

23 St. Thomas L. Rev. 620

Saint Thomas Law Review
Summer 2011

Criminal Law Issue: Featured Contributors
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FEAR ITSELF: THE IMPACT OF ALLEGATIONS OF GANG AFFILIATION ON PRE-TRIAL DETENTION

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***621 I. INTRODUCTION**

In criminal courts, the statement “the defendant is in a gang” often reduces or eliminates the possibility of release on reasonable bail regardless of the merits of the case, or the severity of charges against a defendant. This is because the allegation that a person is affiliated with a gang evokes fear of senseless violence.² This is the case whether or not the defendant has ever been convicted of a crime, and whether or not the arrest is related to a serious crime or alleged gang activity. Most importantly, this fear is evoked whether or not the defendant is actually a member of a gang. A defendant who would otherwise be released to defend himself, to go to school, to work to support his family, or to demonstrate that incarceration is unnecessary through good conduct will often face bail that will all but insure his pre-trial incarceration if the gang label is affixed to him when the court considers release.

The practice of requesting bail based on an allegation that a defendant is affiliated with a gang is deeply problematic for several reasons. First, the information underlying this claim is based on law enforcement gang databases which include non-gang members and are compiled without any requirement of criminal conduct or actual gang membership.³ Second, imposing high bail leading to pre-trial detention exacerbates existing racial disparities in the criminal justice system because the gang label is affixed predominantly to young men of color, despite the fact that gang researchers estimate that forty percent of gang members

are actually white.⁴ Finally, despite popular myths, most gang members are not involved in drive-bys and organized drug selling. Nonetheless, the basis for the allegation is not tested and defendants who face these allegations are often incarcerated when they would otherwise be released. This occurs because the gang label evokes fear of violence and organized crime.

*622 Despite the impact of allegations of gang affiliation on every phase of the criminal process, the literature on gang affiliation in the criminal justice system is extremely limited⁵ and the impact of alleged gang affiliation on pre-trial detention is non-existent. A number of articles have examined the use of civil injunctions in California to criminalize the presence of alleged gang members in public spaces.⁶ Additionally, a spate of articles were penned during the litigation of Chicago's anti-gang loitering ordinance in the late 1990s.⁷ Generally, however, use of allegations of gang affiliation based on inclusion on gang databases has not been subjected to critical review.⁸

While legal academics have left the intersection of gang policing and the criminal justice system largely unexplored, social scientists and sociologists have long focused on the nature of gangs, the different levels of affiliation, and the difficulty of defining both “gangs” and “membership” in a gang.⁹ Law enforcement's bare allegation that an individual is a member of a gang is often inaccurate and is generally tremendously over-inclusive of young men of color.¹⁰ It is simultaneously substantially under-inclusive of women¹¹ and white men.¹² The divide between the extraordinarily inclusive definition of gang membership employed by police and prosecution and the decidedly more complex and nuanced *623 relationship between youth in neighborhoods dominated by street gangs evidenced in the social science literature is more than an issue of academic interest. An allegation of gang affiliation affects every aspect of a criminal case because it is so prejudicial that it is difficult to get a fair trial.¹³ Moreover, in the majority of jurisdictions, substantial sentence enhancements may be imposed upon conviction of a gang related incident.¹⁴

This article addresses the impact of alleged gang membership at the initial detention/bail determination for three reasons. First, the right to non-excessive bail is guaranteed by the Eighth Amendment.¹⁵ Second, although the impact of trial testimony about gangs presents a number of issues meriting exploration, the vast majority of criminal cases are either dismissed or resolved by plea.¹⁶ This is particularly so when charges are less serious.¹⁷ When misdemeanors or low-level felonies are charged, the incarceration of the defendant on excessive pre-trial bail will alter negotiation dynamics such that a defendant is likely to plead guilty in order to obtain release.¹⁸ Thus, the imposition of high bail may be the only decision based on gang allegations affecting the majority of defendants.

Third, the allegation of gang affiliation is often inaccurate and unrelated to the offense, yet a defendant alleged to have a gang affiliation will often be treated as an extremely violent and dangerous individual.¹⁹ The invocation of gang membership suggests senseless violence, danger to others, and can lead to misguided preventive detention in the form of *624 excessive bail. While there is certainly a very real connection between gangs, delinquency, and violence, any non-law enforcement gang expert (and some law enforcement experts) would distinguish among levels of gang membership.²⁰

Further, evidence suggests “gang databases”²¹ are so wildly over-inclusive that many people in gang databases are not even members of a gang.²² The databases are simultaneously under-inclusive of non-minority gang members and women, and their use exacerbates the over-representation of males of color in the criminal justice system. The reliance on unsupported allegations of association with a gang in determining pre-trial bail conditions may, and often does, overshadow the presumption of innocence.²³

To be sure, the imposition of bail that effectively leads to pre-trial detention is a long-established facet of the criminal justice system.²⁴ The presumption of innocence and the right to remain free until proven guilty has often been honored more in the breach than in reality. Jails across the country are filled with defendants awaiting trial.²⁵ A small number of defendants are remanded after specific findings that they pose such a great risk of flight or such a danger to the community that detention, even prior to conviction, is permitted.²⁶ In these circumstances, the decision to remand without an opportunity to post bail and be released is governed by narrowly defined considerations.²⁷ In the vast majority of cases, pre-trial detention is secured by bail.²⁸ Money is the key that can unlock the jail door, but the amount of bail required to secure pre-trial freedom is set, more often than

not, beyond the means of the indigent defendant.²⁹ For those alleged to have gang affiliations, however, higher bail is more likely than for those with similar records, charges and community ties who are *625 not alleged to be in gang databases.³⁰

While there is substantial literature examining the terms and conditions of pre-trial release and bases for pre-trial bail decisions,³¹ the allegations of gang affiliation have not been subjected to such scrutiny. Because the decision to release or detain a defendant is often the most critical moment in the course of a criminal case, this paper fills that gap. This paper proposes that allegations of gang membership be excluded from the release determination in all but a very limited number of cases and that, when such allegations are permitted, procedural safeguards requiring prompt review of the factual basis for allegations of gang affiliation be adopted.

Part II of this article examines the nature and scope of the impact of allegations of gang association. In Part III, the critical nature of the pre-trial release decision and the permissible considerations for release determinations are considered in light of the presumption of innocence and the Eighth Amendment's prohibition on excessive bail. Part IV examines the difficulty of defining gangs and identifying gang members, the problems associated with the development and maintenance of gang databases by law enforcement, and their use by prosecutors in making bail *626 requests. Part V sets forth proposals to limit improper use of allegations of gang affiliation.

II. THE IMPACT OF GANG AFFILIATION ON PRE-TRIAL BAIL DETERMINATIONS

The impact of allegations of gang affiliation on pre-trial bail determinations depends on a number of factors. The most important of these may be the severity of the crime. Counter-intuitively, the less serious and less violent the alleged crime, the greater the impact of the allegation of gang affiliation. This is because the “seriousness of the offense” is a factor considered under most bail statutes.³² Thus, in any case involving a murder, shooting, serious stabbing, large amounts of drugs, or numerous weapons, bail will be set at a relatively high level regardless of gang affiliation. The length of the sentence a defendant faces if convicted of a serious or violent offense is also a factor which may be considered in determining bail.³³ It is only when a defendant would ordinarily be released, or when bail would be set at a low level that his family could post, that the allegation of gang affiliation at the initial detention/bail hearing is likely to change the course of a case.

Thus, when charges are minor, meaning the crimes charged consist of misdemeanors or non-violent felonies, allegations of gang affiliation may often lead to bail requests by prosecutors that are far higher than the typical bail request for the same charges where no gang affiliation is alleged. Similarly, in cases where the charges are more serious, but the evidence is so weak that a defendant would ordinarily be released, the allegation of a gang affiliation will assure insurmountable bail amounts despite the clear possibility of innocence presented by the weakness of evidence supporting the charges themselves.

In this section, I will examine the impact of the gang allegation in two ways. First, I will begin by describing the effect of an allegation of gang *627 affiliation on pre-trial detention in a particular case. Second, I will review survey responses from defense attorneys from various jurisdictions across the country. The case illustrates the themes that are developed in this Article. The survey responses indicate that, while the impact of allegations of gang affiliation vary from jurisdiction to jurisdiction and from judge to judge, these allegations are made frequently, often result in higher bail and are rarely subject to evidentiary hearing.

A. The Impact of Alleged Gang Affiliation for a Particular Defendant Daniel's Story³⁴:

A slight sixteen-year-old³⁵ named Daniel C. and his mother walk into the arraignment courtroom to answer a summons for misdemeanor “harassment” after a schoolmate had accused Daniel of threatening him. After a long wait, Daniel finally stands before the judge while his mother stands behind him at the rail. Although Daniel is in court voluntarily, the prosecutor asks the judge to set \$30,000 bail, stating, “he is in our gang database, and he is affiliated with the Latin Kings.”

The defense attorney hurriedly confers with Daniel, then responds to the prosecutor's bail request, asserting that Daniel has never been in any gang, has no record, and showed up voluntarily to arraignments (and is therefore likely to show up voluntarily on future court dates). Moreover, the defense attorney argues, Daniel is the victim here. The complainant has been suspended from school for harassing and threatening Daniel, not the other way around.

The judge sets bail at \$20,000, and Daniel's mother watches in tears as her son is led away in handcuffs.

The defense attorney immediately begins investigating Daniel's case.³⁶ He confirms that the complainant was suspended from school for harassing Daniel, and that the complainant has an open felony case and is ***628** on the school's gang list. However, Daniel is also on the gang list for wearing gold and black--the Latin King colors--to school during his freshman year. Though he has not worn the colors since, he was never removed from the school's gang list and presumably this information led to Daniel's inclusion in the police gang database. Based on this investigation, the defense attorney appeals the bail decision and Daniel's bail is reduced to \$3,000. After five days, Daniel's parents post bail and take him home. A year of litigation ensues, and the case against Daniel is finally dismissed.

During that year, Daniel is not idle. His attorney pushes for his acceptance into night school, and Daniel develops bonds of friendship and trust with his mentors who were law school interns provided by Daniel's defense attorney. Daniel tells the mentors that he had worn black and gold in his freshman year not because he was in the gang, but because he hoped those colors would dissuade other students from attacking him. Instead, his plan backfired, and he was harassed by the complainant and the complainant's friends, who knew he was not actually in any gang.

Over the year his case is pending, Daniel learns to be careful. He stays home, going out only when an older relative accompanies him. He does well in night school. At each court appearance, Daniel arrives early and neatly dressed. When his case is finally dismissed, Daniel stays in touch with his defense attorney and the legal interns who had mentored him.

A few months later, Daniel violates one of his self-imposed rules, and walks the few blocks home from visiting a relative at night and alone. En route, he encounters friends of the complainant in the first case. What happened next would, of course, be contested. However, when the police arrive, the complainant's friends tell them that when they confronted Daniel verbally about the previous case, Daniel had attacked the group. The group punched Daniel back, and one of the group shows scratches on his torso and claimed that he'd been stabbed with a Swiss Army knife. Despite the somewhat unlikely scenario-- that a single person would attack a group with a small knife--the police arrest Daniel and once again flag him as a person in their "gang database."

This time, the prosecutor charges Daniel with felony assault--because of the alleged use of the Swiss Army knife. Once again, the prosecutor requests high bail because Daniel is on the gang list. Once again, the prosecutor claims Daniel is a member of the Latin Kings. And once again, the prosecutor does not state a basis for this claim other than the gang database.

The defense counsel has a theoretically perfect bail application on ***629** behalf of Daniel. The seventeen-year-old before the court has no criminal record; he had a previous case in which he had made about twenty court appearances and never missed a date. He is in school; his guidance counselor confirms that he is doing well and mentoring other ELS students, his family is in the audience and his community ties are confirmed.

Further, the allegations in the case appear to be incredible on their face and to make out a compelling defense of self-defense. The complainants admit to punching the defendant, and it seems very unlikely that a lone seventeen-year-old of such slight build would decide to attack a group of teens with a Swiss Army knife. Even if the prosecutor were able to obtain a conviction on this evidence, Daniel is eligible for Youthful Offender treatment, time served, and probation.³⁷ More likely, given the lack of injuries, and the weak evidence, the prosecutor will eventually offer a misdemeanor, reduce the case to a misdemeanor or even dismiss the case. For all these reasons the defense attorney requests that Daniel be released on recognizance.

Normally a judge would release Daniel or set bail of no more than \$3,000 under these circumstances. Nevertheless, because of the allegations of gang affiliation the judge grants the prosecutor's request and set bail at \$50,000. Once again, Daniel's family cannot hope to post this amount of bail, and he is sent back to the local jail for pre-trial detention.

On the next court date, the Assistant District Attorney asks defense counsel if Daniel would be willing to accept a misdemeanor and agree to a "gang debriefing."³⁸ Such an offer, the defense attorney realizes, reflects ***630** the prosecutor's awareness that Daniel would likely prevail at trial, as well as the fact that no serious injury has been alleged. As a plea bargain, it is simply not a bargain because the case will likely be dismissed or Daniel will be acquitted if the case is tried--except for one simple fact: Daniel is locked up on bail he and his family cannot post.

Daniel has two choices. He can plead guilty to a crime he didn't commit and would likely be acquitted of at trial, and go home, or he can maintain his innocence, and stay imprisoned, waiting for his day in court--a day that may be months away. Daniel chooses to remain in jail, rejecting the plea offer, acutely aware that a plea would only leave him vulnerable to yet another false allegation. After a month of living behind bars, another judge finally reviews his bail amount at his attorney's request, reducing it to \$5,000. Daniel's family is able to afford that amount, and Daniel is bailed out of jail. Once free, he easily resists the pressure to accept a plea. His case is eventually reduced to a misdemeanor, and, months later the case is dismissed.

This anecdote demonstrates with some particularity the impact of an allegation of gang affiliation on pre-trial detention, and thereby on the dynamics of plea-bargaining. But for the incredibly aggressive advocacy in the first case, Daniel would likely have remained in jail and accepted a misdemeanor plea for harassing the complainant in order to be released. Although he would have received a Youthful Offender adjudication³⁹ and have no official record an order of protection would have been issued in favor of the complainant despite the complainant's record of harassing Daniel.⁴⁰ On the second arrest, the "Youthful Offender" adjudication would appear in the court record, and the bail might well have been set even higher than \$50,000. Having already received a Youthful Offender adjudication in the first case, it would be highly unlikely that he would receive a second Youthful Offender adjudication.⁴¹

By the time Daniel was seventeen he would likely accept a second plea in order to get out of jail, quite possibly to a felony with time served *631 and five years probation. Even with the involvement of counsel in preparing to investigate and mount aggressive bail applications, Daniel spent over a month in jail on charges that were eventually dismissed and missed his final exams during the second incarceration, making it that much less likely that Daniel will ever earn a high school diploma.

If allegations of gang affiliation had not been made, and the prosecutor had relied solely upon the charges and evidence actually at hand, Daniel would not have spent any time in jail;⁴² there was no basis to set any bail on him. He would not have missed his school exams, lost his after school job, and would have been available to assist his attorney in his defense. The gang label served to bypass the presumption of innocence and eliminate the right to reasonable bail in Daniel C's case.

B. Survey Evidence of The Impact of Allegations of Gang Affiliation on Bail Determinations.

In order to get some sense of the frequency and impact of allegations of gang affiliation, I conducted a survey⁴³ of defense attorneys, reaching out to them through defender offices and defender organizations.⁴⁴ Sixty-four private and public defense attorneys practicing in over forty jurisdictions, twelve different states, and state and federal courts, responded to questions about the frequency, impact, and accuracy of allegations of gang affiliation on bail decisions.

To summarize the responses, the vast majority of respondents (90%) observed allegations of gang affiliation at bail hearings. The allegations were made in both felony and misdemeanor cases. The respondents represented hundreds of clients facing gang allegations, and they reported *632 that bail was higher in most cases in which the gang allegations were made. Four-fifths of the respondents reported gang allegations were leveled against individuals who were not gang members. Three quarters of the respondents reported that only their clients of color faced these allegations. The vast majority of respondents indicated higher bail was imposed because of the allegation of gang affiliation. Most importantly, a substantial majority (60%) said they had represented clients like Daniel C. who would have been released had it not been for the allegation of gang affiliation. Finally, evidentiary hearings on the gang allegations were the exception, rather than the rule, with only one in five respondent's reporting that gang allegations were subjected to evidentiary review.

The next few pages provide more detail about the survey's findings and comments made by the attorney respondents. Practices vary from jurisdiction to jurisdiction, but in many places, unsupported allegations of gang affiliation resulted in high bails set on non-gang related offenses. While these conclusions are based on defense attorney reports, Part IV will examine evidence based on gang research, law enforcement database maintenance, and prosecutors' guidelines supporting the conclusion that inaccurate and untested reports of gang affiliation are routinely used in criminal prosecutions.

1. Frequency of Allegations of Gang Affiliation.

The responses made it clear that allegations of gang affiliation are regularly made at bail hearings; 90% of the respondents reported that prosecutors regularly use claims of gang affiliation to justify requests for higher bail.⁴⁵ In some jurisdictions gang allegations were made daily; in others less frequently.

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***633** 2. Types of Cases in Which Gang Allegations Were Made

While one would expect allegations of gang affiliation would be most common and potentially relevant in cases related to gang activities, only 14% reported that most or all of the cases in which gang affiliation was alleged were related to gang activity. In contrast, 36% percent indicated most or all of the cases in which gang affiliation was alleged were not related to gang activity. Half the respondents said some cases were related and some were not.

Nor were allegations of gang affiliation reserved for only the more serious cases. Over half (58%) of the respondents had observed gang allegations at bail hearings in misdemeanor cases.

3. Impact of Allegation of Gang Affiliation

The respondents also reported a significant impact on bail in both felony and misdemeanor cases. Over 90% of respondents indicated the gang affiliation allegation resulted in significantly higher bail or remand in felony cases.⁴⁶ About two-thirds of the respondents indicated higher or significantly higher bails were set in some misdemeanor cases. Further, 60% of respondents reported they had had one or more cases in which a ***634** client like Daniel C., “who would otherwise have been released or been able to post bail, was incarcerated on bail because of the allegation of gang affiliation.”⁴⁷

The comments made it clear that the impact of higher bail is inversely related to the severity of the charge. Thus one respondent explained: “these were homicides so they would not have been able to post bail anyway.”⁴⁸ Another reported: “on misdemeanors where a likelihood would otherwise be a release on their own recognizance with no bail at all--the gang affiliation accusation caused bail to be set in some instances; on felonies--bail was likely to be set regardless”⁴⁹

The responses also illustrated the role of wealth in the criminal justice system. One respondent stated: “most of my clients are retained and therefore end up posting [bail].”⁵⁰ Another respondent reported a case mirroring the Daniel C. anecdote: “I can think of one felony assault case where the defendant (17 y.o.) would have been able to make some modest bail, but the court set higher bail (I believe primarily because of the allegation of gang affiliation) and his family was unable to make bail.”⁵¹

To be sure, there were cases and jurisdictions in which allegations of gang affiliation at the bail hearing had little or no impact. In some cases (for example, murder or shooting cases), the allegation of gang affiliation is unlikely to have an impact on bail, because the bail will be very high or remand, regardless of whether the accused is allegedly affiliated with a gang. In other cases, the allegation of gang affiliation may not have an effect because the judge is skeptical of the basis for the allegation or deems the alleged affiliation irrelevant. In general, however, a concise articulation of the relationship between the expected bail and actual bail in cases with alleged gang affiliation was described by one respondent as follows: “Clients had bail set at higher intervals than similarly charged defendants with similar criminal histories simply because of alleged gang affiliation.”⁵²

4. Impact on Outcomes

While the focus of this paper is the impact on bail and release, the respondents were also asked whether the allegation of gang affiliation had ***635** an impact on the outcome of cases.⁵³ As discussed in the next section, pre-trial detention is correlated with significantly poorer case outcomes. However, where gang allegations are made, outcomes are also affected by prosecutorial policies, statutory enhancements, judicial discretion, and evidence presented to the jury of gang affiliation.⁵⁴ Of the respondents, 73% reported that plea bargaining was affected, 44% indicated the choice to go to trial was affected, another 42.6% reported the outcome of the case was affected, whereas 17.3% of respondents reported they had cases in which the allegation did not affect the outcome.⁵⁵

The comments made it clear that being incarcerated on bail because of allegations of gang affiliation increased the pressure to plead guilty and led to worse outcomes. Further, some jails segregate and lock alleged gang members down twenty-three hours a day.⁵⁶ Lock-down conditions increase pressure to accept pleas and create mental strains inhibiting defense preparation.⁵⁷ Once again, the pressures will be greatest when the offense charged is relatively minor or the evidence is very weak. Where the charge is a violent felony, a plea is not likely to result in release. When, however, the charge is not serious or the evidence is weak, a plea offer for time served or a short sentence is likely.⁵⁸ Gang members and non-gang members, the guilty and the innocent, all are likely to accept a plea if it leads to immediate release. Additionally, the respondents reported that prosecutors sought stiffer punishments and had policies restricting plea-bargaining in cases where gang affiliation was alleged. Further judges were inclined to be harsher. Judges,

[a]fter hearing these unsupported hearsay allegations from the prosecutor[,] . . . frequently appear to view the defendant as deserving of a less favorable plea offer . . . [and] are more comfortable threatening such defendants with greater punishment in the event they are convicted after trial. These threats cause some defendants to plead guilty when they otherwise would not have.⁵⁹

Finally, the introduction of evidence to prove gang allegations at trial may be so prejudicial that a defendant may accept a worse plea rather than risk *636 going to trial.⁶⁰ As one respondent observed: “[u]nless the crime is one pertaining to gang activity, the evidence of gang membership is so prejudicial as to overwhelm the rest of the case and the case becomes a defense of gang membership and how bad the gang is.”⁶¹

5. Race

Like the question on the impact of gang allegations on bail, respondents were permitted to choose all answers that applied. Thus the responses only indicated whether a respondent ever represented a client of a particular race who was alleged to have a gang affiliation. The responses included Asians, Black, Latino, White and Other. Most of the respondents had represented Black (86.8%) and Latino (86.8%) clients accused of having gang affiliations.⁶² Only 24.5% percent indicated that they had represented White clients with alleged gang affiliations. Finally, 13.2% of respondents reported representing Asian clients who were alleged to have gang affiliation.

Despite the fact that nearly a quarter of respondents reported representing White clients with alleged gang affiliation, the comments indicated that Black and Latino clients were far more likely to face these allegations. For example, one respondent indicated “80% were Black, 15% Hispanic and 5% White.”⁶³ Another commented: “[c]an only recall two cases [where] my clients were white-- overwhelming majority are Black or Latino, with the shift seeming to be toward a larger percentage of Latino.”⁶⁴ Other respondents indicated these allegations were made only about defendants of color, e.g. “I have never heard a prosecutor allege gang activity on the part of a Caucasian defendant.”⁶⁵

6. Accuracy of Allegations of Gang Affiliation

Survey respondents were also asked to evaluate the accuracy of allegations of gang affiliation.⁶⁶ Based on all the cases in which a client was alleged to have a gang affiliation, how accurate were the allegations? Only 3.8% of respondents indicated gang allegations were very accurate; *637 that “alleged gang members were active gang members.”⁶⁷ A substantial proportion (40.4%) indicated the allegations were “somewhat accurate,”⁶⁸ but included “former gang members or people who pretended to be gang members.”⁶⁹ Over a third (36.5%) indicated the allegations were “not very accurate”⁷⁰ and included “non-gang members.”⁷¹ Finally, 5.8% indicated they believed the gang allegations were “inaccurate”⁷² and 13.5% indicated they did not know. In addition to inclusion of non-gang members (false positives), two comments indicated there were false negatives (clients who were in gangs who were not so charged).⁷³

The false positives seemed to be the result of overly broad criteria, association with gang members, and failure to recognize when a person has quit a gang. The comments reflected this over-inclusiveness. One respondent stated inaccuracies arise because

“everyone is in a gang who lives in a particular area of town or associates with anyone who has ever been in a gang.”⁷⁴ Another stated:

I don't think that gang information that the prosecution has is very accurate. It seems that once a notation of possible gang affiliation is made in a police database or elsewhere it seems to really stick. It also seems that they will indicate that people are affiliated with gangs who aren't gang members but who know people who are. They seem not to understand that our clients can know gang members (by virtue of the neighborhoods in which they live) without being gang members. Sometimes it seems like determinations of gang membership are made for no apparent reason.⁷⁵

Affiliation is also attributed to those who have brothers or fathers in gangs.⁷⁶ In addition to association with gang members, the use of “fairly generic tattoos”⁷⁷ and the attitude that “once a gang member always a gang member”⁷⁸ led to inaccurate allegations of gang affiliation.

Lawyers who responded that “they did not know how accurate the gang allegations were,” did not express confidence in the accuracy but indicated that there was no opportunity to explore the veracity of gang *638 allegations and that the prosecutor never discloses the basis for the allegation, so they could not judge the accuracy of the gang allegation. As one respondent stated:

It is hard to tell because judges never require the prosecutor or the police to support these allegations. The judges seem to accept the allegations as accurate. However, I have looked into the bases of many such allegations and I often find the defendant are considered to have gang affiliations for such innocuous activities as: being stopped on a corner in the presence of another person that has alleged gang affiliations even though neither was alleged to be engaged in any unlawful conduct, having a brother with alleged gang affiliations, wearing a color associated with a particular gang (red for example), living in an area with alleged gang activity.⁷⁹

Although there may be some concern that defense lawyers might understate gang affiliation, these comments are entirely consistent with the methods used for compiling gang databases. Most of the criteria for adding an individual to a gang database have nothing to do with actual criminal conduct and include being seen with gang members, clothing, wearing gang colors, tattoos and even drawings and lyrics in notebooks.⁸⁰ Moreover, while some law enforcement agencies require multiple criteria some permit the same criteria to be counted multiple times.⁸¹

Thus, if you are seen three times with gang members, then you can be added to the gang database. Of course, if you live in the same building or block as, or are related to gang members and have grown up with them all your life, you are likely to quickly accumulate three “strikes” and be placed in the database. The criteria for determining gang membership do not require engaging in crime on behalf of a gang or with other gang members, paying dues, attending meetings, undergoing a gang initiation, or other specific gang related activity.⁸² Rather, the criteria focus on symbols and association.

7. Evidentiary Review of Allegations of Gang Affiliation

In the vast majority of cases (80%), there was no review of the accuracy of gang allegations. In the cases where there was a review of the *639 gang allegation, it took place long after the bail hearing and in connection with a motion in limine related to the trial. This is particularly problematic because the gang allegations rest on, at the least, double layers of hearsay (the prosecutor reports what the police say).⁸³ Comments indicated that requests for hearings on the allegation were denied, e.g. “I have often asked for [the allegation of gang affiliation] to be substantiated, but have been denied this request every time.”⁸⁴ Given the broad criteria for including individuals in gang databases and the prejudice that flows from gang allegations, prompt hearings are necessary to determine the basis of such allegations if they are to be considered as a factor in setting bail.

III. THE IMPORTANCE OF BAIL DETERMINATIONS

A. The Presumption of Innocence and the Right to Non- Excessive Bail.

The Eighth Amendment's stricture against excessive bail reflects the tension between the presumption of innocence and the need to secure attendance at trial.⁸⁵ The right to non-excessive bail is the product of centuries of English skirmishes to secure the right to be free of punishment prior to a determination of guilt.⁸⁶ The Supreme Court recognized this history stating that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."⁸⁷ If an accused can be incarcerated prior to trial, then what is the need for trial at all?

As in England, provisions which mandated non-excessive bail were easy to write and difficult to enforce.⁸⁸ This is particularly so because the American common law considerations for determining bail focused on the *640 risk of flight, not the risk of danger to society.⁸⁹ However, the mandate barring explicit consideration of future dangerousness and "preventive detention" was nevertheless circumvented by judges who imposed bail in amounts defendants could not afford to pay--a de facto preventive detention.⁹⁰ During the twentieth century, both state and federal jurisdictions increasingly embraced dangerousness and preventive detention as legitimate considerations for bail determinations, and the Supreme Court has upheld such considerations as consistent with due process and the Eighth Amendment in *United States v. Salerno*.⁹¹

Although the *Salerno* Court held that preventive detention, as permitted by the Bail Reform Act of 1984, does not run afoul of the Fourteenth Amendment right to substantive due process or the Eighth Amendment prohibition on excessive bail,⁹² the decision does not undermine any part of the decision in *Stack v. Boyle*,⁹³ which prohibited excessive bail based on association alone.⁹⁴ In the prosecution of the twelve petitioners in *Stack* under the Smith Act,⁹⁵ the Supreme Court expressly rejected the government's argument that the lower court was justified in setting bail in an amount much higher than the norm, "assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction."⁹⁶

In jurisdictions where preventive detention is explicitly permitted, allegations of gang membership are constitutionally permissible when they *641 are accompanied by appropriate individualized risk of future dangerousness, and the procedural safeguards that accompany preventive detention.⁹⁷ But *Stack v. Boyle* does not permit allegations of mere association to justify heightened bail or preventive detention.⁹⁸ In jurisdictions across the country, the allegation that a defendant is in a gang database is just such an allegation--association, but nothing more. It is not enough to support preventive detention, and yet its impact often leads to excessive bail, as the allegation of association with the Communist Party did for the defendants in *Stack v. Boyle*.⁹⁹

B. The Impact of Non-Release on Case Outcomes.

As you enter Riker's Island in New York, you are greeted by a sign welcoming you to the largest jail in the free world.¹⁰⁰ The sign has always struck me as strange in a country where an accused is presumed *642 innocent,¹⁰¹ and where non-excessive bail is a constitutional right.¹⁰² A jail is a place where people are detained prior to trial.¹⁰³ A jail is a place where people who are presumed innocent are incarcerated. A jail is a place where, more often than not, people serve days, weeks, months and sometime years before cases are dismissed, resolved by plea, or tried. Although some detainees with serious charges may be remanded to jail pending trial, most of the people locked in jails awaiting trial are there because they cannot post bail.¹⁰⁴

Whether an individual is held in jail or released is a critical factor in predicting likelihood of conviction and the length of sentence.¹⁰⁵ To be sure, bail determinations take into account factors like the strength of the evidence against a defendant and the severity of the charges, and therefore, are linked to factors that themselves predict likelihood of conviction and longer sentences.¹⁰⁶ However, even controlling for these factors and other factors such as prior convictions, pre-trial detention has an independent impact on the outcome of a criminal case.¹⁰⁷

The importance of pre-trial incarceration is particularly apparent when a plea can unlock the jailhouse doors. For a person charged with a misdemeanor and held on bail, it is not long before the offer in court becomes: plead guilty now and you can go home today, tomorrow or next week. The alternative? Demand a trial and your case will be adjourned for two weeks or four weeks and, when you return to court, it may be *643 adjourned yet again. On the other hand, for someone facing a potential sentence of years or even decades on a serious violent crime, although incarceration hampers the ability to prepare for trial, work with counsel, and engage in activities which might mitigate the sentence should they be convicted, pre-trial detention alone will not likely be determinative of the willingness to plead guilty.¹⁰⁸ Unless the case is extremely weak, the offer of a sentence that is the equivalent or near equivalent to time served will not be made. Thus, pre-trial detention is most likely to undermine the presumption of innocence where the charges are minor or the evidence weak.

Unlike most factors contributing to high bail--prior convictions, failure to appear on prior cases, and severity of charges--allegations of gang affiliation are made without assurances of accuracy.¹⁰⁹ A judge will review a record of prior convictions and warrants, and the allegations in the complaint or indictment are objective proof of the severity of charges.¹¹⁰ The defense will also have access to these records and allegations and is in a position to challenge them. Gang affiliation, however, is alleged based on law enforcement gang databases and, as will be discussed in the next section, this intelligence is based not on criminality, or even active gang participation, but on perceived association with those believed to be in gangs.¹¹¹ The allegation does not relate to the risk of flight but to the perceived dangerousness of the accused. Setting bail based on perceived association undermines the presumption of innocence, violates the dictates of the Eighth Amendment, and ignores the requirements of *Stack v. Boyle*.¹¹²

IV. GANG MEMBERSHIP

Despite the power and simplicity of the words, “the defendant is a *644 member of a gang,” their meaning is anything but simple. In nearly every book on gangs, one or more chapters are dedicated to the definitional problem.¹¹³ What is a gang? Another chapter addresses the issue of gang membership. When does a person become a member of a gang, and when does he cease being a member of a gang? What are the levels of gang membership or affiliation? Despite popular myths¹¹⁴ that paint every gang member with the same violent brush, and assert that there is no escaping a gang, membership is remarkably porous, and most social scientists describe varied levels of involvement with gangs, with a majority of gang members quitting soon after joining a gang and others aging out of gangs.¹¹⁵

Unfortunately, once in a law enforcement gang database, whether accurately or inaccurately, there is little oversight or incentive to ensure the databases are purged of non-gang members or former gang members.¹¹⁶ Thus, the databases are bloated, the basis for inclusion obscured, and many males who have the misfortune of growing up in gang-dominated neighborhoods-- and particularly those who share the ethnic or racial background of the gang-- run the risk of inclusion in these databases.¹¹⁷ In this section, I will explore the definitional issue, the levels of membership and the problems of over-inclusiveness of gang databases.

A. Defining the Gang.

The definition of a gang, and most importantly the distinction between delinquent groups and actual gangs, are issues that I, like others in *645 the field, will note and leave unresolved. According to the Department of Justice, large-scale efforts in both the 1980s and 1990s to arrive at a consensus on how to define a gang have stalled, with researchers and law enforcement failing to reach agreement.¹¹⁸ Thus, in soliciting gang information from law enforcement agencies, the Department of Justice uses the following language for its National Youth Gang Survey:

A group of youths or young adults in your jurisdiction that you or other responsible persons in your agency or community are willing to identify or classify as a “gang.” DO NOT include motorcycle gangs, hate or ideology groups, prison gangs, or other exclusively adult gangs.¹¹⁹

Each law enforcement agency is given substantial discretion to identify and define gangs in its own way, thus some may include white supremacists, or bikers, or adopt other definitions.

Nor have academics been able to agree on a definition.¹²⁰ Academics, in particular, argue about whether inclusion of criminality as a primary objective belongs in the definition of gangs.¹²¹ Some researchers note the primary activity of gangs is hanging around and doing nothing.¹²² While gang members report more acts of delinquency and more crimes,¹²³ they often commit crimes on their own behalf (out of anger or with a smaller group of more trustworthy allies if they hope to earn money).¹²⁴ Thus, for example, drug dealing involves individual members or subgroups and not the gang as a whole.¹²⁵ To attribute to gangs the objective purpose to commit particular crimes is to ignore the reality of most gangs.¹²⁶

***646** Despite these debates, legislatures have tended to adopt formalistic methods for defining gangs, making it easy for the prosecution to prove a particular group is a gang.¹²⁷ Some legislatures have apparently sidestepped the issue entirely, because while forty-six states have some legislation that applies to gangs, only thirty-six states have legislation defining a gang.¹²⁸ While it is difficult to imagine either a law enforcement agency or a gang researcher designating a group of only three people who had previously committed two crimes within a three-year period (either individually or as a group) as a “gang,” the influential STEP Act of California embodies minimal requirements in legislation aimed at gang members, and is designed to impose significant sentence enhancements in such cases.¹²⁹

Like the STEP Act, most definitions of gangs require a gang to have three or more members, a common name or sign, and to engage in crimes as “one of its primary activities.”¹³⁰ The proof requirement for the “primary activities” is satisfied, however, by proof that some member or members of the group have engaged in certain crimes within a designated period.¹³¹ Collective criminality or criminality of all members is not ***647** required. Thus, New Hampshire, for example, requires “members individually or collectively [to] have engaged in the commission, attempted commission, solicitation to commit, or conspiracy to commit [two] or more [of] the following offenses,” including drug sale, violent crimes, possession of a weapon, or witness tampering.¹³²

While the lack of a clear and consistent definition of a gang is troublesome, particularly when law enforcement is encouraged to report on gangs in ways that exclude white supremacist and hate groups, the more difficult issue in the majority of cases is whether a defendant is, in fact, a member of a gang.

B. Identifying the Gang Member

A larger problem related to allegations of gang affiliation is raised by the issue of the accuracy of the allegations of gang membership. Despite the lack of consensus over the definition of gangs, it is widely accepted that there are levels of membership and non-membership that are common to many of the larger gangs.¹³³ While the terminology varies somewhat, most gang researchers recognize that individuals included on law enforcement gang databases have both active and inactive roles.¹³⁴ Further, those with active roles may not be full-fledged members. Lewis Yablonsky, an expert who testifies in many gang prosecutions (usually for the defense), divides the active roles into three categories: Old Gangsters or Veteranos, Gangsters, and Wannabes.¹³⁵ Among these three active roles, only the first and second categories are officially members.¹³⁶

While Wannabes may commit crimes or delinquent acts either on their own, as members of wannabe delinquent groups, or to obtain reputation and membership, the acts are not done for the gang so much as to enhance the individuals' reputation.¹³⁷ Most researchers further look to actual gang activity and distinguish between core members and fringe members.¹³⁸ Core members tend to commit the vast majority of delinquent acts and are heavily involved in gangs.¹³⁹ Fringe members, on the other hand, may join a gang because of the need for protection, but are relatively ***648** inactive when it comes to gang activities.¹⁴⁰

Non-active gang roles described by Yablonsky fall into three categories as well. Two of these three categories are often alleged to be gang members, but, despite Yablonsky's label, they are not gang members. Yablonsky identifies Gangster Groupies, youth who do not ordinarily participate in criminal gang activity but hang out with gangsters and dress and talk like them.¹⁴¹ Residents

of the gangster neighborhood “find it necessary for their survival to identify with the gang, even though they do not participate intensively in the gang’s criminal activities.”¹⁴² Finally, there are former gangsters, who transition out of gangs.¹⁴³ Yablonsky describes a class of alleged gang members who were gang members but move on to marry, have children, and get a steady job, but “are too often identified by law-enforcement as gangsters who still belong to the gang. They are often erroneously arrested and prosecuted for crimes that they did not commit.”¹⁴⁴

Another class of former gang members may be comprised of thousands of children in their early teens.¹⁴⁵ Despite myths that quitting a gang is impossible, two separate Youth Surveys find a remarkably high percentage of teens join and then quit gangs within a single year.¹⁴⁶ Attrition in gang membership is, in fact, great. Nor, in some jurisdictions, does former gang status or actual membership matter. The California STEP act provides for enhancements even without proof

that the person devotes all, or a substantial part of his or her time or efforts to the criminals street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.¹⁴⁷

While “active participation” sounds sufficient, the danger is that it will be established by nothing more than residing in a neighborhood dominated by gangs. Gang allegations are most often proved by gang “experts” for the prosecution.¹⁴⁸ These experts are most often (and ideally according to one prosecutor) the very law enforcement officers who compile the gang databases.¹⁴⁹

C. Compiling and Maintaining Gang Databases

Perhaps the most compelling reason that prosecutors should not allege gang affiliation at bail hearings, and courts should not rely on allegations of gang affiliation in making pre-trial bail determinations, is the potential for false positives that the criteria for inclusion in gang databases create.¹⁵⁰ Law enforcement agencies determine criteria as well as create, maintain, and share gang databases for intelligence purposes.¹⁵¹ The criteria for inclusion in gang databases are almost entirely unrelated to criminal conduct or even to active participation in gang activities.¹⁵² To the contrary, most gang units rely on criteria that are predominantly non-criminal and relate to how a person looks, acts, who he is seen with, and what he wears.¹⁵³ Further, uniform and regular standards for purging and maintaining the gang databases often do not exist¹⁵⁴ or may be ignored where they do.¹⁵⁵ Finally, it is not clear whether law enforcement agencies “even follow their own criteria.”¹⁵⁶ Thus, databases include those who were never gang members, as well as those who joined and then quit gangs.¹⁵⁷

The breadth of these criteria has drawn concerns from judges and communities. In a California gang injunction case, the judge expressed concern over the validation criteria for gang members:

[T]o “validate” specific gang members, the City [of San Jose] merely reviews police records to identify individuals who admit membership in a gang to a peace officer, probation officer, juvenile hall or youth ranch employee, or who meet two or more of the following conditions: wear clothing or tattoos indicating gang affiliation or use gang hand signs; are named by two or more members of a gang as a member; actively participate in gang crime; are identified by a reliable informant as a gang member; or are observed associating with gang members two or more times. Using similarly broad criteria, the Los Angeles Sheriff’s Department has estimated that 47 percent of all African-American males between the ages of 21 and 24 are actual or suspected gang members.¹⁵⁸

The criteria used in *Acuna* at least include active participation in gang crime, but only two of the criteria need be met. Thus, clothing, tattoos, or being observed “associating with gang members” are enough for inclusion on this database.

As in the Acuna case, many of the criteria for inclusion in gang databases are extremely broad. Gang criteria received through a FOIL request to Nassau County did not even include involvement in gang crime as a criterion. Only one criterion, “arrest with a gang member,” (of 12 possible criteria) had any relation to illegality.¹⁵⁹ The “arrest with gang *651 member” criterion does not require the arrest lead to charges or a conviction, nor that the arrest be gang related but consistent with “usual gang activity.”¹⁶⁰ Some of the criteria include, at least, things that the individual controls, such as dress, get tattoos, graffiti, or drawing on books and papers related to gang symbols.¹⁶¹

Other criteria, however, relate only to association. If a person is observed with a known gang member, this would meet a criterion. If a “reliable source” identifies the person as a gang member, this satisfies a criterion even if that source is using the same observations (dress or association) to make the identification.¹⁶² Identification by non-reliable sources--gang members and rival gang members--also satisfy a criterion.¹⁶³

One criterion which is also considered is inclusion in another gang database. Law enforcement agencies regularly update each other providing information from their gang databases to each other. This sharing leads to the potential for double-counting, identical conduct for inclusion. In addition to creating circumstances under which an allegation based on hearsay or mere association suffices to satisfy a “criterion” for inclusion, the sharing of database information has had adverse employment consequences for individuals.¹⁶⁴

Community hearings in Minneapolis-St. Paul focused on the ten-point criteria used in that jurisdiction to compile two separate data files on alleged gang members.¹⁶⁵ Of the ten criteria, only one related to *652 criminality (also arrest with known gang members or associates).¹⁶⁶ For one database--the Gang Pointer File--a minimum age of fourteen, a prior conviction for a gross misdemeanor or felony, and at least three of the ten criteria are required by statute.¹⁶⁷ This database included about 2500 people in 2009.¹⁶⁸ The alternative database “GangNet” served as a means of “pre-identifying potential gang members who met at least one of the ten-point criteria” (with no requirement of a prior conviction or minimum age).¹⁶⁹ The latter database included nearly 17,000 individuals.¹⁷⁰ A partial audit of the more demanding Gang Pointer File revealed a fifteen percent “failure rate.”¹⁷¹ At the Minneapolis-Saint Paul hearings, witnesses who were not gang members reported being denied employment with law enforcement, probation, and the National Guard because of inclusion in the Gang Pointer File and even in GangNet.¹⁷²

The result of these broad criteria is that individuals who never belonged in a gang, but were observed with friends or relatives, photographed with them, and dress in the normal styles for urban youth, are included in gang databases. In the Minneapolis-Saint Paul report, the community asked the following question: “Do the ten-point criteria evidence criminal gang activity or do they highlight factors that are synonymous with urban youth culture?”¹⁷³

Statistics from various jurisdictions are not easy to access, but reports indicate that the databases are dominated by young men of color, including many with no criminal records. The criteria related to dress and association appear to be largely “synonymous with urban youth culture.”¹⁷⁴ How can several criteria if you live with or grew up with people who joined gangs? You will be seen “associating” with your brothers, your neighbors, and your school mates whether or not you belong to a gang. What if your local bodega is also a “gang location?”

*653 In Orange County, California, in 1997, over ninety percent of individuals in gang database were minorities, and nearly half those in the database had never been arrested.¹⁷⁵ “In Los Angeles County, which keeps a computerized gang file, forty seven percent of the county's young black men are considered gang members, although nearly half of those tracked (44 percent) had no previous arrest record.”¹⁷⁶ In Charlotte, North Carolina, police “documented” 853 gang members; only four percent of whom were white.¹⁷⁷ In Denver in 1993, about two-thirds of young black men were on the gang database,¹⁷⁸ and black and Latino men accounted for over ninety three percent of this database.¹⁷⁹ Nevertheless, with federal funding, Denver joined the GangNet database in Colorado in 2002.¹⁸⁰ The Denver Gang Unit does not deny that “police sometimes line up youths on a sidewalk, have them lift their shirts to show tattoos and photograph them for their database.”¹⁸¹

While gang enforcement databases include large percentages of young men of color, social scientists conducting longitudinal studies based on self-reports of youth, estimate the prevalence of gang membership is “statistically infrequent” and temporary

even in studies focused on high-risk youths.¹⁸² The disparity between law enforcement estimates based on broad criteria and research estimates based on in-depth interviews confirms that the broad criteria utilized leads to substantial over-inclusion of young men of color.¹⁸³

That the size of the racial disparities is a product of the breadth of the criteria is demonstrated by the twin databases in Minnesota, where the population is about five percent African-American.¹⁸⁴ The Minnesota *654 Gang Pointer File (the database that requires three criteria and a prior conviction) is fifty four percent African-American (1324) and thirty six percent White (870).¹⁸⁵ The Gang Net database, on the other hand, which includes nearly seventeen thousand people and requires only one criterion, is only eighteen percent white (3120).¹⁸⁶ The more flexible criteria of GangNet led to a more significant underrepresentation of whites and inclusion of many more Blacks, Latinos, and Asians.¹⁸⁷

Permitting use of criteria that can and do include most young men of color in urban areas with gang problems creates an additional disadvantage to an already disadvantaged population. It leads to aggressive policing, more arrests, and higher bail after an arrest because of the alleged gang affiliation.¹⁸⁸ As discussed in Part III, the allegation of gang affiliation is rarely subjected to evidentiary testing, and when it is tested, it is often late in the process (at trial or in pre-trial hearing).¹⁸⁹ Most cases are resolved by plea bargaining before evidentiary hearings, and plea bargaining is substantially affected by pre-trial incarceration due to high bail based on prosecutorial allegations of gang affiliation. The final section suggests approaches to test and diminish the adverse impact of gang allegations on pre-trial detention, and to safeguard the criminal justice system and defendants within it from the impact of inaccurate or irrelevant allegations of gang affiliation.

V. PROPOSALS

In this final section, I propose limits on the use of allegations of gang affiliation based on gang databases in pre-trial detention hearings. As discussed previously, the allegations have a substantial impact on the presumption of innocence and the right to non-excessive bail. The words: “this defendant is in our gang database” raise a specter of violence and danger that frequently lead to bail which then prevents release pending trial. These words, however, are generally based on multiple levels of hearsay and the hearsay is, more often than not, that the accused was seen with or dresses like a gang member. Gang databases are not limited to those who have committed gang-related crimes and are not limited to those who have committed crimes at all.¹⁹⁰

*655 The criteria for inclusion in gang databases do not refer to violence or even to crimes in many jurisdictions, and yet, judges are asked to set high bail based on the “gang database.”¹⁹¹ Nor do gang databases suggest that the defendant poses a greater flight risk. The gang database is not based on the notion that the defendant has travelled for the gang or sold drugs for the gang. Indeed, the gang database covers only stationary activity. In reality, an individual is likely to be included in a gang database if the police observe him around a neighborhood (such as the one he or she lives in) dominated by gang activity. Odd as it may sound, gang affiliation (if it exists) is yet another community tie, typically a factor which would weigh in favor of release or a lower bail.

Allegations of gang affiliation should be confined only to cases where a crime is allegedly committed for the benefit of or at the order of a gang. Gang sentencing enhancements are only available in most jurisdictions on proof that a crime was committed for the benefit of the gang.¹⁹² Enhanced punishment for non-gang-related crimes is nothing more than punishment based on association. Similarly, bail based on nothing more than association with a gang violates the dictates of *Stack v. Boyle* and the Eighth Amendment.¹⁹³

In light of the lack of any consistent definition of a gang, the failure to limit gang databases to active core members, the failure to purge gang databases, and given the impact of allegation of gang affiliation on the pre-trial detention decision, this article makes two recommendations. First, it proposes that prosecutors be prohibited from making allegations of gang affiliation based on gang databases at all because the information is so incendiary. The impact on the fundamental right to non-excessive bail is too great, and the basis for the information far too unreliable.

The gang allegation evokes fear of violence and particularly affects young males of color, because the databases include large numbers of individuals without records, arrests, or any individualized information about violence. When a defendant has a

record of violence or convictions, the record will be before the court and can be properly raised during the bail application, but the allegation that an individual is in a gang implies that the accused has committed violent acts.¹⁹⁴ Prosecutors are, or should be aware, that the criteria for inclusion in gang databases does not provide *656 a good faith basis for raising the specter of gang affiliation or gang violence at a bail hearing because the criteria does not relate to individualized criminality or violence, or even require actual membership in a gang.

A second, more conservative proposal, is that the allegation of gang affiliation be permitted only in limited cases where it is directly related to a serious charge and that charge is related to gang activity.¹⁹⁵ First, a threshold determination must be made. Is the offense a felony, and does it related to alleged gang activity? If the offense is a misdemeanor, even if it is committed in relation to gang activity, imposing bail because of gang affiliation is simply improper. If a felony is committed that is not related to gang activity, then gang affiliation is irrelevant. In either of these cases, the use of gang affiliation to set bail is an improper use of mere association and the prosecutor should be precluded from raising it under *Stack v. Boyle*.¹⁹⁶

In the limited cases in which the threshold determination is that the case is both serious and gang related, then the prosecutor could make the allegation of gang affiliation with appropriate safeguards. The safeguards I propose mirror those approved in Salerno for preventive detention determinations.¹⁹⁷ When allegations of gang affiliation are made at the bail hearing, a hearing should be held to determine the accuracy of the gang allegation. The hearing should take place shortly after the initial bail hearing if the defendant is held on bail or remanded (and ideally within forty eight hours) so that pre-trial detention is not prolonged due to an inaccurate allegation of gang affiliation.

At the hearing to determine whether a defendant is affiliated with a gang, the burden must be placed on the prosecution to prove by clear and convincing evidence¹⁹⁸ that the defendant is properly in the gang database and that he is actively involved in gang criminality. As with the Bail Reform Act safeguards approved by the Supreme Court in Salerno, the defense must have the right to testify, proffer witnesses or evidence, and particularly to confront and cross-examine witnesses at the hearing.¹⁹⁹

A hearing may well reveal, for example, that the defendant was in the gang database because he was in a photograph with gang members, has tattoos, and hangs around the local candy store, which is a gang hangout. This evidence would be insufficient to meet the prosecutor's burden of *657 showing by clear and convincing evidence that the defendant is actively involved in gang criminality. Evidence of non-criminal behavior, merely existing in one's neighborhood, interacting with one's peers and relatives, dressing in baggy clothes or doodling on schoolbooks, would be insufficient to justify heightened bail.

Such a hearing is required not only because the criteria for inclusion on gang databases cover largely lawful behavior, but also because gang databases appear to include those who may have been, at one time, active members of a gang but have long left the group.

Objections to my proposals to prohibit allegations of gang affiliation in bail requests for non-gang related offenses may take one of several forms. First, of course, would be the objection that gang members are dangerous and therefore bail ought to be an available tool to keep such individuals incarcerated. The first problem with this objection is it assumes the allegation of gang affiliation is accurate.

While it is true that core gang members are more delinquent and commit more violent crimes than non-gang members and non-core gang members, gang databases do not distinguish among these groups. Locking up non-gang members, serves no purpose and, because many jails are gang-dominated, non-gang-member may join gangs while incarcerated for protection. Unless there is accurate individualized information establishing an accused is a core gang member, there is a great danger of false positives. Such false positives may lead to more gang members rather than deter gang membership.

Even if the individual is a gang member, not all gang members are dangerous. A gang member may associate with a gang but may not engage in violent behavior. Many young people in gang-dominated areas affiliate with gangs during adolescence for protection. Further, fringe members may become active gang members in jail. As the Nassau Gang unit Detective commented: "Jails just make better gang members."²⁰⁰ Finally, if the defendant is accused of a serious or violent crime, his bail is likely to be high regardless of whether gang affiliation is alleged.

A second objection may be that, at the point soon after arrest when bail is determined, the prosecution may or may not know whether an offense is for the benefit of the gang. While this may undoubtedly be the case, whenever new evidence is developed a party can make a new application to review bail.

Third, law enforcement gang units may object to revealing the *658 “sources” of information relating to gang affiliation. When the source of the allegation is another gang member or confidential informant, such disclosures may subject the informant to danger. For the most part, however, the sources of information are police officers who record observations. When there is a concern for informant safety, the prosecutor can simply request a protective order, ask that the courtroom be closed or request in camera review of evidence.

Finally, it may be observed that prosecutors frequently make allegations that are prejudicial and based on hearsay at bail hearing. For example, a prosecutor may well state that “the defendant is a suspect in a string of robberies” and this will likely result in high bail. The difference between a case-specific, individualized allegation that is common at bail hearings such as “the string of robberies” example, and the use of gang databases that include tens of thousands of youth of color should be apparent. It is true that bail hearings involve hearsay allegations on both the defense and prosecution side, but these are generally based on good faith particularized information and relate to verifiable matters. In the normal bail hearing, hearsay allegations relate to individualized suspicion about actual misconduct. Gang allegations are not based on misconduct, but appearances and association.

A benefit to requiring hearings is that gang databases will be challenged by defendants and subjected to review by prosecutors, judges, and defense attorney. Currently, police gang units have little or no incentive to create or abide by rules for compiling or maintaining databases. The units consider the information they accumulate “intelligence,” and purging gang files, or making sure that they include only real gang members, is not a priority. The knowledge that allegations of gang affiliation would be subjected to review within forty-eight hours of a bail hearing would create an incentive for careful record-keeping.

The early hearing would also have the added benefit of alerting the prosecutor to the strength or weakness of the allegation of gang membership. Since the allegation of gang membership has an impact on the available plea bargains, it is important that the prosecutor learn not only that the defendant's name is in a database, but why it is there. Although gang allegations may be tested via pre-trial hearing or at trial itself, the fact that most cases are resolved by plea bargaining before any hearing or trial makes the likelihood of hearing on gang allegations rare, and encourages lax oversight of gang databases.



***659 VI. CONCLUSION**


The use of allegations of gang affiliation to justify a request for high bail is a common practice in courtrooms across the country. Because of gang allegations, bail is often set at a level that ensures the pre-trial detention of defendants, which in turn leads to convictions and additional jail-time for those who are so labeled. The label in correctional institutions can lead to segregation of non-gang members with gang members and lead non-members to join gangs and fringe members to become core members. The basis for gang allegations, however, is inclusion in law enforcement gang databases that focus on association, not membership or criminality. Nonetheless, the “gang” label inspires fear and deprives many defendants of the constitutional right to non-excessive bail.

While gangs are a problem in our society, so is the mislabeling and mistreatment of youth of color as threats because of a perception that they are gang-involved. Such treatment further handicaps youth from already dangerous and disadvantaged neighborhoods. To counteract such fears, allegations of gang affiliation should not be made based on current law enforcement gang databases. If gang affiliation is alleged, prompt evidentiary hearings must be held to safeguard Eighth Amendment rights.



Footnotes

¹ Associate Professor, CUNY School of Law. Thanks to Douglas Cox, Matthew Chapman, Tigran Eldred, Jenny Roberts, Naree Sinthusek, Nicole Smith, Yasmin Sokkar-Harker, SpearIt, and Steve Zeidman. Thanks also to my research assistants Jhounelle Cunningham, Holly Hobart and Ebette Fortune.


- 2 Even in a state like New York, where preventive detention is not permitted, alleged gang-members are often denied reasonable bail. The New York Criminal Procedure Law outlines the factors to be considered for discretionary bail determinations.  [N.Y. Crim. Proc. Law § 510.30\(2\)\(a\)\(i\)-\(viii\)](#) (McKinney 2010). These factors do not include future dangerousness, but focus on the likelihood of non-appearance in court. *Id.* Thus, the defendant's community ties, record of past non-appearance, the likelihood of conviction (strength of the evidence), and length of likely incarceration are relevant to whether a defendant would choose to flee the jurisdiction rather than appear in court. See *id.*
- 3 See *infra* Part IV.C.
- 4 Judith Greene & Kevin Pranis, Justice Policy Inst. Report, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* 37 (2007), available at [http:// www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf](http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf).
- 5 Cf. Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 *Stan. J. C.R. & C.L.* 115, 13436 (2005) (discussing the impact of consolidated trial, “gang expert” evidence, and the pressure of gang enhancements on plea bargaining in a California trial).
- 6 See, e.g., Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 *Stan. L. Rev.* 409 (1999).
- 7 See, e.g., Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 *U. Chi. Legal F.* 215 (1998); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 *Sup. Ct. Rev.* 203 (1999) (critiquing the Court's dismissal of the right to association claim in *Morales*); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 *U. Chi. Legal F.* 197 (1998).
- 8 Cf. Wright, *supra* note 5.
- 9 See *infra* Part IV.
- 10 See Greene & Pranis, *supra* note 4, at 3339 (comparing gang estimates based on Youth Surveys to law enforcement estimates). Based on youth self-reporting, over forty percent of the U.S. youth gang population is white. *Id.* at 37. Law enforcement estimates that only eight percent of the U.S. youth gang population is white. *Id.*; see also Malcolm Klein, *The American Street Gang: Its Nature, Prevalence, and Control*, 87104 (Oxford University Press, 1995) (discussing issues affecting law enforcement estimates, including both denial of gang problems and over-inclusiveness).
- 11 See Greene & Pranis, *supra* note 4, at 36; see also Terence P. Thornberry et al., *Gangs and Delinquency in Developmental Perspective* 33-35 (Cambridge University Press 2003); Finn-Aage Esbensen & David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 *Criminology* 565, 572 (1993) (females made up 20-46% of the gang population in at-risk neighborhoods in the Denver Youth Study).
- 12 See Greene & Pranis, *supra* note 4, at 37.
- 13 See  [Dawson v. Delaware](#), 503 U.S. 159 (1992) (stating gang affiliation is only admissible when relevant to prove something other than “bad character” because of the prejudicial effect it has on the defendant).
- 14 For an overview of some gang affiliation sentencing enhancements, see the Office of Juvenile Justice and Delinquency Prevention, National Gang Center: Compilation of Gang Related Legislation, [http:// www.nationalgangcenter.gov/Legislation](http://www.nationalgangcenter.gov/Legislation) (last visited Mar. 1, 2011). Enhancements may result in longer sentences. See, e.g.,  [Cal. Penal Code § 186.22](#) (West 2010) (imposing additional sentences up to fifteen years in felony cases). Additionally, they may increase the severity of charges from misdemeanors to felonies or from lower level felonies to higher level felonies. See, e.g., [Alaska Stat. § 12.55.137](#) (2010); [N.C. Gen. Stat. Ann. §14-50.22](#) (West 2010).
- 15 *U.S. Const. amend. VIII*. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

- 16 In 2009, only 3% of criminal cases in federal district courts were tried, 87% were resolved by plea, and the balance were dismissed. Sourcebook for Criminal Justice Statistics (2009), available at <http://www.albany.edu/sourcebook/pdf/t5242009.pdf>. See George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 233 (Stanford Univ. Press 2003);
- 17 See *infra* notes 56-58 and accompanying text.
- 18 See *infra* notes 100-08 and accompanying text.
- 19 See *infra* Part II.B and Part IV.C.
- 20 See *infra* Part IV.B.
- 21 Gang databases are compiled by local, federal and state law enforcement agencies based on varying criteria to identify gang members and associates. See discussion *infra* Part IV.A-C.
- 22 See *infra* Part IV.C.
- 23 See *infra* Parts II.B and III.A.
- 24 See discussion *infra* Part III.B.
- 25 See Thomas H. Cohen & Brian A. Reaves, U.S. Dep't of Justice, *Pretrial Release of Felony Defendants in State Courts* 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf> (five of six felony defendants with monetary bail conditions were unable to post bail); see also Laura Sullivan, *All Things Considered: Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NPR *All Things Considered* (Jan. 21, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=122725771>.
- 26 See, e.g.,  18 U.S.C.A. § 3142(e) (West 2008).
- 27 See *id.*
- 28 See generally Cohen & Reaves, *supra* note 25.
- 29 See Sullivan, *supra* note 25.
- 30 I use the term “alleged to have gang affiliations” and “alleged to be in gang databases” interchangeably because the basis for alleged gang affiliation at bail hearings is typically inclusion in law enforcement gang databases.
- 31 See Mary T. Phillips, *Bail, Detention & Nonfelony Case Outcomes*, Case Brief No. 14 (May 2007), available at <http://www.cjareports.org/reports/brief14.pdf> (“A connection between pretrial detention and the severity of case outcomes has long been reported in the research literature.”); see also U.S. Dep't of Justice, Bureau of Justice Statistics Bull. *Felony Defendants in Large Urban Counties, 2000*, 24 & Table 24 (Dec. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc00.pdf> (examining statistics of pretrial release and detention from the year 2000 depending on the crime charged); U.S. Dep't of Justice, Bureau of Justice Statistics Bull. *Felony Defendants in Large Urban Counties, 2002*, 24 & Table 24 (Feb. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc02.pdf> (examining statistics of pretrial release and detention from the year 2002 depending on the crime charged); Charles E. Ayres et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67, 71 (1963) (discussing the work on bail and pretrial release which extends to empirical work done in the late 1950s); Caleb Foote, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 693, 705-06 (1958) (stating that the pretrial bail determinations in New York City are based on a number of factors including the severity of the crime); Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkley J. Crim. L. 135, 143 (2007) (examining the relationship of pre-trial detention to case outcomes); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641, 641 (1964) (exploring “whether the marked statistical relationship between pre-trial detention and unfavorable disposition is a casual one”); Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2: Felony Cases*, New York City Criminal Justice Agency, (March 2008), available at <http://www.pretrial.org/Docs/Documents/felonydetention.pdf> (discussing the impact of pretrial detention versus release through the trial process and conviction).

32

See, e.g.,  18 U.S.C. § 3142(e) (2010);  Cal. Const. art. I, § 28(e) (requiring the judge or magistrate to take into consideration the seriousness of the offense charged); LA. Code Crim. Proc. Ann. art. 334(1) (2010) (mandating that bail should be set in relation to “[t]he seriousness of the offense charged”). See also S. Molly Chaudhuri, *Bail or Jail? The Dangerous Dilemma of Determining Future Dangerousness*, 39 B. B. J. 16, 18 (1995); Tad A. Delvin, *Review of Selected 1995 California Legislation: Criminal Procedure; misdemeanors--release on own recognizance*, 27 Pac. L. J. 634, 635 (1996) (discussing the California legislation and how the seriousness of the offense is taken into consideration during the pretrial stage).


33

See  N.Y. Crim. Proc. Law § 510.30(2)(a)(viii) (Consol. 2010) (establishing “the sentence which may be or has been imposed upon conviction” must be taken into account).

34

The anecdote is based on a case observed by the author. The names and details are changed.

35

In New York, sixteen-year-olds are criminally responsible as adults under the penal law. See  N.Y. Penal Law § 30.00(1) (McKinney 2008).

36

Daniel C. was lucky to have an attorney in his misdemeanor case; despite the right to counsel in misdemeanors, there are many jurisdictions where attorneys are not provided. For a discussion of the absence of counsel in misdemeanors, see Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, Nat'l Ass'n of Crim. Def. Law. 14, 19 (April 2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf). See id.




37

See  N.Y. Penal Law § 60.02 (McKinney 2005);  N.Y. Crim. Proc. Law § 720.20 (McKinney 2010).



38

In Nassau County pleas are often conditioned on an agreement by an alleged gang member to a “gang debriefing,” in which law enforcement agents ask alleged gang members to name other gang members and ask about known crimes. Office of the Nassau County District Attorney, *District Court Bureau Guidelines*, 48. For a discussion of the use of gang debriefings in correctional contexts, see, e.g., 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 Calif. L. Rev. 1115, 1119, 1130 (1995). The author explains that prison officials gain the majority of their gang-related information from debriefings. See id. at 1130. The author also provides an example of a gang investigator's insistence on “debriefing” an alleged gang member who was, in fact, not in a gang. See id. at 1119; see also Gang Intelligence Newsletter, N.Y. St. Intelligence Ctr. Gang intelligence Newsl. (N.Y. St. Intelligence Ctr., Latham, N.Y.), Nov. 2009, at 6, 8, available at <http://info.publicintelligence.net/nysicgangreport.pdf> (revealing information obtained from inmates in the New York state and Nassau County area after conducting debriefing sessions); Michael Montgomery, *Locked Down: Gangs in the Supermax*, American RadioWorks, <http://americanradioworks.publicradio.org/features/prisongangs/cl.html> (last visited Mar. 1, 2011) (describing the process of gang debriefing as requiring a prisoner to “become a snitch” in exchange for an earlier release).



39

See  N.Y. Penal Law § 60.02 (Consol. 2010) (detailing the sentencing guidelines for youthful offenders);  N.Y. Crim. Proc. Law §§ 720.10,  720.35 (Consol. 2010) (describing the youthful offender eligibility and procedures).

40

See  N.Y. Crim. Proc. Law § 530.13(1)(3) (Consol. 2010) (describing the conditions that warrant temporary orders of protection for victims);  N.Y. Crim. Proc. Law § 530.13(4) (stating defendants who receive youthful offender adjudications are considered to have a convictions for purposes of determining order of protection duration).




41

 N.Y. Crim. Proc. Law §§ 720.10,  720.35 (Consol. 2010) (only the first youthful offender adjudication is mandatory).

42



One might imagine that his stint in jail after the first arrest might have been a factor in Daniel's impeccable court appearance record and new dedication to schoolwork. Daniel, however, suggested that the experience had the opposite effect on him. According to Daniel, after having experienced jail for those few days, he knew he could handle it and was far less afraid of incarceration than he would have been had he not been put in jail.

- 43 Bail and Alleged Gang Affiliation Survey (Jul. 6, 2010- Aug. 3, 2010), available at <http://www.law.cuny.edu/faculty-staff/howell/howell-rightbar/Bail-and-Alleged-Gang-Affiliation-Survey-2010.pdf> [hereinafter Bail and Alleged Gang Affiliation Survey] (results on file with author).
- 44 The author also reached out to the prosecutor in the jurisdiction where Daniel's case took place for their input on how gang allegations affect bail decisions via FOIL and by telephone. The response to a Freedom of Information Law ("FOIL") request to the District Attorney's Office in the jurisdiction where Daniel's case took place, was met with an objection on the basis that bail requests were work product and would not be shared. Interview with an Assistant District Attorney in the Special Narcotics and Gang Unit, Nassau County's District Attorney's Office (Oct. 9, 2009).
- 45 Bail and Alleged Gang Affiliation Survey, *supra* note 43, at question 1. Of course, attorneys who practice in jurisdictions where gang allegations are rare, or where attorneys are not present at bail hearings, were unlikely to respond to the survey. Thus, the 90% figure tells us that there are many jurisdictions where gang allegations are made at bail hearings, not that gang allegations are made in 90% of all jurisdictions.
- 46 Respondents made it clear in comments that the impact of gang affiliation allegations varies based on jurisdiction and judge. For example, one respondent stated that while an allegation of gang affiliation "has a slight impact (higher) in Brooklyn. In Nassau County, it would result often times in twice or three times as much bail." *Id.* at question 6, cmt. 10.
- 47 Bail and Alleged Gang Affiliation Survey, *supra* note 43, at question 7.
- 48 *Id.* at question 7, cmt. 2.
- 49 *Id.* at question 7, cmt. 9.
- 50 *Id.* at question 7, cmt. 7.
- 51 *Id.* at question 7, cmt. 15.
- 52 *Id.* at question 7, cmt. 2.
- 53 *Id.* at question 8.
- 54 *Id.* at question 8, cmt. 8 (stating the allegation of gang affiliation complicated "the case in every single way").
- 55 These numbers add up to more than 100% because a single defense lawyer could have cases in all categories.
- 56 *Id.* at question 16, cmt. 3.
- 57 *Id.* at question 8, cmt. 11.
- 58 *Id.* at question 8, cmt. 12.
- 59 *Id.* at question 8, cmt. 16; see also *infra* notes 108-12.
- 60 *Id.*
- 61 *Id.* at question 16, cmt. 4.
- 62 *Id.* at question 4.
- 63 *Id.* at question 4, cmt. 1.
- 64 *Id.* at question 4, cmt. 4.
- 65 *Id.* at question 4, cmt. 6.
- 66 *Id.* at question 9.
- 67 *Id.*


- 68 Id.
- 69 Id.
- 70 Bail and Alleged Gang Affiliation Survey, *supra* note 43, question 9.
- 71 Id.
- 72 Id.
- 73 Id. at question 9, cmts. 6, 14.
- 74 Id. at question 9, cmt. 5.
- 75 Id. at question 9, cmt. 9.
- 76 Id. question 9, cmt. 12.
- 77 Id. at question 9, cmt. 10.
- 78 Id. at question 9, cmt. 7.
- 79 Id. at question 9, cmt. 19.
- 80 See *infra* at IV.C.
- 81 Telephone interview with detective from the Special Detectives Squad, Nassau County Police Dept. (July 15, 2010) [hereinafter Interview with Nassau Gang Squad Detective].
- 82 Bail and Alleged Gang Affiliation Survey, *supra* note 43, question 9, cmt. 15; see also Julie Barrows & Ronald Huff, Gangs and Public Policy, 8 *Criminology & Pub. Pol'y* 675, 686 (2009) (Table 2).
- 83 Id. at question 11, cmt. 8 (stating there are often triple layers of hearsay where the inclusion in the gang database is the result of reports from third parties).
- 84 Id. at question 11, cmt. 2.
- 85 John N. Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 *Va. L. Rev.* 1223, 1223-24 (1969) (discussing the relationship between the presumption of innocence, pretrial detention and bail reform).
- 86 Kurt X. Metzmeier, [Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations](#), 8 *Pace Int'l L. Rev.* 399, 402-03 (1996) (discussing the general history of how the common law individual right to bail developed in response to conflicts between 17th century barons of Parliament and the King, and broader public criticisms of widespread corruption in the English legal system).
- 87  [Stack v. Boyle](#), 342 U.S. 1, 4 (1951) (citation omitted).
- 88 See Metzmeier, *supra* note 86, at 406 (explaining how the use of high bail became a form of “quasi-preventative detention”).
- 89 Id. at 403.
- 90 Id. at 406, 408.
- 91  481 U.S. 739, 751-52 (1987) (upholding federal preventive detention under the Bail Reform Act of 1984 (18 U.S.C. §§ 3141-56 (2006))), because the Bail Reform Act provides sufficient procedural safeguards, including a hearing, enumerated factors, the burden of proof on the prosecution by clear and convincing evidence and immediate appeal);  [Schall v. Martin](#), 467 U.S. 253, 265-66 (1984) (permitting short-term juvenile detention based on risk of reoffending).

because “juveniles, unlike adults, are always in some form of custody” and the detention was designed to protect “a juvenile from the consequences of his criminal activity”) (citations omitted).


92

 *Salerno*, 481 U.S. at 751 (“When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community ... we cannot categorically state that pretrial detention ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”) (quoting  *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

93

 *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (overturning excessive bail based on alleged membership in the Communist Party).

94

See  *id.* at 5-6 (describing atypically high bail based solely on association as arbitrary and totalitarian in nature).



95

Smith Act, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2006)).

96

 *Stack*, 342 U.S. at 5-6.


97

See  *United States v. Jackson*, 845 F.2d 1262, 1265-66 (5th Cir. 1988) (holding that evidence of association with a motorcycle gang was properly considered in the determination of detention, but absent additional allegations was insufficient when the defendant posed no flight risk and no specific allegations of criminal conduct were presented); see also  *United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986) (stating the Bail Reform Act imposes a rebuttable presumption that when a defendant is accused of certain federal or state offenses, preventive detention is justified to ensure attendance and avoid danger to the community, although a defendant's production of some credible evidence to the contrary may rebut this presumption); *United States v. Rodgers*, 738 F. Supp. 156, 159 (E.D. Pa. 1990) (holding that detention was proper when the defendant was an alleged gang member, the state alleged sufficient evidence of dangerous criminal activity, and the defendant lacked community ties).

98

See  *Stack*, 342 U.S. at 5-6.

99

See  *id.* at 10 (Jackson, J., concurring) (criticizing the lower court's requirement of excessive bail based on allegations the defendants were Communists as a mere veiled attempt to keep the defendants in jail and as “contrary to the whole policy and philosophy of bail”).

100





See N.Y.C. Dep't. of Corr., *Rikers Island Visitors Guide*, (2010) http://www.nyc.gov/html/doc/html/news/visit_guide_022210.pdf. The average number of inmates in the New York City Department of Correction jails in 2009 was 13,362 per day, with the average length of stay for pre-trial detainees equal to 50.3 days and the average length of stay for sentenced detainees equal to 34.8 days. *Id.*; see also N.Y.C. Dep't. of Corr., *DOC Statistics*, http://www.nyc.gov/html/doc/html/stats/doc_stats.shtml (last visited Mar. 1, 2011). In addition to pre-trial detainees, the jail incarcerates prisoners serving misdemeanor sentences and sentences of one year or less and those convicted of felonies and sentenced to prison sentences of more than one year until they can be transferred to state prison. *Id.*; N.Y.C. Dep't. of Corr., *An Overview of NYC DOC Facilities*, http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml (last visited Mar. 1, 2011). The inmates serving sentences are a small portion of the total incarcerated population. *Id.* One facility with a capacity of 2351 is designated for sentenced men; sentenced women occupy a facility that holds 1139 inmates along with detainees. *Id.* About 75% of the population housed by New York City Department of Correction are pre-trial detainees or detainees not yet sentenced. *Id.*; see also Press Release, N.Y.C. Dep't. of Corr., *New York City Department of Correction Announces Plan to Right-Size Jail System with Fewer Beds, New Jail* (Aug. 11, 2010), available at http://www.nyc.gov/html/doc/html/news/Facilities_Plan_Press_Release.pdf.

101

See  *Coffin v. United States*, 156 U.S. 432, 458-60 (1895).

102

U.S. Const. amend. VIII; N.Y. Const. art. I, § 5.

- 103 See Webster's Third New International Dictionary of the English Language Unabridged 1208 (3d ed. 2002) (defining jail as "a building for the confinement of persons held in lawful custody (as for minor offenses or some future judicial proceeding.)").
- 104 See Sullivan, *supra* note 25; see also Holly Otterbein, *Bail Is for the Rich*, Phila. Citypaper, June 23, 2010, <http://citypaper.net/print-article.php?aid=22308> (demonstrating the amount of time an alleged criminal may sit in jail due to his or her inability to post bail).
- 105 See Thomas H. Cohen & Brian A. Reaves, U.S. Dep't of Just., *Felony Defendants in Large Urban Counties*, 2002 24 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc02.pdf>; Gerard Rainville & Brian A. Reaves, U.S. Dep't of Just., *Felony Defendants in Large Urban Counties*, 2000 24 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc00.pdf>; Mary T. Phillips, *Bail, Detention, & Felony Case Outcomes*, Research Brief series, no. 18. N.Y.; N.Y.C. Crim. Just. Agency, Inc. (2008), available at <http://www.cjareports.org/reports/brief18.pdf>; Phillips, *Bail, Detention, & Felony Case Outcomes*, Research Brief series, no. 14, *supra* note 31, at 5-6; Rankin, *supra* note 31, at 655.
- 106 See, e.g.,  Fla. Stat. § 903.046 (2010);  N.Y. Crim. Proc. Law § 510.30 (Consol. 2010).
- 107 See Phillips, *Bail, Detention, & Felony Case Outcomes*, Research Brief series, no. 18 *supra* note 105, at 1-6; Phillips, *Bail, Detention, & Felony Case Outcomes*, Research Brief series, no. 14, *supra* note 31, at 5-6; Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 98 *U. Ill. L. Rev.* 1, 6 (1998); Rankin, *supra* note 31, at 655.
- 108 See Phillips, *Bail, Detention, & Felony Case Outcomes*, Research Brief series, no. 18 *supra* note 105, at 7; Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 *Marq. L. Rev.* 183, 185 (2007); Paul E. Wilson, *New Approaches to Pre-Trial Detention*, 39 *J. Kan. B. Ass'n* 13, 60 (1970).
- 109 See *infra* Part IV.C.
- 110 See  *Harp v. Hinckley*, 410 So. 2d 619, 622-23 (Fla. 5th Dist. Ct. App. 1982) ("In determining which form of release will reasonably assure appearance, the judge shall ... take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition").
- 111 See Colbert, *supra* note 107, at 15; see also *infra* Part IV.C.
- 112 See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.");  *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (holding that bail set above an amount which gives adequate assurances that the defendant will stand trial based on alleged association is excessive under the Eighth Amendment).
- 113 See generally e.g., C. Ronald Huff, *Gangs in America* (1990) (containing three chapters on definitions); Klein, *supra* note 10, chapter 2; Irving A. Spergel, *The Youth Gang Problem: A Community Approach* (1991) (Chapter 2).
- 114 See James C. Howell, *Menacing or Mimicking? Realities of Youth Gangs*, 58 *Juv. & Fam. Ct. J.* 39, 40 (2007) (discussing the myths surrounding gangs).
- 115 See Thornberry et al., *supra* note 11. In a study of one thousand Rochester youths from the age of thirteen to seventeen and a half year olds, about 31% reported belonging to a gang at some point during, but 50% of these quit within a year and an additional 28% reported membership for two years. *Id.* at 31. Only 14.3% were gang members for three years and 7.3% for four years. *Id.* at 39. Gang membership dropped precipitously after the age of 17.5, only 1.6% of the sample remained in gangs at the age of 18 and this number did not increase through the rest of the study to age twenty-two. *Id.* at 38. See also Spergel, *supra* note 113, at 104 (indicating that "most studies suggest that gang members simply 'mature-out'").
- 116 See Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 *Crime & Delinq.* 485, 500 (2003) (finding that despite guidelines that required continuous purging, the database had not been purged for four years prior to the research period); cf. Charles M. Katz

& Vincent J. Webb, *Policing Gangs in America* 220 (2006) (in units with automated purging systems, officers review records for any evidence of gang association and update the database for another one to five years if they find such evidence).

117 See *infra* Part III.C.

118 See Arlen Egley Jr., James C. Howell & Aline K. Major, U.S. Dep't of Just., *National Youth Gang Survey 1999-2001*, 4-5 (2006), available at <http://www.ncjrs.gov/pdffiles1/ojdp/209392.pdf>.

119 *Id.* at 4 (excluding certain groups results from research focused on “street gangs”).

120 Spergel, *supra* note 113, at 24 (noting that criminal justice agencies tend to emphasize different types of crimes in their descriptions, while “nonjustice organization representatives” tend to emphasize “symbolic behaviors” in their identification of youths as gang members).

121 Klein, *supra* note 10, at 25-27.

122 *Id.* at 29.

123 See Thornberry et al., *supra* note 11, at 42-44 (listing percentages showing gang members have a higher prevalence of delinquency than nonmembers).


124 Klein, *supra* note 10, at 68.

125 See Spergel, *supra* note 113, at 54 (“The fighting gang has not traditionally been an adequate or efficient basis for drug distribution, despite the fact that individuals or subgroups, or former gang members, may engage in drug trafficking.”); see also Klein, *supra* note 10, at 42-43 (summarizing law enforcement interviews, by stating only 16% reported having “drug gangs” in their cities, and that gang research points to the conclusion that gang involvement in drug sales varies, but as a whole is rather low).

126 Klein, *supra* note 10, at 86; see also Felix Padilla, *The Gang as an American Enterprise* 93-94 (1992) (describing a gang that is organized around selling drugs).

127 See *Compilation of Gang-Related Legislation*, National Gang Center, <http://www.nationalgangcenter.gov/Legislation> (last visited Mar. 1, 2011) (compiling a list of individual state legislation relating to gangs).

128 *Highlights of Gang-Related Legislation Spring 2008*, National Youth Gang Center, <http://www.iir.com/nygc/gang-legis/highlights-gang-related-legislation.htm> (last visited Mar. 1, 2011).


129  **Cal. Penal Code § 186.22 (2010)**. Participation in a criminal street gang provides in relevant part:
As used in this chapter, “criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.




Id. at § 186.22(f).



As used in this chapter, “pattern of criminal gang activity” means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons


Id. at § 186.22(e). To which thirty three designated felony offenses follow. See *id.* at §§ 186.22(e)(1)-(33).



130 See *id.* at § 186.22(f).

131 See  **People v. Vy**, 19 Cal. Rptr. 3d 402, 414 (Cal. Ct. App. 6th Dist. 2004) (holding that there was enough evidence to support a finding by the trial court that the requirement of “primary activities” was satisfied because the evidence showed the existence of three crimes by gang members over a short period of less than three months).

- 132  N.H. Rev. Stat. Ann. § 651:6 (2010).
- 133 Lewis Yablonsky, *Gangs in Court* 9-10 (2d ed. 2008).
- 134 *Id.*
- 135 See *id.* at 10.
- 136 See *id.*
- 137 See *id.*
- 138 See Klein, *supra* note 10, at 59.
- 139 See *id.*
- 140 See *id.*
- 141 See Yablonsky, *supra* note 133, at 10.
- 142 *Id.*
- 143 See *id.*
- 144 *Id.*
- 145 See Thornberry et al., *supra* note 11, at 35-36.
- 146 See *id.* at 39 (explaining that over half of young teens who reported gang membership were members for one year or less, and twenty-eight percent were members for two years). See also F. Esbensen and D. Huizinga, *Gangs, Drugs and Delinquency in a Survey of Urban Youth*, 31 *Criminology* 565, 579 (between 3 and 7% of at risk youths in the Denver Youth Survey reported being gang members in any given year and 67% stayed in a gang for only 1 year, while 3% remained in the gang for 4 years)
- 147  Cal. Penal Code § 186.22 (i) (West 2010) (emphasis added).
- 148 See Yablonsky, *supra* 133, at 158.
- 149 Alan Jackson, American Prosecutor's Research Institute Publication, (April 2004), reproduced in Yablonsky, *supra* note 133, at 171.
- 150 See, e.g., Dirk Johnson, 2 of 3 Young Black Men in Denver Listed by Police as Suspected Gangsters, *N.Y. Times*, Dec. 11, 1993, at A18. After a public outcry alleging discrimination in the racial composition of the database, the Denver Police Department eventually removed over half of the names. See Christopher Lopez, City Lops 3,747 Off Gang List, *Denv. Post*, Jan. 20, 1994, at A1.
- 151 See Minn. Stat. §299C.091 (2009).
- 152 A few states have legislations relating to gang databases., however, such legislations often do not require actual membership or criminality. See, e.g., Fla. Stat. §874.09(d) (2010) (authorizing the maintenance of databases “relating to criminal gangs and their members and associates”) (emphasis added);  20 Ill. Comp. Stat. Ann. 2640/10(e) (West 2010) (including “member or affiliate”); Minn. Stat. § 299C.091(1) (2009) (authorizing maintenance of data on individuals who “are or may be engaged in criminal gang activity”).
- 153 See, e.g., Katz & Webb, *Policing Gangs in America*, *supra* note 116, at 146 (providing gang criteria for four different police departments). Anne O'Connor & Chris Graves, *Gang Awareness Up, But Actual Threat Low In Twin Cities*, *Star Trib.*, March 20, 1995, at 1B.

- 154 See Interview with Nassau Gang Squad Detective, *supra* note 81 (indicating that while purging criteria did not exist, they updated the database daily, but that he would consider five years too short a time to purge an individual from the gang database).
- 155 See Katz, *Issues in the Production and Dissemination of Gang Statistics*, *supra* note 116, at 500 (explaining that despite purging requirements that required information to be purged after one, two, or five years depending on level of involvement, no purge had been conducted in the four years prior to the researcher's nine-month observations in 1997); see also Univ. of St. Thomas Sch. of L. in collaboration with St. Paul NAACP, *Evaluation of Gang Databases in Minnesota & Recommendations for Change*, Minn. Dep't of Pub. Safety, SF 2725 Workgroup, 5 n.18 (2009), available at <http://twincities.indymedia.org/files/GangsofStPaulReport.pdf> (noting Ice Demmings' name remained in the gang databases thirteen years after he had left the gang).
- 156 See Katz & Webb, *Policing Gangs in America*, *supra* note 116, at 269-71 (a study of four gang units that revealed they were poorly supervised and lacked governing policies, procedures and rules); see also Katz, *Issues in the Production and Dissemination of Gang Statistics*, *supra* note 116, at 497 (noting that most gang intelligence came from regular patrol officers who did not employ official criteria consistently).
- 157 See Katz, *Issues in the Production and Dissemination of Gang Statistics*, *supra* note 116, at 497; see also Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for a National Gang Database*, 42 Colum. J.L. & Soc. Probs. 293, 305 (2009); Jennifer M. Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, 2007 U. Chi. Legal F. 317, 348 (noting that a substantial number of alleged gang members and associates, swept up by ICE on the basis of local law enforcements gang databases under Operation Community Shield, were not accused of any violent crime).
- 158  *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 623 n.1 (Cal. 1997) (Mosk, J., dissenting) (citing Ira Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* 121 (1992)).
- 159 Nassau County Gang Criteria: Self admission alone establishes gang membership. *Id.* In the absence of self-admission, three of the other criteria (or one criteria noted on three dates) justified classification as a gang member. *Id.* A single criteria (other than self admission) results in identification as an "associate." *Id.* The remaining eleven criteria, are: (1) tattoos depicting gang affiliation; (2) style of dress consistent with gang membership; (3) possession of gang graffiti on personal property or clothing; (4) use of hand signs or symbols associated with gangs; (5) reliable informant identified person gang member; (6) associates with known gang members; (7) prior arrests with known gang members; crime consistent with usual gang activity; (8) statements from family members indicating gang membership; (9) other law enforcement agencies identifying subject as a gang member; (10) attendance at gang functions or known gang hangouts; and (11) identified by other gang members or rival gang members.
- 160 *Id.*
- 161 *Id.*
- 162 *Id.*
- 163 *Id.* As part of many plea bargains in gang cases, defendants are required to "debrief" and name names of other gang members in order to obtain favorable deals. See, e.g., District Attorney's Office, Nassau County, District Court Bureau Guidelines 48 (2003) ("Advise the defense attorney that there will be no automatic plea bargaining, unless he ... arranges for the defendant to be debriefed with regard to gang activity.").
- 164 See Katz, *Issues in the Production and Dissemination of Gang Statistics*, *supra* note 116, at 513.
- 165 See *Evaluation of Gang Databases in Minnesota & Recommendations for Change*, *supra* note 155, at 20.
- 166 *Id.* at 4.
- 167 Minn. Stat. § 299C.091, subdiv. 2(b) (2009); see also  Minn. Stat. § 299A.641, subdiv. 1 (2009) ("The Gang and Drug Oversight Counsel is established to provide guidance related to the investigation and prosecution of gang and drug crime.").

- 168 See Evaluation of Gang Databases in Minnesota & Recommendations for Change, *supra* note 155, at 9 n.38.
- 169 *Id.* at 10.
- 170 *Id.*
- 171 *Id.* at 9 (explaining a 2007 audit determining that of 219 files checked, thirty-two were “unsuccessful audits”).
- 172 *Id.* at 20-21.
- 173 *Id.* at 19.
- 174 See Evaluation of Gang Databases in Minnesota & Recommendations for Change, *supra* note 155, at 19.
- 175 Lorenza Munoz, Gang Database Raises Civil Rights Concerns, *L.A. Times*, July 14, 1997, at B1.
- 176 Nkechi Taifa, Laying Down the Law Race by Race: Criminal Sentencing Falls Disproportionately on Blacks and Latinos, 17 *Legal Times*, Oct. 10, 1994, at S36.
- 177 Mark Johnson, Legislators Urged to Pass Anti-Gang Laws: Mayor, Police Chief Visit Statehouse to Lobby for Tougher Penalties, *Charlotte Observer*, Aug. 4, 2005, at 1B.
- 178 Johnson, *supra* note 150, at A8.
- 179 Carol Kreck, Police to Share GangNet Database: Youth Advocates Say List Will Violate Right, *Denv. Post*, Sept. 24, 2002, at B3.
- 180 *Id.*
- 181 *Id.*
- 182 See Esbensen & Huizinga, *supra* note 11, at 569. Between three and seven percent of at-risk youths in the Denver Youth Survey reported being gang members in any given year. *Id.* at 569. Sixty-seven percent stayed in a gang for only one year, while three percent remained in the gang for four years. *Id.* at 575; see also Thornberry et al., *supra* note 11, at 39. Within one year, 50.4% quit. *Id.*
- 183 See Greene & Pranis, *supra* note 4, at 33-39.
- 184 See Evaluation of Gang Databases in Minnesota & Recommendations for Change, *supra* note 155, at 22.
- 185 *Id.*
- 186 *Id.*
- 187 *Id.*
- 188 See Part II.B.3.
- 189 See Bail and Alleged Gang Affiliation Survey, *supra* note 43, at question 11.
- 190 See *supra* Part IV.C.
- 191 See *supra* notes 152-56, 175-78 and accompanying text.
- 192 See generally, e.g., *Studebaker v. Uribe*, 658 F. Supp. 2d 1102 (C.D. Cal. 2009); *Ariano v. State*, 961 So. 2d 366 (Fla. 4th Dist. Ct. App. 2007); *Kirkpatrick v. State*, 137 P.3d 1193 (Nev. 2006);  *Origel-Candido v. State*, 956 P.2d 1378 (Nev. 1998).
- 193 See *supra* notes 92-94 and accompanying text.

- 194 See supra notes 109-10 and accompanying text.
- 195 See supra text accompanying note 43.
- 196  342 U.S. 1, 5-6 (1951); see also supra note 96 and accompanying text.
- 197  *United States v. Salerno*, 481 U.S. 739, 751-52 (1987).
- 198 *Id.*; see also supra notes 91-94 and accompanying text.
- 199 *Salerno*, 342 U.S. at 751; see also supra notes 91-94 and accompanying text.
- 200 Interview with Nassau Gang Squad Detective, supra note 81.

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