

# IMMIGRATION RELIANCE ON GANG DATABASES: UNCHECKED DISCRETION AND UNDESIRABLE CONSEQUENCES

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*The Obama Administration has historically expanded the availability of deferred action, which provides a reprieve from the threat of deportation and work authorization to certain undocumented immigrants, through the creation of the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). These programs, as well as legislative efforts to provide a path to citizenship for undocumented immigrants, increasingly seek to exclude suspected gang members. In doing so, they make gang databases managed by state and local law enforcement increasingly relevant to eligibility decisions. These databases, however, lack the procedural safeguards necessary to curb police discretion, which can allow racial stereotypes and biases to influence decisionmaking and lead to the disproportionate inclusion of people of color. This Note argues that the policy rationales underlying procedural due process highlight the inadequacies of these databases as tools for immigration adjudicators. By using them to determine eligibility for immigration benefits, the Department of Homeland Security (DHS) imports the racial bias inherent in the criminal justice system to the immigration system. In order to avoid this result and increase both fairness and accuracy, DHS should bar adjudicators from relying on gang databases.*

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INTRODUCTION

In 1995, the American Civil Liberties Union (ACLU) settled with the Garden Grove, California, Police Department on behalf of two Vietnamese-American girls who were photographed while waiting for a ride outside a shopping mall by police compiling a gang database.<sup>1</sup> In 2002, police officers and school officials approached approximately sixty students at James Logan High School in Union City, California and ordered Latino and Asian students into separate classrooms.<sup>2</sup> They then photographed the students and entered their names and pictures into a gang database.<sup>3</sup> In December 2010, officers from the Salt Lake City Police Department entered West High School and conducted a “gang sweep,” photographing twenty-four students of color and entering their names and pictures into the department’s Versadex database.<sup>4</sup> Officers detained fifteen-year-old Latina freshman Y.A. in a school room, accused her of being a gang member, and photographed her holding a whiteboard identifying her by name, demographic information, and alleged gang affiliation.<sup>5</sup> The officers filled out an electronic “field card” identifying Y.A. as a gang member and entered it into their database.<sup>6</sup> In each of these incidents, local and

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<sup>1</sup> Davan Maharaj, *Garden Grove Settlement Restricts Police Photographing of Detainees*, LOS ANGELES TIMES (Dec. 12, 1995), [http://articles.latimes.com/1995-12-12/news/mn-13051\\_1\\_garden-grove-police-department](http://articles.latimes.com/1995-12-12/news/mn-13051_1_garden-grove-police-department).

<sup>2</sup> Third Amended Complaint ¶¶ 39–40, *Benitez v. Montoya*, No. C 03-0392 JSW (N.D. Cal. Feb. 19, 2003).

<sup>3</sup> *Id.* ¶ 56.

<sup>4</sup> Second Amended Complaint ¶¶ 3, 6, 10, *Winston v. Salt Lake City*, No. 2:12-cv-01134 TS-PMW (D. Utah June 17, 2013).

<sup>5</sup> *Id.* ¶¶ 17, 119–125.

<sup>6</sup> *Id.* ¶¶ 129, 131.

state law enforcement officials targeted people of color for documentation in gang databases.

Racial bias has a particularly profound impact on police decisions to document individuals in gang databases because those decisions are the product of virtually unrestrained discretion.<sup>7</sup> Individuals do not receive notice when police seek to classify them as likely gang members, nor do they have an opportunity to challenge their documentation in an adversarial proceeding.<sup>8</sup> Moreover, the vague and subjective nature of the criteria that officials use to determine gang membership enhances the risk of racially-biased documentation and leaves people who live in neighborhoods with high levels of gang activity especially vulnerable to inclusion in gang databases.<sup>9</sup>

A currently developing federal policy of relying on gang databases to determine immigration benefits and burdens amplifies the effects of these flawed law enforcement techniques. Secretary of Homeland Security Janet Napolitano announced in 2012 that her department would grant prosecutorial discretion and work authorization to undocumented youth who came to the United States before the age of sixteen.<sup>10</sup> However, this program, called Deferred Action for Childhood Arrivals (DACA), excludes youth who the Department determines “pose[ ] a threat to . . . public safety,”<sup>11</sup> which has the potential to include anyone documented in a gang database.<sup>12</sup> Since undocumented individuals that the Department of Homeland Security (DHS) considers to be threats to public safety are targets of deportation, this policy deters youth who have had contact with the police or

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<sup>7</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW* 123 (2012) (identifying police discretion as a key entry point for racial bias in the criminal justice system); *infra* Part II.A (discussing discretion and racial bias in the gang database documentation process).

<sup>8</sup> See *infra* notes 48–50, 111–16 and accompanying text (describing the lack of procedural safeguards and the confidentiality surrounding gang databases).

<sup>9</sup> See Stacey Leyton, *The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases*, in *CRIME CONTROL AND SOCIAL JUSTICE* 109, 115 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003) (describing the weaknesses in many of the typical criteria for database documentation); *infra* Part II.A.2 (arguing that database criteria are too vague to sufficiently constrain police discretion).

<sup>10</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Sec. to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; John Morton, Dir. U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter Napolitano Memo], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> AM. IMMIGRATION COUNCIL, AM. IMMIGRATION LAWYERS ASS’N & NAT’L IMMIGRATION PROJECT, NAT’L LAWYERS GUILD, PRACTICE ADVISORY: DEFERRED ACTION FOR CHILDHOOD ARRIVALS 20 (2013) [hereinafter AIC Practice Advisory], available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_DACA.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_DACA.pdf).

live in certain neighborhoods from applying for benefits under DACA, even if they have never been arrested or convicted of a crime.<sup>13</sup> The immigration reform bill that passed the Senate in 2013, S. 744, would further increase the immigration consequences of documentation in a gang database. Immigrants who DHS determines are gang members would be barred from accessing the path to citizenship that the bill creates.<sup>14</sup> Most recently, President Obama expanded the deferred action to include undocumented parents of U.S. citizens and permanent residents in a new program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), but explicitly excluded people who are believed to have participated in gang activity.<sup>15</sup> The same executive action made those people high priorities for deportation.<sup>16</sup> Future comprehensive immigration reform efforts may continue this trend of using gang databases to determine eligibility for immigration benefits—a trend that this Note argues is misguided and leads to racially-biased results.

One scholar has argued that gang databases implicate a protected interest that triggers the procedural requirements imposed by the Due Process Clause and articulated in *Mathews v. Eldridge*.<sup>17</sup> DACA, DAPA, and the legalization program envisioned by S. 744 are discretionary, meaning that they likely would not constitute an additional protected interest.<sup>18</sup> Nonetheless, this Note argues that the policy con-

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<sup>13</sup> See *id.* at 21–22 (noting that individuals that U.S. Citizenship & Immigration Services (USCIS) believes are gang members may risk deportation).

<sup>14</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3701(c)(1)(B) (2013).

<sup>15</sup> Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents from Jeh Charles Johnson, Sec’y of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 4 (Nov. 20, 2014) [hereinafter Deferred Action Memo], available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

<sup>16</sup> Memorandum on Policy for the Apprehension, Detention and Removal of Undocumented Immigrants from Jeh Charles Johnson, Sec’y of Homeland Sec. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy 3 (Nov. 20, 2014) [hereinafter Enforcement Memo], available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>17</sup> 424 U.S. 319, 332–35 (1976); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 131–37 (2005).

<sup>18</sup> See *Perales v. Reno*, 48 F.3d 1305, 1313 (2d Cir. 1995) (finding that the plaintiffs had a protected interest in benefiting from the 1986 legalization program because the language of the statute said that the Attorney General “shall” grant the status); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(a)(245B)(a) (2013) (stating that the Secretary of Homeland Security “may” grant

siderations that underlie procedural due process jurisprudence highlight why gang databases are unsuitable tools for adjudicators to use when determining critical immigration benefits. Even as these immigration programs aim to provide an opportunity for some undocumented immigrants to come out of the shadows and gain legal status, they exclude people based on a single, discretionary decision that was not made through an adversarial proceeding.<sup>19</sup> These provisions make federal policy dependent on the insidious patterns of racially disparate law enforcement that characterize our criminal justice system.<sup>20</sup> Ultimately, this systematic racial bias undermines the purpose of immigration benefits by failing to include the very people whom those programs purport to integrate into the mainstream American economy.<sup>21</sup> Therefore, I propose that DHS promulgate regulations instructing officials who adjudicate benefits applications not to consider gang databases. In this way, the Department could decrease the impact of racially-biased police discretion on federal immigration policy, and increase fairness and notice for noncitizen applicants for immigration benefits.

Part I.A provides background on gang databases and the procedures that state and local law enforcement agencies use to maintain them. Part I.B discusses the databases' increasing role in the adjudication of federal immigration benefits. Part II.A uses procedural due process jurisprudence to highlight the ways in which insufficient safeguards allow racial bias to influence the gang database documentation process. Part II.B then argues that immigration reliance on gang databases, like the broader intersection of the immigration and criminal justice systems, amplifies the effects of this racial bias. Part III concludes by proposing that, to avoid unjustly limiting beneficial programs, DHS should adopt regulations that would bar adjudicators from relying on gang databases.

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registered provisional immigrant (RPI) status to individuals who meet the eligibility requirements); Napolitano Memo, *supra* note 10, at 3 (stating that DACA confers no substantive right but instead is an exercise of discretion).

<sup>19</sup> See *infra* notes 187–91 and accompanying text (detailing the problems associated with relying on databases that lack due process protections).

<sup>20</sup> See, e.g., ALEXANDER, *supra* note 7, at 123–26 (describing the effects that racially-biased police discretion has on the criminal justice system).

<sup>21</sup> See *infra* notes 168–75 and accompanying text (stating the purpose of DACA and legalization and arguing that excluding people who are documented in gang databases contradicts that purpose).

## I

GANG DATABASES AND THEIR INCREASING ROLE IN THE  
FEDERAL IMMIGRATION SYSTEMA. *Introduction to Gang Databases*

Specialized anti-gang units began to develop within urban police departments as early as the 1950s and 1960s, and rapidly proliferated both in the mid-1980s and again in the mid-2000s.<sup>22</sup> In 2011, 40% of local law enforcement units surveyed by the National Gang Center's National Youth Gang Survey reported that they operated a specialized gang unit.<sup>23</sup> These units often focus on gathering and disseminating data about street gangs, thus their creation has been accompanied by a rise in electronic gang databases that track this information.<sup>24</sup> 84% of local law enforcement agencies that collected gang-related intelligence in 2011 stored that data in a computerized system.<sup>25</sup> This data typically includes personal information and pictures of suspected gang members, and may also involve information about gang-related criminal incidents.<sup>26</sup>

States and localities set up their gang databases in different ways. Ten state legislatures have passed legislation expressly authorizing state gang databases.<sup>27</sup> In 1997, California's governor used state funds to create CalGang, which integrated existing regional databases and is overseen by a statewide advisory committee.<sup>28</sup> Local law enforcement

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<sup>22</sup> LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, GANG UNITS IN LARGE LOCAL LAW ENFORCEMENT AGENCIES, 2007, at 1 (2010), *available at* <http://www.bjs.gov/content/pub/pdf/gullea07.pdf> (graphing the number of gang units created each year from 1975 to 2007); Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for a National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 300 (2009).

<sup>23</sup> ARLEN EGLEY, JR. & JAMES C. HOWELL, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, HIGHLIGHTS OF THE 2011 NATIONAL YOUTH GANG SURVEY 3 (2013), *available at* <http://www.ojjdp.gov/pubs/242884.pdf>.

<sup>24</sup> Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnography Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 485–86 (2003).

<sup>25</sup> EGLEY & HOWELL, *supra* note 23, at 3.

<sup>26</sup> See CHARLES M. KATZ & VINCENT J. WEBB, POLICING GANGS IN AMERICA 219 (2006) (describing the typical personal information included in a gang database record in all four cities that the authors studied—Inglewood, Las Vegas, Albuquerque, and Phoenix); Brown, *supra* note 22, at 303–06 (contrasting incident-based and individual documentation); Leyton, *supra* note 9, at 111 (detailing the records in California's statewide CalGang database).

<sup>27</sup> *Gang Related Legislation by Subject: Gang Databases*, NAT'L GANG CENTER, <http://www.nationalgangcenter.gov/Legislation/Databases> (last visited Feb. 13, 2015). The ten states are Arizona, Colorado, Florida, Georgia, Illinois, Minnesota, South Carolina, Texas, Virginia, and Washington.

<sup>28</sup> Leyton, *supra* note 9, at 111; *CalGang*, ST. OF CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., <http://oag.ca.gov/calgang> (last visited Feb. 13, 2015).

agencies can also operate their own databases.<sup>29</sup> Finally, the federal government tracks information about gangs and suspected gang members through the Violent Gang and Terrorist Organization File (VGTOF), which is part of the FBI's National Crime Information Center.<sup>30</sup> In 2007, 17% of local gang units (sixty-one units) shared information with VGTOF.<sup>31</sup>

The documentation of suspected gang members generally begins with a field interview, which may be conducted by a gang unit member or a patrol officer.<sup>32</sup> Different agencies take different approaches to these stops, with some emphasizing friendly and conversational encounters and others using municipal traffic ordinances as pretextual reasons to stop suspected gang members.<sup>33</sup> In Las Vegas, ethnographers Katz and Webb report that officers took a more aggressive approach that involved targeting individuals or groups, approaching them with three or four squad cars, searching them in a prone position, and questioning them about gang activity.<sup>34</sup> These searches were always recorded as being consensual.<sup>35</sup> Officers would issue tickets whenever possible so that in the future they could arrest suspected gang members whom they felt were being disrespectful or uncooperative for failure to pay a past fine.<sup>36</sup>

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<sup>29</sup> See, e.g., KATZ & WEBB, *supra* note 26, at 218 (discussing the databases used by various local police departments). As another example, in 1998, Ramsey County, Minnesota set up a GangNet database that had looser requirements for documentation than the statewide database and was ultimately shut down in 2011. CMTY. JUSTICE PROJECT, UNIV. OF ST. THOMAS SCH. OF LAW, EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 9–10 (2009); Sheila Regan, *GangNet Shuts Down, but What's Coming Next?*, TWIN CITIES DAILY PLANET (Aug. 14, 2011), <http://www.tcdailyplanet.net/news/2011/08/14/gangnet-shuts-down-whats-coming-next>. GangNet itself is software owned by SRA International, which contracts with governments in fourteen states and the District of Columbia to operate gang databases. SRA INT'L, INC., WHITE PAPER: GANGNET SOFTWARE 2 (2013), available at [http://www.sra.com/legacy/media/gangnet/GangNet8\\_WhitePaper2013.pdf](http://www.sra.com/legacy/media/gangnet/GangNet8_WhitePaper2013.pdf). With the exception of California's CalGang, the databases are generally called GangNet, and they often share information electronically across state or municipal borders. *Id.* at 12.

<sup>30</sup> Brown, *supra* note 22, at 310–11.

<sup>31</sup> LANGTON, *supra* note 22, at 8.

<sup>32</sup> Wright, *supra* note 17, at 120–21.

<sup>33</sup> See KATZ & WEBB, *supra* note 26, at 207–09 (comparing the friendly stop tactics used by the Albuquerque and Inglewood gang units with pretextual suspicion stops used in Albuquerque and Phoenix); see also *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that pretextual stops do not violate the Fourth Amendment as long as there is probable cause to believe the person committed a traffic violation).

<sup>34</sup> KATZ & WEBB, *supra* note 26, at 211–12.

<sup>35</sup> *Id.* at 212. Consensual stops do not implicate the Fourth Amendment and therefore need not be justified by reasonable suspicion or probable cause. See *United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (explaining that law enforcement officers do not violate the Fourth Amendment by approaching people in public and questioning them).

<sup>36</sup> KATZ & WEBB, *supra* note 26, at 212.

In every department, officers record information about the people they stop on a field interview (FI) or field observation (F/O) card.<sup>37</sup> These cards include identification information such as name, date of birth, social security number, address, workplace, race, sex, and identifying tattoos, among other things.<sup>38</sup> Some agencies take photographs of suspected gang members or even require them to lift their shirts for officers to inspect their tattoos.<sup>39</sup> FI cards also allow officers to indicate which criteria for gang membership the person in question meets.<sup>40</sup> However, since patrol officers rather than gang unit members often fill out these cards, the patrol officers may not have sufficient training on how to apply the predetermined criteria to identify gang members.<sup>41</sup>

After an officer identifies a sufficient number of criteria on an FI card, another member of the department enters it into the database.<sup>42</sup> Once that officer, usually a member of the department's gang unit, decides that the individual should be documented as a gang member, all the identifying information from the FI card, including any photographs, is entered into the database.<sup>43</sup> Studies of individual departments suggest, however, that internal review does little to limit the decisionmaking authority of the officer who conducted the initial field interview. In a midwestern city that ethnographer Katz profiled in 2003, "officers indicated that their reports were never questioned or returned by the sergeants."<sup>44</sup> Reviewing officers in Albuquerque and

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<sup>37</sup> See, e.g., *id.* at 207, 211, 213 (describing the use of field interview (FI) cards in Inglewood, Albuquerque, Phoenix, and Las Vegas); DEBORAH LAMM WEISEL & TARA O'CONNOR SHELLEY, SPECIALIZED GANG UNITS: FORM AND FUNCTION IN COMMUNITY POLICING 83, 108 (2004) (describing the use of gang contact or FI cards in Indianapolis and San Diego); Katz, *supra* note 24, at 497 (detailing the role of field observation (F/O) cards in documenting suspected gang members in a midwestern city). Although agencies have different names for these cards, I will refer to them as "FI cards."

<sup>38</sup> KATZ & WEBB, *supra* note 26, at 207–08.

<sup>39</sup> See *id.* at 211, 213 (describing the Phoenix gang unit's practice of including Polaroid pictures with their FI cards and the Las Vegas gang unit's practice of searching people's bodies for gang-related tattoos); Hong H. Tieu, *Picturing the Asian Gang Member Among Us*, 11 ASIAN PAC. AM. L.J. 41, 50–53, 56 (2006) (cataloging lawsuits resulting from "photo stops" of suspected gang members in California).

<sup>40</sup> KATZ & WEBB, *supra* note 26, at 208; Katz, *supra* note 24, at 497. For an explanation of the typical criteria for documentation, see *infra* notes 46–47 and accompanying text.

<sup>41</sup> See Katz, *supra* note 24, at 497 (noting that despite a particular gang unit's reliance on patrol officers for intelligence, those officers received little training on gang identification).

<sup>42</sup> Wright, *supra* note 17, at 122; see also KATZ & WEBB, *supra* note 26, at 218.

<sup>43</sup> KATZ & WEBB, *supra* note 26, at 219. Some departments have additional requirements in place at this stage. For example, San Diego requires three FI cards on the same person before the individual is documented in CalGang. WEISEL & SHELLEY, *supra* note 37, at 108.

<sup>44</sup> Katz, *supra* note 24, at 499.

Phoenix similarly reported that individuals who had been nominated as gang members were “virtually always documented” in the database.<sup>45</sup>

The criteria for gang member documentation vary among jurisdictions, but emphasize similar themes. Some criteria relate to identification by an informant or admission of gang membership.<sup>46</sup> Others are more circumstantial and include affiliating with known gang members, frequenting areas identified with gangs, having tattoos or clothing associated with a gang, or displaying gang hand symbols.<sup>47</sup>

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<sup>45</sup> KATZ & WEBB, *supra* note 26, at 218.

<sup>46</sup> See, e.g., CALIFORNIA GANG NODE ADVISORY COMM., POLICY AND PROCEDURES FOR THE CALGANG SYSTEM 7 (2007), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/policy\\_procedure.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/policy_procedure.pdf) (listing necessary criteria for an individual to be documented in a gang database); TEX. CODE CRIM. PROC. ANN. art. 61.02 (West 2011) (same).

<sup>47</sup> For example, for a subject to be documented in CalGang, he or she must either have completed an in-custody jail classification interview or meet two of the following criteria: 1) subject has admitted to being a gang member; 2) subject has been arrested with known gang members for offenses consistent with gang activity; 3) subject has been identified as a gang member by a reliable informant/source; 4) subject has been identified as a gang member by an untested informant; 5) subject has been seen affiliating with documented gang members; 6) subject has been seen displaying gang symbols or hand signs; 7) subject has been seen frequenting gang areas; 8) subject has been seen wearing gang dress; 9) subject has been known to have gang tattoos. CALIFORNIA GANG NODE ADVISORY COMM., *supra* note 46. However, seemingly at odds with this policy, jurisdictions within California may also document individuals in CalGang based on their own criteria. See WEISEL & SHELLEY, *supra* note 37, at 112 (detailing San Diego’s shorter list of criteria for documentation in CalGang); Brown, *supra* note 22, at 307 (“Specific requirements for documenting known or suspected gang members appear to vary according to locality.”). Texas state law provides that individuals should be entered into a local or regional gang database if they are convicted of an offense that has participation in a gang as an element, admit to gang membership during a judicial proceeding, or meet any two of the following criteria: 1) self-admission by the individual of criminal street gang membership that is not made during a judicial proceeding, including the use of the Internet or other electronic format or medium to post photographs or other documentation identifying the individual as a member of a criminal street gang; 2) identification of the individual as a criminal street gang member by a reliable informant or other individual; 3) corroborated identification of the individual as a criminal street gang member by an informant or other individual of unknown reliability; 4) evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members; 5) evidence that the individual uses, in more than an incidental manner, criminal street gang dress, hand signals, tattoos, or symbols, including expressions of letters, numbers, words, or marks, regardless of how or the means by which the symbols are displayed, that are associated with a criminal street gang that operates in an area frequented by the individual; 6) 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; 7) evidence that the individual has visited a known criminal street gang member, other than a family member of the individual, while the gang member is confined in or committed to a penal institution; 8) evidence of the individual’s use of technology, including the Internet, to recruit new criminal street gang members. TEX. CODE CRIM. PROC. ANN. art. 61.02. Some databases have a narrower set of criteria. For example, a

Civil litigation is the only mechanism for individuals who believe they have been wrongly identified as gang members to challenge their documentation.<sup>48</sup> However, most people never become aware that they are in a database. For example, all data in Minnesota's Gang Pointer File is considered "confidential," meaning not available to the public.<sup>49</sup> If an individual seeks to find out whether she is in the Gang Pointer File, she will only be informed whether she is the "subject of stored data on individuals, and whether it is classified as public, private or confidential."<sup>50</sup>

The primary mechanism for removing individuals from gang databases is an internal "purge" policy. For example, CalGang removes records that are "not modified by the addition of new criteria" for five years, and Minnesota law requires that records in its Gang Pointer File that have been inactive for three years be purged.<sup>51</sup> The midwestern city Katz studied purged records after one, two, or five years, depending on whether the person was categorized as an associate/"wannabe" member, or hardcore member of the gang in question.<sup>52</sup> However, Katz found that despite the policy described above, the same midwestern police department had not purged any files for four years at the time the study was conducted, and thus included the names of 400 to 500 individuals whose names should have been purged.<sup>53</sup> The secrecy and lack of accountability that surround these databases reduce departments' incentive to adhere to purge policies, especially when facing limited resources.<sup>54</sup> Even if

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criminal conviction is a prerequisite for documentation in Minnesota's Gang Pointer File. CMTY. JUSTICE PROJECT, *supra* note 29, at 3–4.

<sup>48</sup> See Leyton, *supra* note 9, at 119–20 (describing the difficulties individuals face when attempting to challenge their inclusion in a gang database); accord Tieu, *supra* note 39, at 52–53 (describing the settlement in *Benitez v. Montoya*, in which school administrators and police agreed to destroy photographs and records collected during a high school gang sweep and provided a sworn statement that the records were not included in CalGang).

<sup>49</sup> CMTY. JUSTICE PROJECT, *supra* note 29, at 5. As another example, in October 2013, California passed a bill requiring law enforcement to notify the parents of children under eighteen who are documented in a shared gang database, and allowing parents to challenge their child's documentation. CAL. PENAL CODE § 186.34 (West 2014). This legislation came in response to information that youth as young as ten years old could be included in the database without any notification requirement, and speaks to the extreme secrecy surrounding gang databases. CALIFORNIA STATE ASSEMBLY OFFICE OF THE CHIEF CLERK, ASSEMBLY FLOOR ANALYSIS, S.B. 458, at 4 (2013).

<sup>50</sup> CMTY. JUSTICE PROJECT, *supra* note 29.

<sup>51</sup> CALIFORNIA GANG NODE ADVISORY COMM., *supra* note 46, at 8; CMTY. JUSTICE PROJECT, *supra* note 29, at 8.

<sup>52</sup> Katz, *supra* note 24, at 500.

<sup>53</sup> *Id.* (noting that the gang unit had not purged its files since 1993).

<sup>54</sup> See CMTY. JUSTICE PROJECT, *supra* note 29, at 8 ("[I]t is unclear to the public when, how often, and by what procedures the BCA uses to purge such names/data from the Gang Pointer File."); Wright, *supra* note 17, at 123 ("Departments are not likely to face any

departments do adhere to purge policies, “it may be difficult for a minor living in a gang-heavy community to avoid qualifying criteria” when activity like commenting on a Facebook post or being photographed with gang members could restart the purge period.<sup>55</sup> Similarly, an individual living in a heavily policed area could accumulate FI cards on a consistent basis, each one of which could trigger an additional purge period, even if the person no longer participates in a gang.<sup>56</sup>

### B. *The Immigration Impact of Gang Databases*

While unsupported by evidence,<sup>57</sup> popular rhetoric linking immigration to crime has led to essentially unquestioned political support for the deportation of immigrants labeled as “criminals,” and thus to increased federal reliance on state and local criminal justice systems.<sup>58</sup> On numerous occasions over the last twenty-five years, Congress has expanded the criminal grounds of deportation, which make authorized as well as unauthorized immigrants subject to removal from the country on the basis of criminal convictions.<sup>59</sup> Meanwhile, enforcement efforts such as Operation Community Shield, the Criminal Alien Program, and Secure Communities have targeted noncitizens that come into contact with the criminal justice system.<sup>60</sup> Even as President

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external pressure to follow these guidelines because individuals do not generally know whether or not they are documented.”).

<sup>55</sup> ASSEMBLY FLOOR ANALYSIS, S.B. 458, at 5 (2013).

<sup>56</sup> See Wright, *supra* note 17, at 129 (noting that police could generate a stream of FI contacts to keep names from being purged from gang databases).

<sup>57</sup> See IMMIGRATION POLICY CENTER, FROM ANECDOTES TO EVIDENCE: SETTING THE RECORD STRAIGHT ON IMMIGRANTS AND CRIME (2013) (presenting statistics that contradict the myth that immigration leads to increased crime); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the ‘Criminal Street Gang Member,’* 2007 U. CHI. LEGAL F. 317, 318 (identifying the “linkage between gangs and immigrants” as part of a broader conception of the connection between crime and immigration).

<sup>58</sup> Compare S. REP. NO. 113-40, at 52 (2013) (stating, in the Democratic Committee Chair’s report in favor of a comprehensive immigration reform bill, that it “contains many provisions to ensure that undocumented immigrants with significant criminal histories are barred from staying in the United States” and “toughens the already significant [criminal] grounds for deportation and inadmissibility”), with *id.* at 167, 174 (stating, in Republican minority views opposing the bill, that it creates an “enforcement holiday” that “extends to those with criminal records” and “makes it harder for the government to detain people here unlawfully, including even serious criminals”).

<sup>59</sup> See, e.g., 8 U.S.C. § 1227(a) (2012) (detailing categories of criminal offenses that make noncitizens who have been admitted to the country deportable, including the commission of an aggravated felony); Chacón, *supra* note 57, at 321–23 (describing the expansion of the criminal grounds of deportation).

<sup>60</sup> Operation Community Shield, initiated by Immigration and Customs Enforcement (ICE) in 2005, works with federal, state, and local law enforcement to target immigrant gang members for prosecution or removal. *Operation Community Shield Gangs*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/community-shield/> (last visited

Obama announced a significant expansion of deferred action—a program designed to curb the harsh effects of immigration enforcement—he framed the decision as an effort to focus enforcement resources on “[f]elons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”<sup>61</sup> Thus, even as the executive branch has moved to provide additional benefits to some immigrants, it has increased efforts to deport anyone with a criminal record and, increasingly, those whom the government suspects are members of a gang.<sup>62</sup>

### 1. *The Impact of Gang Database Documentation on DACA Applicants*

Deferred Action for Childhood Arrivals (DACA) allows undocumented youth who came to the United States before the age of sixteen to apply for a renewable two-year period of prosecutorial discretion, during which time they are not subject to deportation and can work legally.<sup>63</sup> This provides a tremendous opportunity for immigrants to

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Jan. 23, 2015) (describing how Operation Community Shield works with state, local, and foreign law enforcement partners to locate, investigate, prosecute, and remove gang members). The Criminal Alien Program (CAP) seeks to identify noncitizens in jails and prisons and begin the deportation process so that they can be released into ICE custody and then deported at the conclusion of their criminal sentence. *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program/> (last visited Jan. 23, 2015) (describing how CAP provides ICE-wide direction in the biometric and biographic identification and removal of aliens incarcerated within U.S. prisons). Until recently, Secure Communities gave ICE access to the fingerprints of anyone who was arrested or booked by law enforcement so that they could check their immigration status and potentially target them for deportation. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Jan. 23, 2015) (describing the process through which ICE takes enforcement action after receiving fingerprint data). Secure Communities has been discontinued, but ICE “continue[s] to rely on fingerprint-based biometric data” from law enforcement agencies. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs 2 (Nov. 20, 2014), *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>61</sup> President Barack Obama, Remarks in Address to the Nation on Immigration (Nov. 20, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>62</sup> Documentation in a gang database, like any other interaction with the criminal justice system, can negatively impact a noncitizen contending with virtually any type of immigration issue. This paper, however, focuses on the effect of these databases on undocumented applicants for existing and proposed programs that would allow them to regularize their immigration status.

<sup>63</sup> See Press Release, U.S. Citizenship & Immigration Servs., Secretary Johnson Announces Process for DACA Renewal (June 5, 2014), *available at* <http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal> (describing the two-year employment authorization period and the discretionary nature of the renewal process);

deflect, at least temporarily, the threat of deportation. However, DACA is entirely discretionary and excludes anyone whom the Department of Homeland Security (DHS) deems a threat to public safety.<sup>64</sup>

While DHS considers the totality of the circumstances when deciding whether an individual poses a threat to public safety, suspected gang membership likely weighs heavily against a requestor, since people with past gang ties reportedly have had little success when seeking prosecutorial discretion or other immigration relief.<sup>65</sup> The U.S. Citizenship and Immigration Services (USCIS), which administers DACA, conducts background checks that rely on the federal Violent Gang and Terrorist Organization File (VGTOF), which in 2007 included information from 17% of local police departments.<sup>66</sup> It also looks to reports from state and local law enforcement or at times has access to search their gang databases directly.<sup>67</sup> Legislation in Georgia, South Carolina, Virginia, and Washington explicitly states that those states' databases should be available to federal law enforcement,<sup>68</sup> and California's CalGang database's statement of Policy and Procedures states that its purpose is to serve the federal, state, and local criminal justice communities.<sup>69</sup> Immigration and Customs Enforcement (ICE), the enforcement arm of DHS, also maintains its own database called ICEGangs, which it can share with other sister

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*Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process> (last visited Jan. 23, 2015) (describing the age requirements for undocumented youth applying for DACA).

<sup>64</sup> See Napolitano Memo, *supra* note 10, at 1 (noting that prosecutorial discretion may not be exercised where the individual poses a threat to public safety).

<sup>65</sup> See AIC Practice Advisory, *supra* note 12, at 20 n.33 (noting the difficulties which former gang members face when attempting to obtain immigration benefits and prosecutorial discretion in general).

<sup>66</sup> *Id.* at n.34.

<sup>67</sup> See Second Amended Complaint at 75, *Winston v. Salt Lake City*, No. 2:12-cv-01134 TS-BCW (D. Utah June 17, 2013) (alleging that parts of Utah's Versadex database are included in the National Crime Information Center (NCIC), which USCIS checks when adjudicating DACA applications); AIC Practice Advisory, *supra* note 12, at 21 (noting that USCIS may rely on local and state law enforcement to determine whether an individual is a gang member); Tieu, *supra* note 39, at 44 (stating that USCIS has access to CalGang).

<sup>68</sup> GA. CODE ANN. § 16-15-11 (2011) (providing for the creation of the Georgia Criminal Street Gang Database in order to "facilitate the exchange of information between federal, state, county, and municipal law enforcement"); S.C. CODE ANN. § 16-8-320, 330 (Supp. 2014) (requiring state and local law enforcement to contribute to the VGTOF and providing for the creation of a state gang database to achieve that goal); VA. CODE ANN. § 52-8.6 (2013) (requiring the state police to record gang-related information in both the state and federal databases); WASH. REV. CODE ANN. § 43.43.762 (West 2013) (requiring that information in the state criminal street gang database be available to federal authorities).

<sup>69</sup> CALIFORNIA GANG NODE ADVISORY COMM., *supra* note 46, at 3.

agencies within the Department.<sup>70</sup> As of 2010, ICEGangs included information from CalGang, and ICE sought to expand data sharing with other state and local law enforcement agencies.<sup>71</sup>

Because the information in most gang databases is confidential, DACA requestors may have difficulty determining in advance whether DHS is likely to find that they are suspected gang members who pose a threat to public safety.<sup>72</sup> If the government does reject an application, it need not provide the requestor an opportunity to rebut the evidence on which it based the rejection or even to inform him why his application was rejected.<sup>73</sup> Instead, USCIS is likely to refer the requestor to Immigration and Customs Enforcement (ICE), the enforcement arm of DHS. While USCIS policy dictates that only requests that meet certain criteria should be referred to ICE upon denial of DACA status, suspected street gang members are considered “Egregious Public Safety” (EPS) cases and therefore must be referred for potential removal.<sup>74</sup> An undocumented youth could gain access to significant opportunities by achieving DACA status, but she could also turn herself in for deportation by submitting the request.

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<sup>70</sup> See U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE ICEGANGS DATABASE 10 (2010), available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ice\\_icegangs.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_icegangs.pdf) (describing how ICEGangs shares information with certain U.S. Customs and Border Protection personnel).

<sup>71</sup> See *id.* at 2, 7 (describing the relationship between ICEGangs and CalGang and the effort to integrate and share data from other local agencies).

<sup>72</sup> See *supra* notes 49–50 and accompanying text (describing the confidentiality of gang databases).

<sup>73</sup> See AIC Practice Advisory, *supra* note 12, at 21 (“USCIS . . . has not indicated whether individuals will be advised if [suspected gang membership] is the reason for a failed request, much less whether a requester will be notified of the issue and provided an opportunity to rebut allegations of gang membership.”). DACA is a policy that guides the executive branch’s discretion in exercising its authority to enforce immigration law, but it confers no substantive right or entitlement. Napolitano Memo, *supra* note 10, at 3. Therefore, procedural due process is not constitutionally required, despite being desirable as a policy matter.

<sup>74</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0050, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSABLE AND REMOVABLE ALIENS 3–4 (2011), available at [www.uscis.gov/NTA](http://www.uscis.gov/NTA) (stating that USCIS should refer all Egregious Public Safety (EPS) cases to ICE and including “suspected street gang members” in the definition of an EPS case); *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (Jan. 18, 2013) (stating that information provided in DACA requests will only be shared with ICE if the requestor meets the criteria in USCIS’s Notice to Appear guidance).

For immigrants who are uncertain whether or not they are documented in a gang database,<sup>75</sup> USCIS's policy creates a difficult decision. For many, the risk of separation from their families and removal to a country they do not remember outweighs the potential reward of work authorization. For example, the Immigrant Justice Network records the true story of "Julia," who lives in California and is eligible for DACA.<sup>76</sup> Although she has never been part of a gang, she lives in a neighborhood where many gangs are active, has friends who are gang members, and has been arrested twice on charges that were ultimately dismissed.<sup>77</sup> Therefore, the risk that she may be in CalGang and thus considered a threat to public safety has deterred her from requesting deferred action.<sup>78</sup>

## 2. *Gang Database Documentation and the Deferred Action Expansion*

On November 20, 2014, President Obama announced Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a historic expansion of deferred action that will provide relief from deportation and work authorization to parents of U.S. citizens and permanent residents, in addition to immigrants who came to the United States as children.<sup>79</sup> This program makes the exclusion of suspected gang members explicit. One of the requirements for DAPA eligibility is not being an enforcement priority under a separate memorandum issued on the same day.<sup>80</sup> That memorandum identifies "aliens not younger than sixteen years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang" as one of the categories within "Priority 1"—"the highest priority to which enforcement resources should be directed."<sup>81</sup>

Taken as a whole, this executive action makes gang participation the difference between being eligible for work authorization and being a high priority target for deportation. As with the original DACA program, the exclusion for gang participation does not require

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<sup>75</sup> See, e.g., *supra* notes 55–56 and accompanying text (noting that individuals in areas with significant gang activity may have difficulty avoiding the criteria for database documentation, even if they are not gang members).

<sup>76</sup> Immigrant Justice Network, *Gang Fact Sheet 2* (on file with *New York University Law Review*) (describing the story of a real individual living in California whose name has been anonymized for her protection).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Deferred Action Memo, *supra* note 15, at 3–4.

<sup>80</sup> See *id.* at 4 (directing deferral of enforcement action only where the individual is not considered an enforcement priority).

<sup>81</sup> Enforcement Memo, *supra* note 16, at 3.

a conviction, and therefore must rely on gang databases to identify suspected gang members.<sup>82</sup> While DAPA has not yet taken effect, Secretary of Homeland Security Jeh Johnson has made clear that the Department's existing policy on issuing notices to appear (referrals for removal) will continue to apply,<sup>83</sup> meaning that noncitizens who apply for the new program and are found to have participated in a gang are likely to face deportation.<sup>84</sup> The executive action makes the problem faced by immigrants who are uncertain whether they are documented in a gang database more explicit. They must choose whether to risk deportation or forego a life-altering benefit.

### 3. *Legislative Proposals to Increase Immigration Reliance on Gang Databases*

Senate Bill 744, the immigration reform bill that passed the U.S. Senate in 2013, would have extended and codified the dilemma created by the executive branch's efforts to exclude suspected gang members from immigration benefits. Unlike the executive branch, Congress can create a pathway to permanent legal status for undocumented immigrants,<sup>85</sup> which in the 2013 proposal took the form of Registered Provisional Immigrant (RPI) status.<sup>86</sup> The bill set out criminal bars to RPI status,<sup>87</sup> and contained a specific provision on criminal street gangs.<sup>88</sup> That provision made anyone who is eighteen or older and whom "the Secretary [of Homeland Security] determines by clear and convincing evidence, based upon law enforcement information deemed credible by the Secretary, has, since the age of 18, knowingly and willingly participated in a [criminal street] gang with knowledge that such participation promoted or furthered the illegal activity of such gang" ineligible for RPI status.<sup>89</sup> DHS could have

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<sup>82</sup> See *supra* notes 66–71 (describing DHS's access to gang databases).

<sup>83</sup> See Deferred Action Memo, *supra* note 15, at 5 (directing the USCIS to implement the DACA program consistent with existing guidance regarding the issuance of notices to appear).

<sup>84</sup> See *supra* note 74 and accompanying text (describing USCIS's current policy for issuing notices to appear).

<sup>85</sup> See Napolitano Memo, *supra* note 10, at 3 (noting that only Congress, acting through its legislative authority, can confer substantive rights or a pathway to citizenship).

<sup>86</sup> See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101 (2013) (creating and defining the eligibility for registered provisional immigrant status).

<sup>87</sup> See *id.* § 2101(a)(245B)(b)(3)(A)(i) (making ineligible any aliens who have been convicted of felonies, three or more misdemeanor offenses, any offense under foreign law, or unlawful voting).

<sup>88</sup> *Id.* § 3701.

<sup>89</sup> *Id.* § 3701(c)(1)(B). The bill's criminal street gangs provision also creates a second ground of ineligibility that requires that the individual have been convicted of an offense for which active participation in a criminal street gang is an element, and both knew that

decided that an individual likely participated in gang activity even if she had never been convicted of any crime.<sup>90</sup> Adjudicators making this decision would have access to the local, state, and federal gang databases that would be part of required background checks for every applicant.<sup>91</sup> The databases would be the primary source of information, beyond criminal convictions, that could lead DHS to determine that clear and convincing evidence exists to believe the applicant is or was a gang member.

In comparison to DACA and DAPA, Senate Bill 744 did create avenues for RPI applicants to avoid the harsh consequences of gang database documentation, including a waiver and administrative review.<sup>92</sup> Nonetheless, the consequences of an adverse result would have remained dire. The USCIS policy of turning “Egregious Public Safety” cases over to ICE would have continued to apply,<sup>93</sup> so immigrants who were found to have participated in gang activity would likely face deportation. The bill only provided for an application period of one year, with a potential eighteen-month extension, during which RPI status would be available.<sup>94</sup> While deferred action requestors can attempt to ascertain whether they are documented in a gang database prior to applying by seeking an FBI background check and filing a Freedom of Information Act (FOIA) request to ICE or a public records request to their local or state police department,<sup>95</sup> the limited application period would constrain RPI applicants’ ability to

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the gang’s members were engaged in continuing illegal conduct and intended to promote or further those felonious activities. *Id.* § 3701(c)(1)(A). It also makes this second, narrower set of criteria grounds for deportation and makes both grounds of ineligibility for RPI status grounds of inadmissibility, meaning that they could prevent incoming immigrant applicants from achieving any type of legal status. *Id.* § 3701(a), (b).

<sup>90</sup> See S. REP. NO. 113-40, at 55 n.164 (2013) (“Indeed, certain individuals can be considered street gang members under Section 3701 without any conviction at all.”).

<sup>91</sup> See S. 744 § 2101(a)(245B)(c)(8)(C) (requiring that DHS conduct national security and law enforcement clearances of every applicant prior to granting RPI status); *supra* notes 66–71 and accompanying text (describing the inclusion of gang databases in USCIS background checks).

<sup>92</sup> S. 744 § 2104(a)(245E)(c) (describing the administrative review process); *id.* § 3701(c)(2) (stating that the Secretary may waive inadmissibility if the alien has renounced all association with the criminal street gang, is otherwise admissible, and is not a threat to the security of the United States). *But see* S. REP. NO. 113-40, at 173 (arguing, in Republican opposition to the bill, that the waiver makes the provision toothless and will allow more criminal gang members admission into the country).

<sup>93</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 74, at 3–4 (requiring USCIS to refer all Egregious Public Safety cases to ICE).

<sup>94</sup> S. 744 § 2101(a)(245B)(c)(3)(A)–(B).

<sup>95</sup> See AIC Practice Advisory, *supra* note 12, at 21 (advising attorneys of potential DACA requestors who may be considered suspected gang members to take these steps).

undertake these time-consuming investigations.<sup>96</sup> Therefore, they would face the choice between missing a once-in-a-lifetime opportunity to gain legal status (and ultimately citizenship) and risking deportation because of insufficient information about their documentation in a gang database. Despite the enormous benefits of legalization, fear of the potential consequences would likely deter otherwise eligible applicants who spend time with people or live in areas that might suggest gang membership.

Senate Bill 744 did not become law, and the future of legislative immigration reform is uncertain,<sup>97</sup> but the bill, along with the recent executive action, represents a trend that suggests that future immigration reform proposals might contain even harsher exclusions of people in gang databases. Also in 2013, an amendment proposed in the Senate Judiciary Committee, Grassley 43, would have replaced Senate Bill 744's criminal street gangs provision with a provision broadening the federal definition of a gang and making any member of such a gang ineligible for RPI status, as long as DHS determined the applicant was a danger to the community.<sup>98</sup> The amendment would shift the burden of proof to the applicant to show that he did not know and should not reasonably have known that the organization was engaged in criminal activity, and would significantly enlarge the scope of the provision.<sup>99</sup> The Strengthen and Fortify Enforcement (SAFE) Act, introduced that year in the House of Representatives, would create even harsher grounds of inadmissibility and deportability for immigrants found to be gang members, which, unlike the Grassley Amendment, would not even require a finding that the person is a danger to the community.<sup>100</sup>

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<sup>96</sup> Cf. *Proyecto San Pablo v. U.S. Immigration & Naturalization Serv.*, No. CIV 89-456-TUC-WDB, 2001 WL 36167472, at \*4 (finding that a Freedom of Information Act (FOIA) request was insufficient under the Due Process Clause as a means for legalization applicants to gain access to prior deportation files because the FOIA would likely take longer than the time allotted for an appeal of a legalization denial).

<sup>97</sup> See David Nakamura & Ed O'Keefe, *Immigration Reform Effectively Dead Until After Obama Leaves Office, Both Sides Say*, WASH. POST (June 27, 2014, 11:00 PM), [http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b\\_story.html](http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html) (reporting that immigration reform is unlikely to pass until Obama leaves office).

<sup>98</sup> Grassley Amendment to S. 744, ARM13616, 113th Cong. (1st Sess. 2013).

<sup>99</sup> *Id.* at 5; see also *Discriminatory Gang Provisions Enforce Guilt by Association*, IMMIGRANT JUSTICE NETWORK, <http://immigrantjusticenetwork.org/?portfolio=discriminatory-gang-provisions-enforce-guilt-by-association> (last visited Jan. 23, 2015) (describing how the Grassley Amendment attempted to shift the burden of proof onto the individual).

<sup>100</sup> Strengthen and Fortify Enforcement (SAFE) Act, H.R. 2278, 113th Cong. § 311 (1st Sess. 2013).

S. 744's measures on criminal street gangs are part of a legislative trend of increasingly subjecting suspected gang members to deportation and excluding them from immigration benefits, even without a single criminal conviction. These provisions, like the 2014 executive action, would increase the role of state and local gang databases in the administration of federal immigration law, even though this role has already proved problematic in the context of DACA.<sup>101</sup> By basing immigration decisions on confidential data entered into gang databases without any procedural protections, the federal government will make it difficult for some immigrants to determine their eligibility for legalization opportunities. A closer examination of these databases reveals that they do not employ sufficient safeguards of fairness and accuracy to merit their increasing significance in the immigration context.

## II

### UNCHECKED DISCRETION AND THE IMPORTATION OF RACIAL BIAS FROM THE CRIMINAL JUSTICE SYSTEM TO THE IMMIGRATION SYSTEM

#### A. *The Absence of Procedural Due Process Protections in State and Local Gang Databases*

While immigration law entrusts many decisions to the discretion of the executive branch and does not subject them to procedural due process protections,<sup>102</sup> it usually avoids relying on the discretion of state and local law enforcement. The vast majority of criminal grounds of deportability and inadmissibility, which allow the government to deport noncitizens regardless of whether they have a visa or other immigration status, require convictions, not just mere arrests or allegations by law enforcement.<sup>103</sup> By focusing on convictions, the Immigration and Nationality Act demonstrates Congress's long-held respect, in the context of life-altering immigration decisions, for the fairness and accuracy that judicial due process has been designed to protect. The movement toward immigration reliance on gang databases threatens to abandon that principle by basing eligibility for immigration benefits on law enforcement tools that are notoriously

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<sup>101</sup> See *supra* notes 63–78 and accompanying text (noting the use of gang databases by local and federal authorities and describing the due process and privacy issues presented by such use).

<sup>102</sup> See *supra* note 18 and accompanying text (describing the barriers to finding that an immigration benefit constitutes a protected interest for procedural due process purposes).

<sup>103</sup> See, e.g., 8 U.S.C. § 1182(a)(2) (listing criminal grounds of inadmissibility, many of which require a conviction); 8 U.S.C. § 1226(a)(2) (listing criminal grounds of deportability, nearly all of which require a conviction).

inaccurate and possibly contrary to the Constitution's procedural due process guarantees.<sup>104</sup> Rather than focusing on whether or not gang databases on their own are unconstitutional, this Note traces the lack of procedural protections and notice provided to individuals prior to documentation as a suspected gang member. Through the lens of the constitutional doctrines of procedural due process and void for vagueness, I highlight why, as a policy matter, these databases are inadequate and racially-biased bases for determining eligibility for immigration benefits.

### 1. *Procedural Due Process and the Mathews v. Eldridge Test*

Gang databases raise serious questions regarding procedural due process. When a government seeks to impact a "protected interest" that falls within the ambit of the Due Process Clause's guarantee against deprivation of "life, liberty, or property,"<sup>105</sup> it must employ adequate administrative procedures that allow the individual "the opportunity to be heard at a meaningful time and in a meaningful manner."<sup>106</sup> In determining whether procedures satisfy due process, courts consider the private interest, the risk of an erroneous deprivation, including the likely value of additional procedural safeguards and the Government's interest, including the administrative burden of additional procedural requirements.<sup>107</sup> This Note argues that the policy considerations underlying the Constitution's procedural due process requirements are relevant regardless of the presence of a constitutionally cognizable protected interest, particularly when the federal government relies on and compounds the impact of a state or local government's action. The primary purpose of procedural due process doctrine is to ensure accuracy by avoiding the kind of one-sided process that can lead even the most well-intentioned decisionmakers to draw mistaken conclusions.<sup>108</sup> As Justice Frankfurter notes in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, suspicion and fear tend to cultivate a biased view of facts, making an adversarial process all the more critical.<sup>109</sup>

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<sup>104</sup> See Wright, *supra* note 17, at 119 (arguing that use of gang databases violates due process).

<sup>105</sup> See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–71 (1972) (explaining the "protected interest" requirement for procedural due process protections).

<sup>106</sup> Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

<sup>107</sup> *Id.* at 335.

<sup>108</sup> See Goss v. Lopez, 419 U.S. 565, 579–80 (1975) (noting that school disciplinarians, even when acting in good faith, may unfairly suspend students in the absence of an adversarial hearing).

<sup>109</sup> See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–71 (1951) (Frankfurter, J., concurring) ("[D]emocracy implies respect for the elementary rights of

Yet rather than imposing procedural safeguards that would limit the impact of individual police officers' racial stereotypes and biases, gang databases allow their discretion to go unchecked, and provide no opportunity for individuals to be heard prior to inclusion in a database.<sup>110</sup>

Despite the significance of the individual interest implicated by gang database documentation,<sup>111</sup> the risk of erroneous deprivation is high. The factual issue—whether the person is likely a gang member—is a subjective, complex determination made by a potentially poorly trained officer.<sup>112</sup> In such cases, where the relevant issue does not lend itself to documentary proof, adversarial proceedings which allow the impacted individual to present her case and question the evidence against her, are necessary to avoid mistaken conclusions.<sup>113</sup> Since the officers who fill out field interview/observation cards are tasked with gathering and documenting information showing that the individual *is* a gang member, they are unlikely to collect and present countervailing facts to the reviewing officer.<sup>114</sup> The second layer of review by a gang unit officer does not provide a sufficient safeguard because it provides the individual neither notice nor the opportunity to be heard, and acts essentially as a rubber stamp.<sup>115</sup> While introducing an adversarial proceeding into the documentation process would certainly have administrative costs, it would also serve

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men, however suspect and unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”).

<sup>110</sup> Cf. Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System*, 3 HASTINGS RACE & POVERTY L.J. 1, 23 (2006) (arguing that a lack of procedural safeguards on the discretion of caseworkers making decisions about welfare benefits creates a risk of erroneous deprivation because it fails to check caseworkers' inherent racial biases).

<sup>111</sup> See Wright, *supra* note 17, at 131–38 (describing the potential harms caused by database documentation); *supra* Part I.B (detailing additional harms to noncitizens seeking immigration benefits).

<sup>112</sup> See *supra* notes 37–41 and accompanying text (describing the documentation process); cf. Mathews v. Eldridge, 424 U.S. 319, 344–45 (1976) (finding that additional procedures were less necessary for review of disability benefits because the determinations generally relied on routine and unbiased physicians' reports).

<sup>113</sup> See Connecticut v. Doehr, 501 U.S. 1, 14–15 (1991) (finding that pre-deprivation hearing was necessary because the relevant issues were complicated); Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (discussing the importance of the defendant's individual right to present evidence on her own behalf and question the evidence against her).

<sup>114</sup> Cf. Goldberg, 397 U.S. at 269 (“[S]ince the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him.”).

<sup>115</sup> See *supra* notes 42–45 and accompanying text (describing the review process for documentation decisions); cf. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (identifying notice and opportunity to be heard as key procedural protections when the government seeks to classify a U.S. citizen-detainee as an enemy combatant).

the government's interest in maintaining an *accurate* database of likely gang members rather than a list with potentially little relationship to the reality of gang crime in the locality.<sup>116</sup> Some form of adversarial hearing prior to gang database documentation is necessary to ensure the accuracy and fairness that the Due Process Clause safeguards.

The temporal duration of the deprivation is also an important factor in the *Mathews v. Eldridge* analysis, because it affects the private interest at stake.<sup>117</sup> When the impact of the decision is temporary pending a full adversarial proceeding, a hearing prior to the initial deprivation may not be necessary.<sup>118</sup> In the case of gang databases, however, no such post-documentation proceeding exists to mitigate the harm caused by inclusion in the database, and purge policies leave records undisturbed for too long and are unreliable.<sup>119</sup> Therefore, the lack of effective time limitations on inclusion in these databases increases the need for adequate procedures to assure accuracy in the initial documentation decision.<sup>120</sup>

Without the type of procedural constraints required by *Mathews*, police officers exercise virtually unchecked discretion. This discretion allows both unconscious and conscious racial biases to impact documentation decisions.<sup>121</sup> The beliefs and intuitions of individual officers—shaped by societal stereotypes about the criminality of people of color—can easily translate into documentation decisions.<sup>122</sup>

<sup>116</sup> See Wright, *supra* note 17, at 141 (“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.”).

<sup>117</sup> See *Mathews*, 424 U.S. at 340 (identifying a diminished private interest where the benefits in question could be reinstated after a full hearing).

<sup>118</sup> See *id.* at 342 (holding that a full hearing was not necessary prior to termination of disability benefits because recipients would be able to survive during the temporary period while they awaited such a hearing). *But see Doehr*, 501 U.S. at 14–15 (requiring a hearing prior to the attachment of property, even though a hearing could be provided shortly after attachment).

<sup>119</sup> See *supra* notes 48–56 and accompanying text (describing individuals’ inability to challenge their documentation and the inadequacy of departmental purge policies).

<sup>120</sup> See *Mathews*, 424 U.S. at 343 (noting that something less than a hearing could only comport with due process in the case of a temporary, rather than permanent, termination of benefits).

<sup>121</sup> See ALEXANDER, *supra* note 7, at 103, 123 (arguing that law enforcement discretion generally “ensur[es] that conscious and unconscious racial beliefs and stereotypes will be given free rein,” and that “[r]acially biased police discretion is key to understanding how the overwhelming majority of people who get swept into the criminal justice system in the War on Drugs turn out to be black or brown . . .”).

<sup>122</sup> See Katz, *supra* note 24, at 487 (critiquing gang-related data collection based on police discretion, subjective criteria, and personal biases); see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 580–81 (S.D.N.Y. 2013) (suggesting unconscious racial bias is likely to play a role in police officers’ decisions about whom to stop and frisk).

Additionally, the political narratives and media imagery that unrelentingly link street crime to communities of color are especially prominent in the gang context.<sup>123</sup> Street gangs do, in many cases, have racial identities<sup>124</sup> and operate in particular neighborhoods. This leads police to believe that “they know a gang, and a gang member, when they see one . . . [which] generally means young minority males in lower or working class neighborhoods who act, talk, and wear clothing associated with stereotypical gang images.”<sup>125</sup> Heavy policing of poor, racially-segregated neighborhoods increases the likelihood that someone who fits this description will come into contact with law enforcement and ultimately end up in a gang database.<sup>126</sup>

Studies of individual gang units reflect the predominance of racially-influenced policing. In Phoenix, Katz and Webb found that officers frequently stopped people who looked like they might be gang members because they were young, male, and members of a minority group.<sup>127</sup> Similarly, almost everyone Katz and Webb observed the Las Vegas police unit stop were people of color.<sup>128</sup> One sergeant in the Las Vegas gang unit said the following in a response to a question about racial profiling:

You have to walk a fine line, because we do target particular kids. While there are white, Asian, etcetera, gang members, we just do not run into them. We primarily deal with blacks and Hispanics . . . . If you have 15 black kids hanging out on a corner and 15 white kids

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<sup>123</sup> See ALEXANDER, *supra* note 7, at 106 (detailing the impact of racialized stereotypes about street crime and drug use on law enforcement); Beth Bjerregaard, *Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls*, 18 CRIM. JUST. POL'Y REV. 171, 175 (2003) (describing media portrayals of gang members as dangerous “others”).

<sup>124</sup> See, e.g., KATZ & WEBB, *supra* note 26, at 42 (“[I]n the Southwestern United States . . . gangs have been predominantly comprised of Mexican Americans and Mexican Nationals. This differentiates our research from that conducted in communities where the character of the gang problem has been substantially African American (New York, Chicago) or Asian (San Francisco, Seattle).”).

<sup>125</sup> RICHARD C. McCORKLE & TERANCE D. MIETHE, PANIC: THE SOCIAL CONSTRUCTION OF THE STREET GANG PROBLEM 64 (2002); cf. *Floyd*, 959 F. Supp. 2d at 603 (“[T]he NYPD’s policy of targeting ‘the right people’ encourages the disproportionate stopping of the members of any racial group that is heavily represented in the NYPD’s crime suspect data. This is an indirect form of racial profiling.”).

<sup>126</sup> See ALEXANDER, *supra* note 7, at 124–25 (describing the “militarized nature of law enforcement” in racially-segregated urban ghettos); Wright, *supra* note 17, at 120–21 (“Aggressive policing in inner city neighborhoods that tend to have high densities of gang membership frequently includes consensual contacts.”); see also *supra* notes 32–41 and accompanying text (describing the process of documenting gang members through field interviews by police officers).

<sup>127</sup> KATZ & WEBB, *supra* note 26, at 210.

<sup>128</sup> *Id.* at 211.

also hanging out on a corner, the blacks are more likely to be questioned.<sup>129</sup>

The experiences of youth of color corroborate this sergeant's description. For example, the ACLU is currently suing the Salt Lake City Police Department and School District over a gang sweep at West High School during which officers questioned twenty-six students, all of whom were non-white, and entered many students' names and photographs into a gang database.<sup>130</sup> A school employee told the mother of one of the students that the police were called in to deal with "a problem with the Mexicans."<sup>131</sup>

These examples illustrate the pervasiveness of racially-targeted law enforcement within gang prevention efforts. Societal beliefs linking people of color to gang activity have the same impact on the administration of gang databases as the "fear and suspicion" that Justice Frankfurter identified as a danger to administrative processes during the Cold War era.<sup>132</sup> We should expect that officers will be more likely to perceive evidence that confirms, rather than contradicts, media portrayals and past personal experiences.<sup>133</sup> Adversarial procedures could provide a check on the natural instincts of the officers, and improve the accuracy of fact-finding.<sup>134</sup>

Nonetheless, the administration of gang databases currently relies entirely on police discretion, resulting in a significantly disparate impact on communities of color. For example, as of December 2012, 66% of the more than 200,000 people in the CalGang database were Latino and 20% were Black, despite the fact that the state's popula-

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<sup>129</sup> *Id.*

<sup>130</sup> Second Amended Complaint ¶¶ 57, 72–73 *Winston v. Salt Lake City*, No. 2:12-cv-01134 TS-PMW (D. Utah June 17, 2013). The suit alleges that police and school officials violated the students' Fourth Amendment right against unreasonable search and seizure, their Fourteenth Amendment right to equal protection, their Fourteenth Amendment procedural and substantive due process rights, and their rights under the Utah Constitution. *Id.* ¶¶ 225–243.

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

<sup>133</sup> See *id.* (quoting Letter from Oliver Wendell Holmes to Arthur Garfield Hays (1928)) ("One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point."); Bjerregaard, *supra* note 123, at 176 (describing the risk that police officers who have been exposed to media portrayals of minority gangs and participated in enforcement efforts targeted toward minority communities will rely on stereotyping to identify perpetrators).

<sup>134</sup> See *McGrath*, 341 U.S. at 171–72 (identifying notice and the opportunity for the impacted individual to address the accusations against her as the best way to address the unreliability of discretionary decisionmaking).

tion is only 38% Latino and less than 7% Black.<sup>135</sup> This statistical evidence of disparate impact suggests that the racial stereotypes in gang-related law enforcement leave people of color vulnerable to a disproportionately high risk of erroneous documentation.<sup>136</sup>

## 2. *Substantive Limits on Discretion and Void for Vagueness Doctrine*

Given the lack of procedural protections in the documentation process, the substantive standards defining whether an individual is likely to be a gang member could play a significant role in curbing police discretion. Yet their vague, subjective, and over-inclusive nature makes them foster, rather than discourage, decisionmaking that is influenced by racial stereotypes.<sup>137</sup> The substantive criteria can also be critiqued from the policy lens of an element of procedural due process—the void for vagueness doctrine—which requires that criminal laws be clear enough to “enable the ordinary citizen to conform his or her conduct to the law.”<sup>138</sup> Since documentation does not amount to a violation of a criminal law that directly triggers penalties, it does not fall within the constitutional purview of the void for vagueness doctrine.<sup>139</sup> However, like the procedural due process jurisprudence discussed above, the rationales behind the void for vagueness doctrine highlight the problems with fairness and accuracy that plague gang databases from a policy perspective.<sup>140</sup>

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<sup>135</sup> YOUTH JUSTICE COALITION, TRACKED AND TRAPPED: YOUTH OF COLOR, GANG DATABASES, AND GANG INJUNCTIONS 8–9 (2012), available at <http://www.youth4justice.org/wp-content/uploads/2012/12/TrackedandTrapped.pdf>. In 2011, North Carolina’s GangNet database was 68% Black, 21% Hispanic, 8% White, and 1% Asian, GOVERNOR’S CRIME COMM’N, GANGS IN NORTH CAROLINA: AN ANALYSIS OF GANGNET DATA 5 (2011), available at <https://www.ncdps.gov/div/gcc/pdfs/gangs2011.pdf>, while the state’s population in 2013 was 22% Black, 8.9% Hispanic, 71.7% White, and 2.6% Asian. *State & County QuickFacts: North Carolina*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/37000.html> (last visited Jan. 24, 2015). In 2011, law enforcement agencies participating in the National Youth Gang Survey reported that gang members were 46% Latino, 35% Black, 11% White, and 7% of another race or ethnicity. *National Youth Gang Survey Analysis: Demographics*, NATIONAL GANG CENTER, <http://www.nationalgangcenter.gov/Survey-Analysis/Demographics#anchorregm> (last visited Jan. 24, 2015).

<sup>136</sup> Cf. Kaufman, *supra* note 110, at 25 (“Evidence of disparate racial impact can strongly suggest a real risk of an ‘erroneous deprivation’ of benefits, resulting from caseworkers making arbitrary decisions and exercising unregulated discretion . . .”).

<sup>137</sup> See *supra* notes 46–47 (providing examples of database criteria).

<sup>138</sup> *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

<sup>139</sup> See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness . . .”).

<sup>140</sup> Cf. *Jordan v. De George*, 341 U.S. 223, 231 (1951) (applying the void for vagueness doctrine to a deportation statute “in view of the grave nature” of the penalty at stake).

Even though gang database documentation carries serious consequences, many of the criteria used to determine whether a person should be considered a gang member fail to meet the constitutional standard. In *City of Chicago v. Morales*, the Supreme Court held that an ordinance criminalizing “loitering” in a public place with a suspected gang member was unconstitutionally vague, because “[f]riends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.”<sup>141</sup> Documentation criteria such as “evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members”<sup>142</sup> or “subject has been seen affiliating with documented gang members”<sup>143</sup> raise the same problem. The police have the discretion to decide that someone’s conduct is suspicious based on whom they associate with rather than what they have done. Similarly, criteria that focus on the subject’s presence in “gang areas”<sup>144</sup> could capture a broad swath of people who may simply live in a particular neighborhood.<sup>145</sup>

The primary purpose of the void for vagueness doctrine is to require “‘that a legislature establish minimal guidelines to govern law enforcement’ . . . [w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a ‘standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”<sup>146</sup> The “standardless sweep” problem is clearly implicated by gang database documentation. The standards for inclusion in the database allow police to determine what should be considered gang dress, a gang-related tattoo, or a gang area, based on their own potentially biased perspectives.<sup>147</sup> Furthermore, since many people

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<sup>141</sup> 521 U.S. 41, 63 (1999).

<sup>142</sup> TEX. CODE CRIM. PROC. ANN. art. 61.02 (West 2011) (listing criteria for entry of individuals into Texas gang database).

<sup>143</sup> CALIFORNIA GANG NODE ADVISORY COMM., *supra* note 46, at 7 (listing criteria for entry of individuals into California gang database).

<sup>144</sup> *See supra* notes 123–26 and accompanying text (discussing racial implications of policing targeted at low-income communities of color).

<sup>145</sup> *Cf.* *Floyd v. City of New York*, 959 F. Supp. 2d 540, 581 & n.161 (S.D.N.Y. 2013) (noting, in the context of a form listing reasons for police stops, that “plaintiffs offered evidence that the High Crime Area checkbox has been interpreted so broadly by at least some officers that it would contribute very little to the justification for a stop”).

<sup>146</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

<sup>147</sup> *Cf.* *City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (finding that a statutory requirement that was inherently subjective did not sufficiently limit police discretion).

could meet these criteria for entirely innocent reasons, officers have unchecked discretion to selectively document individuals.<sup>148</sup>

Database criteria encourages documentation of people of color. Neighborhoods with a high concentration of gang activity and many documented gang members tend to be populated by people of color, making it difficult for youth in those areas to avoid triggering documentation criteria when simply walking to school or talking to neighbors.<sup>149</sup> Many of the criteria also focus on tattoos and clothing that are popular in communities of color, including with people who are not affiliated with gangs.<sup>150</sup> For example, the Vietnamese girls who sued the police in *Quyên Pham* were targeted because they were wearing loose pants and tight tops, a fashion that law enforcement associated with certain gangs despite being popular with many teenaged Asian girls.<sup>151</sup> Rather than reining in biases ingrained by racialized stereotypes, many of the gang database criteria give these biases official expression and allow subjective and over-inclusive factors to support a finding that an individual is likely a member of a gang.

### B. *The Rhetoric of Criminality and Exclusion from Immigration Opportunities*

The increasing importance of gang databases in immigration adjudications reflects the influence of two parallel rhetorical tropes in American society that link people of color and undocumented immigrants to crime. Michelle Alexander describes the phenomenon of mass incarceration, and argues that it, like past systems of racial subordination, “serve[s] to define the meaning and significance of race in America.”<sup>152</sup> Criminality defines what it means to be black, and blackness is at the core of societal beliefs about criminality.<sup>153</sup> Politicians

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<sup>148</sup> See *id.* at 62 (describing the broad discretion to selectively enforce the vague statute in question); *supra* notes 121–26 and accompanying text (discussing the impact of racial stereotypes on law enforcement decisions).

<sup>149</sup> See CMTY. JUSTICE PROJECT, *supra* note 29, at 17–18 (“[I]f an individual lives in a targeted area where there is a high concentration of ‘gang members’ it is almost certain that, that individual meets criterion 2 or 5 [of the Minnesota criteria] and/or other enumerated criteria.”); Bjerregaard, *supra* note 123, at 176 (noting that most anti-gang enforcement takes place in minority communities).

<sup>150</sup> CMTY. JUSTICE PROJECT, *supra* note 29, at 18; Wright, *supra* note 17, at 127.

<sup>151</sup> Tieu, *supra* note 39, at 56.

<sup>152</sup> ALEXANDER, *supra* note 7, at 197. Alexander uses the term “mass incarceration” to refer “not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison.” *Id.* at 13.

<sup>153</sup> See *id.* at 197 (“Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals.”); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 598 (2003)

seeking white votes foster this link through racially-motivated rhetoric about crime and the War on Drugs,<sup>154</sup> and the law facilitates the targeting of people of color by failing to limit police discretion and making challenges based on racial discrimination nearly impossible.<sup>155</sup> As gang databases illustrate, the societal coupling of race and crime furthers the racially disparate impact of discretionary policing, since law enforcement officers act, subconsciously or consciously, on their own racial biases.<sup>156</sup> Thus, mass incarceration serves to preserve the status quo of racial stratification.<sup>157</sup>

At the same time, political discourse even more openly links immigration, and especially unauthorized immigration, to crime, starting with the widespread use of terms like “illegal immigrant” and “criminal alien.”<sup>158</sup> Opponents of pro-immigrant policies argue that undocumented immigrants are a principle cause of gang crime,<sup>159</sup> and even politicians who support legalization of undocumented immigrants go out of their way to exclude those whom they label

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(“[I]ncarceration plays a role in constructing the meaning of race in American society by defining race and crime in terms of each other.”).

<sup>154</sup> See generally ALEXANDER, *supra* note 7, at 40–58 (describing the political birth and development of mass incarceration); Ian Haney F. López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032–34 (2010) (same).

<sup>155</sup> See ALEXANDER, *supra* note 7, at 103 (arguing that the legal system “[c]lose[s] the courthouse doors” to litigants by requiring virtually unobtainable proof of intentional racial discrimination to challenge policing practices).

<sup>156</sup> See *supra* notes 121–26 and accompanying text (describing how racial stereotypes about gangs increase the chances that people of color will be documented in a gang database).

<sup>157</sup> See Haney López, *supra* note 154, at 1045 (“The contemporary carceral system more forcefully contributes to preserving racial stratification through exclusion rather than through direct exploitation.”).

<sup>158</sup> See Lisa A. Flores, *Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration*, 20 CRITICAL STUD. IN MEDIA COMM. 362, 363 (2003) (describing a pattern “in which immigrant and criminality are so closely connected rhetorically that the slippage from immigrant to criminal seems almost natural”); see also, e.g., Jana Winter & Judson Berger, *Watchdog: 600-Plus ‘Criminal’ Illegal Immigrants Released Amid 2013 Budget Cuts*, FOXNEWS.COM (Aug. 12, 2014), <http://www.foxnews.com/politics/2014/08/12/watchdog-600-plus-criminal-illegal-immigrants-released-amid-2013-budget-cuts/> (condemning the release of immigrants defined as both criminal and illegal from immigration detention).

<sup>159</sup> See, e.g., Heather Mac Donald, *Crime & the Illegal Alien: The Fallout from Crippled Immigration Enforcement*, CENTER FOR IMMIGRATION STUDIES (June 2004), <http://cis.org/IllegalAliensCrime> (arguing that “sanctuary city” policies that bar local police from enforcing immigration law make law enforcement in cities like Los Angeles powerless to control a gang problem caused by undocumented immigrants). The Center for Immigration Studies is an anti-immigration think tank that describes its own position as “low-immigration, pro-immigrant.” *Id.*

“criminals.”<sup>160</sup> On the first anniversary of the DACA program, President Obama said that “[b]y removing the threat of deportation for people brought to the country as children, we were able to continue to focus our enforcement efforts on criminals who endanger our communities rather than students who are pursuing an education.”<sup>161</sup>

This association between immigrants and crime dovetails with the racially-loaded discourse about criminality in the United States that Alexander describes,<sup>162</sup> and therefore links undocumented immigrants to racial otherness. Calling immigrants criminals marks them as racial outsiders who should be excluded from the United States through restrictive immigration policies and deportation, just as citizens of color are marginalized by the criminal justice system and its collateral consequences.<sup>163</sup> Immigration law operationalizes this connection by making eligibility for immigration benefits and susceptibility to deportation heavily dependent on the applicant’s past interactions with the criminal justice system.<sup>164</sup> Professor César Cuauhtémoc García Hernández succinctly describes this phenomenon:

Immigration policing tactics that are intended to siphon out the “criminals” inevitably must use the markers of race and class that criminal law uses to identify its targeted population. Because contemporary immigration law has become interwoven with criminal law, the potentially undeserving are the potential “criminal aliens”

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<sup>160</sup> See, e.g., S. REP. NO. 113-40, at 52 (noting, in support of Senate Bill 744, that it “contains many provisions to ensure that undocumented immigrants with significant criminal histories are barred from staying in the United States”); see also Ramiro Martínez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE 1 (Ramiro Martínez, Jr. & Abel Valenzuela, Jr. eds., 2006) (“[D]iscussion of social problems stereotypically associated with racial minorities (e.g. blacks and Native Americans), such as high rates of male unemployment, substance abuse, and violent crime involvement, have now become important themes in the public immigration debate.”).

<sup>161</sup> Benjamin Goad, *A Year Later, Obama Calls Deferred Action for ‘Dreamers’ a Success*, THE HILL (June 15, 2013, 2:03 PM), <http://thehill.com/blogs/regwatch/administration/305785-a-year-later-obama-calls-deferred-action-for-dreamers-a-success>.

<sup>162</sup> ALEXANDER, *supra* note 7, at 198 (“The critical point here is that, for black men, the stigma of being a ‘criminal’ in the era of mass incarceration is fundamentally a racial stigma.”).

<sup>163</sup> See *id.* at 141–44 (detailing the impact of collateral consequences of criminal convictions).

<sup>164</sup> In some geographic areas this connection may extend even further, with law enforcement targeting those whom they believe are racially identifiable as undocumented immigrants in an attempt to trigger federal enforcement of immigration laws. See Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 646 (2012) (describing law enforcement efforts to target potentially undocumented immigrants).

lying in our midst. These people, criminal law enforcement institutions have so readily announced, are race and class outsiders—people of color and poor people.<sup>165</sup>

Immigration law's reliance on gang databases is a prime example. The existence of gangs linked to particular racial groups, including Mexicans, Southeast Asians, and Blacks in different parts of the country,<sup>166</sup> leads to an association between those races and gang crime that extends from the existing association of blackness and criminality. The broad discretion and vague criteria governing gang databases allow and encourage these racial associations to dictate which individuals police target for stops and ultimately document in gang databases.<sup>167</sup> When immigration adjudicators base decisions on these databases, they import the effect of police discretion that is exercised in a racially-biased way into the administration of immigration benefits.

The narratives that portray immigrants as criminal outsiders run directly counter to the political rhetoric that has built support for programs like DACA, the recent executive action, and legalization. Proponents of more inclusive immigration laws frequently reiterate that we are a “Nation of immigrants,”<sup>168</sup> emphasizing the economic contributions of working class immigrants and the academic achievements of their children.<sup>169</sup> This rhetoric in support of programs such as

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<sup>165</sup> César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 361 (2012).

<sup>166</sup> See KATZ & WEBB, *supra* note 26, at 42 (identifying cities where “the gang problem” is predominantly Mexican, African American, and Asian).

<sup>167</sup> See *supra* Part II.A (describing the prevalence of racial profiling in the gang documentation process).

<sup>168</sup> See, e.g., Proclamation of President Barack Obama, Constitution Day, Citizenship Day, and Constitution Week, 2013 (Sept. 16, 2013), available at <http://www.whitehouse.gov/>

[the-press-office/2013/09/16/presidential-proclamation-constitution-day-citizenship-day-and-constitution](http://www.whitehouse.gov/the-press-office/2013/09/16/presidential-proclamation-constitution-day-citizenship-day-and-constitution) (“We are a proud Nation of immigrants, home to a long line of aspiring citizens who contributed to their communities, founded businesses, or sacrificed their livelihoods so they could pass a brighter future on to their children.”); see also Valerie Jarrett, *A Nation of Immigrants: President Obama Recognizes Citizenship Day 2013*, THE WHITE HOUSE BLOG (Sept. 18, 2013, 11:25 AM), <http://www.whitehouse.gov/blog/2013/09/18/nation-immigrants-president-obama-recognizes-citizenship-day-2013> (stating that while the President paused to “reaffirm our pride as a nation of immigrants,” “we are also reminded of the countless individuals who at this point in our nation’s history do not have the opportunity to earn their citizenship,” referring to the 11 million undocumented immigrants who might benefit from a proposed legalization program).

<sup>169</sup> See, e.g., S. REP. NO. 113-40, at 2 (2013) (noting that many undocumented immigrants have made valuable contributions to their communities); see also *Passing the Dream Act*, DICK DURBIN, U.S. SENATOR FOR ILLINOIS (June 28, 2011), [http://www.durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord\\_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9](http://www.durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9) (highlighting the stories of highly accomplished “dreamers,” a

DACA, DAPA, and legalization for undocumented immigrants emphasizes the parallels between current and past immigration, and suggests that if only these groups could gain legal immigration status, they would assimilate in the same way that other groups did before them. Immigration reformers propose to achieve this assimilation by bringing undocumented immigrants “out of the shadows.”<sup>170</sup>

The reliance of immigration officials on gang databases undermines this goal by marking certain undocumented immigrants as criminals and excluding them from deferred action or legalization opportunities. Even assuming that it is good policy to exclude gang members from these programs,<sup>171</sup> the current approach is over-inclusive. Unlike a criminal conviction, documentation in a gang database requires no criminal conduct whatsoever, making it especially difficult for an individual who fits the racial profile of a gang member in his geographic area to avoid documentation.<sup>172</sup> The confidential nature of many gang databases makes it difficult or impossible for immigrants to determine their eligibility for a particular program prior to applying, and therefore is likely to deter people in heavily policed communities from seeking immigration benefits.<sup>173</sup> In California, anyone who has been seen affiliating with documented gang members and frequenting gang areas can be documented in Cal-Gang.<sup>174</sup> Thus, anyone who lives in a neighborhood associated with a particular Mexican, Salvadoran, or Vietnamese gang and speaks to other people in their neighborhood could become ineligible for legalization and prioritized for deportation, if a police officer targets her for

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name for undocumented youth who would be eligible for the DREAM Act’s path to citizenship).

<sup>170</sup> *Immigration, THE WHITE HOUSE: PRESIDENT BARACK OBAMA*, <http://www.whitehouse.gov/issues/immigration> (last visited Jan. 23, 2015).

<sup>171</sup> A policy of unyielding exclusion of undocumented immigrants affiliated with gangs from legalization or work authorization may not be the best way to achieve the goal of crime control. The development of transnational gangs like MS-13 was fueled not only by immigration from Central American countries to the United States but also by deportation of immigrants with criminal convictions back to those countries. Melissa Siskind, Note, *Guilt by Association: Transnational Gangs and the Merits of a New Mano Dura*, 40 *GEO. WASH. INT’L L. REV.* 289, 294 (2008). This reality has led some to argue that the deportation of immigrants with criminal convictions fuels gang violence not only in Central America but also in the United States, and thus that our removal policy should change. Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 *U. MIAMI L. REV.* 301, 317–18, 322 (2008). This Note does not take up that question.

<sup>172</sup> See *supra* notes 47–48, 55–56 and accompanying text (describing database criteria and the difficulty, for certain demographics, of avoiding documentation).

<sup>173</sup> See *supra* notes 49–50, 72–75, 93–96 and accompanying text (describing the confidentiality of gang databases and the deterrent effect of this confidentiality on applicants for immigration benefits).

<sup>174</sup> CALIFORNIA GANG NODE ADVISORY COMM., *supra* note 46, at 7.

a stop and chooses to document her. Given these facts, it is entirely rational and predictable that people in ethnic and geographic communities associated with gangs will largely fail to take advantage of legalization or work authorization opportunities in fear of deportation stemming from allegations that they are gang members.<sup>175</sup> President Obama's strict dichotomies between "criminals who endanger our communities" and "students who are pursuing an education"<sup>176</sup> and between gang members and working moms<sup>177</sup> break down. In the eyes of the law, many may be both.

As the example above illustrates, location is a critical factor for anti-gang enforcement. Gang activity, and therefore policing focused on gang database documentation, is not simply concentrated in minority-dominated areas, but specifically in poor, urban neighborhoods.<sup>178</sup> Therefore, poor immigrants of color experience intersectional subordination on the basis of race and class through both the criminal justice and immigration systems.<sup>179</sup> Scholars like Michelle Alexander have described the economic impact of mass incarceration on the black community, noting that the collateral consequences of incarceration make it difficult to get jobs or find housing and lead to devastating poverty, which in turn makes criminal activity seem like the only option.<sup>180</sup> For undocumented immigrants, the cyclical effects of racially-biased law enforcement and poverty can be just as pronounced. Unauthorized immigrants cannot legally work nor access most government benefits, and therefore often rely on under-the-table employment that affords few worker protections.<sup>181</sup> One of the principle purposes of programs like DACA, DAPA, and the proposed legalization within Senate Bill 744 is to bring unauthorized immigrants into the mainstream American economy.<sup>182</sup> Yet those who are denied or deterred from applying for these programs because they may be

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<sup>175</sup> See *supra* note 74 and accompanying text (explaining that immigrants identified as likely gang members after applying for an immigration benefit become priorities for deportation).

<sup>176</sup> Goad, *supra* note 161.

<sup>177</sup> Obama, *supra* note 61.

<sup>178</sup> Bjerregaard, *supra* note 123, at 177.

<sup>179</sup> See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 4-5 (2009) (applying the concept of intersectionality to the treatment of poor immigrants of color in immigration law).

<sup>180</sup> ALEXANDER, *supra* note 7, at 143.

<sup>181</sup> See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 6, 17 (2006) (listing challenges that undocumented immigrants face, including lack of access to government benefits and poor working conditions).

<sup>182</sup> See S. REP. NO. 113-40, at 2 (2013) (identifying low wages and employer exploitation as conditions within the undocumented community that the bill seeks to address); see also Goad, *supra* note 161 (reporting that President Obama, while lauding the success of

documented in a gang database will miss a rare opportunity to gain the work authorization that is, in most cases, a critical prerequisite to economic mobility.

This reality is the most important consequence of immigration reliance on gang databases. The rhetoric surrounding these immigration benefits presupposes an assimilation process that will be completed when undocumented immigrants achieve legal status and work authorization.<sup>183</sup> Yet the gang databases that exclude people from this opportunity lack the procedural safeguards and clear standards necessary to restrain the impact of law enforcement discretion, allowing racial bias to influence a documentation decision that might then make an applicant ineligible for deferred action or legalization.<sup>184</sup> Meanwhile, gang activity stems from the growth of an urban “underclass” that is “effectively excluded from participation in the mainstream economy.”<sup>185</sup> The immigration policies discussed in this Note go further—they *actually* exclude undocumented immigrants who are suspected of being in gangs from an extraordinarily rare chance to participate in the mainstream economy. In fact, for communities that struggle with gang violence and heavy policing, these policies send the message that the “American Dream”—so often touted by politicians who favor integration—is not and will never be available to them.<sup>186</sup> The exclusions from DACA, DAPA, and RPI status based on gang database documentation make a permanent judgment about an individual’s immigration status based on a racially-inflected past decision by a law enforcement officer.

### III

#### A PROPOSAL TO LIMIT THE IMPACT OF RACIALLY-BIASED POLICING ON IMMIGRATION ADJUDICATIONS

The Department of Homeland Security (DHS) should seek to avoid the broad exclusion of immigrants who fear they may be documented in a gang database from programs designed to facilitate their

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DACA, emphasized that comprehensive reform was necessary to continue to allow undocumented youth to “contribut[e] to this country”).

<sup>183</sup> See *supra* notes 168–70 and accompanying text (stating the prevalence of ethnicity theory in pro-immigrant political rhetoric); see also Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2102(a)(245C)(b)(3), (4) (2013) (requiring that individuals with RPI status who seek to become lawful permanent residents must show that they are employed and speak English).

<sup>184</sup> See *supra* notes 121–31, 149–51 and accompanying text (describing the impact of racial bias on gang database documentation).

<sup>185</sup> Bjerregaard, *supra* note 123, at 175–76.

<sup>186</sup> See Haney López, *supra* note 154, at 1040 (describing the role of racial stratification in producing categorical inequality).

legal integration into American society. By relying on gang databases to make immigration decisions, DHS greatly increases the consequences of documentation for certain noncitizens. Even if these consequences do not amount to constitutionally protected interests that could give rise to a procedural due process claim,<sup>187</sup> they bolster the policy arguments against relying on documentation decisions made without adequate procedural safeguards. Most importantly, procedural due process protects the shared private and governmental interest in accuracy, because without an adversarial proceeding, the biases of the police can have an unconstrained effect on the decision to classify certain individuals as suspected gang members.<sup>188</sup> In the context of immigration adjudications, this phenomenon is particularly harmful because it threatens to undermine the purpose of the DACA, DAPA, and legalization programs by excluding people who should be eligible.<sup>189</sup> The policy considerations of the void for vagueness doctrine also counsel against placing so much reliance on databases that lack substantive standards that sufficiently guide and restrain police discretion.<sup>190</sup> Without clear guidelines, the databases can too easily become expressions of our cultural association between race and criminality.<sup>191</sup> DHS reliance on those databases then imports that association into our immigration laws, repeating and magnifying the marginalization enacted by the criminal justice system.

DHS should minimize these negative consequences by promulgating regulations that bar USCIS officials who adjudicate benefits applications from using gang databases that lack due process protections when determining eligibility. In the context of DACA or DAPA, this would mean that USCIS would not deny a request based on a determination that an individual poses a “threat[ ] to . . . public safety” or “participated in an organized criminal gang to further the illegal activity of the gang” if the only evidence supporting that determination is a gang database whose policy does not require notice or a hearing prior to such documentation.<sup>192</sup> In the context of a proposed

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<sup>187</sup> See *supra* note 18 and accompanying text (explaining that since these immigration benefits are discretionary, they do not give rise to a protected interest for procedural due process purposes).

<sup>188</sup> See *supra* Part II.A (describing the lack of procedural safeguards in the documentation process and the resulting impact of racial bias).

<sup>189</sup> See *supra* notes 178–86 and accompanying text (discussing the potential for gang database documentation to undermine the purpose of DACA and legalization).

<sup>190</sup> See *supra* Part II.A (describing the vague criteria for gang database documentation).

<sup>191</sup> See *supra* notes 152–57 and accompanying text (discussing mass incarceration and the societal link between blackness and criminality).

<sup>192</sup> See Napolitano Memo, *supra* note 10, at 1 (establishing that an individual need not pose a threat to public safety in order to be eligible for DACA); Enforcement Memo, *supra*

legalization program like the one in Senate Bill 744, DHS would expressly dictate that these databases categorically do *not* constitute the “law enforcement information deemed credible by the Secretary” that can allow the Department to determine by clear and convincing evidence that the applicant has participated in a gang.<sup>193</sup>

Given the lack of due process protections governing virtually all gang databases, the proposed regulations would bar immigration officials from relying on both the federal VGTOF and on state and local gang databases, at least for the purpose of determining street gang membership.<sup>194</sup> USCIS would have to rely on criminal convictions, rather than the discretionary decision of a single law enforcement officer.<sup>195</sup> This approach tracks existing law using criminal grounds for deportation and ineligibility,<sup>196</sup> and criminal bars to eligibility would remain significant. For DACA, any requestor who has been convicted of a felony, a significant misdemeanor, or multiple misdemeanor offenses is ineligible.<sup>197</sup> The category of “significant misdemeanor” includes any offense related to driving under the influence or drug distribution or trafficking, among other types of offenses.<sup>198</sup> Similarly, the “Priority 1” enforcement category created by the recent executive action includes anyone convicted of a felony or an aggravated felony, as classified by immigration law, and the “Priority 2” category includes people convicted of three or more misdemeanors or a signifi-

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note 16, at 3 (identifying as an enforcement priority aliens convicted of a crime involving gang participation).

<sup>193</sup> See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3701(c)(1)(B) (2013) (making ineligible for RPI status “any alien . . . 18 years of age or older whom the Secretary determines by clear and convincing evidence, based upon law enforcement information deemed credible by the Secretary, has . . . knowingly and willingly participated in a such [sic] gang with knowledge that such participation . . . furthered the illegal activity of such gang”).

<sup>194</sup> See OPERATOR’S LESSON PLAN: VIOLENT GANG AND TERRORIST ORGANIZATION FILE 204 (2005), available at [http://www.in.gov/isp/files/Violent\\_Gang\\_Terrorist\\_Organization\\_File.pdf](http://www.in.gov/isp/files/Violent_Gang_Terrorist_Organization_File.pdf) (“VGTOF information is based on investigative information not previously subject to independent judicial review.”); see also *supra* notes 42–45, 48–50 and accompanying text (describing the procedures for documenting individuals in state and local gang databases and the lack of an avenue to challenge one’s documentation).

<sup>195</sup> To be sure, criminal convictions are also the product of significant discretion that can be exercised in a racially biased way. See *supra* notes 152–57 and accompanying text (describing the racial subordination present throughout the criminal justice system). Gang databases provide a particularly stark example, however, of how the lack of safeguards in the criminal justice system can import racial bias into immigration adjudications.

<sup>196</sup> See *supra* note 103 and accompanying text (describing the Immigration and Nationality Act’s emphasis on convictions in its deportation statutes).

<sup>197</sup> Napolitano Memo, *supra* note 10, at 1. A felony in this context is any offense punishable by a potential sentence of more than one year, while a misdemeanor is punishable by a sentence of more than five days but less than a year. AIC Practice Advisory, *supra* note 12, at 17.

<sup>198</sup> AIC Practice Advisory, *supra* note 12, at 17.

cant misdemeanor.<sup>199</sup> Anyone in either of these categories would be ineligible for DAPA.<sup>200</sup> Senate Bill 744 also sets out criminal grounds of ineligibility for RPI status, in addition to the existing criminal grounds of inadmissibility that apply to any immigration status.<sup>201</sup> Furthermore, the criminal street gang provision itself provides an alternative to the “clear and convincing evidence” bar, which instead requires that the immigrant 1) have been convicted of an offense for which an element was active participation in a criminal street gang; 2) had knowledge that the gang’s members engaged in a continuing series of criminal offenses; and 3) acted with the intention to promote or further the felonious activities of the gang or maintain or increase his or her position in the gang.<sup>202</sup> Since this exclusion does not rely on gang databases, it would remain intact. Therefore, applicants whose criminal history constituted evidence of gang participation would continue to be ineligible for RPI status.

The many existing exclusions of people with criminal convictions from immigration benefits provides a response to the position that immigration authorities need not less but more power to sanction gang members, embraced by many Republican politicians during the 2013 debate around comprehensive immigration reform.<sup>203</sup> There are immigrants who participate in criminal street gangs and even dangerous transnational gangs.<sup>204</sup> At times, they victimize their own immigrant communities.<sup>205</sup> Some, including the supporters of measures like Grassley 43, believe that this reality means that broader grounds of ineligibility for immigration benefits are necessary in order to ensure that no undocumented gang members can legalize.<sup>206</sup> They

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<sup>199</sup> Enforcement Memo, *supra* note 16, at 3–4.

<sup>200</sup> Deferred Action Memo, *supra* note 15, at 4.

<sup>201</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(a)(245B)(b)(3)(A)(i) (2013); *see also* 8 U.S.C. § 1182(a)(2) (detailing criminal grounds of inadmissibility for any visa or immigration status).

<sup>202</sup> S. 744 § 3701(c)(1)(A).

<sup>203</sup> *See, e.g.*, S. REP. NO. 113-40, at 173 (stating, in Republican minority views opposing Senate Bill 744, “[w]e are also concerned that the bill is weak on foreign national criminal street gang members”).

<sup>204</sup> *See* KATZ & WEBB, *supra* note 26, at 42 (describing gangs in the Southwestern United States as being “predominately comprised of Mexican Americans and Mexican Nationals”); *see also* Siskind, *supra* note 171, at 293–94 (detailing the role of immigration in the development of transnational gangs like MS-13); Tieu, *supra* note 39, at 42 (describing Asian gangs in the United States).

<sup>205</sup> *See* S. REP. NO. 113-40, at 173 (arguing that criminal street gangs “are particularly dangerous to immigrant communities, often times praying [sic] on recent immigrants to further their criminal activities”); *see also* Tieu, *supra* note 39, at 42 (noting that Asian gangs often victimize Asian immigrant communities).

<sup>206</sup> *See* Press Release, Senator Chuck Grassley, Grassley Amendments Focus on Strengthening Criminal Laws That Are Weakened in Immigration Bill (June 18, 2013),

would likely respond to this Note's proposal by arguing that since all these immigration benefits are opportunities that the government might choose to provide some immigrants who are in this country without status, it is more important to ensure that no gang members access these benefits than to prevent non-gang members from unfair exclusion. Therefore, DHS should use any information available to prevent approving applicants who may have gang connections.

However, fears about the legalization of dangerous gang members are unfounded. Any immigrant who has been convicted of crimes frequently associated with gangs, such as drug trafficking or firearm possession, would be categorically ineligible for any work authorization or legalization.<sup>207</sup> Meanwhile, people who are documented in gang databases are more likely than others to be targeted for intense policing and convicted of crimes.<sup>208</sup> Their status as suspected gang members increases law enforcement's interest in stopping them for intelligence gathering purposes, and if arrested the fact of their documentation can be evidence to support a conviction.<sup>209</sup> Therefore, if an individual is documented in a gang database but has managed to avoid criminal convictions, it is likely that he or she has not, in fact, engaged in a pattern of criminal conduct. Only this limited class of immigrants—those who are not made ineligible by any criminal conviction but still fear they may be documented in a gang database<sup>210</sup>—would be impacted by this Note's proposal. Given the aggressive policing and prosecution of documented gang members, the criminal grounds of ineligibility are more than sufficient to prevent actual criminal gang

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available at <http://www.grassley.senate.gov/news/news-releases/grassley-amendments-focus-strengthening-criminal-laws-are-weakened-immigration> (“[Grassley’s] amendment would strike the provision in the bill that allows criminal gang members admittance to the country and replaces it with a provision that would deny entry or remove a gang member.”); see also *supra* notes 98–99 and accompanying text (describing Grassley 43).

<sup>207</sup> See 8 U.S.C. § 1101(a)(43)(B)–(C), (E) (2012) (including drug trafficking and firearm offenses in the definition of an aggravated felony); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(a)(245B)(b)(3)(A)(i)(II) (2013) (making anyone who has been convicted of an aggravated felony ineligible for RPI status); AIC Practice Advisory, *supra* note 12, at 17 (noting that drug trafficking and firearm offenses, if not classified as felonies, are considered significant misdemeanors for DACA eligibility purposes).

<sup>208</sup> Wright, *supra* note 17, at 134 (arguing that documented people are more likely to experience aggressive policing and have greater exposure to incarceration).

<sup>209</sup> See KATZ & WEBB, *supra* note 26, at 209, 213 (describing law enforcement efforts to stop suspected gang members for pretextual reasons in order to gather intelligence); Wright, *supra* note 17, at 134 (arguing that gang database documentation serves as evidence of guilt in addition to supporting sentence enhancements in gang-related criminal prosecutions).

<sup>210</sup> See, e.g., *supra* notes 75–78 and accompanying text (telling the story of one such immigrant).

members from accessing these opportunities. At the same time, barring those who are or may be documented in gang databases from immigration benefits is not likely to cause them to leave the country, since by definition they have already lived here without status for years.<sup>211</sup>

By basing determinations of gang membership only on criminal convictions rather than gang databases, DHS would achieve the twin goals of fairness and notice. First, it would ensure that individuals had at least some opportunity to challenge the allegations against them, and that permanent immigration decisions were not based on a single, potentially racially-biased impression of a police officer, who likely has no understanding of the collateral consequences of her actions.<sup>212</sup> Second, it would ensure that immigrants would know what evidence might be considered in the adjudication of their immigration application, rather than being left to wonder whether they will be found eligible or not.<sup>213</sup> Ending immigration reliance on gang databases would effectuate the goals of procedural due process and avoid allowing the racially-biased exercise of police discretion that plagues our criminal justice system to unnecessarily exclude people from immigration opportunities for which they are otherwise eligible.

## CONCLUSION

All immigration laws that rely on the criminal justice system “inevitably must use the markers of race and class that the criminal law uses to identify its targeted population.”<sup>214</sup> However, gang databases provide a particularly stark example because their lack of procedural safeguards leaves police discretion entirely unrestrained. Recent immigration policies that seek to provide undocumented immigrants with opportunities to gain legal status or work authorization, but exclude applicants on the basis of documentation in these databases, import the effect of that racially-biased discretion into the

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<sup>211</sup> DACA requestors must have continuously resided in the United States for at least five years prior to 2012. Napolitano Memo, *supra* note 10, at 1. Applicants for the new deferred action, which will be implemented in 2015, must have lived in the country since before January 1, 2010. Deferred Action Memo, *supra* note 15, at 4. Applicants for RPI status must have continuously resided in the country since December 31, 2011. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(a)(245B)(b)(2) (2013).

<sup>212</sup> See *supra* Part II.A (describing the lack of due process protections and the likelihood of racially-inflected decisionmaking in the gang database documentation process).

<sup>213</sup> See *supra* notes 72–75 and 93–96 (describing the deterrent effect of gang databases’ confidentiality on applicants for immigration benefits).

<sup>214</sup> García Hernández, *supra* note 165, at 361.

immigration system.<sup>215</sup> These policies threaten to exclude entire communities of otherwise eligible immigrants from life-changing opportunities and replicate the problems that legalization policies seek to address. Therefore, DHS should adopt regulations that bar immigration officials from relying on gang databases that lack due process protections when they adjudicate benefits applications.

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<sup>215</sup> See ALEXANDER, *supra* note 7, at 123 (“Racially biased police discretion is key to understanding how the overwhelming majority of people who get swept into the criminal justice system in the War on Drugs turn out to be black or brown, even though the police adamantly deny that they engage in racial profiling.”).