2 Stan. J. Civ. Rts. & Civ. Liberties 115

Stanford Journal of Civil Rights & Civil Liberties
November, 2005

Article

Joshua D. Wright [a1]

THE CONSTITUTIONAL FAILURE OF GANG DATABASES

Law enforcement agencies increasingly utilize databases, such as California's Calgang system, to facilitate data sharing and prosecution of criminal defendants in gang-related cases. Suspected gang members typically enter the database through "documentation," a highly subjective process resulting in serious legal and social consequences such as increased probability of conviction, longer sentences, loss of employment, and other stigmatizing effects. An examination of the documentation process reveals serious defects above and beyond the subjective nature of documentation criteria. Research strongly suggests that documentation procedures suffer from a general lack of quality control and oversight in maintaining the database, causing frequently erroneous documentation. Erroneously documented persons are left without recourse and can be left in the database for their entire lifetime whether or not they are involved in a gang because the responsible agencies systematically fail to adhere to policies requiring names to be purged after specified amounts of time without criminal or gang activity. These features of gang databases raise serious due process questions. In this article, I assert that documentation without a hearing violates the procedural due process guarantees of the Constitution. A hearing requirement would not only immunize documentation practices from constitutional challenges by allowing input from the affected parties, but would also increase database accuracy, thereby improving the efficacy of databases as a tool in policing and prosecuting gang crime.

***116** "When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them." [1]

I. Introduction

There is no dispute that gang crime is a serious problem in many major cities across the United States. One account estimates gang membership in the United States more than tripled from 1992 to 2000 from 249,352 to 772,500. [2] Nor is there any serious doubt that gang membership and crime rates are positively correlated. [3] One popular strategy aimed at reducing gang crime is the imposition of sentence enhancements. California was among the first states to adopt such measures. [4] These enhancements dramatically increase the sentences of those participating in crimes deemed to be gang-related. [5] How does one determine which crimes are gang-related? The efficacy of sentence enhancements in deterring gang crime depends on how accurately prosecutors and police departments can answer the question "who is a gang member?" [6]

***117** For prosecutors and police departments, the answer to this question invariably involves documentation, the process through which individuals are entered into a law enforcement managed database. California's Calgang is representative of the gang databases that have become commonplace in police departments across the country. [7] At trial, expert testimony from peace officers testifying the defendant is documented is typically sufficient to establish membership. Prosecutors, expert witnesses, judges, and juries rely heavily on the accuracy of the information in gang databases.

Evidence of documentation can have dramatic legal consequences for criminal defendants. One obvious effect is that a felony conviction exposes the defendant to tougher sentences under gang enhancement statutes. Documentation also increases the probability of conviction by opening the door for otherwise prejudicial gang evidence purporting to establish motive. Increasing the probability of conviction at trial, in turn, allows prosecutors to negotiate plea bargains in the ominous shadow of sentence enhancements. In some cities, gang prosecutions are assigned to special units where district attorney's may be forbidden from accepting plea bargains and are mandated to pursue maximum penalties. [8] Suspected gang members that are documented are also more likely to find their names on gang-injunction lists, which prohibit listed individuals from associating with each other, wearing certain colors, or engaging in other activities.

Non-legal consequences follow from documentation as well. One study suggests that documented gang members are more likely to be subjected to excessive force by law enforcement than non-documented individuals. [9] Other obvious social consequences might also follow from documentation, including ***118** loss of employment and other social stigma.

One unifying feature of gang databases is that documented individuals are not entitled to notice, a hearing on the merits, or the opportunity to challenge the documentation decision. Indeed, documented individuals are without recourse for agency failure to purge names that should be thrown out of the system according to departmental and federal guidelines. The position of many police departments has been that individuals should not have the right to know their documentation status. Consider Los Angeles County Sheriff's Sergeant Steve Newman's statement that "the information can't be used in a court of law, so it shouldn't negatively impact anybody in any way." [10]

Similarly, Los Angeles Police Department Commander Dan Koenig recently expressed the following rhetorical inquiry: "Why would we tell them they're on it? Does Schwarzkopf tell the Iraqis? . . . If you're not involved in criminal activity why would you care about being on it?" [11] Koenig implies two claims: that non-members should not worry about being included in the database because documentation is costless to the individual and that databases are capable of reliably identifying gang members. Both are dubious.A rational person would immediately be concerned with the increased likelihood of future prosecution and exposure to sentence enhancements occurring at the moment of documentation whether or not she is a gang member. Further, evidence suggests that those operating the databases are not capable of ensuring that non-gang members do not find themselves documented and trapped in the database system. Contrary to Koenig's statement, documentation, independent of the potential for future criminal activity, gives reason for concern.

The assertion that documentation is costless to the documented individual is factually inaccurate. The information is frequently used in a court of law to prove motive and trigger sentence enhancements. Introduction of gang evidence can have a significant impact on the probability of conviction. [12] Further, an incorrectly documented individual may face unwarranted enhanced penalties for non-gang related criminal acts.

The assertion that inclusion in the database is costless is more than simply factually inaccurate. It is fundamentally at odds with the primary purpose of the database - to deter gang activity by imposing costs on documented individuals. If the database was truly useless in this regard, as Sergeant Newman's statement seems to suggest, there would be no point in having it around. To the

contrary, I assume that gang databases have at least the potential to suppress gang crime. The value of gang databases therefore becomes a question of trading off any increased deterrence associated with gang databases against the ***119** risks of erroneously imposing the consequences of documentation. This balance is a critical component of the procedural due process analysis.

A number of caveats are in order before proceeding. I am not arguing that gang crime is not a serious problem worth solving. I am not claiming that gang databases are without any redeeming values. Nor am I taking the position that the documentation process could not be altered to remedy the constitutional defects.

Instead, I am claiming that gang documentation without a hearing violates the procedural due process guarantees of the United States Constitution. [13] Part 2 of the article describes gang databases, the documentation process, and documentation criteria. Part 3 asserts and presents evidence for the central claim of this paper: Documentation without a hearing is not a constitutionally permitted practice because it violates the due process clause.

II. Gang Databases

Gang databases, or gang information tracking systems, are commonplace in many jurisdictions nationwide. California describes its system, Calgang, as "an automated gang intelligence database system that provides intelligence information to assist local, state, and federal law enforcement agencies in order to solve gang related crimes." [14] Calgang was put into initial operation on December 31, 1997. Similar systems are used in other states under the generic name "GangNet." Police departments use data to locate suspects and offenders, to ascertain the magnitude of the jurisdiction's gang problem, and to help prosecute criminal defendants. In this section, I discuss the mechanics of the documentation and law enforcement procedures regarding the conditions under which a "documented" individual is to be purged from the database. [15]

A. The Documentation Process

Most gang research finds very few differences in both frequency and type of crime committed by non-documented individuals and documented gang members. [16] Consequently, this research suggests gang databases are of little ***120** incremental value in reducing gang crime. A second strand of research addresses issues of database accuracy. Researchers finding systematic errors in database information frequently speculate that these errors result from administrative overload and technical failure. Allegations of police department misconduct, however, are not uncommon. For instance, one study reported evidence of a police department purposefully manipulating estimates of gang membership in order to secure federal funding. [17] These flaws in the documentation process are reasons for concern because of the serious consequences associated with entry into the database: exposure to sentence enhancements, the possibility of being named in a civil gang injunction, increased exposure to the use of excessive police force, loss of employment, and other stigmatic effects.

While documentation practices are certain to vary across jurisdictions and departments, my due process analysis relies heavily on a recent study by Charles Katz, ("Katz"), which examines the actual documentation practices within a particular department, and a follow-up study of four major cities. [18] Press accounts of gang database problems corroborate the findings in these studies. Here, I begin by reviewing the documentation process and the potential for inaccuracies existing at each stage of the process.

There are essentially two paths to documentation. The first path involves the investigation of a crime already at the attention of the police department. When a crime is committed and a crime report issued, the crime report is forwarded to the gang unit's staff. Once in the hands of its staff, gang units treat homicide reports differently for the purposes of documentation. If the unit determines the homicide is gang-motivated, it documents the individual. For non-homicides, the gang unit matches suspects in the crime report to the existing gang list. Where there is a match, the gang unit specifies the crime as a gang crime and documents individuals involved as gang members.

The second path is more frequently traveled and presents more interesting due process questions because an arrest is not necessary to trigger the process. This process starts with what is frequently called a field interview" (FI). It should be noted that an FI is not a probable cause stop. Aggressive policing in ***121** inner city neighborhoods that tend to have high densities of gang membership frequently includes consensual contacts. Officers frequently make contact with known gang members or individuals suspected to be gang members based on their race, ethnicity, gender, age, and clothing. Officers interview these individuals,

frequently asking questions regarding gang membership, monikers, and tattoos. Officers then record this information on the FI card, along with details regarding where the stop took place, the identity of any associates, vehicles involved, schools attended, and home addresses.

Katz finds that the majority of documentation intelligence comes from FI cards describing individuals' contacts with patrol officers rather than gang unit personnel. [19] This is an interesting finding because patrol officers have less training on how to identify gang members than gang unit personnel. The seriousness of this problem is exacerbated by the subjective nature of the criteria used for documentation. [20]

For example, Katz and Webb find that Las Vegas gang enforcement officers were the most aggressive in this type of policing:

[G]ang enforcement squads moved through neighborhoods in an orchestrated fashion, and officers rarely used any pretext for making suspicion stops. If an individual was thought to be a gang member, or if there was a small crowd of young minority males in a known gang neighborhood, the squad targeted them. [21]

Consider Katz and Webb's description of one of these stops in Las Vegas:

Three or four squad cars moved in harmony toward the target . . .. Once the squad car stopped, officers would quickly leave their cars, hands on their guns, requesting the targeted individual to get out of the vehicle (if they were in one). They would place the person(s) in a prone position, either on the ground or against the hood of the squad car, and hand pat him for weapons or other contraband. They would request identification, check for a criminal history, and conduct an interview about the person's activities and gang involvement. [22]

During these types of aggressive stops, officers would frequently demand that suspects pull up shirts or otherwise disrobe for a physical inspection for gang tattoos. [23] These “suspicion stops” generally focused on male minorities under the age of thirty and varied in duration from only twelve minutes in Inglewood to forty-one minutes in Las Vegas. [24]

***122** In theory, the next step is the review of FI cards by gang detectives to ascertain whether there is sufficient information to document an individual as a gang member. In San Diego, for example, one report indicates that detectives will review an individual for documentation only if he or she accumulates three FI cards. It is only then that detectives will initiate a gang file for that person with a supervisor's approval. [25] Other departments purport to have similar quality control measures for filtering out FI cards that do not satisfy documentation criteria. [26] Katz's findings, however, illuminate the divergence between theoretical protocol and actual practice. Among Katz's more interesting findings is that departmental oversight and quality control measures are simply not reliable. Katz finds that “all officers indicated that their reports were never questioned or returned by sergeants.” [27] This is likely due to an oversupply of FI cards relative to the number of sergeants. In San Diego, for example, nearly 7,000 FIs were completed in 1999. [28]

Combining Katz's findings, it appears that the majority of individuals in the database are documented as a result of FIs filled out by patrol officers without gang experience and without review for accuracy. [29] While troublesome that departments may not follow their own documentation protocol, the lack of supervision and expertise in documenting individuals would amount to harmless error if the documentation criteria were rigorously and accurately applied. As we will see, this is simply not the case.

Once reviewed for accuracy, the file is sent to a central depository for gang files and is entered into the database by an administrator. The file generally will include the individual's photo, criminal history, gang profile, and personal information. [30] Katz exposes two major flaws in the data processing stage. First, “[m]any gang member files were incomplete and [generally] outdated.” [31] Information on the individual's probation or parole status, for example, had generally not been updated in the last three to four years. [32] The explanation from one civilian administrator for the delay in updating files is suggestive:

It's just hit and miss if a file gets updated . . . . We do not have time to constantly update every file, so we only do it if something comes up. For example, if the officers are investigating something, they will run a record check on the guy and then throw it in the file. But if the guy is never involved ***123** in anything, his file will never be updated. [33]

In the above example, data processing appears to be overloaded and understaffed, a problem likely to be shared with other police departments. [34] Katz found that the gang information system was at least six months behind and argues that the most troublesome aspect of this delay is that departmental policy often requires purging of names from the database after one year of inactivity. [35] While obsolete database information is certainly troublesome, widespread departmental failure to follow purging policies, thus erroneously leaving individuals in the database, is at least equally problematic.

Generally, departments have policies that allow individual names to be purged from the database after some period of time. The San Diego Police Department, for example, purges individuals after five years if they have no recorded gang activity and are at least twenty five years old. They classify as "inactive" those that have no recorded gang activity after two years. [36] The department at issue in the Katz study varied in its purging practices between one, two, and five years, depending on the documented individual's gang history and level of involvement. "Wannabe/associate" gang members were to be purged within one year, members without gang activity after two years, and hardcore gang members with no activity after five years. [37]

In practice, departments often violate their own policies and do not purge individuals from the database within their established timelines. Departments are not likely to face any external pressure to follow these guidelines because individuals do not generally know whether or not they are documented. Police departments are generally free to keep names in the system and keep whatever value that information might have in the future at little or zero cost to the department. Surprisingly, Katz found that one department had failed to purge any records in the four years prior to his study. [38] Katz also found that officers and supervisors were simply ignorant of departmental purging procedures and routinely misinformed interested parties regarding the length of time one was to be documented before being expunged from the database. [39] This is not to say that all departments do not purge names that have been in the database for the requisite period of time. For instance, Katz and Webb report that three of the ***124** four units they observed automatically generated lists of names of individuals that should be purged if the system does not contain recent information of additional police contact. [40]

The general tendency, however, is that police departments have been notorious in their failure to purge individuals who are no longer affiliated with the gang or otherwise meet the guidelines for purging. [41] Even if one is fortunate enough to know that he or she is documented, it is very difficult to have one's name removed from the database. However, there are cases in which individuals have been purged from a database after significant effort. For instance, two teenage Vietnamese-American girls in California were fortunate enough to have their names removed and photographs purged as a result of a settlement after the ACLU filed a class action lawsuit on their behalf. [42] A more recent case involved a Union City Police Department sweep of James Logan High School in Union City, California. School administrators detained approximately sixty Hispanic and Asian students who were taken from the school cafeteria to vacant classrooms for questioning. Photos of the students were taken and put in the Union City Police gang database and have not been removed to this date. The ACLU has filed a class action lawsuit on behalf of three of the students. [43]

Documented individuals or those in neighborhoods with a great deal of gang activity have expressed a different fear regarding purging practices. Combining the reality that names are never purged with the fact that police contacts can be instigated without commission of a crime, gang activity, or even probable cause, many are skeptical that it is possible to ever reach the five year purging threshold in California. [44] Some suspect that police sweeps of these neighborhoods are designed to get as many youth into the system - whether they are involved in gangs or not - to facilitate later attempts at prosecution. [45]

Failure to properly purge individuals is just one reason that gang databases ***125** are unreliable. The subjective criteria used to document gang members also reinforce the suspicion that databases, even if properly managed and administered, are excessively over inclusive and overstate minority participation rates. In Denver, for example, over 66% of black males between the ages of twelve and twenty-four were included in the gang database. [46] Los Angeles police classified 47% of the young black males in the city as gang members. [47] According to California's Office of Criminal Justice Planning, recorded data for FY 2001-02 includes:

5,018 distinct identified gangs;

180,219 identified active gang members;

108,651 gang vehicles; and

773,124 gang related locations. [48]

One commonly voiced objection to Calgang and similar databases is that the criteria used to document individuals are subjective at best and not capable of consistent application. Some have expressed the fear that documentation practices create incentives for law enforcement officers to "label any young man from a tough neighborhood a gang member" or wrongly prosecute a crime as gang-related based on ambiguous or insufficient standards. [49] I turn now to the criteria used in documentation.

B. Criteria

Stated police criteria for documenting gang members vary across state and local agencies. Katz suggests that deviations from stated documentation practices might be an additional source of variance across departments. There is no reason to exhaustively catalog the differences in criteria, written or implicit, across jurisdictions in this paper. Rather, I sample the criteria applied in several jurisdictions. In California, an individual can be documented if any of the following appear on an FI report:

the individual admits gang membership;

the individual has tattoos, wears clothing, or possesses paraphernalia that is associated with a specific gang;

the individual is arrested participating in delinquent or criminal activity with a known gang member;

police records and/ or observations confirm the individual as a gang member;and ***126**

information from a reliable informant identifies the individual as a gang member. [50]

Another set of guidelines provides that names will be added to the database if two or more of the following gang criteria are met:

self-admission;

tattoos associated with gangs;

possession of gang graffiti;

use of hand signs associated with gangs;

identified as gang member by a reliable informant;

associates with gang members;

prior arrest with gang members;

statements from family members;

identified as gang member by other law enforcement agency;

attendance at gang function;

identified by other gang members. [51]

In some instances, documentation criteria are published by statute. In Texas, for example, an individual can be documented and information collected for the gang database if any of the following two criteria are satisfied:

self-admission by the individual of criminal street gang membership;

identification of the individual as a criminal street gang member by a reliable informant or other individual;

a corroborated identification of the individual as a criminal street gang member by an informant or other individual of unknown reliability;

evidence that the individual frequents a documented area of a criminal

street gang, associates with known criminal street gang members, and

uses criminal street gang dress, hand signals, tattoos, or symbols; or

evidence that the individual has been arrested or taken into custody with

known criminal street gang members for an offense or conduct consistent

with criminal street gang activity. [52]

Some police departments vary documentation requirements by "type" or "class" of gang member. In these jurisdictions, gang members are divided into three classes: (1) associates/wannabe members; (2) members; and (3) hardcore members. An individual may be documented as an "associate" if the individual wears "colored clothing and/or uses gang hand signals consistent with suspected gangs," associates or corresponds "with known gang members," is "observed writing gang-related graffiti on any type of property," is "included in group pictures of known gang members," or "arrested in the company of identified gang members." [53] Admission of membership, tattoos, past criminal ***127** records including gang-related activity, or identification from an informant is sufficient to identify an individual as a "member." Hardcore membership status is reserved for members that are involved in "high-level narcotic distribution and/or commit gang-related felony crimes." [54]

The subjective element in the documentation standards generates obvious concerns and has been pointed out by many. [55] Two major flaws in the criteria are the reliance on self-reporting and on clothing. Leading gang researchers have repeatedly stressed that gangs are loosely connected organizations with especially fluid membership and little institutional memory. [56] A member today may very well not be a member tomorrow, but will remain documented. Further, youth in many gang-dominated neighborhoods, not unlike youth generally, may tend to claim membership or connection to an organization that will command respect and attention but to which they have no real affiliation. The police department's focus on "gang clothing" has also been criticized for equating clothing, tattoos, music, and other paraphernalia generally popular with minorities as gang-related. [57]

A few examples may best illustrate the problems associated with the subjective component of documentation. Consider whether the following hypothetical scenarios warrant documentation:

Example 1: An individual lives in a neighborhood with heavy gang activity, grew up with many persons who are active gang members, and is frequently observed socializing with gang members in his neighborhood. There is no other evidence that this person is a gang member. Is it enough to justify documentation that the individual has been seen near his home with suspected gang members?

Example 2: An officer is confronted by a situation in which a random passerby indicates that a young person in a heavily gang-populated neighborhood belongs to a gang. What is sufficient to "corroborate" identification as a gang member by an informant of unknown reliability?

Perhaps the most problematic documentation issue is the individual who ***128** was once, but is no longer, active within the gang. This is not likely to be a small group since research shows that gang membership is often short lived, usually from one to two years. [58] One might think that a gang database imposing serious criminal penalties and non-legal sanctions on individuals would account for this reality by frequently updating the system and purging individuals when appropriate. Another more involved hypothetical illustrates some of the problems that arise in this context.

Example 3: Consider a 28-year-old man who admits gang membership at the age of 13 in a field interview. This initial field interview is followed by fifteen years without any record of criminal gang activity. During those fifteen years, the individual accumulates fifteen additional FI cards, but in each interview it is recorded that "the individual states that he was in a gang until age 17, but no longer claims." In four of the fifteen contacts, the individual is wearing a color consistent with the neighborhood gang. For the past six years, the individual has been attending junior college, and for the last ten years he has been employed at a youth recreation center. Is it justified that this individual is still in the gang database at the age of 28, despite the fact that he has not been involved in gang activity for eleven years?

The interpretation of these fifteen post-admission FI cards has dramatic consequences for our hypothetical individual. Let's call him Jerome from here on out. If the FI cards are interpreted as gang-related police contacts, the five-year clock for purging would restart at each FI card and Jerome would likely remains in the database. Alternatively, it can be argued that the same fifteen FI cards show that Jerome has not been active in the gang over a five-year period and should therefore be purged from the system. The differences between these two conclusions have huge implications for Jerome.

Let's take the hypothetical a little bit further to illustrate the impact of documentation at trial. Jerome goes to the park with a group of people from the neighborhood, some gang members and some not, when a fight breaks out between two gang members from Jerome's group and some members of a rival gang. Jerome watches the fight but does not participate. A gang member from Jerome's group, whom Jerome has never met, shoots a member of the rival gang and is charged with murder.

If Jerome is a documented gang member, it is likely, despite the fact he is "inactive" within the gang, he will be charged with a crime. Further, the fact that Jerome would be a documented gang member being charged with other gang defendants would be highly prejudicial to his defense and substantially increase his probability of conviction. On the other hand, if he has been purged and is no longer documented in the system, there are a number of other possibilities. Jerome may not be charged at all. If charged, Jerome may be able to get a severance from the gang member defendants because gang motive ***129** evidence introduced against co-defendants will be highly prejudicial to his defense and substantially increase his probability of conviction. Since Jerome is not in the database as a gang member, he has a greater chance to defend himself against any potential sentence enhancement if the court finds him guilty of a crime. Perhaps most importantly in a system where the majority of cases never make it to trial, Jerome will have a substantially increased opportunity to extract a favorable plea bargain offer from the district attorney if he is no longer a documented gang member.

In truth, this debate is only theoretical because many departments simply do not purge names from the database. In reality, Jerome would be documented, tried for murder along with the shooter and other gang member defendants on an aiding and abetting theory, and his trial would not be severed. [59]

Several gang members I interviewed expressed the belief that a primary function of FI contacts was to continue a stream of police contact such that names were never purged. This would, in turn, accomplish three tasks: (1) increase the probability of conviction if the person ever went to trial; (2) facilitate sentencing enhancements; and (3) increase the total number of persons in the database since one commonly used criteria for documentation is "hanging around" other documented individuals. [60]

The difficulties in applying these criteria to the realities of life in neighborhoods where gangs are prevalent are exacerbated by the previously discussed failures of most departments to control the quality of information collected by officers. Further, the fact that it is often patrol officers, rather than trained gang unit officers, applying these fuzzy criteria creates further doubts regarding database reliability.

In sum, gang databases appear to be riddled with factual inaccuracies, administrative errors, lack of compliance with departmental guidelines, and lack of oversight. But this is not the worst of it. The root of the problem may be that even if properly applied, application of the subjective criteria would not produce useful results. My goal here is not merely to identify these flaws but to establish the context in which to evaluate the implications of documentation for procedural due process.

III. The Constitutionality of Gang Databases

Gang databases raise a wide array of interesting constitutional issues. Commentators have argued that anti-gang injunctions, which generally apply to documented gang members, are unconstitutionally vague, overly broad, ***130** impinge on rights to free association, and suggest guilt by association. [61] In People ex rel. Gallo v. Acuna, [62] the California Supreme Court recently

upheld an anti-gang injunction against vagueness and guilt by association challenges. [63] The injunction prohibited documented members of the "VST" gang in San Jose from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' . . . or 'VSL' . . . member." It is important to note Acuna did not involve the procedural due process issues discussed here, but rather upholds the injunction against charges of excessive vagueness and ambiguity. Commentators have also debated whether gang injunction proceedings implicate the right to counsel. [64] One could also imagine potential equal protection challenges to the use of anti-gang injunctions, which are used almost exclusively against Latino and black youth, and Fourth Amendment challenges to the manner in which gang members are documented. [65]

I do not address these particular constitutional issues, nor do I make any claims regarding the efficacy of gang databases. [66] It is clear that gang injunctions reduce violent crime. [67] Gang injunctions also deter a host of non- ***131** criminal activities, such as socializing with documented individuals or wearing clothing that may be mistaken for gang dress. Because documentation sometimes leads to listing gang members on anti-gang injunctions, I do not doubt that documentation has at least a second order effect in reducing gang crime. Whatever the relationship between documentation and gang crime, documentation procedures must comport with procedural due process guarantees. My claim is that documentation sadly fails to meet these standards.

Several features of the documentation procedure raises due process concerns. Documentation without participation of the individual radically diminishes the opportunity to correct errors. Most importantly, however, documentation imposes a significant risk of erroneously meting out severe consequences. The essential due process question is whether the marginal benefit of introducing additional procedures to eliminate errors and protect the liberty interests involved exceeds the marginal cost of introducing these procedures with the possible effect of sacrificing some of the impact they may have had in deterring gang crime. To reach that inquiry, however, documentation must affect a cognizable interest in a manner sufficient to trigger due process protections.

A. Documentation Infringes Upon a Protected Interest

The Fifth and Fourteenth Amendments concern the deprivation of life, liberty, or property. [68] Cognizable interests must implicate one of these three in a non-trivial manner. In the documentation context, one candidate interest is the "liberty interest" in one's name, reputation, and integrity that is called into question by being labeled a gang member. As discussed, documentation results in an increased probability of facing a costly gang injunction proceeding which will seriously restrict his or her freedom to associate and move within the neighborhood, possible sentence enhancements, increased exposure to excessive force and police harassment, and loss of employment.

A second candidate liberty interest is freedom from the involuntary confinement that has been described as the "core of the liberty protected by the Due Process Clause." [69] It is this interest that the Court has found implicated in various forms of detention. [70] While documentation does not directly detain those in the database, it does expose them to increased sentences under enhancement statutes, an increased probability of conviction, and weakens the defendant at the plea bargaining stage.

The Supreme Court's jurisprudence in the "posting cases" set forth a useful ***132** framework for analyzing the first candidate interest. [71] In particular, these cases teach that due process is not triggered upon the loss of reputation or imposition of social stigma alone, but rather must be accompanied by the loss of a right previously recognized by state law.

In Wisconsin v. Constantineau, [72] the Supreme Court struck down a Wisconsin statute that allowed law enforcement to post fliers at liquor stores and bars stating that a listed individual was an excessive drinker and should not be allowed to buy liquor. [73] Constantineau successfully challenged her "posting" on the grounds that the statute impinged on her liberty interest in reputation without procedural due process. The Court ruled that because "the label is a degrading one," and "a person's good name, reputation, honor or integrity is at stake," the posted individual is entitled to "notice and an opportunity to be heard." [74]

Five years later, the Court narrowed the scope of the liberty interest in reputation in Paul v. Davis. [75] There, the Court upheld a law enforcement practice of distributing fliers to local merchants with names and photographs of suspected "active" shoplifters in the city and county. Davis had been arrested, but not convicted, of shoplifting at the time the fliers were distributed and the

court subsequently dismissed his case. Davis brought a Section 1983 action claiming that the police had violated his due process rights by distributing the fliers to merchants. As in Constantineau, Davis received neither notice nor opportunity to be heard prior to his "posting." Despite the factual parallels with the Wisconsin statute, the Court ruled that no liberty interest had been deprived by the law enforcement practice. Specifically, the Court ruled:

The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. We have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ***133** 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause. [76]

The Court reconciled its decision in Constantineau by pointing out that the plaintiff's reputational injury was coupled with deprivation of a distinct right under state law - the right to buy alcohol. [77] The Court also stressed an important distinction between complete deprivation of a state right and an event that "significantly altered [plaintiff's] status as a matter of state law." [78] Davis emphasizes that the latter is a sufficient condition for triggering a due process inquiry. [79]

The constitutional issue thus turns upon whether documentation significantly alters an individual's status as a matter of state law or merely causes stigma to reputation. This is a fact-intensive inquiry that depends crucially on the consequences imposed by the documentation process. One can argue that documentation does not injure one's reputation because database information is privately held by law enforcement and therefore unlikely to result in loss of employment or reputation. Further, even if documentation involved some loss of reputation, the "plus" factor required by Davis is absent because documentation alone is not accompanied by criminal penalties and therefore does not alter one's status under color of state law. Even a superficial analysis of actual documentation practices suggests such an argument is not faithful to empirical reality and thus ultimately unpersuasive.

In reality, the reputational impact and social consequences of documentation are significant. Gang database information is sometimes available to those potential employers who ask for it and is sometimes distributed to those that don't. [80] Katz finds, for example, that documentation information was often shared with both public and private employers. [81] There are other social consequences of documentation. Documented persons are likely to be on the receiving end of more aggressive police tactics, including "consensual" field interviews, and, as discussed, excessive use of force. ***134** Additionally, a person constantly stopped by police officers as a result of his or her documentation is certain to face a loss of reputation within the community.

As required by Davis, documentation alters the individual's status as a criminal defendant under state law in states with gang sentence enhancements. [82] The reality of documentation is that it is typically a sufficient condition for triggering the sentence enhancement. One is hard pressed to find a single case where a documented defendant successfully challenges gang membership. [83] Gang expert Malcolm Klein describes the theme of most criminal prosecutions against gang defendants as follows:

"[P]rove the defendant's gang affiliation and thereby increase the likelihood of conviction and of sentence enhancement. Gang membership per se is taken as evidence of guilt and of commitment to a career of crime." [84]

Documentation's impact on one's liberty interest in name, reputation, and integrity is therefore sufficient to trigger some level of due process protections.

The second candidate interest impacted by documentation is one's liberty interest in avoiding additional exposure to incarceration. A core objection to documentation by many individuals, documented and not, is that it: (1) increases the probability that they are charged with crimes committed by gang members on secondary liability theories; (2) increases the probability of conviction if they are charged; and (3) and guarantees harsher penalties if they are convicted. [85]

The Supreme Court's recent decision in Hamdi v. Rumsfeld is illustrative in this regard. [86] Justice O'Connor's opinion in Hamdi settled a dispute similar, though admittedly not identical, [87] to that involving the documentation process. ***135** In Hamdi, the

Supreme Court addressed the mechanism used by the Bush Administration in classifying Hamdi as an "enemy combatant," [88] ultimately concluding that Hamdi's incarceration triggers at least some due process protections allowing him to challenge his classification. [89] The similarities are obvious. The nature and quality of Hamdi's incarceration depends critically on the how the Bush Administration classifies persons as "enemy combatants." The gang documentation process determines in large part the probability and duration of incarceration for those labeled as gang members. The Court in Hamdi applies the Mathews balancing test in determining which procedural protections are necessary during the classification process and this test is applicable to gang documentation as well. The determination procedures in each situation are subjective, not well publicized, and not available for inspection by those classified. But despite these flaws in measurable criteria, both designations - enemy combatant and gang member - increase the likelihood of incarceration, albeit admittedly to differing degrees.

There is strong evidence that documentation procedures increase the likelihood of, and thereby impact one's right to avoid, incarceration. Consider the aiding and abetting theory offered by the district attorney during Jerome's murder prosecution. [90] The homicide resulted from a physical scuffle between two groups that included members of two San Diego gangs involved in a decade long feud: the Lincoln Park Bloods and Skyline Piru. Interestingly, the homicide detective assigned to the case had been promoted from his position in the gang unit where he had served as the gang officer responsible for the Lincoln Park gang. This allowed the detective to play a unique dual role in the trial as both the principal homicide detective and as an expert offering testimony regarding membership of defendants, the Lincoln Park/ Skyline gang rivalry, gang psychology, and other topics.

Jerome did not have any record of criminal gang activity. The detective testified that in his several years of experience as the gang officer for this particular gang, he had never had gang-related contact with Jerome. Nonetheless, the detective offered his expert opinion that Jerome was a gang member, opening the door for sentence enhancements and other gang evidence to establish a gang-related motive to aid and abet the homicide of a "rival" gang member. The prosecution's case against Jerome predominately consisted of this testimony, based largely upon Jerome's documentation, and his presence at the ***136** scene of the altercation. [91]

The resolution of Jerome's prosecution further illustrates yet another connection between documentation and prosecution. Before trial, Jerome refused several plea, the most generous of which offered six years in state prison. Because of Jerome's supposed gang connection, the prosecutor was unwilling to negotiate further. At trial, the jury convicted the two other defendants, acquitted Jerome of first degree murder, and deadlocked 6-6 on the second degree murder and manslaughter charges. The prosecutor opted for a second trial. Jerome again rejected an improved offer of three years because he did not feel responsible for the crime and refused to accept a felony conviction and prison time. [92] After opening statements in the second trial, Jerome accepted an offer allowing his immediate release, without prison time, and putting an end to his 18-month incarceration. [93]

Jerome's prosecution illustrates that the link between documentation and exposure to sentence enhancements under state law is strong. Jerome's documentation as a teenager contributed to his inability to sever his trial from the active gang members and changed the nature of the plea negotiations, which now took place in the shadow of sentence enhancements. The fact that he was facing sentence enhancements defined the nature of the plea bargain process. That documentation does not itself subject the individual to criminal penalties or arrest is of relatively little importance. The individual's status under state law is altered at the moment of documentation nonetheless. [94] Compared to the interests at issue in both Davis and Constantineau (loss of job or loss of the ability to buy liquor respectively), documentation implicates a much more pressing liberty interest - namely, keeping oneself out of prison for long periods of time. The Supreme Court has a longstanding history of recognizing that the Fourteenth Amendment liberty interest encompasses "not merely freedom from bodily restraint but also the right of the individual . . . ***137** generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." [95] Having found that documentation by the police department [96] implicates the loss of an individual's liberty because it alters one's legal status for the purpose of sentence enhancements and increases the length and likelihood of potential incarceration, I move to the second prong of the due process analysis: determining which procedures are necessary to avoid deprivation of a cognizable liberty interest.

B. Applying Mathews v. Eldridge

The United States Supreme Court has set forth a three part test in Mathews v. Eldridge to determine whether the state's procedures meet constitutional due process standards. [97] Recently, the Supreme Court referred to Mathews as "[t]he ordinary mechanism

that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law. . ..'" [98] The Mathews test requires courts to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional safeguards; and (3) the government's interests, including any administrative burdens that additional procedural safeguards would pose. [99] I contend that this balancing analysis strongly favors requiring additional procedural safeguards for documentation.

1. The Private Interest

As discussed, the liberty interests at stake for documented individuals are significant. Documented individuals seek to avoid a change in legal status that would subject one to a decreased probability of favorable plea bargains and an increased probability of conviction, inclusion in anti-gang injunctions, subjection to police abuse, and longer sentences upon conviction. Further, ***138** because gang database information is available to prospective employers, documentation also implicates distinct interests in reputation and employment.

A few additional observations regarding the calculus of an individual's interest in documentation are appropriate here. First, the risks created by documentation are not one time events. Rather, the risk of loss of employment, of increased police contact, the possibility of excessive force, and the imposition of larger sentences continue so long as the individual is documented. Second, it should be noted that anti-gang injunction civil proceedings, by contrast to database documentation, afford defendants notice and an opportunity to be heard, though it appears that most individuals do not contest the injunction. [100] If civil anti-gang injunction proceedings justify notice and a pre-deprivation hearing, it is unclear why documentation would not require the same procedural safeguards. Documentation, like an anti-gang injunction order, does not involve immediate detention or incarceration, but increases the potential for both since injunction proceedings increase the probability of future criminal contempt proceedings.

2. Risk of Erroneous Deprivation

The lynchpin of the claim that documentation fails due process safeguards stems from the extraordinarily high risk that an individual will be erroneously documented and therefore subjected to loss of liberty without recourse. As discussed in Section 2, the documentation process is seriously flawed both in theory and practice. At best, the process depends critically on the application of inherently vague and subjective criteria. In practice, it is far worse. The history of Calgang and other databases is a tale of an inexcusable series of errors at each stage of the process: erroneous application of criteria, lack of expertise and training in applying the criteria, administrative backlog, data entry errors, lack of oversight, and failure to comply with departmental purging guidelines. Unfortunately, these types of errors have been systematic and appear to be the rule rather than the exception. [101]

The Mathews balancing analysis requires one to consider not only the risk of erroneous deprivation, which is very high, but also the "probable value, if any, of additional or substitute procedural safeguards." [102] The balancing analysis can be conveniently expressed in Hand Formula terms: due process is denied when $B < PL$, where B is the cost of introducing a particular procedural safeguard, P is the probability of erroneous deprivation without the safeguard, and L is the magnitude of the loss if the risk materializes. [103] In these terms, Section 2 provides evidence that P is quite large. Section 3 makes the case that ***139** L is also significant if granted certain probable concomitant variables - that the liberty interest at stake includes the potential for sentence enhancements, increased probability of conviction, exposure to a greater likelihood of excessive police force, and loss of employment. One must ultimately weigh these losses against the incremental costs of the additional procedures, B. I will return to this balancing test below.

An alternative formulation of the cost-benefit analysis when adding additional procedural safeguards is of the form:

Increase in Accuracy X Claimaint's Interest > Burden on Government. [104]

The marginal benefit of additional safeguards to gang documentation procedures would not be trivial. [105] To the contrary, the complete absence of procedural safeguards in the documentation process and input from the affected party suggests that additional safeguards would have a dramatic effect on the accuracy of the gang database. For example, many of the types of errors being committed with respect to documentation are exactly the types of mistakes that additional safeguards would serve

to eliminate, e.g., the simple failure to purge names that should be removed according to the jurisdiction's own guidelines. It is therefore highly likely that additional safeguards would substantially improve the accuracy of the database because they would afford the court the opportunity to ensure that criteria were properly applied and information properly obtained. Further, a hearing would provide the opportunity for documented individuals to argue that their names should be purged from the database under appropriate circumstances.

3. Government's Interest

Finally, Mathews demands a weighing of the values of government interests in maintaining current procedures, a calculus that must account for the administrative burden associated with adding a particular procedure. The imposition of additional procedural safeguards does not implicate the state's interest in reducing gang crime in any meaningful sense. Whatever impact gang databases have on crime rates, a hearing requirement would not compromise the agencies' ability to share information, analyze the data to inform their resource allocation decisions, and facilitate prosecution by presenting the data in court. It is also important to note that a hearing requirement, in many respects, is consistent with the state's interests. A hearing would improve the accuracy of the information in the database by allowing those who are wrongly documented to challenge the decision. Increasing the accuracy of the database ***140** is consistent with improving resource allocation decisions, facilitating prosecution, and ultimately reducing gang crime.

By way of contrast, the government in Hamdi argued that its reduction of process was necessary as a result of the practical difficulties of waging the war on terror. For instance, forcing military officers waging battle to be concerned with far away litigation or allowing discovery of military secrets that threatened national security might threaten the viability of the government's mission. [106] Undoubtedly, the addition of procedures in Hamdi would be closer to orthogonal to the government's mission than those at issue with respect to gang databases since the latter would be considerably less likely to involve the disclosure of secrets which might reasonably be thought to jeopardize any conceivable "mission." The Hamdi Court found that

> "the risk of erroneous deprivation" of a detainee's liberty interest unacceptably high under the Government's proposed rule . . . . [The Court held] that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. [107]

Similar to Hamdi, the risk of erroneous deprivation as a result of documentation is extremely high. [108] It is difficult to imagine the justification for a rule allowing enemy combatants a hearing and opportunity to be heard but none for individuals documented as gang members. To be sure, a notice and hearing requirement would increase administrative costs. [109] However, when applying the balancing test, the extremely high risk of erroneous documentation and significant magnitude of the losses associated with this risk justify a hearing of some sort. [110]

While quantitative application of the Mathews test is difficult, it is a qualitatively useful framework in the presence of competing interests. While there is no magic formula for balancing individual interests, government ***141** interests, and the risk of erroneous deprivation, two factors render application of the test relatively straightforward. First, the government's interest is not overwhelming. This is not to say that reducing gang crime is not a substantial interest. It surely is. But the due process question should not be analyzed in a vacuum without considering how documentation works in the real world. The government interest is premised upon a negative relationship between documentation and gang crime. The bulk of serious scholarly evidence, however, suggests that gang databases have little if any impact on gang crime. [111] Perhaps most importantly, to the extent that documentation hearings increase the accuracy of the database, hearings are consistent with the governmental interest in fighting crime. There is an especially weighty governmental interest in favoring additional procedural safeguards when it is considered that courts are particularly sensitive to the risk of erroneous deprivation. [112] The amount by which the government's interest in containing costs or in fighting crime must outweigh an individual's private liberty interest increases with the risk of error. As I have shown above, there is ample evidence showing that a high probability of error is systemically pervasive throughout the documentation processes.

This creates two pertinent dynamics in considering the Mathews balancing test in the gang documentation context. First, the extreme risk of error implies that the government must show that its interests in fighting crime and containing costs outweigh the

private liberty interests by an insurmountable burden. In fact, the evidence strongly suggests that the liberty interests dominate what boils down to a government interest premised on a non-existent or extremely weak relationship between documentation and crime reduction. Second, the high probability of error inherent to the gang database suggests that private and government interests are aligned with respect to the addition of procedural safeguards. In other words, procedural safeguards would promote, not hinder, the government's interest in reducing crime by increasing database accuracy. In sum, the Mathews test weighs heavily in favor of imposing a hearing requirement on the documentation process.

IV. Conclusion

The documentation process is broken. A database or gang tracking system may very well be an effective way to fight crime. However, the reality of gang prosecutions is that evidence of documentation is sufficient to trigger sentence enhancements and significantly increase the probability of conviction by introducing prejudicial gang evidence to the jury. With so much at stake for criminal defendants facing these enhancements, one would imagine that the responsible agencies would take their duty to maintain the accuracy of the ***142** information seriously. Perhaps they have. But the history of database errors suggests otherwise.

As the practice is currently employed, documentation without a hearing violates the procedural due process guarantees of the Fifth and Fourteenth Amendment. Perhaps a properly managed database would survive such a balance, but that inquiry remains hypothetical. The uncontradicted evidence is that the current documentation system is inherently prone to erroneous deprivation of individual liberties without significant offsetting benefits demanded by the Mathews analysis.

A pre- or post-documentation hearing would improve the situation in two ways. Most importantly, a documentation hearing would insert much needed fairness into documentation procedures. The very legitimacy of these practices is undermined by the lack of process afforded those individuals deprived of liberties sufficient to trigger constitutional protections. Secondly, a hearing would improve the incentives of the police departments to adopt better review processes for FI cards and to solve some of the data entry and administrative problems that have hampered databases from providing accurate data. My proposal would therefore increase the effectiveness of the gang databases by increasing the accuracy of this notoriously unreliable data. A more accurate database will not only help police departments achieve their objectives, but also will allow the courts to view the database as a legitimate source of information.

Justice Douglas once warned against succumbing to the temptation to achieve noble aims by taking measures that depreciate the value of our Constitutional commitment to due process. [113] Reducing gang crime is no doubt a worthy goal, but our Constitution plainly requires that we achieve that goal in a manner that properly respects the constitutional commitment to due process.

Footnotes

a1 Assistant Professor, George Mason University School of Law. J.D. UCLA School of Law; Ph.D. UCLA Department of Economics. I thank Charles Katz for valuable comments on a previous draft. I both owe and dedicate this article to Jerome Silvels and his family. Please do not cite or quote without the author's permission.

1 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J. concurring).

2 See Deborah Lamm Weisel & Tara O'Connor Shelley, Specialized Gang Units: Form and Function in Community Policing, Final Report to the National Institute of Justice, NCJRS Document No. 207204, 17 (2000) [hereinafter Gang Units]. The most recent Department of Justice estimates are understated because police departments have not been willing to share data with the federal government. See Kevin Johnson, U.S. Gang Membership May Be Higher than Reported, USA Today, Aug. 3, 2005.

3 See, e.g., Richard Block, Gang Activity and Overall Levels of Crime: A New Mapping Tool for Defining Areas of Gang Activity Using Police Records, 16 (3) J. of Quantitative Criminology 369 (2000).

4 Cal. Penal Code § 186.22 (b)(4).

5 Id. § 186.22 (b)(1)(A-C).

6 Properly defining gang members and gang crime is a crucial question for social science research in this area. The seminal treatment of this issue by Cheryl Maxson and Malcolm Klein shows that gang-related homicide rates are very sensitive to perturbations between motive-based definitions and member-based definitions. Cheryl L. Maxson & Malcolm W. Klein, Street Gang Violence: Twice as Great, or Half as Great?, in Gangs in America 71, 100 (C. Ronald Huff ed., 1990). See also Malcolm W. Klein, What are Street Gangs When They Get to Court, 31 Val. U. L. Rev. 515, 516 (1997) ("Every effort to provide a definition common to all gangs has failed. Efforts to determine who is and who is not a gang member similarly have failed, with the numbers of false positives and false negatives often approaching the numbers of agreed-upon membership").

7 For example, Orange County's Gang Incident Tracking System ("GITS"), Illinois's Law Enforcement Agencies' Data System ("LEADS"), Las Vegas's Gang/ Narcotics Relational Intelligence Program ("GRIP") and Albuquerque's Gang Reporting, Evaluation and Tracking System ("GREAT").

8 Malcolm W. Klein, The American Street Gang: Its Nature, Prevalence and Control (1995). See also Klein (1997), supra note 6 (citing a series of prosecutorial advantages in gang-related felony cases, including special gang prosecution units).

9 Joel H. Garner et al., Understanding the Use of Force By and Against the Police, NIJ Research in Brief 9 (November 1996) (finding that police in Phoenix, Arizona used excessive force significantly more often in encounters with documented gang members than with non-documented gang members). Subsequent research calls into the question the strength of these findings. See, e.g., Joel H. Garner & Christopher D. Maxwell, Understanding the Use of Force By and Against the Police in Six Jurisdictions, Use of Force By Police, NCJRS Doc. No. 196694, at 104 (October 2002) (finding known gang members were less likely to be subjected to excessive force than non gang members without regard to documentation).

10 Merlin Chowkwanyun, California 'Anti-Terror' Databases Unchecked, Z Mag., July 03, 2003, http://www.zmag.org/content/showarticle.cfm? SectionID=43&ItemID=3854.

11 John Seeley, Vows of Peace, LA Wkly., Aug. 4, 2000, at 25 (discussing L.A. Sheriff's Department's verbal commitment to a new policy of informing individuals of their inclusion in Calgang under limited circumstances).

12 Irving A. Spergel, The youth gang problem: a community approach (1995).

13 Much of the gang research that I rely on was undertaken in the early to mid-1990s in response to the size of the gang problem at that time. It is quite possible that many of the findings in those studies have since changed. On the other hand, the empirical findings on gang databases which serve as the foundation for my due process claims utilize post-2000 data.

14 Kirby L. Everhart, Cal. Gov.'s Office of Criminal Justice Planning, Evaluation, Monitoring and Audits Division, An Evaluation of The Gang Violence Suppression Program: Final Evaluation Report (Mar. 2003).

15 For a comprehensive treatment of the police response to gangs in the United States, see Charles M. Katz & Vincent Webb, Policing Gangs in America (forthcoming 2005).

16 See generally Meda Chesney-Lind et al., Gangs and Delinquency, 21 L. & Soc. Change 201 (1994); Charles M. Katz, Vincent J. Webb, and David R. Schaefer, The Validity of Police Gang Intelligence Lists: Examining Differences in Delinquency Between Documented Gang Members and Non-Documented Delinquent Youth, 3 Police Quarterly, 413 (2000). Richard McCorkle & Terence Miethe The Political and Organizational Response to Gangs, 15 Justice Quarterly 41 (1998); Marjorie Zatz, Chicano Youth Gangs and Crime: The Creation of a Moral Panic, 11 Contemporary Crises 129 (1987); but see Katz et al. (2000).

17 Majorie Zatz, Chicano Youth Gangs and Crime: The Creation of a Moral Panic, 11 Contemporary Crises 129 (1987).

18 Charles M. Katz, Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit, 49 (3) Crime and Delinquency 485 (2003). See also Katz and Webb, supra note 15 (analyzing gang intelligence procedures in Inglewood, Las Vegas, Pheonix and Albuquerque). Katz and Webb's findings are largely consistent with Katz's single city findings. Id. at 198-240.

19 Katz, supra note 18, at 497. Katz and Webb found that the average time gang unit personnel devoted to collecting intelligence in Inglewood, Albuquerque, Pheonix and Las Vegas was 3.5 hours, 1.35 hours, 1.15 hours, and .2 hours respectively. Katz and Webb, supra note 15, at 206.

20 See id.

21 Katz and Webb, supra note 15, at 211.

22 Id. at 212.

23 Id. at 213. Katz and Webb find that individuals rarely declined these demands but often appeared embarrassed and offended.

24 Id. at 233 (Table 7.5).

25 Gang Units, supra note 2, at 108.

26 Katz & Webb, supra note 14, at 218 (finding that police departments in Inglewood, Phoenix, and Albuquerque exercised such review measures, but Las Vegas did not).

27 Katz, supra note 17, at 499.

28 Weisel & Shelley, supra note 2, at 108.

29 Katz & Webb, supra note 14, at 218 (finding that at least some review of FI cards occurs in Phoenix, Albuquerque and Inglewood).

30 Katz, supra note 17, at 499.

31 Id.

32 Id.

33 Id. at 500.

34 For example, Katz and Webb report that Las Vegas was four months behind in processing gang intelligence and entering data into the system. Katz & Webb, supra note 14, at 219.

35 Id.

36 Weisel & Shelley, supra note 2, at 111-12 n.9.

37 Albuquerque and Inglewood purge names from the system after five years, Las Vegas maintains individuals in the system for two years as “active”, scheduling them for purging after two years of inactivity, and Phoenix purges associate gang members after one year and hardcore members after five years. Katz & Webb, supra note 14, at 219.

38 Katz, supra note 17, at 500. Katz estimates, based on a conservative guess from within the department, that the database was inflated by 20 to 25%.

39 Id. at 501.

40 Katz & Webb, supra note 14, at 220. In two of these departments, Inglewood and Las Vegas, record purging was not supervised by any specific person within the unit. Id.

41 Deborah Lamm Weisel, Contemporary Gangs: An Organizational Analysis 62-63 (2002); Cheryl L. Maxson, Street Gangs and Drug Sales in Two Suburban Cities, NIJ Research in Brief 3 (July 1995) (asserting that authorities in Pasadena and Pomona do not purge gang lists of inactive members); Daniel C. Tsang, The Computer Wore Colors, Orange County Weekly, July 16-22, 1999, at 12 (citing software glitch that caused Orange County, California database to fail to purge non-members).

42 See Davan Maharaj, Rights Suit Involving Police Photos Is Settled, L.A. Times, May 19, 1994, at B1.

43 See Benitez v. Montoya, 2004 WL 2370637 (N.D. Cal. 2003) (denying defendants' motion to dismiss plaintiffs' 42 U.S.C. § 1983 claims under the Fourth and Fourteenth Amendment). See Linda Beres & Thomas D. Griffith, Gangs, Schools and Stereotypes, 37 Loy. L.A. L. Rev. 935 (2004).

44 Interviews with anonymous San Diego gang members. Initial interviews conducted in November 2004 and follow-up interviews conducted in June 2005.

45 Id.

46 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, § 1, at 8. After a public outcry alleging discrimination in the racial composition of the database, the Denver Police Department eventually removed over half of the names. Christopher Lopez, City Lops 3,747 Off Gang List, Denver Post, Jan. 20, 1994, at A-01.

47 Ira Reiner, Office of the District Att'y, County of Los Angeles, Gangs, Crime and Violence in Los Angeles, 100 Table 1 (1992).

48 See Everhart, supra note 13, at 19.

49 Megan Garvey & Richard Winton, Tracking of Gang-Related Crime Falls Short, L.A. Times, Jan. 24, 2003, §1, at 1.

50 Weisel & Shelley, supra note 2, at 112.

51 Katz & Webb, supra note 15, at 146.

52 Tex. Code Crim. Proc. Ann. art. 61.02(c) (1965). The Texas statute also calls for purging records after a three year period without criminal activity. Tex. Code Crim. Proc. Ann. art. 61.06 (1965). It is unclear whether FI or consensual contacts are considered criminal activity for the purposes of art. 61.06.

53 Katz, supra note 17, at 496. See also Susan L. Burrell, Gang Evidence: Issues for Criminal Defense, 30 Santa Clara L. Rev. 739, 748-51 (1990); Placido G. Gomez, It is Not So Simply Because An Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership In Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702, 34 St. Mary's L.J. 581, 611 (2003) (commenting on subjective nature of San Antonio Police Department documentation criteria); Matthew Mickle Werdegar, Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs, 51 Stan. L. Rev. 409, 423 (1999).

54 Katz supra note 18 at 496.

55 See, e.g., Linda S. Beres & Thomas D. Griffith, Demonizing Youth, 34 Loy. L.A. L. Rev. 747 (2001).

56 See generally, Klein, supra note 6. Beres & Griffith, supra note 51, at 761 (“The vague criteria, secrecy of the process, and lack of judicial review create a danger that police officers add many young, minority males to the database simply because they wear hip-hop clothing and live in poverty-stricken, high-crime areas”).

57 Ira Reiner, Office of the Dist. Att'y of LA, Gangs, Crimes, and Violence in Los Angeles 100 (1992).

58 Linda S. Beres & Thomas D. Griffith, Gangs, Schools and Stereotypes, 37 Loy. L.A. L. Rev. 935, 949 n.80 (2004) (citing literature).

59 In fact, this is exactly what happened to Jerome. I will return to the story of his trial later.

60 Interviews with anonymous gang members.

61 See Christopher S. Yoo, The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances, 89 N.W. U. L. Rev. 212, 247-51 (1994); Werdegar, supra note 49, at 422-24. But see Gregory S. Walston, Taking the Constitution At

Its Word: A Defense of the Use of Anti-Gang Injunctions, 54 U. Miami L. Rev. 47 (1999). See also People ex rel. Gallo v. Acuna, 929 P. 2d 596, 629-31 (Cal. 1997) (Mosk, J., dissenting) (concluding that the Acuna injunction violated vagueness and overbreadth doctrines).

62 40 Cal. Rptr. 2d 589 (Ct. App. 1995), rev'd, 929 P.2d 596 (Cal. 1997), cert. denied, 117 S. Ct. 2513 (1997).

63 Id. at 592.

64 See Werdegar, supra note 49, at 433-38; Yoo, supra note 57, at 264-66. Compare Walston, supra note 57, at 72-73 (arguing that the right to counsel is not implicated by the "frequent failure of gang members to attend their hearings"). Others have argued that unique civil remedies like banishment of gang members violate procedural due process. Stephanie Smith, Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?, 67 U. Chi. L. Rev. 1461 (2000).

65 See Werdegar, supra note 49, at 433-36.

66 The consensus amongst researchers, however, has been that the databases are not very effective. Many researchers have found little or no difference between documented and non-documented individuals in terms of frequency and severity of criminal offenses. See, e.g., Meda Chesney-Lind, et al, Gangs and Delinquency: Exploring police estimates of gang membership, 21 Crime, Law and Social Change 201 (1994); Richard McCorkle and Terance Miethe, The Political and Organizational Response to Gangs: An Examination of a "Moral Panic" in Nevada, 15 Justice Quarterly 41 (1998); Marjorie Zatz, Los Cholos: Legal Processing of Chicano Gang Members, 33 Social Problems 13 (1985); Marjorie Zatz, Chicano Youth Gangs and Crime: The Creation of a Moral Panic, 11 Contemporary Crises 129 (1987). One recent study, in contrast to the bulk of the literature, finds a significant difference between the frequency and severity of crimes committed by documented gang members. See Katz, et al, The Validity of Police Gang Intelligence Lists: Examining Differences in Delinquency Between Documented Gang Members and Non-Documented Delinquent Youth, 3 Police Quarterly 4 (2000).

67 See Jeffrey Grogger, The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County, 45 J. L. & Econ. 69 (2002).

68 U.S. Const. amend. V; U.S. Const. amend. XIV.

69 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngblood v. Romeo, 457 U.S. 307, 316 (1982)).

70 See United States v. Salerno, 481 U.S. 739, 755 (1987) (pre-trial detention); Kansas v. Hendricks, 521 U.S. 346, 356-57 (1997) (civil commitment); Zadvydas v. Davis, 533 U.S. 678 (2001) (deportation).

71 I thank Maxwell Stearns for bringing these cases to my attention.

72 400 U.S. 433 (1971).

73 The statute reads, in part:
When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as thereby to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as to injures his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person ... the wife of such person, [or certain governmental officers], may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year....
Wisconsin v. Constantineau, 400 U.S. 433 at 434 n.2 (citing Wis. Stat. § 176.26 (1967) (repealed 1972)).

74 400 U.S. at 437.

75 424 U.S. 693 (1976).

76 Davis at 701 (emphasis added).

77 Id. at 708-9.

78 Id. at 708. See also Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating that the scope of protected interests are "defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.") (emphasis added). Typically, effect on future employment is enough to establish a "plus" factor. See, e.g., Huntlay v. Comty School Bd. of Brooklyn, 543 F.2d 979 (2d Cir. 1976); Quinn v. Syracuse Model Neighorhood Corp., 613 F.2d 438 (2d Cir. 1980); Rosenstein v. City of Dallas, 876 F.2d 392 (5th Cir. 1989). See generally, Steinbock, supra note 64.

79 424 U.S. at 711.

80 Ryan Pintado-Vertner & Jeff Chang, The War on Youth, 2 Color Lines (Special Issue) 4 (Winter 1999-2000). It is important to note that the extent to which distribution of this information occurs is unknown.

81 Katz, supra note 17, at 513. Documentation information is also shared with schools, which can have seriously effects on an individual's educational experience.

82 At least twenty-three states have gang-related sentence enhancements according to the National Youth Gang Center. See NYGC Compilation of Gang Legislation, available at: http://www.iir.com/nygc/gang-legis/enhanced_ penalties.htm.

83 This may occur for a variety of reasons. The prosecution in gang cases has in-house expert testimony available in the form of gang officers or detectives whereas the defense experts are rarely introduced, if at all. See Klein, supra note 8, at 518-519.

84 Id. at 518.

85 Most gang members believed that they were documented, but were unsure. All had been the subject of field interviews, while only some told the officers that they "claimed" involvement in the gang. Most knew the San Diego Police Department purging procedures and were very aware of how long it had been since their last field interview. A number of former gang members or older members no longer actively involved in the gang expressed concern that constant police sweeps through the neighborhood were aimed at documenting as many individuals as possible who would agree to interviews because they did not know that they had the option of refusing to answer the officer's questions during the field interview.

86 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

87 One obvious difference is that enemy combatant status is the primary cause of loss of liberty, while documentation is a secondary cause of loss of liberty contingent upon arrest and conviction--though it should be noted that there is evidence that documentation is directly correlated with non-legal penalties such as excessive force and loss of employment. Still, this is an important difference. Nonetheless, to the extent that documentation increases the probability that one is charged with a crime, convicted at trial, and receives a longer sentence if convicted, these are differences of degree and not of kind.

88 Id. at 2646.

89 See Tung Yin, Procedural Due Process to Determine "Enemy Combatant" Status in the War in Terrorism, 73 Tenn. L. Rev. 351 (2006) (analyzing the Supreme Court's due process jurisprudence in the war on terror).

90 People v. Downey, 92 Cal. App. 4th 899 (Cal. App. 2000). As a matter of disclosure, I participated in the defense of Jerome Silvels as a character witness and as counsel. This paper contains my personal views which should not be attributed to Mr. Silvels or members of his defense team

91 The Ninth Circuit has ruled that evidence of gang membership and presence at the scene of a crime is not sufficient to establish aiding and abetting liability as a matter of law. Mitchell v. Prunty, 107 F.3d 1337, 1341 (9th Cir.), cert. denied, 118 S.Ct. 295 (1997), overruled in part on other grounds, Santamaria v. Horsley, 133 F.3d 1242 (9th Cir. 1998) (en banc) ("membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. To hold otherwise would invite absurd results. Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the 'common purpose of 'fighting the enemy.'") (quoting Curtin v. Lataille, 527 A.2d 1130, 1133 (R.I. 1987)).

92 For one media account of the trial, see http://www.uniontrib.com/news/metro/20041007-9999-1m7silvels.html.

93 See http://www.signonsandiego.com/uniontrib/20041203/news_ 7m3jerome.html.

94 See, e.g., Jenkins v. McKeithen, 395 U.S. 411, 427 (finding that while "the Commission does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding .... [n]evertheless, the Act ... makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability.").

95 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

96 I am assuming that documentation by the police department involves state action.

97 42 U.S. 319 (1976).

98 Hamdi v. Rumsfeld, 542 U.S. at 528. Compare Yin, supra note 89, arguing that the Mathews test is not appropriate in the war on terror context where both the individual and government interests are very significant. Yin argues due process in terrorism detention cases would be better guided by analogical reasoning to prior cases rather than Mathews "straitjacket of utilitarianism and accuracy." To the extent that Yin's model concludes that cases involving detention universally require a hearing in front of an unbiased decision maker, the right to present a defense, adequate notice, and the right to counsel, it does not appear that application of the analogical model would require that I reach a different conclusion. However, the Mathews balancing framework is particularly useful where the probability of erroneous deprivation is superbly high, as I have argued is the case for documentation, because it correctly requires the government's burden to be increased proportionally to the error rate.

99 Id. at 334-35.

100 Werdegar, supra note 49, at 434-435.

101 See Katz, supra note 17; discussion infra, Section 2.

102 424 U.S. at 335.

103 See Richard A. Posner, Economic Analysis of the Law 564 (6th ed. 2003).

104 See, e.g., Stephen G. Breyer et al., Administrative Law and Regulatory Policy 843 (5th ed. 2002).

105 Compare Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (determining that trial court did not err in failing to appoint counsel for mother, since she had shown little interest in regaining custody of son).

106 Hamdi v. Rumsfeld, 542 U.S. at 531-532.

107 Id. at 533.

108 As demonstrated in Part II above.

109 Mathews, 424 U.S. at 347-48 ("at some point the benefit of an additional safeguard to the individual ... may be outweighed by the cost").

110 One way to minimize potential administrative costs would be to require notice and a post-documentation hearing. A hearing available to any person who asserted that right upon notice of documentation would likely reduce the total cost burden on the state since there is evidence that most afforded notice in gang injunction proceedings do not contest the judgment. A post-documentation hearing would thereby allow the agencies to conserve resources in those instances where an individual does not contest gang membership. To be clear, I am not arguing that a pre-documentation hearing is not warranted. To the contrary, the high risk of erroneous deprivation combined with the magnitude of the individual's liberty interests suggests that a pre-documentation hearing might be warranted. The debate between pre and post documentation hearing is one that depends critically on an empirical evaluation of the administrative costs associated with both. However, my focus here is to emphasize that some sort of hearing is necessary.

111 See supra note 15.

112 See, e.g., Santosky v. Kramer, 455 U.S. 795 (1982).

113 Supra note 1.

2 STNJCRCL 115

End of Document