Speri, supra note 4.
(among 12 other charges), the first two “overt acts” listed in the indictment were posting “Fuck Grant” and “Money Ave Up” on Facebook.\textsuperscript{220} Under conspiracy law, someone found to have taken an overt act in furtherance of the conspiracy can be found liable for all the criminal acts of the conspiracy.\textsuperscript{221} In the “Money Ave” indictment, this would mean that someone found to have posted “Money Ave Up” on Facebook could be liable for attempted murder, among other charges.

For immigrants, the consequences can be more severe with even less process.\textsuperscript{222} Even for immigrants who are in the United States legally, being added to a gang database for non-criminal criteria can make them a “priority” for deportation, and they can be torn from their families and deported to their home countries absent any criminal conviction or even charge.\textsuperscript{223}

3. Gang Raids and Immigration Sweeps

After secret indictments are secured, police arrest those indicted in military-style gang raids, kicking down doors and wielding assault rifles while sweeping housing projects in the middle of the night.\textsuperscript{224} The coverage is predictably sensationalist. The press is tipped off before the raids take place and are thus present to document them.\textsuperscript{225} The arrestees’ faces are plastered across newspapers without being blurred.\textsuperscript{226} Headlines declare them criminal gang members without the word “alleged.”\textsuperscript{227} The stories typically list the gratuitous charges secured by secret indictment before the raids, such as multiple counts of

\begin{footnotesize}
\begin{itemize}
\item 220 Id. ¶¶ 1–2.
\item 221 Speri, supra note 4.
\item 223 Id.
\item 224 See sources cited supra note 5.
\item 226 Id.
\item 227 Id.
\end{itemize}
\end{footnotesize}
homicide,\textsuperscript{228} even though the majority of the acts alleged are for social media posts that allegedly furthered the conspiracy.\textsuperscript{229}

In addition to the damage to reputation, the raids themselves exact heavy tolls. Videos of the raids show heavily armed men, clad in black, knocking down doors, ransacking homes, pointing assault rifles in people’s faces, and screaming unintelligible commands.\textsuperscript{230} Innocent bystanders, including the elderly and children as young as one year old, report extreme emotional distress from the incidents.\textsuperscript{231} Sometimes these bystanders are held on the ground for hours as police search for people who have not lived at the residence in years.\textsuperscript{232} Yet people report being evicted and having their families torn apart as a result of being erroneously targeted.\textsuperscript{233}

Mirroring these tactics, ICE conducts “immigration sweeps.”\textsuperscript{234} Also relying on gang databases, ICE agents ransack homes with guns drawn and arrest immigrants.\textsuperscript{235} Unlike the gang raids, ICE does not even need to secure indictments before conducting these raids.\textsuperscript{236}

4. Gang Prosecutions and Deportation

Once arrested, defendants are denied bail based in part on their inclusion in gang databases.\textsuperscript{237} Their cases often languish in pre-trial

\textsuperscript{229} See, e.g., Indictment, supra note 219.
\textsuperscript{230} Davis-Cohen, supra note 5.
\textsuperscript{231} Id.
\textsuperscript{233} Id.
\textsuperscript{236} \textit{The Difference Between a Judicial Warrant and an Administrative Warrant Used by ICE}, LONG ISLAND WINS (Apr. 11, 2017), https://longislandwins.com/issues/difference-judicial-warrant-administrative-warrant-used-ice [https://perma.cc/4AYA-J4DB].
motion practice. Indictments for seemingly serious crimes like conspiracy to commit attempted murder give way to superseding indictments for crimes such as conspiracy to possess marijuana. Although federal prosecutors work with local law enforcement, they will bring such superseding indictments even where acts like possession of the amount of marijuana in question is decriminalized by the local municipality but can still carry up to twenty years in prison under federal law. One young man reportedly spent nearly two years in solitary confinement in federal facilities before his charges were dropped to marijuana-related offenses.

Some defendants fight their charges to the bitter end. However, many take pleas and get “time served,” meaning they are sentenced to the amount of time they spent detained before trial. But even “time served” pre-trial in some large indictments can be as long as two

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238 See generally Court Docket, U.S. v. Parrish, No. 1:16-cr-00212 (S.D.N.Y. Mar. 16, 2016) (over 1,000 documents filed on the docket, with prosecutions taking over two years after the initial indictment).


244 Sentenced to Time Served, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A sentencing disposition whereby a criminal defendant is sentenced to the same jail time that the defendant is credited with serving while in custody awaiting trial. The sentence results in the defendant’s release from custody.”).
years.\textsuperscript{245} Prosecutors report that almost everyone originally indicted pleads guilty or is convicted.\textsuperscript{246} But they do not mention that the superseding indictments and plea deals are for significantly less serious offenses than the original charges, let alone that the defendants were subjected to intense surveillance, secret indictments, and military-style gang raids simply to secure convictions for conspiracy to possess marijuana.\textsuperscript{247} Nor do they mention that the surveillance and prosecutions all stemmed from the defendants being added to a gang database based on vague, non-criminal criteria.\textsuperscript{248}

Those convicted can face sentencing enhancement for being included in the gang databases.\textsuperscript{249} Once sentenced, they can be sent to higher security prisons\textsuperscript{250} and are less eligible for parole because of their alleged gang membership.\textsuperscript{251} Even upon release, they can be prohibited from going to their old neighborhoods and affiliating with their old friends, raising further constitutional concerns, such as violations of freedom of association and freedom of movement.\textsuperscript{252}

For immigrants, fighting prosecution also poses unique hurdles. Once detained for alleged gang membership, immigrants can be

\textsuperscript{245} See generally Indictment, United States v. Parrish, No. 1:16-cr-00212 (S.D.N.Y. Mar. 16, 2016).


\textsuperscript{247} See id.

\textsuperscript{248} Id.


deported based on this allegation alone, and can only appeal to the more limited constitutional protections afforded to non-U.S. citizens.\textsuperscript{253}

II. ANALYSIS: THE UNCONSTITUTIONALITY OF CONTEMPORARY GANG POLICING AND PROSECUTIONS

Where sufficient evidence is available, contemporary gang policing is racially discriminatory in violation of the equal protection clause. In addition, where contemporary gang policing is mandated by statute, it violates the constitutional vagueness doctrine.

A. Equal Protection

In jurisdictions where racial breakdowns of gang databases and evidence of intent are available, contemporary gang policing violates equal protection.\textsuperscript{254}

1. Disproportionate Impact

Gang policing disproportionately impacts people of color. Across the country, over ninety percent of the people police add to gang databases are people of color,\textsuperscript{255} while over sixty percent of Americans


\textsuperscript{254} Supra notes 172–79. To be sure, in 2017, the Sixth Circuit held that designating people as gang members was not final agency action and was thus not judicially reviewable. Parsons v. U.S. Dep’t of Justice, 878 F.3d 162 (6th Cir. 2017). However, this ruling was based largely on the fact that the Federal Justice Department was the agency that labeled the plaintiffs gang members while local police took action based on this label, holding that, “harms caused by agency decisions are not legal consequences if they ’stem from independent actions taken by third parties.’” Id. at 168 (internal citations omitted). However, in the cases analyzed in this Note—and in the vast majority of gang policing—law enforcement agencies are acting on information in their own gang databases. See discussion supra Section I.F. In Parsons, the court noted that “agency actions that expose an individual to criminal or civil liability” are justiciable agency actions. 878 F.3d at 167. As this Note has documented, adding people to gang databases exposes them to criminal and civil liability. See discussion supra Section I.F.

\textsuperscript{255} Supra notes 172–79.
are white. That is far more disproportionate than the NYPD’s stop-and-frisk program that was held unconstitutional in *Floyd*. But since *Washington v. Davis* and *Arlington Heights*, to prove an equal protection violation, plaintiffs must show that one of the motivating factors for such disproportionate impact was discriminatory intent.  

2. Discriminatory Intent

The NYPD insists that it is adding “the right people” to its gang database, based in part on criminal suspect data, which is racially disproportionate. NYPD Detective Shea specifically defended the racial disparity of who the NYPD adds to its gang database by citing crime data. Yet the criteria for adding people to gang databases—including the NYPD’s gang database—is non-criminal and subject to extreme police discretion. As Detective Shea put it, “it is possible” for the NYPD to add someone to its gang database for standing on the corner and wearing a red T-shirt.

This practice of subjecting people to police action based on the same rates as racially disproportionate criminal suspect data for non-criminal criteria at the discretion of police is the exact finding that the court held constituted discriminatory intent in violation of the equal protection clause in *Floyd*. Again, in *Floyd* the police claimed they were targeting “the right people” by subjecting people to stops-and-frisks at the same rates as racially disproportionate criminal suspect data based

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257 *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013). It is also far more disproportionate than the percentage of Americans who have Spanish surnames compared to the percentage of Americans with Spanish surnames who are called for jury duty that the Supreme Court said constituted a prima facie Equal Protection violation in *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (holding that a showing that 79% of the county’s population had Spanish surnames while only 39% of people selected for juries had Spanish surnames was sufficient to establish a prima facie equal protection violation).

258 See discussion supra Section I.F.

259 Meminger, supra note 193.


261 Pinto, supra note 194.

262 See sources cited supra note 2.

263 Offenharta, supra note 168.
on non-criminal criteria at the discretion of the police—in that case, “furtive movements.”

In *Floyd*, this connection between the racial proportions of criminal suspect data and who was targeted for police action was further substantiated through discovery. Such discovery is not available for contemporary gang policing because no lawsuit over the practice has progressed this far. However, based on the public comments made about contemporary gang policing by policymaking officials of police departments, such discovery would likely further substantiate such a connection.

B. *Policy or Custom*

For a municipality to be liable for a constitutional violation, the violation must be the result of a policy or custom with the force of law. Municipalities are liable for the equal protection violations of contemporary gang policing under the same policy or custom theories for which the court found NYC liable for equal protection violations in *Floyd*.

1. *Official Policy*

In municipalities that justify the racially disproportionate inclusion of people on gang databases by claiming they are targeting “the right people” based in part on criminal suspect data, the equal protection violations of gang policing are the result of an official policy under *Floyd*, where the court found that intentionally transposing the racial proportions of criminal suspect data onto the non-criminal population based on non-criminal criteria constituted an official policy of discrimination.

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264 *Floyd*, 959 F. Supp. 2d at 561.
2. Deliberate Indifference

In *Floyd*, the court found that a showing that the NYPD had received notice through a report by the Attorney General that its stop-and-frisk practices likely violated equal protection, yet failed to address the problem, constituted deliberate indifference sufficient to establish a policy or custom under *Monell*.\(^{267}\) Across the country, police have been put on notice that their use of gang databases likely violates equal protection,\(^{268}\) yet very little meaningful reform has occurred.\(^{269}\)

Through both official policy and deliberate indifference, municipalities are thus liable for the equal protection violations caused by contemporary gang policing.

C. Vagueness

While contemporary gang policing may seem tailored to avoid the vagueness failings of *Morales*,\(^{270}\) when viewed in its totality, contemporary gang policing actually gives police and prosecutors even more discretion than the ordinance in *Morales* did, and it gives the public less notice about what conduct is criminal, failing both prongs of the vagueness doctrine.

In the Proposal, this Note argues for an extension of the vagueness doctrine to non-statutory policies and customs with the force of law and applies it to contemporary gang policing where it is not proscribed by statute. But first—in this Section—this Note focuses on gang policing where it is codified in statute, demonstrating how such statutes violate the vagueness doctrine.

In some jurisdictions, being a member of a gang is an element of several criminal offenses. The criteria used to determine that people are gang members are substantially the same subjective, non-criminal criteria used nationwide,\(^{271}\) which were substantially the same criteria

\(^{267}\) *Id.* at 665–67.

\(^{268}\) See sources cited *supra* note 188–192, 208 (documenting instances of the people in various cities notifying the government that the use of gang databases targets minorities).

\(^{269}\) See discussion *infra* Section III.B.

\(^{270}\) See *supra* notes 26–27 and accompanying text.

used by the police in *Morales*. And some lower courts have found these criteria implicate constitutionally protected rights, requiring that courts analyze the practice with stricter scrutiny under both prongs of the vagueness doctrine.

In such jurisdictions, there is a clear parallel to the unconstitutional vagueness finding in *Morales*. Innocuous conduct is criminalized at the extreme discretion of the police. With contemporary gang policing, there is also less notice to the public of what conduct is criminalized than there was in *Morales*. The result is that contemporary gang policing fails under both prongs of the vagueness doctrine.

### 1. Discretion

In *Morales*, the statute required police to identify alleged gang members. If police saw an alleged gang member loitering with anyone else—alleged gang member or not—“with no apparent purpose,” the statute required the police to give the whole group a dispersal order. If the group did not disperse, the statute required the police to arrest everyone in the group. The Court held that this violated the vagueness doctrine because it “provide[ed] absolute discretion to police officers to decide what activities constitute[d] loitering,” even though the ultimate charge would be for failing to follow a dispersal order, and even though the statute required the police to identify an alleged gang member in the group using the police department’s criteria.

Where it is codified by statute, contemporary gang policing gives police at least as much discretion to determine who to classify as gang members as the *Morales* statute gave the police to determine who was loitering. Even those jurisdictions that grant police the authority to create gang databases by statute give minimal instructions on what

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272 See sources cited supra note 2.
273 See discussion supra Section I.D.
274 See sources cited supra note 67.
275 *Morales*, 527 U.S. at 47.
276 Id.
277 Id. at 61.
278 Id.
279 Id.
280 See sources cited supra note 2.
criteria to use to include people in the databases. And most police departments use substantially the same criteria, which did not save the statute in *Morales*.

The use of gang databases could be seen as an attempt to follow the *Morales* Court’s suggestion that targeting only people “reasonably believed to be criminal gang members” may save the statute. But the majority said this would only “possibly” save the statute, and Scalia’s dissent persuasively dispelled this idea, consistent with Supreme Court precedent on vagueness and criminalizing gang membership.

Likewise, ultimately charging people with conspiracy or RICO, which do not rely on the discretionary determination that someone is a gang member, could be seen as an attempt to follow the Court’s recommendation in *Morales* to target only acts that have “an apparently harmful purpose or effect.” However, being labeled a gang member is effectively a predicate to gang policing and prosecutions. The fact that some people added to gang databases may never be prosecuted for a crime does not save the statute under *Morales*. Under the statute at issue in *Morales*, some people who were given a dispersal order did disperse and were thus not prosecuted, but this did not save that statute. If anything, the greater attenuation between the discretionary determination of alleged gang membership—without notification—and the ultimate charges, gives the public less notice of what conduct is criminalized, failing the other prong of the vagueness doctrine as well.

Contemporary gang policing is also demonstrably under- and over-inclusive, which is strong evidence of violating the vagueness doctrine. It is under-inclusive in that white gang members are underrepresented in gang databases. Even white people with extensive criminal records who are openly part of white supremacist gangs avoid being placed in gang databases and subjected to the heightened policing

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281 See sources cited supra note 2.
282 See sources cited supra note 2.
283 *Morales*, 527 U.S. at 97.
284 Id. at 67.
285 See supra notes 93–97 and accompanying text.
286 See supra notes 93–97 and accompanying text.
287 *Morales*, 527 U.S. at 62.
288 See discussion supra Section I.F.
289 See generally *Morales*, 527 U.S. 41.
290 See discussion infra Section II.C.2.
291 Howell, supra note 2, at 16.
and prosecutions that accompany such classifications.\textsuperscript{292} The over-inclusion of contemporary gang policing is also stark.\textsuperscript{293} Contemporary gang policing has demonstrably captured people who have no criminal record,\textsuperscript{294} who have disavowed gangs,\textsuperscript{295} and who were never in gangs to begin with,\textsuperscript{296} including children younger than one year old, some of whom police claimed admitted to being gang members.\textsuperscript{297} 

Aside from the complete discretion afforded police, this over-inclusion—coupled with the extreme disproportionate impact on communities of color—implicates the underlying concern of the vagueness doctrine: that discretionary enforcement leads to discriminatory enforcement, as is evident from the equal protection discussion above.

2. Notice

Even where contemporary gang policing is codified by statute to some degree, the criteria used to add people to gang databases is vague or not specified at all.\textsuperscript{298} Many police departments are secretive about what criteria are used to add people to gang databases.\textsuperscript{299} Some states

\textsuperscript{292} Carimah Townes, \textit{How Is This Man Not a Gang Member?}, SLATE, http://www.slate.com/articles/news_and_politics/trials_and_error/2017/06/how_the_portland_police_s_racist_gang_database_missed_white_supremacist.html [https://perma.cc/JYM6-6DZV] (last visited Sept. 27, 2017); Thompson, Winton & Bond Graham, \textit{supra} note 12. Labeling more white people as gang members would not save contemporary gang policing from violating the vagueness doctrine because the label would still be based on the discretionary application of vague criteria. But the fact that some of the most dangerous activity that should ostensibly be captured is not being captured is strong evidence that the practice violates the vagueness doctrine.

\textsuperscript{293} To be sure, the Supreme Court has held that a defendant cannot suppress evidence found in a search based on erroneous inclusion in a database. Herring v. United States, 555 U.S. 135 (2009). However, that decision left open the question of whether erroneous entries, in the aggregate, could support due process and equal protection claims. \textit{Id.}

\textsuperscript{294} Winton, \textit{supra} note 10.


\textsuperscript{296} See sources cited \textit{supra} note 187.

\textsuperscript{297} Winton, \textit{supra} note 10.

\textsuperscript{298} NAT’L GANG CTR., \textit{supra} note 155.

\textsuperscript{299} See sources cited \textit{supra} note 164.
even specifically exempt such criteria from public review.\textsuperscript{300} As this Note has demonstrated, being added to gang databases effectively leads to gang policing and prosecutions,\textsuperscript{301} thus the lack of notice about what gets people added to gang databases—and what the outcomes of being added to such databases are—violates the notice prong of the vagueness doctrine.

Notice of what conduct is criminalized is further obscured by the joint state and federal prosecutions that occur in contemporary gang policing because people are prosecuted for charges that are decriminalized in their municipalities, like conspiracy to possess marijuana.\textsuperscript{302} In addition, many scholars have argued that conspiracy and RICO charges themselves violate the vagueness doctrine.\textsuperscript{303} As long ago as 1908, Clarence Darrow—the legendary criminal defense attorney—said that no one’s liberty is safe from conspiracy charges.\textsuperscript{304} Today, people argue that conspiracy and RICO charges are used to score easy convictions in gang policing.\textsuperscript{305} These concerns are magnified by the fact that some charges in contemporary gang policing are for conspiracy to commit an attempted crime,\textsuperscript{306} as crimes of attempt rely on a subjective determination that a suspect has taken a “substantial step” toward committing a crime,\textsuperscript{307} which some have argued allows prosecutors to indict people for acts too attenuated from actually committing a crime.\textsuperscript{308} If this were ever true, it surely was true of construing posting “Money Ave Up” to Facebook as a substantial step toward committing attempted murder.\textsuperscript{309}

The attenuated relationship between being added to a gang database without notice based on vague, discretionary criteria—at least some of which implicates constitutionally protected rights—leading to

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\textsuperscript{300} See sources cited supra note 164.
\textsuperscript{301} See discussion supra Section I.F.
\textsuperscript{302} See supra notes 239–41 and accompanying text.
\textsuperscript{304} CLARENCE DARROW, \textit{THE STORY OF MY LIFE} 69 (Da Capo Press, 1996).
\textsuperscript{305} Speri, \textit{supra} note 4.
\textsuperscript{306} See discussion supra Section I.F.
\textsuperscript{309} See text accompanying supra note 219.
\end{flushright}
being surveilled, secretly indicted for conspiracy or RICO, arrested in military-style raids, and ultimately being convicted of something that is decriminalized in your state, thus does not give the public adequate notice of what conduct is criminalized under the first prong of the vagueness doctrine.

III. PROPOSAL: AN ABOLITIONIST APPROACH

This Note proposes two things. First, that the vagueness doctrine be extended to non-statutory municipal policies and customs with the force of law and applied to contemporary gang policing. And second, that rather than attempt to reform gang policing, municipalities take an abolitionist approach and reallocate resources from gang policing to community programs that have proven more effective at curtailing violence.

A. Apply the Vagueness Doctrine to Non-Statutory Policies and Customs

Like equal protection, the vagueness doctrine has been used as an affirmative defense to challenge the legality of criminal statutes and to establish municipal liability based on the enforcement of criminal statutes. However, the vagueness doctrine has not been used to challenge non-statutory municipal policies and customs that have the force of law as equal protection has.

Contemporary gang policing is the perfect example of why the vagueness doctrine should be applied to non-statutory policies or customs that have the force of law. The purpose of establishing that municipalities are liable for non-statutory policies and customs is to

311 See, e.g., Clary v. City of Cape Girardeau, 165 F. Supp. 3d 808, 829 (E.D. Mo. 2016) (“To establish municipal liability, a plaintiff must first show that one of the municipality’s officers violated [his] federal right. Plaintiff has established this element by virtue of the fact that he was cited and arrested for activity protected by the First Amendment, pursuant to the unconstitutionally vague Ordinance.”) (alteration in original) (internal citation omitted); Nichols v. Vill. of Pelham Manor, 974 F. Supp. 243, 258 (S.D.N.Y. 1997) (“It is almost self-evident that plaintiff’s claim against the Village for his arrest under an unconstitutional statute supports municipal liability under Monell.”).
redress the constitutional violations of such policies and customs.313 The purpose of the vagueness doctrine is to protect "the first essential" of people’s due process rights.314 If the vagueness doctrine is not applied to non-statutory policies and customs with the force of law, both objectives—redressing constitutional violations and ensuring due process—are thus undermined.

One could argue that police must be afforded discretion to conduct investigations. However, police must not—at minimum—deprive people of their constitutional rights. As this Note has demonstrated, where contemporary gang policing is in part codified by statute, it violates both prongs of the vagueness doctrine.315 It is counterintuitive to argue that, absent those statutes, those constitutional failings simply disappear. To the contrary, where contemporary gang policing is executed wholly absent a statute, the public logically has even less notice of what conduct is criminalized, and the police have even greater discretion. At least one scholar has argued that courts should invalidate all police action not taken pursuant to specific grants of power from traditional democratic processes.316 This Note’s proposal actually goes slightly less far. I argue only that police actions not taken pursuant to specific statutory authority should be subjected to all of the same constitutional rigors as those that are.

Even where gang policing is not codified by statute, the unconstitutional vagueness of contemporary gang policing qualifies as a policy or custom with the force of law under the same three theories of municipal liability found in Floyd.317 First, the police discretion and lack of notice in contemporary gang policing is an official policy, as evidenced by the fact that police are instructed to add people to gang databases using vague, subjective criteria, and these databases are intentionally kept secret from the public.318 Second, there has been deliberate indifference to the vagueness violations, as complaints of police discretion and lack of notice about what conduct is criminalized have been brought to the attention of officials across the country.319 And

315 See discussion supra Section II.C.
317 See discussion supra Section I.F.
318 See discussion supra Section I.F.1.
319 See sources cited supra note 188 and accompanying text.
third, contemporary gang policing’s violations of the vagueness doctrine are so widespread as to have the force of law. In Floyd, thirty-six percent of 200,000 stops being conducted without reasonable suspicion qualified as a practice of unconstitutional stops so widespread as to have the force of law.320 In contemporary gang policing, hundreds of thousands of people are contained in the gang databases of each of several major cities alone,321 and effectively everyone who has been added to gang databases, and thus subjected to gang policing, has been subjected to it in violation of their due process rights under the vagueness doctrine. Few people subjected to it were given adequate notice of why, and police and prosecutors used extreme discretion in subjecting them to it.322 Thus, the constitutional violations of contemporary gang policing, even where the practice is not proscribed by statute, is a policy or custom with the force of law under Monell.

B. Reform v. Abolition

Instead of taking an abolitionist approach, some jurisdictions, most notably California, have attempted to solve the failings of contemporary gang policing by reforming it.323 However, these reforms have failed to fix the constitutional failing they attempted to address324 and did not even begin to deal with the larger constitutional failing of contemporary gang policing like equal protection and vagueness.

1. Reform: California’s AB 90

Challenges to contemporary gang policing have focused on inclusion in gang databases violating due process by not giving notice and an opportunity to challenge such inclusion despite inclusion resulting in deprivations of liberty.325 This legal doctrine was not explored in the background of this Note because other scholars have

321 See sources cited supra note 2.
322 See discussion supra Section I.F.
323 See sources cited supra note 29.
324 See sources cited supra note 29.
325 Wright, supra note 28.
written about it as it applies to gang databases.\textsuperscript{326} However, it is worth mentioning here because California has overhauled its gang policing laws to address these concerns since the issue was last explored in a law review.\textsuperscript{327}

The primary innovation of California’s new law is notifying people that they have been added to its gang database and giving them an opportunity to challenge their inclusion \emph{after} they have been added.\textsuperscript{328} This is an important admission that adding people to a gang database implicates due process. But the amount of process given in California is still constitutionally inadequate.

The standard test for deciding how much due process is required for a particular deprivation is the \textit{Mathews} test, named for the Supreme Court case of \textit{Mathews v. Eldridge}.* The \textit{Mathews} test holds that three considerations must be weighed: (1) the private interest affected; (2) the risk of erroneous deprivation; and (3) the government interest at stake.\textsuperscript{330} \textit{Mathews} itself notes that incarceration is the weightiest potential private interest, and the Court has required that governments give people notice and opportunity \textit{pre}-deprivation for far less weighty interests.\textsuperscript{331}

When applied to being added to a gang database, the \textit{Mathews} test requires that people be given notice and an opportunity to object \textit{before}

\textsuperscript{326} Id.

\textsuperscript{327} Compare sources cited supra note 28 (discussing due process criticisms of California’s gang policing), with sources cited supra note 29 (discussing subsequent changes to California’s gang policing).


\textsuperscript{329} Jerry L. Mashaw, \textit{The Supreme Court’s Due Process Calculus for Administrative Adjudication in \textit{Mathews v. Eldridge}: Three Factors in Search of a Theory of Value}, 44 U. CHI. L. REV. 28 (1976). To be sure, the Supreme Court has declined to apply the \textit{Mathews} test to state criminal procedures, holding that under \textit{Patterson v. New York}, 432 U.S. 197 (1977), state criminal procedures should be “subject to proscription under the Due Process Clause” only if they “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” \textit{Medina v. California}, 505 U.S. 437, 445 (1992) (internal citations and quotation marks omitted). However, courts have analyzed adding people to gang databases as administrative action. \textit{See Parsons v. U.S. Dep’t of Justice}, 878 F.3d 162 (6th Cir. 2017).


\textsuperscript{331} \textit{Cleveland Bd. of Educ. v. Loudermill}, 470 U.S. 532, 542 (1985) (termination of school district employees); \textit{Goldberg v. Kelly}, 397 U.S. 254, 264 (1970) (“[W]e agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.”).
they are added. First, as to the private interest affected, this Note has shown that, the true interest at stake in being added to a gang database is heightened risk of incarceration. They are added. Second, the risk of erroneous deprivation is extremely high when it comes to gang databases, as is evidenced by the abundance of people erroneously added to California’s own gang database, which included infants under one year old. Even after California instituted its reforms, people have erroneously remained on the State’s gang database and have been unable to get themselves removed, even through litigation. Third, the government interest at stake is low because policing has proven counterproductive to curtailing gang violence. Thus, under the Mathews test and the Court’s precedents, due process requires that people be given notice and an opportunity to challenge being labeled as gang members before they are added to gang databases. So, California’s reforms, which are the most sweeping in the country, fail to satisfy the notice and opportunity requirement of due process that they set out to address. And even satisfying this requirement would not save contemporary gang policing from its larger constitutional failings of equal protection and vagueness.

2. Abolition

With even the most sweeping reforms failing to solve the greatest constitutional failings of contemporary gang policing, the more sound approach is abolition. The city of Portland, Oregon has taken steps toward doing just that, abolishing its gang database. Portland’s decision was sparked by the racial disparity in its gang database and was part of a larger bill passed to address concerns that communities of color were being targeted for heightened surveillance, policing, and

332 See discussion supra Section I.F.
333 Winton, supra note 10.
335 Howell, supra note 2, at 4.
337 Id.
prosecution. But even this is only a first step. An abolitionist approach demands that, instead of shifting these resources into another form of policing that will likely be fraught with the same constitutional failings, the city redirect these resources into community programs that address the root causes of gang violence, such as poverty and a lack of education, housing, and community resources.

The obvious counterargument to abolishing gang policing is that without it, gang crime will flourish. This is a common response whenever people advocate for abolishing any form of policing, even when it is demonstrably unconstitutional and ineffective. In NYC, the NYPD’s use of stop-and-frisk was challenged as unconstitutional. The NYPD contested by arguing that the practice was a cornerstone of its policing. Indeed, at the height of the practice, the NYPD was stopping-and-frisking more than 684,000 people per year. Right wing news outlets and think tanks sounded alarms, warning that if the NYPD’s wanton stop-and-frisk practice were curtailed in any way, it would lead to massive spikes in crime and a return to the “bad old days” of high crime rates in NYC. After a federal judge held the practice unconstitutional and ordered the NYPD to cease the practice, stops

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344 Floyd, 959 F. Supp. 2d at 667.
fell to about 7,000 per year\textsuperscript{345} and crime decreased.\textsuperscript{346} Studies suggest similar reductions in crime where proactive policing is reduced more broadly.\textsuperscript{347} Indeed, when the NYPD intentionally slowed down proactive policing entirely—in protest of the Mayor saying he needed to teach his mixed-race son to be cautious around law enforcement officers—crime fell to its lowest rate in years.\textsuperscript{348} One could argue that crime rates did not actually drop during this slowdown, but that police simply took fewer reports and thus less crime was documented. But there is no indication that police “slowed down” in taking reports—or even investigating the serious crimes that make up crime data—only that they slowed down proactive policing of minor offenses.\textsuperscript{349}

Now, the same sources that said crime would soar without stop-and-frisk claim it will spike without gang databases.\textsuperscript{350} But studies show that gang policing is particularly counterproductive, encourages more gang formation, solidifies gang identities, and increases gang crime.\textsuperscript{351} History shows that, where gang crime was addressed with community programs instead of policing, gangs did not take hold during the same periods of time that they flourished in other cities where there was more aggressive gang policing.\textsuperscript{352} Even today, across the country, community programs have proven more effective than gang policing at reducing


\textsuperscript{346} Id.

\textsuperscript{347} Christopher M. Sullivan & Zachary P. O’Keeffe, Evidence that Curtailing Proactive Policing Can Reduce Major Crime, 1 NATURE HUM. BEHAV. 730 (2017).


\textsuperscript{349} Sullivan & O’Keeffe, supra note 347.


\textsuperscript{351} Howell, supra note 2, at 4.

\textsuperscript{352} GREENE & PRANIS, supra note 16.
gang crime. This is because these programs are specifically tailored to address the needs that drive people to join gangs and commit crime. They provide job training and affordable housing and create strong communities rooted in non-criminal activity. Furthermore, evidence shows that gang policing actually inhibits the work of these programs, both by bolstering gangs and by exacerbating the problems that cause gang crime, because gang policing and incarceration make it harder for people to get jobs and housing, and tear communities apart. Yet community programs are woefully underfunded—their budgets miniscule compared to the resources poured into policing.

While many decry any reduction in policing, any civilized society should be working toward a future where police are obsolete, because the root causes of crimes—such as poverty, homelessness, and mental illness—have been adequately addressed. An abolitionist approach holds that we will never achieve this goal if we focus on reforms rather than abolition, because doing so keeps the bulk of our resources invested in systems of policing and incarceration that perpetuate cycles of poverty, homelessness, and mental illness—keeping that money out of programs that directly address those root causes of crime. Even nationally acclaimed gang policing reforms that attempt to incorporate civil services through the police have failed. This should come as no surprise, because police departments are ill-equipped to provide civil services outside the criminal justice system. Even when providing civil services, if police officers suspect criminal activity,
they are bound to investigate and, if necessary, arrest, eroding the trust required for community programs to succeed and perpetuating the effects of incarceration that increase gang crime. High-level police officials have themselves complained that police today have to provide civil services they are ill-equipped to deliver. True community alternatives are needed.

Opponents of an abolitionist approach suggest that it is the affected communities themselves that request more policing in response to crime. However, this argument ignores the fact that these communities ask for a myriad of other services that would curtail crime as well, such as affordable housing, quality education, mental healthcare, and other social services. While municipalities zealously oblige requests for more policing, they neglect requests for these other services that would be more effective at reducing crime. The communities advocating for an abolition of gang policing specifically advocate for resources to be reallocated to community programs. Diversion programs have already demonstrated the huge amount of resources that can be shifted into community programs from incarceration. And now detailed studies have demonstrated how even more money could be effectively shifted to such programs from police department budgets. Such reallocation is the most effective and constitutionally sound way to address the problems of contemporary gang policing. Courts can take an active role in encouraging this reallocation by imposing injunctions where widespread unconstitutional practices are

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361 Id.
364 VITALE, supra note 353, at 2.
365 Smith, supra note 339; MIJENTE, supra note 10; PASadena City C.Courier, supra note 358.
367 THE CTR. FOR POPULAR DEMOCRACY ET AL., supra note 356.
brought before them, as in *Floyd*, and by beating the drum for more community alternatives at every opportunity.368

**CONCLUSION**

Under the finding of discriminatory intent in *Floyd v. City of New York*, contemporary gang policing violates equal protection. In jurisdictions where gang policing is codified by statute, even in part, it also violates the vagueness doctrine (as that doctrine exists today). But to address all of the constitutional failings of gang policing and similar practices nationwide, the vagueness doctrine should be extended to apply to non-statutory municipal policies and customs that have the force of law. Then, where courts find that such policies and customs violate the vagueness doctrine—as contemporary gang policing clearly does—the courts should enjoin them, as they do policies and customs that violate equal protection. And when they are enjoined—if not before—we as a society should not simply replace them with similar, inevitably discriminatory practices. We should take the resources wasted on these counterproductive police practices and invest them in the more effective alternatives-to-policing that affected communities demand.