

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

TABLE OF CONTENTS

INTRODUCTION	992
I. BACKGROUND: GANG POLICING AND THE LAW	998
A. <i>Gang Policing Before Morales</i>	998
B. <i>Vagueness Doctrine</i>	1000
C. <i>Morales</i>	1003
D. <i>The Application of Morales</i>	1006
E. <i>Vagueness Doctrine and Equal Protection</i>	1007
1. <i>Discriminatory Intent—The Floyd Innovation</i>	1010
2. <i>Policy or Custom</i>	1011

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¹ *City of Chicago v. Morales*, 527 U.S. 41, 97 (1999) (Scalia, J., dissenting).

F. Contemporary Gang Policing	1013
1. Gang Databases	1013
2. Surveillance and Secret Indictments—Conspiracy and RICO	1020
3. Gang Raids and Immigration Sweeps	1022
4. Gang Prosecutions and Deportation	1023
II. ANALYSIS: THE UNCONSTITUTIONALITY OF CONTEMPORARY GANG POLICING AND PROSECUTIONS	1026
A. Equal Protection	1026
1. Disproportionate Impact	1026
2. Discriminatory Intent	1027
B. Policy or Custom	1028
1. Official Policy	1028
2. Deliberate Indifference	1029
C. Vagueness	1029
1. Discretion	1030
2. Notice	1032
III. PROPOSAL: AN ABOLITIONIST APPROACH	1034
A. Apply the Vagueness Doctrine to Non-Statutory Policies and Customs	1034
B. Reform v. Abolition	1036
1. Reform: California’s AB 90	1036
2. Abolition	1038
CONCLUSION	1043

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

² See K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 16 (2015) (listing the criteria used by the NYPD to add people to its gang database); James B. Jacobs, *Gang Databases: Context and Questions*, 8 CRIMINOLOGY & PUB. POL’Y 705 (2009) (discussing the proliferation of gang databases); NAT’L GANG CTR., BRIEF REVIEW OF FEDERAL AND STATE DEFINITIONS OF THE TERMS “GANG,” “GANG CRIME,” AND “GANG MEMBER” (2016) 3–6, <https://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf> [<https://perma.cc/D88L-N3D6>] (listing the criteria used to label people a “gang member” in state statutes that list such criteria).

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

³ See Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J.L. & TECH. 315, 320–21 (2015) (discussing how police use social media in gang investigations); Meredith Broussard, *When Cops Check Facebook*, ATLANTIC (Apr. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882> [<https://perma.cc/Y6RY-5GNM>].

⁴ See Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 109–10 (2002) (discussing the creation of a gang conspiracy charge in California); David R. Truman, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 720–28 (1995) (discussing the use of RICO charges in gang prosecutions); Alice Speri, *In New York Gang Sweeps, Prosecutors Use Conspiracy Laws to Score Easy Convictions*, INTERCEPT (July 12, 2016, 1:25 PM), <https://theintercept.com/2016/07/12/in-new-york-gang-sweeps-prosecutors-use-conspiracy-laws-to-score-easy-convictions> [<https://perma.cc/KU3P-MCTF>].

⁵ For examples from various cities, see *Raids Carried Out Across Metro Detroit; Gang Members Indicted*, CBS DETROIT (Nov. 8, 2017, 12:00 PM), <http://detroit.cbslocal.com/2017/11/08/several-raids-carried-out-across-metro-detroit> [<https://perma.cc/R7DW-EQL4>]; Simon Davis-Cohen, *Footage of the Largest Gang Raid in NYPD History Reveals the Agency's Military-Style Tactics*, NATION (Sept. 1, 2016), <https://www.thenation.com/article/footage-of-the-largest-gang-raid-in-nypd-history-reveals-the-agencys-military-style-tactics> [<https://perma.cc/9C4J-53NB>]; Monica Davey & Mitch Smith, *140 Are Arrested in Gang Raids in Chicago*, N.Y. TIMES (May 20, 2016), <https://www.nytimes.com/2016/05/21/us/chicago-gang-raids.html>.

⁶ See Speri, *supra* note 4; discussion *infra* Section I.F.4.

⁷ Christine Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017, 7:00 AM), <https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants> [<https://perma.cc/Y8DW-VTXS>]; Ali Winston, *Obama's Use of Unreliable Gang Databases for Deportations Could Be a Model for Trump*, INTERCEPT (Nov. 28, 2016, 12:24 PM), <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump> [<https://perma.cc/TXT3-PNZ3>].

⁸ Alyxandra Goodwin, *What You Need to Know About Chicago's 'Gang Database' and the Lawsuit From Local Activists*, BLACK YOUTH PROJECT (May 7, 2017), <http://blackyouthproject.com/chicago-gang-database-deportation> [<https://perma.cc/LF4B-4BQB>]; Jillian Jorgensen, *Activists Urge Inspector General to Probe NYPD's Gang Policing Tactics*, N.Y. DAILY NEWS (May 16, 2017, 6:13 PM), <http://www.nydailynews.com/new-york/manhattan/>

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

activists-urge-inspector-general-probe-nypd-gang-databases-article-1.3171323 [https://perma.cc/P5EQ-P97Y].

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.

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

¹⁰ Daryl Khan, *New York City's Gang Database is 99% People of Color, Chief of Detectives Testifies*, JUVENILE JUST. INFO. EXCHANGE (June 14, 2018), <https://jjie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies> [https://perma.cc/TWK6-SXEM]; POLICING IN CHI. RESEARCH GRP. AT THE UNIV. OF ILL. AT CHI., CHICAGO GANG DATABASE: FACTS AND FIGURES (2017), https://docs.google.com/document/d/1Ft_41wtKLU2NVKGSiN2hMHFmHaSRkIS3rNatZVvAnOk/edit [https://perma.cc/5R7S-K99X]; *Chicago Gang Database Targets Black and Latino Men [Infographics]*, MIJENTE (Dec. 4, 2017), <https://mijente.net/2017/12/04/chicago-gang-database-targets-black-latino-men-infographics> [https://perma.cc/QWM2-PCKS]; Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://beta.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> [https://perma.cc/J7N2-57WW].

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.”).

¹² A.C. Thompson, Ali Winston & Darwin Bond Graham, *Racist, Violent, Unpunished: A White Hate Group's Campaign of Menace*, PROPUBLICA (Oct. 19, 2017, 2:01 PM), <https://www.propublica.org/article/white-hate-group-campaign-of-menace-rise-above-movement> [https://perma.cc/6JUS-NZ2D].

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

¹⁴ POLICING IN CHI. RESEARCH GRP. AT THE UNIV. OF ILL. AT CHI., CHICAGO GANG DATABASE: FACTS AND FIGURES (2017), https://docs.google.com/document/d/1Ft_41wtKLU2NVKGSiN2hMHFmHaSRkIS3rNatZVvAnOk/edit [<https://perma.cc/QF3V-2ZLY>]; MIJENTE, *supra* note 10.

¹⁵ Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, JACKSON FREE PRESS (Mar. 29, 2018, 1:32 PM), <http://www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan> [<https://perma.cc/65VH-Y557>].

¹⁶ JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INSTIT., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 13–14 (2007), http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf [<https://perma.cc/27YE-UK7F>]; Truman, *supra* note 4, at 688 ("Some states . . . have made substantial and troubling departures from the California model.").

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*).

¹⁹ *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

²⁰ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding that an early gang policing statute violated the vagueness doctrine).

²¹ Strosnider, *supra* note 4.

other²²—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.²³ 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,²⁴ and which is a difficult burden for plaintiffs to meet.²⁵

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.²⁶ 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.²⁷ 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.²⁸ At least one

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).

²⁸ Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115 (2005). Additionally, some legal scholars have persuasively argued that introducing evidence of gang membership at bail hearings violates a defendant’s constitutional right to a fair trial. Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027 (2014).

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.

²⁹ Fair and Accurate Gang Database Act of 2017, A.B. 90, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017); Amul Kalia, *Victory! California Just Reformed Its Gang Databases and Made Them More Accountable*, ELECTRONIC FRONTIER FOUND. (Oct. 12, 2017), <https://www EFF.ORG/deeplinks/2017/10/victory-california-just-reformed-its-gang-databases-and-made-them-more-accountable> [<https://perma.cc/MHY7-5YMZ>] (celebrating how California’s A.B. 90 bill will reform California’s gang databases by requiring that people be notified and allowed to challenge inclusion after they are added).

³⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (appeal dismissed by Second Circuit pursuant to joint stipulation by the parties).

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.³¹ NYC had virtually no gang-specific police units and no laws targeting gang activity.³² NYC primarily targeted gangs with community programs such as youth services, recreation, and employment.³³ 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.³⁴ NYC implemented gang policing in earnest only after *Morales*, but it did not do so in response to an increase in gang-related crime.³⁵ 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.³⁶ 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.³⁷ 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*³⁸ was certified—almost guaranteeing the practice would be held unlawful.³⁹ 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.⁴⁰ 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.

³⁸ *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (granting class certification in May, 2012).

³⁹ Howell, *supra* note 2, at 10–14.

⁴⁰ *Id.*

a form of policing whose constitutionality had been rigorously tested in other cities post-*Morales*.⁴¹

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.⁴² 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.⁴³ The STEP Act was structured similarly to the federal Racketeer Influenced and Corrupt Organizations Act (RICO Act),⁴⁴ and much of contemporary, post-*Morales* gang policing has in turn been patterned on the STEP Act.⁴⁵ 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,⁴⁶ and gang crime increased after passage of the STEP Act.⁴⁷

Before *Morales*, Chicago's gang policing fell somewhere between L.A.'s and NYC's lack thereof.⁴⁸ L.A.'s laws and practices facially targeted alleged gang members only⁴⁹ (though there is ample evidence that many non-gang members were arrested under the laws and police practices as well).⁵⁰ By contrast, Chicago's gang laws and police practices targeting gangs facially applied to both alleged gang members and non-gang members.⁵¹ Here, although arguably not as intense as L.A.'s gang

⁴¹ See discussion *infra* Section I.D.

⁴² John M. Glionna, *A Murder that Woke Up L.A.*, L.A. TIMES (Jan. 30, 1998), <http://articles.latimes.com/1998/jan/30/news/mn-13746> [<https://perma.cc/GP2Z-JUKE>].

⁴³ CAL. PENAL CODE §§ 186.20–186.33 (West 2018).

⁴⁴ Truman, *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.”).

⁴⁵ Strosnider, *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.”).

⁴⁶ PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 40 (1995).

⁴⁷ Sara Lynn Van Hofwegen, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 689 (2009) (“[G]ang membership and activity has actually increased in the years since the STEP Act was passed.”).

⁴⁸ Strosnider, *supra* note 4.

⁴⁹ CAL. PENAL CODE §§ 186.20–186.33 (West 2018).

⁵⁰ CHEVIGNY, *supra* note 46, at 40.

⁵¹ *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.”).

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).

⁵³ *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015); *Morales*, 527 U.S. at 56–57; *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

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.⁵⁹ Even through *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.⁶⁰ Critically, the *Morales* majority held otherwise.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.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.⁶³ This also firmly established that arbitrary enforcement is an independent concern of the vagueness doctrine.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 vague⁶⁵ and (2) under- and over-inclusiveness are strong evidence of unconstitutional vagueness.⁶⁶ As to the first, the Court has held that laws that impinge on other constitutionally-protected activity must be even less vague than

⁵⁹ Strosnider, *supra* note 4, at 113 (stating that the second prong was long a “silent partner”).

⁶⁰ *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.”).

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

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ In *Morales*, a plurality held that loitering was a constitutional right. 527 U.S. at 53 (plurality opinion). But the majority did not. *Id.* at 60 (majority opinion). And the ordinance was still struck down by the majority. *Id.* at 64. In dissent, Scalia noted that “there is not the slightest evidence for the existence of a genuine constitutional right to loiter.” *Id.* at 84 (Scalia, J., dissenting); *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”).

⁶⁶ *Morales*, 527 U.S. at 62 (majority opinion); *Kolender*, 461 U.S. at 358.

those that do not,⁶⁷ but laws that do not impinge on independent constitutional rights can nevertheless violate the vagueness doctrine.⁶⁸

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.⁶⁹ 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.⁷⁰ Decisions striking down laws for unconstitutional vagueness often encourage lawmakers to draft laws to restrict the discretion of law enforcement officers.⁷¹ 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.⁷² 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.⁷³

Finally, a history of the vagueness doctrine and gang policing would not be complete without noting that the two have long been intertwined.⁷⁴ One of the Supreme Court’s earliest vagueness doctrine cases related to one of the country’s first gang policing measures.⁷⁵ 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.⁷⁶

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.

⁷⁴ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding that an early gang policing statute violated the vagueness doctrine).

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,

C. Morales

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.⁷⁷ The Chicago ordinance at issue in *Morales* made it a crime to not follow a police order to disperse from "gang loitering."⁷⁸ 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.⁷⁹ The ordinance instructed the police to determine who was a gang member.⁸⁰ A subsequent police department directive gave officers criteria for determining who was a criminal street gang member,⁸¹ including personal knowledge, witness testimony, admission, or the display of distinctive colors, tattoos, signs, or other markings.⁸² 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.⁸³

The city of Chicago argued that the arrest was ultimately for failing to disperse, a crime that was constitutionally valid to punish.⁸⁴ But the Court held that the statute effectively criminalized the conduct that led

criminalizing being in a gang would also arguably violate the constitutional prohibition against criminalizing a status rather than an act. For example, the Court has held that it is unconstitutional to criminalize the status of being an addict rather than the act of using drugs. *Robinson v. California*, 370 U.S. 660, 666–68 (1962).

⁷⁷ Strosnider, *supra* note 4, at 102.

⁷⁸ *City of Chicago v. Morales*, 527 U.S. 41, 47–48 (1999). The ordinance stated, in pertinent part:

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Id. at 47 n.2.

⁷⁹ *Id.* at 47.

⁸⁰ *Id.* at 47 & n.2.

⁸¹ *Id.* at 48; *id.* at 92 (Scalia, J., dissenting).

⁸² *Morales*, 527 U.S. at 92.

⁸³ *Id.* at 47 (majority opinion).

⁸⁴ *Id.* at 61.

to the dispersal order—gang loitering—and that determining what constituted loitering was left entirely to police discretion.⁸⁵ Although much has been made of the fractured decision in *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;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;⁸⁷ and the dissents would have held that the law did not violate either prong of the vagueness doctrine.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.⁸⁹

Critical to the application of *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.”⁹⁰ Second, the majority said that the ordinance would “possibly” be constitutional if it applied only to criminal gang members.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.⁹² But in dissent, Justice Scalia said that this would be patently unconstitutional:

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.”).

⁸⁶ *Id.* at 60.

⁸⁷ *Id.* at 56–60 (plurality opinion).

⁸⁸ *Id.* at 73–98 (Scalia, J., dissenting); *id.* at 98–115 (Thomas, J., dissenting).

⁸⁹ See sources cited *supra* note 2.

⁹⁰ *Morales*, 527 U.S. at 62 (majority opinion) (“[The 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.”).

⁹¹ *Id.*

⁹² *Id.* at 68 (O’Connor, J., concurring).

[I]f “remaining in once 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).

⁹⁴ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding that an early gang policing statute violated the vagueness doctrine).

⁹⁵ *Id.* at 457–58 (1939).

⁹⁶ *Morales*, 527 U.S. at 62 (majority opinion).

⁹⁷ *Lanzetta*, 306 U.S. at 457–58.

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

¹⁰² *NAACP Anne Arundel Cty. Branch v. City of Annapolis*, 133 F. Supp. 2d 795, 808 (D. Md. 2001); *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1244–45 (D.N.M. 2000); *Johnson v. Athens-Clarke Cty.*, 529 S.E.2d 613, 616–17 (Ga. 2000).

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.¹⁰⁹ However, some have argued—including Justice Scalia in dissent in *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,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.¹¹¹

E. *Vagueness Doctrine and Equal Protection*

Long before *Morales*, Justice Thurgood Marshall made it clear that one purpose of the vagueness doctrine is to prevent discriminatory enforcement.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 *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”¹¹³ At least one scholar has argued that a fear of such discriminatory enforcement lay behind the *Morales* decision itself, noting that the arresting officer said he was suspicious of the Hispanic teens for being present in a white neighborhood.¹¹⁴ And in applying *Morales*, lower courts have been extremely explicit about this concern.¹¹⁵

¹⁰⁹ *NAACP Anne Arundel*, 133 F. Supp. 2d 795; *Hodge*, 88 F. Supp. 2d 1234; *Johnson*, 529 S.E.2d at 616–17.

¹¹⁰ *City of Chicago v. Morales*, 527 U.S. 41, 77, 97 (1999) (Scalia, J., dissenting).

¹¹¹ Strosnider, *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 . . .).

¹¹² *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

¹¹³ *Id.*

¹¹⁴ Strosnider, *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.”).

¹¹⁵ *See, e.g., 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.¹¹⁶ Proving an equal protection violation has been notoriously difficult since *Washington v. Davis*¹¹⁷ and *Arlington Heights*.¹¹⁸ *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,¹¹⁹ 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.”¹²⁰ Disproportionate impact may still, however, be considered evidence of discriminatory intent in a totality of the circumstances analysis.¹²¹ 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.”).

¹¹⁶ See discussion *supra* Section I.D; see also Ashlee Riopka, *Equal Protection Falling Through the Crack: A Critique of the Crack-to-Powder Sentencing Disparity*, 6 ALA. C.R. & C.L. L. REV. 121, 131 (2015).

¹¹⁷ 426 U.S. 229 (1976).

¹¹⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); Jeremy Linden, Student Article, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?*, 16 N.Y.U. ENVTL. L.J. 170, 181–82 (2008) (“Intentional discrimination is difficult to prove. Plaintiffs will often struggle to uncover hard evidence to back such a claim. This severely limits environmental justice plaintiffs’ abilities to bring constitutional claims, denying them a claim that could potentially carry far-ranging results.”).

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).

¹²³ *United States v. Armstrong*, 517 U.S. 456 (1996).

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.

¹²⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (appeal dismissed by Second Circuit pursuant to joint stipulation by the parties).

1. Discriminatory Intent—The *Floyd* Innovation

NYC's stop-and-frisk program disproportionately impacted people of color.¹²⁸ Eighty-three percent of those stopped-and-frisked were Black or Latino.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.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.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."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 *Washington v. Davis*.¹³³

¹²⁸ *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.").

¹²⁹ *Id.*

¹³⁰ *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." *Id.* at 662.

¹³¹ *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.").

¹³² *Id.* at 561.

¹³³ *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).

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 challenged¹³⁸ 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.”).

¹³⁵ *Id.*; *City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (majority opinion).

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*.”).

¹⁴³ Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, 25 *TOURO L. REV.* 829 (2009).

establish that non-statutory policies or customs carry the force of law under *Monell*.¹⁴⁴ 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.¹⁴⁵ 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.”¹⁴⁶

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*.¹⁴⁷ 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.¹⁴⁸

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*.¹⁴⁹ 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.¹⁵⁰

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.”).

¹⁴⁸ *Floyd*, 959 F. Supp. 2d at 658–60.

¹⁴⁹ *Connick v. Thompson*, 563 U.S. 51 (2011).

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.¹⁵¹ 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.”¹⁵² 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.¹⁵³ 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.¹⁵⁴

¹⁵¹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”).

¹⁵² *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

¹⁵³ *Supra* notes 2–6 and accompanying text.

¹⁵⁴ *Jacobs, supra* note 2.

The legal footing for these gang databases is far from uniform.¹⁵⁵ Only twelve states have given law enforcement a statutory mandate to use gang databases.¹⁵⁶ Some give minimal guidance about what criteria should be used to add people, while others leave it to the complete discretion of the police.¹⁵⁷ 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.¹⁵⁸ For example, the largest police department in the country—the NYPD—has no statutory mandate to maintain its gang database.¹⁵⁹ Further, only one state has any statutory mechanism to challenge being on a gang database or to be removed from a gang database.¹⁶⁰ In most jurisdictions, the public cannot even find out if they are included on gang databases.¹⁶¹ 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.¹⁶² The NYPD denied his request, claiming that telling him whether he is on the gang database would “reveal criminal investigative techniques or procedures.”¹⁶³ In some states, everything about gang databases is specifically exempt from freedom of information requests.¹⁶⁴

¹⁵⁵ *Gang-Related Legislation by Subject: Gang Databases*, NAT’L GANG CTR., <https://www.nationalgangcenter.gov/Legislation/Databases> [<https://perma.cc/8B3E-4CWJ>] (last visited Sept. 19, 2018).

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).

¹⁶¹ Howell, *supra* note 2, at 15; Josmar Trujillo, *Are you in the NYPD Gang Database? Am I?*, AM N.Y. (June 6, 2018, 5:17 PM), <https://www.amny.com/opinion/are-you-in-the-nypd-gang-database-am-i-1.19010551> [<https://perma.cc/24ZA-D76P>].

¹⁶² Trujillo, *supra* note 161.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., WASH. REV. CODE § 43.43.762(3) (2018); Letter from James L. Coggeshall, Assistant Att’y Gen., Off. Tex. Att’y Gen., to Arlington Police Dep’t, No. OR2018-00357 (Jan. 5, 2018), <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2018/pdf/or201800357.pdf> [<https://perma.cc/RVE3-2JNA>]; see also Yvette Cabrera, *New ICE Tactic Raises Questions About Due Process*, THINKPROGRESS (Oct. 6, 2017, 8:27 AM), <https://thinkprogress.org/ice-targets-gangs-6775356473a8> [<https://perma.cc/4TNY-CAJK>].

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.¹⁶⁵ These criteria are non-criminal, and at least some fall within the bounds of constitutionally protected activity.¹⁶⁶ Police departments openly admit that they use gang databases to track alleged gang members even before there is suspicion of criminal activity.¹⁶⁷ 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.”¹⁶⁸ Detective Shea replied that “[i]t is possible.”¹⁶⁹ 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.¹⁷⁰

This extreme discretion has led to extreme racial disparity.¹⁷¹ 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,¹⁷² 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,’”¹⁷³ are not tracked in the NYPD’s gang database at all.¹⁷⁴ 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—independent of conviction, arrest, or even a criminal investigation.”).

¹⁶⁸ Jake Offenhartz, *The NYPD’s Expanding Gang Database is Latest Form of Stop & Frisk, Advocates Say*, GOTHAMIST (June 13, 2018, 3:00 PM), http://gothamist.com/2018/06/13/nypd_gang_database_nyc.php [<https://perma.cc/K4AN-RLAR>].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See sources cited *supra* note 10 and accompanying text.

¹⁷² Khan, *supra* note 10.

¹⁷³ Jane Coaston, *The Proud Boys, The Bizarre Far-Right Street Fighters Behind Violence in New York, Explained*, VOX (Oct 15, 2018, 5:10 PM), <https://www.vox.com/2018/10/15/17978358/proud-boys-gavin-mcinnis-manchattan-gop-violence> [<https://perma.cc/Z8VW-DL6U>].

¹⁷⁴ Rosa Goldensohn (@RosaGoldensohn), TWITTER (Oct. 15, 2018 10:18 PM), <https://twitter.com/RosaGoldensohn/status/1052036066277056513> [<https://perma.cc/H63P-F45J>].

charge,¹⁷⁵ and the gang database includes at least 33,000 juveniles, over 300 of whom are twelve or younger,¹⁷⁶ and 163 people over the age of seventy,¹⁷⁷ including political activists such as Black Panthers.¹⁷⁸ 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.¹⁷⁹ Police records indicated that twenty-eight of these children under one year old admitted to being gang members.¹⁸⁰ 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.¹⁸¹ 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.¹⁸²

Contrary to this vast racial disparity in gang databases, studies have consistently found that at least twenty-five percent of gang members are white,¹⁸³ that white people commit a majority of gang-related murders (fifty-three percent),¹⁸⁴ and that white people commit the vast majority of violent crimes, in general.¹⁸⁵ Recent investigations have even found

¹⁷⁵ POLICING IN CHI. RESEARCH GRP., *supra* note 14; MIJENTE, *supra* note 10.

¹⁷⁶ Annie Sweeney & Paige Fry, *Nearly 33,000 Juveniles Arrested Over Last Two Decades Labeled as Gang Members by Chicago Police*, CHICAGO TRIBUNE (Aug. 9, 2018, 5:00 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html> [<https://perma.cc/W76V-RUPD>].

¹⁷⁷ Mick Dumke, *Chicago's Gang Database Is Full of Errors—And Records We Have Prove It*, PROPUBLICA (Apr. 19, 2018, 4:00 AM), <https://www.propublica.org/article/politic-il-insider-chicago-gang-database> [<https://perma.cc/CB3Z-PS9E>].

¹⁷⁸ *Id.*

¹⁷⁹ Winton, *supra* note 10.

¹⁸⁰ *Id.*

¹⁸¹ Greg Howard, *A Lamentation for a Life Cut Short*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/books/review/cuz-danielle-allen-michael-biography.html>.

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.").

¹⁸⁴ Kerry Coddett, *White on White Crime: An Unspoken Tragedy*, HUFFPOST (Mar. 2, 2015, 12:17 PM), https://www.huffingtonpost.com/kerry-coddett/white-on-white-crime-an-u_b_6771878 [<https://perma.cc/QEW4-QY6A>] (citing U.S. Department of Justice statistics regarding gang-related murders between 1980 and 2008).

¹⁸⁵ *Id.*

that white supremacist gangs, openly organized to commit violent crimes, still attract little attention from law enforcement.¹⁸⁶

Audits, lawsuits, and studies have also revealed that many people are erroneously included in gang databases.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.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.¹⁸⁹ Public defenders have complained that police have absurdly listed their clients as being in two or more competing gangs,¹⁹⁰ and in at least one such case, police ultimately admitted that the person was never in either gang but only

¹⁸⁶ Thompson, Winston & Bond Graham, *supra* note 12.

¹⁸⁷ Jeff Asher, *Gang Stats Aren't Remotely Reliable, But Voters Keep Hearing About Them Anyway*, FIVETHIRTYEIGHT (Nov. 3, 2017, 2:57 PM), <https://fivethirtyeight.com/features/gang-stats-arent-remotely-reliable-but-voters-keep-hearing-about-them-anyway> [<https://perma.cc/6522-2SZZ>]; Jacqueline Serrato, *Chicago Police Admits Gang Database Error that Enabled ICE Raid*, CHI. TRIBUNE (Dec. 6, 2017, 1:31 PM), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html> [<https://perma.cc/H3VT-DXM7>]; Winton, *supra* note 10.

¹⁸⁸ MIJENTE, *supra* note 10; *see, e.g.*, Nick Rummell, *Groups Demand to See Criteria for NYPD Gang Database*, COURTHOUSE NEWS SERV. (Aug. 8, 2018), <https://www.courthousenews.com/groups-demand-to-see-criteria-for-nypd-gang-database> [<https://perma.cc/KAD7-2C8K>]; Annie Sweeney, *Lawsuit Alleges Chicago Police Department's Massive Gang Database Discriminatory, Inaccurate*, CHI. TRIB. (June 20, 2018, 5:45 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-lawsuit-20180619-story.html>; Dan McGowan, *With Providence Police Reform Ordinance Coming, 'Investigatory Powers' of Citizen Review Board Questioned*, WPRI (Dec. 6, 2017, 1:22 PM), <http://wpri.com/2017/12/06/with-providence-police-reform-ordinance-coming-jan-1-investigatory-powers-of-citizen-review-board-questioned1> [<https://perma.cc/9UYN-KS5W>]; Madina Toure, *Activists Call on NYPD Inspector General to Probe Department's Gang-Busting Methods*, OBSERVER (May 16, 2017, 4:41 PM), <http://observer.com/2017/05/black-lives-matter-latino-nypd-inspector-general-philip-eure-gang-busting-rico> [<https://perma.cc/2PT5-UVAR>]; Winton, *supra* note 10.

¹⁸⁹ *See, e.g.*, Josmar Trujillo, *Probe NYPD Gang Tactics*, AM N.Y. (Sept. 17, 2018, 6:00 AM), <https://www.amny.com/opinion/probe-nypd-gang-tactics-1.21008637> [<https://perma.cc/Y2DS-KGLB>].

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.¹⁹¹ Even former police officers have begun raising alarms that gang databases are “racist and error-ridden.”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.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,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.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.¹⁹⁶ Being included on a gang database can immediately make people ineligible for jobs¹⁹⁷ and housing,¹⁹⁸ subject to

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.”).

¹⁹² Larry Smith, *Former Baltimore Police Officer Unloads on the Department’s Gang Database*, THE APPEAL (July 23, 2018), <https://theappeal.org/expert-crime-registries-turn-people-into-pariahs-with-very-little-to-lose> [<https://perma.cc/LQ2P-PH32>].

¹⁹³ See, e.g., Dean Meminger, *Activists Question NYPD Practice of Arresting Large Number of Gang Members at One Time*, NY1 (May 17, 2017, 12:23 AM), <http://www.ny1.com/nyc/all-boroughs/criminal-justice/2017/05/16/activists-question-nypd-practice-of-arresting-large-numbers-of-gang-members-at-one-time.html> [<https://perma.cc/2CE2-SQ8N>].

¹⁹⁴ Nick Pinto, *NYPD Disputes Gang Database Numbers—But Its Math Doesn’t Add Up*, INTERCEPT (June 14, 2018, 2:51 PM), <https://theintercept.com/2018/06/14/nypd-gang-database-city-council-dermot-shea> [<https://perma.cc/WUB6-FAYK>].

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.”).

¹⁹⁶ See sources cited *supra* note 28 and accompanying text.

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,¹⁹⁹ and more likely to get deported,²⁰⁰ raising independent due process concerns.²⁰¹ 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.²⁰² The federal government is pouring money into states for them to expand their own databases.²⁰³ In addition, ICE maintains its own gang database, the contents of which it claims are exempt from public review.²⁰⁴ At least three federal judges have halted

of deportation.”); Marcella Raymond & Associated Press, *Chicago Gang Database is Full of Errors, Lawsuit Says*, WGN9 (June 19, 2018), <https://wgntv.com/2018/06/19/chicago-gang-database-is-full-of-errors-lawsuit-says> [<https://perma.cc/D69W-PV3C>] (“Those listed as gang members have a harder time landing jobs . . . [Donta Lucas] couldn’t get a concealed-carry permit he needed in 2016 for a security job because he was in the database.”); Ailsa Chang, *During Investigation, ProPublica Finds Issues with Chicago Gang Database*, NPR (Apr. 23, 2018, 4:46 PM), <https://www.npr.org/2018/04/23/605045031/during-investigation-propublica-finds-issues-with-chicago-gang-database>, [<https://perma.cc/QT8X-ELED>]; Maxine Bernstein, *Portland Police to Halt, Purge All Gang Designations*, OREGONIAN (Sept. 9, 2017), http://www.oregonlive.com/portland/index.ssf/2017/09/portland_police_to_halt_purge.html [<https://perma.cc/2H9N-CNHD>] (“The Police Bureau recognizes that the gang designations have led to ‘unintended consequences’ and served as lifelong barriers for those who have shunned the gang lifestyle and tried to get jobs, said Acting Tactical Operations Capt. Andy Shearer.”); Jacobs, *supra* note 2, at 706 (“Employers argue that screening gang members from the job applicant pool contributes to a reliable and competent workforce that will best promote the interests of the business and its customers and employees.”); Tamar Manasseh, Opinion, *To the Chicago Police, Any Black Kid is in a Gang*, N.Y. TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/opinion/chicago-police-black-kids-gangs.html?mtrref=undefined&assetType=opinion> [<https://perma.cc/Y496-GYHW>].

¹⁹⁸ Rummell, *supra* note 188; Chang, *supra* note 197.

¹⁹⁹ Rummell, *supra* note 188.

²⁰⁰ *Id.*

²⁰¹ See sources cited *supra* note 28.

²⁰² George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases With Immigrant Data*, NPR (May 12, 2017, 1:44 PM), <https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d>.

²⁰³ See, e.g., Robin Kemp, *Clayton Gang Members Being Tracked Statewide*, CLAYTON NEWS DAILY (Oct. 18, 2018), https://www.news-daily.com/features/clayton-gang-members-being-tracked-statewide/article_8d3b9c2f-d1ee-5f00-9c54-3684e020f1f6.html [<https://perma.cc/3Y4M-JVQX>] (“[T]he Georgia Gang Intelligence Platform . . . has just gotten a \$2.6 million infusion of federal funds.”).

²⁰⁴ Winston, *supra* note 7.

deportation proceedings premised on alleged gang membership, holding that ICE was asserting gang membership based on no evidence.²⁰⁵ 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.”²⁰⁶ 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.²⁰⁷ Both federal and state governments have been sued over their gang databases being used in immigration proceedings.²⁰⁸

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,²⁰⁹ being on a gang database is used to justify heightened surveillance, which leads to inclusion in sweeping conspiracy and RICO indictments.²¹⁰ 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).

²⁰⁷ LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 3 (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf [<https://perma.cc/K79D-4TKC>].

²⁰⁸ See sources cited *supra* note 205; see also Shannon Dooling, *ACLU Sues Boston Police for Access to Gang Database*, WBUR NEWS (Nov. 15, 2018), <http://www.wbur.org/news/2018/11/15/aclu-boston-police-gang-database-lawsuit> [<https://perma.cc/2R7N-FA78>].

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,²¹¹ then adding their friends to gang databases based on photos and interactions with people’s posts.²¹² The NYPD has admitted that communicating with the wrong person on social media is enough to get someone placed on a gang database²¹³ and that it uses the leads in its gang database to build criminal cases.²¹⁴ 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,²¹⁵ some of them crimes of attempt,²¹⁶ and some of them crimes for which people are already serving time.²¹⁷ 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.²¹⁸ In gang conspiracy indictments, social media posts are often described as overt acts in furtherance of conspiracy to commit murder.²¹⁹ 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.

²¹⁴ Dermot Shea, *Criminal Group Database is Vital Tool to Controlling Gang Violence*, N.Y. DAILY NEWS (June 12, 2018, 12:00 AM), <https://www.nydailynews.com/opinion/ny-oped-criminal-group-database-20180612-story.html> [<https://perma.cc/UR4H-UACZ>].

²¹⁵ Speri, *supra* note 4.

²¹⁶ Shayna Jacobs, *Harlem Gang Members Charged in Connection with Slay*, N.Y. DAILY NEWS (May 18, 2017, 9:07 PM), <http://www.nydailynews.com/new-york/manhattan/harlem-gang-members-charged-connection-slay-article-1.3177451> [<https://perma.cc/87HG-MPDL>].

²¹⁷ Simon Davis-Cohen, *Massive Bronx Gang Prosecution Raises Fairness Questions*, CITY LIMITS (Jan. 16, 2017), <https://citylimits.org/2017/01/16/massive-bronx-gang-prosecution-raises-fairness-questions> [<https://perma.cc/U232-6XT9>] (“One murder being tacked to the gang as a whole is the killing of a 92-year-old woman by a stray bullet, even though the perpetrator already plead guilty and was doing time in state prison.”); Stacey Sager, *Harlem Housing Complex Raids Lead to More than 100 Gang Indictments*, ABC (June 4, 2014), <http://abc7ny.com/news/more-than-100-gang-indictments-in-harlem-housing-complex-raids/92910> [<https://perma.cc/884E-G6NC>] (“Officials say 103 people were indicted by prosecutors, 41 of whom are already in jail on other charges.”); Speri, *supra* note 4.

²¹⁸ Speri, *supra* note 4.

²¹⁹ See, e.g., Indictment, *People of New York v. Terrance Abdur-Rahman, et al.*, <http://docplayer.net/14709670-The-people-of-the-state-of-new-york-against.html> [<https://perma.cc/8W2Q-XAMR>].

(among 12 other charges), the first two “overt acts” listed in the indictment were posting “Fuck Grant” and “Money Ave Up” on Facebook.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.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.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.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.²²⁴ The coverage is predictably sensationalist. The press is tipped off before the raids take place and are thus present to document them.²²⁵ The arrestees’ faces are plastered across newspapers without being blurred.²²⁶ Headlines declare them criminal gang members without the word “alleged.”²²⁷ The stories typically list the gratuitous charges secured by secret indictment before the raids, such as multiple counts of

²²⁰ *Id.* ¶¶ 1–2.

²²¹ Speri, *supra* note 4.

²²² Ali Winston, *Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members*, INTERCEPT (Feb. 17, 2017, 7:12 PM), <https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members> [<https://perma.cc/TF87-E38Y>].

²²³ *Id.*

²²⁴ See sources cited *supra* note 5.

²²⁵ Adam Johnson, *Media Convicts Scores of ‘Gang Members’ on NYPD’s Say-So—No Trials Necessary*, FAIRNESS & ACCURACY IN REPORTING (May 2, 2016), <http://fair.org/home/media-convicts-scores-of-gang-members-on-nypds-say-so-no-trials-necessary> [<https://perma.cc/CCW3-LA8H>].

²²⁶ *Id.*

²²⁷ *Id.*

homicide,²²⁸ even though the majority of the acts alleged are for social media posts that allegedly furthered the conspiracy.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.²³⁰ Innocent bystanders, including the elderly and children as young as one year old, report extreme emotional distress from the incidents.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.²³² Yet people report being evicted and having their families torn apart as a result of being erroneously targeted.²³³

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

4. Gang Prosecutions and Deportation

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

²²⁸ Mirela Iverac, *Takedown in the Bronx*, WNYC (Aug. 6, 2018), <https://www.wnyc.org/story/takedown-in-the-bronx>.

²²⁹ See, e.g., Indictment, *supra* note 219.

²³⁰ Davis-Cohen, *supra* note 5.

²³¹ *Id.*

²³² Ashoka Jegroo, *With Nighttime Raids, Police Wage War on Black and Brown Families in New York*, TRUTHOUT (Mar. 31, 2017), <https://truthout.org/articles/with-nighttime-raids-police-wage-war-on-black-and-brown-families-in-new-york> [<https://perma.cc/6799-VA4U>].

²³³ *Id.*

²³⁴ Tessa Berenson, *Immigration Raids Are Sweeping Up More People Who Weren't Targets*, TIME (Aug. 9, 2017), <http://time.com/4893074/immigration-raids-undocumented-targets> [<https://perma.cc/3HXX-F2DA>].

²³⁵ Jennifer Medina & Miriam Jordan, *A Broader Sweep*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/interactive/2017/07/21/us/immigration-enforcement-california-trump.html>.

²³⁶ *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>].

²³⁷ Cannell, *supra* note 28, at 1039–44; Noah Hurowitz, *NYPD's Secret Gang Database Filled with 'Garbage,' Advocates Say*, DNAINFO (Oct. 19, 2017, 11:34 AM), <https://www.dnainfo.com/new-york/20171019/civic-center/nypd-gang-database-legal-aid-brooklyn-defenders-foil>.

motion practice.²³⁸ Indictments for seemingly serious crimes like conspiracy to commit attempted murder give way to superseding indictments for crimes such as conspiracy to possess marijuana.²³⁹ Although federal prosecutors work with local law enforcement,²⁴⁰ 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.²⁴¹ One young man reportedly spent nearly two years in solitary confinement in federal facilities before his charges were dropped to marijuana-related offenses.²⁴²

Some defendants fight their charges to the bitter end. However, many take pleas and get “time served,”²⁴³ meaning they are sentenced to the amount of time they spent detained before trial.²⁴⁴ But even “time served” pre-trial in some large indictments can be as long as two

request [<https://perma.cc/DD84-YQEY>]; Dean Meminger, *Groups Want NYPD and Ice to End Gang Databases*, NY1 (Oct. 18, 2017, 11:36 PM), <http://www.ny1.com/nyc/all-boroughs/news/2017/10/18/groups-want-nypd-to-ditch-gang-database-> [<https://perma.cc/ZNV8-VJLN>]; Rocco Parascandola, *Legal Aid Society Questions NYPD's Criteria for Classifying People as Gang Members*, N.Y. DAILY NEWS (Oct. 19, 2017, 9:08 AM), <http://www.nydailynews.com/new-york/legal-aid-society-questions-nypd-gang-member-database-criteria-article-1.3572270> [<https://perma.cc/RD5M-GGK9>].

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).

²³⁹ Superseding Misdemeanor Information as to Defendant Jonathan Cummings, *United States v. Cummings*, No. 1:16-cr-00212 (S.D.N.Y. Mar. 16, 2016), ECF No. 899.

²⁴⁰ Press Release, Department of Justice, U.S. Att’y’s Office for the S. Dist. of N.Y., 120 Members and Associates of Two Rival Street Gangs in the Bronx Charged in Federal Court with Racketeering, Narcotics, and Firearms Offenses (Apr. 27, 2016), <https://www.justice.gov/usao-sdny/pr/120-members-and-associates-two-rival-street-gangs-bronx-charged-federal-court> [<https://perma.cc/LE5K-HTYV>].

²⁴¹ 21 U.S.C. § 841 (2018).

²⁴² Josmar Trujillo, *What's Wrong with the NYPD's Gang Database: It's Overbroad and Stigmatizing*, N.Y. DAILY NEWS (June 13, 2018, 8:55 PM), <https://www.nydailynews.com/opinion/ny-oped-whats-wrong-with-nypd-database-20180613-story.html> [<https://perma.cc/4EFK-FPYM>].

²⁴³ See, e.g., Judgment, *United States v. Walker*, No. 1:16-cr-00212 (S.D.N.Y. Dec. 21, 2016), ECF No. 778; *United States v. Moncrieffe*, No. 1:16-cr-00212 (S.D.N.Y. Dec. 21, 2016), ECF No. 779.

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.²⁴⁵ Prosecutors report that almost everyone originally indicted pleads guilty or is convicted.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.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.²⁴⁸

Those convicted can face sentencing enhancement for being included in the gang databases.²⁴⁹ Once sentenced, they can be sent to higher security prisons²⁵⁰ and are less eligible for parole because of their alleged gang membership.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.²⁵²

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

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

²⁴⁶ Dean Meminger, *NYPD Credits Reduction in NYC Murders to Gang Takedowns*, NY1 (Nov. 8, 2017, 6:00 AM), <http://www.ny1.com/nyc/bronx/criminal-justice/2017/11/08/nypd-credits-reduction-in-nyc-murders-to-gang-takedowns> [https://perma.cc/2P65-XEU4] (including interview with federal prosecutor).

²⁴⁷ See *id.*

²⁴⁸ *Id.*

²⁴⁹ *Gang-Related Legislation: Enhanced Penalties-Sentencing*, NAT'L GANG CTR., <https://www.nationalgangcenter.gov/Legislation/Enhanced-Penalties-Sentencing> [https://perma.cc/PH7B-AU3H] (last visited Sept. 20, 2018).

²⁵⁰ Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1117-18 (1995).

²⁵¹ See, e.g., *Parole / Mandatory Supervision Information*, TEX. BOARD PARDONS & PAROLES, http://www.tdcj.state.tx.us/bpp/what_is_parole/reasons.htm [https://perma.cc/4CG8-DCAG] (last visited Oct. 5, 2018); The Law Office of Greg Tsioros, *How the Texas Parole Board Makes Decisions*, TEX. PAROLE L. (Apr. 25, 2018), <https://txparolelaw.com/texas-parole-board-makes-decision> [https://perma.cc/X5MB-546T].

²⁵² Thomas A. Myers, Note, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285 (2009).

deported based on this allegation alone, and can only appeal to the more limited constitutional protections afforded to non-U.S. citizens.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.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,²⁵⁵ while over sixty percent of Americans

²⁵³ Jeremy Moorehouse, *Due Process Rights in Removal Proceedings: ICE Raids and the True Price of Border Security*, 14 PUB. INT. L. REP. 88 (2008); *Deportation and Gangs*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/deportation-and-gangs> [https://perma.cc/Q7M5-825M] (last visited Sept. 20, 2018).

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.

²⁵⁵ *Supra* notes 172–79.

are white.²⁵⁶ That is far more disproportionate than the NYPD's stop-and-frisk program that was held unconstitutional in *Floyd*.²⁵⁷ 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.²⁵⁸

2. Discriminatory Intent

The NYPD insists that it is adding “the right people” to its gang database, based in part on criminal suspect data,²⁵⁹ which is racially disproportionate.²⁶⁰ NYPD Detective Shea specifically defended the racial disparity of who the NYPD adds to its gang database by citing crime data.²⁶¹ Yet the criteria for adding people to gang databases—including the NYPD's gang database—is non-criminal and subject to extreme police discretion.²⁶² 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.²⁶³

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

²⁵⁶ *QuickFacts*, U.S. CENSUS (July 1, 2017), <https://www.census.gov/quickfacts/fact/table/US/PST045217> [<https://perma.cc/96NF-3S87>].

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.

²⁶⁰ *Floyd*, 959 F. Supp. 2d at 660–61.

²⁶¹ Pinto, *supra* note 194.

²⁶² See sources cited *supra* note 2.

²⁶³ Offenhartz, *supra* note 168.

on non-criminal criteria at the discretion of the police—in that case, “furtive movements.”²⁶⁴

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.²⁶⁵ 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.²⁶⁶

²⁶⁴ *Floyd*, 959 F. Supp. 2d at 561.

²⁶⁵ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

²⁶⁶ *Floyd*, 959 F. Supp. 2d at 660–61.

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.

²⁷¹ See *Gang-Related Legislation by State—Texas*, NAT'L GANG CENTER, <https://www.nationalgangcenter.gov/Legislation/Texas> [<https://perma.cc/5PKN-NJEM>] (last visited July 8, 2018).

used by the police in *Morales*.²⁷² And some lower courts have found these criteria implicate constitutionally protected rights,²⁷³ requiring that courts analyze the practice with stricter scrutiny under both prongs of the vagueness doctrine.²⁷⁴

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.²⁷⁵ If the group did not disperse, the statute required the police to arrest everyone in the group.²⁷⁶ 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,”²⁷⁷ even though the ultimate charge would be for failing to follow a dispersal order,²⁷⁸ and even though the statute required the police to identify an alleged gang member in the group using the police department’s criteria.²⁷⁹

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.²⁸⁰ Even those jurisdictions that grant police the authority to create gang databases by statute give minimal instructions on what

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.²⁸¹ And most police departments use substantially the same criteria, which did not save the statute in *Morales*.²⁸²

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.²⁸³ But the majority said this would only "possibly" save the statute,²⁸⁴ and Scalia's dissent persuasively dispelled this idea,²⁸⁵ consistent with Supreme Court precedent on vagueness and criminalizing gang membership.²⁸⁶

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."²⁸⁷ However, being labeled a gang member is effectively a predicate to gang policing and prosecutions.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰

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.²⁹¹ 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

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.²⁹² The over-inclusion of contemporary gang policing is also stark.²⁹³ Contemporary gang policing has demonstrably captured people who have no criminal record,²⁹⁴ who have disavowed gangs,²⁹⁵ and who were never in gangs to begin with,²⁹⁶ including children younger than one year old, some of whom police claimed admitted to being gang members.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.²⁹⁸ Many police departments are secretive about what criteria are used to add people to gang databases.²⁹⁹ Some states

²⁹² Carimah Townes, *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, *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.

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. *Id.*

²⁹⁴ Winton, *supra* note 10.

²⁹⁵ SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, U.C. IRVINE SCH. OF LAW IMMIGRANT RIGHTS CLINIC, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 10 (2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> [<https://perma.cc/CK57-FXLM>]; Tara García Mathewson, *Out of the Gang, But Still on the Database*, DAILY HERALD (Jan. 9, 2014 4:13 PM), <http://www.dailyherald.com/article/20120109/news/701099947> [<https://perma.cc/CP76-2VGT>].

²⁹⁶ See sources cited *supra* note 187.

²⁹⁷ Winton, *supra* note 10.

²⁹⁸ NAT'L GANG CTR., *supra* note 155.

²⁹⁹ See sources cited *supra* note 164.

even specifically exempt such criteria from public review.³⁰⁰ As this Note has demonstrated, being added to gang databases effectively leads to gang policing and prosecutions,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.³⁰² In addition, many scholars have argued that conspiracy and RICO charges themselves violate the vagueness doctrine.³⁰³ As long ago as 1908, Clarence Darrow—the legendary criminal defense attorney—said that no one’s liberty is safe from conspiracy charges.³⁰⁴ Today, people argue that conspiracy and RICO charges are used to score easy convictions in gang policing.³⁰⁵ These concerns are magnified by the fact that some charges in contemporary gang policing are for conspiracy to commit an *attempted* crime,³⁰⁶ as crimes of attempt rely on a subjective determination that a suspect has taken a “substantial step” toward committing a crime,³⁰⁷ which some have argued allows prosecutors to indict people for acts too attenuated from actually committing a crime.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.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

³⁰⁰ See sources cited *supra* note 164.

³⁰¹ See discussion *supra* Section I.F.

³⁰² See *supra* notes 239–41 and accompanying text.

³⁰³ Jeremy M. Miller, *RICO and Conspiracy Construction: The Mischief of the Economic Model*, 104 COM. L.J. 26, 31 (1999).

³⁰⁴ CLARENCE DARROW, *THE STORY OF MY LIFE* 69 (Da Capo Press, 1996).

³⁰⁵ Speri, *supra* note 4.

³⁰⁶ See discussion *supra* Section I.F.

³⁰⁷ Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 CRIM. L. BULL., no. 4, 2007, art.1.

³⁰⁸ Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL’Y 1, 72 (2005); George P. Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 339 (1980).

³⁰⁹ See text accompanying *supra* note 219.

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 statutes³¹⁰ and to establish municipal liability based on the enforcement of criminal statutes.³¹¹ 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.³¹²

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

³¹⁰ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999).

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*.”).

³¹² See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

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

³¹³ Cf. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

³¹⁴ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

³¹⁵ See discussion *supra* Section II.C.

³¹⁶ BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 107–08 (2017).

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

³²⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

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.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.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 *after* they have been added.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 *Mathews* test, named for the Supreme Court case of *Mathews v. Eldridge*.³²⁹ The *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.³³⁰ *Mathews* itself notes that incarceration is the weightiest potential private interest, and the Court has required that governments give people notice and opportunity *pre*-deprivation for far less weighty interests.³³¹

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

³²⁶ *Id.*

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).

³²⁸ Fair and Accurate Gang Database Act of 2017, A.B. 90, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017).

³²⁹ Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in 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 *Mathews* test to state criminal procedures, holding that under *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." *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. See *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162 (6th Cir. 2017).

³³⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³³¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (termination of school district employees); *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.³³² 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.³³³ 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.³³⁴ Third, the government interest at stake is low because policing has proven counterproductive to curtailing gang violence.³³⁵ 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.³³⁶ Portland's decision was sparked by the racial disparity in its gang database³³⁷ 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.

³³⁴ Brooke Ruth, Claire Trageser & Maureen Cavanaugh, *San Diego Man's Challenge to California Gang Database Fails*, KPBS (Mar. 26, 2018), <https://www.kpbs.org/news/2018/mar/26/challenge-californias-gang-database-fails> [<https://perma.cc/F88X-2UGV>].

³³⁵ Howell, *supra* note 2, at 4.

³³⁶ Josh Saul, *In a First for the Nation, Portland Police End Gang List to Improve Relations with Black and Latinos*, NEWSWEEK (Sept. 15, 2017, 6:40 AM), <http://www.newsweek.com/gang-violence-portland-police-tear-gang-member-list-effort-rebuild-community-665374> [<https://perma.cc/X6SG-7X6J>].

³³⁷ *Id.*

prosecution.³³⁸ 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.³³⁹

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.³⁴⁰ The NYPD contested by arguing that the practice was a cornerstone of its policing.³⁴¹ Indeed, at the height of the practice, the NYPD was stopping-and-frisking more than 684,000 people per year.³⁴² 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.³⁴³ After a federal judge held the practice unconstitutional and ordered the NYPD to cease the practice,³⁴⁴ stops

³³⁸ Stacy M. Brown, *Portland Lawmakers Pass Racial Profiling Bill*, SEATTLE MEDIUM (Aug. 2, 2017, 8:17 AM), <http://seattlemedium.com/portland-lawmakers-pass-racial-profiling-bill> [<https://perma.cc/KB7S-YUFU>].

³³⁹ See, e.g., Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality*, NATION (Apr. 9, 2015), <https://www.thenation.com/article/abolish-police-instead-lets-have-full-social-economic-and-political-equality> [<https://perma.cc/97ZG-TAZ6>].

³⁴⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

³⁴¹ Chris Franciscani & David Ingram, *Justice Department Steps into NYC Stop-and-Frisk Lawsuit*, REUTERS (June 13, 2013, 3:05 PM), <https://www.reuters.com/article/us-usa-newyork-stopandfrisk-idUSBRE95C15X20130613> [<https://perma.cc/HN6F-9TA3>] (“[Then-Police Commissioner] Kelly has called stop-and-frisk the cornerstone of successful policing that has driven crime rates to historic lows.”).

³⁴² Kerry Burke, Rocco Parascandola & Larry McShane, *Exclusive: NYPD's Stop-and-Frisk Drops to Record Low*, N.Y. DAILY NEWS (Dec. 9, 2015), <http://www.nydailynews.com/new-york/nyc-crime/exclusive-nypd-stop-and-frisk-drops-record-article-1.2459465> [<https://perma.cc/9RQL-LUMN>].

³⁴³ Editorial Board, *We Were Wrong: Ending Stop and Frisk Did Not End Stopping Crime*, N.Y. DAILY NEWS (Aug. 8, 2016, 4:10 AM), <http://www.nydailynews.com/opinion/wrong-ending-stop-frisk-not-stopping-crime-article-1.2740157>.

³⁴⁴ *Floyd*, 959 F. Supp. 2d at 667.

fell to about 7,000 per year³⁴⁵ and crime decreased.³⁴⁶ Studies suggest similar reductions in crime where proactive policing is reduced more broadly.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.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.³⁴⁹

Now, the same sources that said crime would soar without stop-and-frisk claim it will spike without gang databases.³⁵⁰ But studies show that gang policing is particularly counterproductive, encourages more gang formation, solidifies gang identities, and increases gang crime.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.³⁵² Even today, across the country, community programs have proven more effective than gang policing at reducing

³⁴⁵ Press Release, N.Y. Civil Liberties Union, Latest Data: Stop-and-Frisk and Crime Both Lowest in Years (Oct. 11, 2016), <https://www.nyclu.org/en/press-releases/latest-data-stop-and-frisk-and-crime-both-lowest-years> [https://perma.cc/L95J-L24R].

³⁴⁶ *Id.*

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

³⁴⁸ Ed Krayewski, *Study: NYPD Slowdown in Petty Law Enforcement Saw Reduction in Major Crimes Complaints*, REASON (Sept. 26, 2017, 2:08 PM), <http://reason.com/blog/2017/09/26/study-finds-nypd-slowdown-in-petty-law-e> [https://perma.cc/UU97-W2FD] (noting major crimes reports fell during and after sharp reductions in proactive policing); Jim Naureckas, *Less Crimefighting, Less Crime? WSJ Avoids the Evidence*, FAIRNESS & ACCURACY IN REPORTING (May 15, 2015), <http://fair.org/home/less-crimefighting-less-crime-wsj-avoids-the-evidence> [https://perma.cc/JA5M-VMC4] (noting that complaints by civilians to the NYPD fell to the lowest level in twelve years, and the number of certain major crimes fell to the lowest levels since the NYPD began keeping reliable records).

³⁴⁹ Sullivan & O’Keeffe, *supra* note 347.

³⁵⁰ Josmar Trujillo, *Papers Insist ‘We Need’ Secret Gang Databases—Just Like We ‘Needed’ Stop & Frisk*, FAIRNESS & ACCURACY IN REPORTING (June 28, 2018), <https://fair.org/home/papers-insist-we-need-secret-gang-databases-just-like-we-needed-stop-frisk> [https://perma.cc/3RTS-E55P].

³⁵¹ Howell, *supra* note 2, at 4.

³⁵² GREENE & PRANIS, *supra* note 16.

gang crime.³⁵³ 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.³⁵⁴ 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.³⁵⁵ Yet community programs are woefully underfunded—their budgets miniscule compared to the resources poured into policing.³⁵⁶

While many decry any reduction in policing,³⁵⁷ 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.³⁵⁸ Even nationally acclaimed gang policing reforms that attempt to incorporate civil services through the police have failed.³⁵⁹ This should come as no surprise, because police departments are ill-equipped to provide civil services outside the criminal justice system.³⁶⁰ Even when providing civil services, if police officers suspect criminal activity,

³⁵³ ALEX S. VITALE, *THE END OF POLICING* 170–75 (2017).

³⁵⁴ *Id.*; GREENE & PRANIS, *supra* note 16, at 16, 23.

³⁵⁵ Howell, *supra* note 2, at 4.

³⁵⁶ THE CTR. FOR POPULAR DEMOCRACY, LAW FOR BLACK LIVES & BLACK YOUTH PROJECT, *FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES* (2017), <https://populardemocracy.app.box.com/v/FreedomtoThrive>.

³⁵⁷ See, e.g., Heather Mac Donald, *The Great Stop-and-Frisk Fraud*, N.Y. DAILY NEWS (May 26, 2013, 4:20 AM), <http://www.nydailynews.com/opinion/great-stop-and-frisk-fraud-article-1.1354173> [<https://perma.cc/M9MB-9P2N>].

³⁵⁸ *The Case for Abolishing Police vs Reform*, PASEDNA CITY C. COURIER (Sept. 29, 2016), <http://www.pcccourier.com/features/the-case-for-abolishing-police-vs-reform.html> [<https://perma.cc/5E7Q-XYBJ>].

³⁵⁹ Maura Ewing, *Philly's Gang Violence Strategy Doesn't Work. Here's Why.*, APPEAL (Dec. 21, 2017), <https://theappeal.org/former-lead-social-worker-says-philly-violence-reduction-strategy-fails-to-deliver-on-promises-a2b8a95df8af> [<https://perma.cc/2S2G-FHUP>].

³⁶⁰ VITALE, *supra* note 353, at 1–30.

they are bound to investigate and, if necessary, arrest,³⁶¹ 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.³⁶² 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.³⁶³ 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 health care, 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.³⁶⁴ The communities advocating for an abolition of gang policing specifically advocate for resources to be reallocated to community programs.³⁶⁵ Diversion programs have already demonstrated the huge amount of resources that can be shifted into community programs from incarceration.³⁶⁶ And now detailed studies have demonstrated how even more money could be effectively shifted to such programs from police department budgets.³⁶⁷ 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

³⁶¹ *Id.*

³⁶² Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says 'We're Asking Cops to Do Too Much in This Country'*, WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing> [<https://perma.cc/RWC5-AUNX>].

³⁶³ Beth Fertig, *NYPD Tells Skeptical Council Members Complaints Drive Marijuana Arrests*, WNYC (Feb. 26, 2018), <https://www.wnyc.org/story/nypd-tells-skeptical-council-members-marijuana-arrests-are-driven-complaints> [<https://perma.cc/52L2-V3JS>].

³⁶⁴ VITALE, *supra* note 353, at 2.

³⁶⁵ Smith, *supra* note 339; MIJENTE, *supra* note 10; PASEDNA CITY C. COURIER, *supra* note 358.

³⁶⁶ *Diversion*, CTR. CT. INNOVATION, <https://www.courtinnovation.org/areas-of-focus/diversion> [<https://perma.cc/HK3Q-AV7R>] (last visited on Sept. 21, 2018).

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.

³⁶⁸ Judge Jack B. Weinstein's Statement of Reasons in *United States v. Rivera* is an excellent example. Statement of Reasons Pursuant to 18 U.S.C. § 3553(2), *United States v. Rivera*, No. 16-CR-323-002 (E.D.N.Y. Dec. 7, 2017), ECF No. 168, <https://images.law.com/contrib/content/uploads/documents/389/13775/12.7.17-Statement-of-Reasons.pdf> [<https://perma.cc/55G8-5W3Q>].