

Constructing a Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform

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ABSTRACT: Computerized gang databases have been utilized throughout the United States for decades as a way to combat gang violence, yet many people are concerned with the harmful effects for individuals who are designated as a gang member within the database. Therefore, activists have called for state reform on the use of gang databases. This Note analyzes the benefits of a gang database for law enforcement personnel and the costs to individuals who may be labeled as a gang member. It then examines current state legislation regarding the use of computerized gang databases throughout the United States. Finally, this Note proposes a model statute that states should adopt as a compromise between law enforcement agencies and gang database opponents. The proposed statute offers more safeguards to individuals while simultaneously allowing law enforcement personnel to continue to use the database as a helpful investigative tool.

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I. INTRODUCTION

Throughout the United States, violent gang crimes present an area of concern for law enforcement and citizens alike. In response to these concerns, local, state, and federal law enforcement personnel have utilized criminal street gang databases as a tool for preventing and solving gang crimes. A gang database is an intelligence system, often in an electronic format, that stores information about known or suspected gang members. Today, 12 states have passed legislation outlining the use of gang databases. The implementation of gang databases prompted activists across the nation to voice their apprehensions of these laws. Activists argue the current processes used by law enforcement do not offer the necessary safeguards for individuals who may be added to the database and have consequently called for reform.

This Note argues that state legislatures should adopt a model statute that acts as a compromise between law enforcement personnel and activists opposing the use of gang databases. Though some argue there are potential constitutional claims that may be raised regarding gang databases, those arguments go beyond the scope of this Note.¹ Part II of this Note will analyze

1. See, e.g., CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 123-40 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003) (discussing individuals “asserting causes of action based on the rights to equal protection, privacy, due process, association, freedom from unreasonable searches and seizures, and freedom from racial

the history of gang databases, the benefits that the databases offer to law enforcement agencies, and the costs the databases impose on individuals in the community. Part III will examine current state gang database statutes, including those that offer only a general guideline for law enforcement agencies and those that offer more comprehensive instructions for officials. Finally, Part IV will analyze the shortcomings and advantages of the state statutes currently in place and will then propose a model state statute that provides sufficient protections for individuals while still allowing police departments to utilize gang databases as an investigative tool.

II. THE HISTORY OF GANG DATABASES IN THE UNITED STATES

Computerized gang databases have been used in the United States since 1987 when the Los Angeles County Sheriff's Department implemented its electronic system,² the Gang Reporting, Evaluation, and Tracking System ("GREAT").³ After implementing GREAT, Los Angeles law enforcement officials encouraged the California Legislature to adopt statewide gang policies⁴ and in 1988, "the California Legislature became the first state to enact comprehensive gang legislation."⁵ This legislation, known as the Street Terrorism Enforcement and Prevention ("STEP") Act, was the first statute in the United States to define the term "gang."⁶ The STEP Act defined a gang as:

[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the crimes (listed below), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁷

harassment and intimidation"); THE HANDBOOK OF GANGS 72 (Scott H. Decker & David C. Pyrooz eds., 2015) ("Such challenges have generally been based on the use of vague criteria, the equal protection clause, the first amendment right to freedom of association, and procedural due process.").

2. Anne Teigen, *The Controversy Over Gang Databases*, NAT'L CONF. OF STATE LEGISLATURES: THE NCSL BLOG (Dec. 20, 2018), <http://www.ncsl.org/blog/2018/12/20/the-controversy-over-gang-databases.aspx> [<https://perma.cc/H785-JTMQ>].

3. ANA MUÑIZ & KIM MCGILL, YOUTH JUST. COAL., TRACKED AND TRAPPED: YOUTH OF COLOR, GANG DATABASES AND GANG INJUNCTIONS 2 (2012), <https://youthjusticela.org/wp-content/uploads/2013/07/Tracked-and-Trapped.pdf> [<https://perma.cc/Y4PZ-KYSB>].

4. *Id.*

5. Teigen, *supra* note 2.

6. MUÑIZ & MCGILL, *supra* note 3, at 2.

7. *Id.* This definition has not been universally applied in gang database legislation. However, it provides a basic understanding of what some law enforcement departments use to characterize gangs.

After the California Legislature enacted the STEP Act, state officials began building a statewide database to retain gang information.⁸ In 1997, California implemented CalGang.⁹ Several other cities and states have since introduced gang databases, and 12 states have passed legislation outlining the structure and use of these systems.¹⁰ Today, Arizona, California, Colorado, Florida, Georgia, Illinois, Minnesota, North Dakota, South Carolina, Texas, Virginia and Washington have laws regarding gang databases.¹¹

A. *GANG DATABASES: A USEFUL TOOL FOR LAW ENFORCEMENT*

Law enforcement personnel across the United States use gang databases to combat gang-related crime. As recognized by the U.S. Department of Justice, “[s]treet gangs have posed a significant threat to public safety in the United States for decades.”¹² According to the Federal Bureau of Investigation (“FBI”), there are around 33,000 active street gangs in the United States.¹³ “Overall, gang members engage in a higher level of serious and violent crime than their non-gang-involved peers.”¹⁴ In response to that threat, law enforcement personnel throughout the country have started using gang databases to identify known or suspected gang members.¹⁵

The federal government, through federal statute, directed the Attorney General to establish a National Gang Intelligence Center (“NGIC”) and a gang database.¹⁶ The “NGIC was established by statute in January 2006 to ‘collect, analyze, and disseminate gang activity information’ from various federal, state, and local law enforcement, prosecutorial, and corrections agencies.”¹⁷ The Federal Bureau of Investigation manages both the NGIC and the gang database.¹⁸ “The NGIC integrates gang intelligence from across federal, state, and local law enforcement” and “supports law enforcement by sharing timely and accurate information and by providing intelligence

8. *Id.* at 3.

9. *Id.*

10. Teigen, *supra* note 2.

11. *Id.*

12. *Gangs: Special Feature*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, <https://www.ojp.gov/feature/gangs/overview> [<https://perma.cc/T83Y-U6GM>].

13. *Gangs*, FBI, <https://www.fbi.gov/investigate/violent-crime/gangs> [<https://perma.cc/H8LB-R778>].

14. *Gangs: Special Feature*, *supra* note 12.

15. Teigen, *supra* note 2 (“Gang databases have been used to measure and assess the extent of gang activity in communities.”).

16. 34 U.S.C. § 41507 (2018).

17. OFF. OF INSPECTOR GEN. EVALUATION & INSPECTIONS DIV., U.S. DEP’T OF JUST., A REVIEW OF THE DEPARTMENT’S ANTI-GANG INTELLIGENCE AND COORDINATION CENTERS 3 (2009) [hereinafter ANTI-GANG INTELLIGENCE], <https://oig.justice.gov/reports/FBI/i2010001.pdf> [<https://perma.cc/PA94-FWNE>].

18. 34 U.S.C. § 41507.

analysis” in the form of national gang reports.¹⁹ Although only 12 states have enacted gang database legislation, many law enforcement departments in the United States track gang membership statistics and report them to the NGIC.²⁰

The NGIC published national gang reports in 2009, 2011, 2013, and 2015.²¹ According to the 2015 National Gang Report, 49 percent of jurisdictions in the United States reported an increase in gang membership within the preceding two years, while 43 percent reported no change in the number of gang members, and only eight percent of jurisdictions reported a decrease in gang membership in the preceding two years.²² Likewise, 50 percent of jurisdictions reported an increase in gang-related crime, while 36 percent reported a consistency in crime rates, and under 14 percent of jurisdictions reported a decrease in gang-related crimes.²³ The NGIC reports state that gangs are actively involved in “illegal money-making activities, which include robbery, drug and gun trafficking, prostitution and human trafficking, and fraud.”²⁴ Further, a study of one major U.S. city found that “[n]eighborhoods with higher levels of gang membership . . . have a gun assault rate double . . . that of low membership neighborhoods.”²⁵

There are numerous ways gang databases serve as a useful tool for law enforcement personnel. First, police departments can use gang databases to investigate previously committed crimes.²⁶ Law enforcement personnel can “search the database for alleged gang members when investigating a crime with possible gang connections. Police can then review social media postings for mentions of the crime, which might turn up new witnesses and other leads.”²⁷

19. *Gangs*, *supra* note 13.

20. See NAT'L GANG INTEL. CTR., 2015 NATIONAL GANG REPORT 5 (2015), <https://www.fbi.gov/file-repository/stats-services-publications-national-gang-report-2015.pdf/view> [<https://perma.cc/W33L-YSH8>].

21. *Gang Reports*, FBI [hereinafter *Gang Reports*], <https://www.fbi.gov/resources/library/gang-reports> [<https://perma.cc/ET7P-QQPT>].

22. NAT'L GANG INTEL. CTR., *supra* note 20, at 11.

23. *Id.*

24. *Gangs*, *supra* note 13.

25. Beth M. Huebner, Kimberly Martin, Richard K. Moule Jr., David Pyrooz & Scott H. Decker, *Dangerous Places: Gang Members and Neighborhood Levels of Gun Assault*, 33 JUST. Q. 836, 849 (2016). This study focused on the relationship between gangs and levels of gun assault in St. Louis, Missouri. The study found that gang members rely on guns in their day-to-day activities and are “more likely to engage in violence and experience violent victimization—especially gun violence—than youth who avoid gangs.” *Id.* at 856.

26. Zolan Kanno-Youngs & Gerald Porter Jr., *Gang Databases Are the Latest Controversial Policing Tool*, WALL ST. J. (July 26, 2018, 12:51 PM), <https://www.wsj.com/articles/gang-databases-are-the-latest-controversial-policing-tool-1532597400> [<https://perma.cc/R2TY-PLJJ>].

27. *Id.*

Gang databases also allow the police to determine potential targets of retaliation between opposing gangs.²⁸ Take New York City, for example. In 2017, half of New York City's "shootings involved a gang member as either the shooter or the victim."²⁹ "Gangs and their members have a well-documented history of engaging in retaliatory violence . . . , with gang violence frequently spilling into surrounding territories and neighborhoods"³⁰ Therefore, according to Chief of Detectives Dermot Shea, "[w]hen violence erupts between two groups, it is vital for [police] to know who might retaliate and who is likely to be targeted."³¹ Gang databases aid in that analysis.

Finally, gang databases allow law enforcement personnel to work with other departments to obtain information about gang members.³² When discussing actions by law enforcement agencies to contest gang violence, the NGIC emphasized:

Investigative entities and intelligence units have long been vital in mitigating gang activity. Agencies at every level of law enforcement continue to join forces to combat gang violence, and remain committed to combating gangs, as gang activity continues to threaten communities nationwide Technology is increasingly playing a pivotal role in police investigations and anti-gang efforts. Most police agencies today maintain gang databases whereby gang intelligence and gang-related crime statistics can be shared with law enforcement partners in other jurisdictions.³³

As expressed by Kamala Harris during her tenure as San Francisco District Attorney, "[p]olice need updated gang databases, because gang-affiliated offenders often move from place to place. Police must quickly obtain full information on the offenders in their custody, to make sure that individuals don't slip through the cracks."³⁴

Massachusetts implemented a statewide gang database, MassGangs, as a means for local police departments to receive information on gang members

28. Rocco Parascandola, Khadija Hussain & Larry McShane, *NYPD Honcho Insists Gang Database Saves Lives, but a Teary City Council Member Said It Can Have Devastating Consequences*, N.Y. DAILY NEWS (June 13, 2018, 1:25 PM), <https://www.nydailynews.com/new-york/ny-metro-nypd-gang-database-20180613-story.html>.

29. *Id.*

30. Huebner et al., *supra* note 25, at 841 (citations omitted).

31. Parascandola et al., *supra* note 28.

32. James B. Jacobs, *Gang Databases: Context and Questions*, 8 CRIMINOLOGY & PUB. POL'Y 705, 705 (2009).

33. NAT'L GANG INTEL. CTR., *supra* note 20, at 45.

34. KAMALA D. HARRIS & JOAN O'C. HAMILTON, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER 187 (2009).

who frequently travel from one city to another within the state.³⁵ The local departments previously maintained separate systems and law enforcement personnel in one city would have to contact another city to obtain all of the information that city had on an individual gang member.³⁶ The universal system allows each department to quickly acquire gang information that would otherwise be difficult or nearly impossible to obtain.³⁷ Several other states have taken the same approach as Massachusetts. As of the 2015 National Gang Report, 65 percent of responding jurisdictions indicated that they used a gang database and 45 percent of those jurisdictions indicated that the information could be accessed by law enforcement partners.³⁸

B. GANG DATABASES: CRITICISM FROM ACTIVISTS

Despite support from the law enforcement community, gang databases have come under scrutiny in the past few years because “the impact that [gang databases] ha[ve] on these individuals extends far beyond the intended law enforcement purposes for which [the police department] collects and utilizes this information.”³⁹ Although law enforcement personnel view gang databases as a “vital tool in keeping [cities] safe,”⁴⁰ others see it as “a prime tool for racial profiling.”⁴¹ Critics of gang databases contend that “Black and Latino communities constitute a disproportionate number of individuals on gang lists.”⁴² Some argue that gang databases and “gang policing practices are a

35. Jim McKay, *Law Enforcement Database Tracks Gang Members Statewide*, GOV'T TECH. (June 21, 2009), <https://www.govtech.com/public-safety/Law-Enforcement-Database-Tracks-Gang-Members.html> [<https://perma.cc/Y37X-GVLW>].

36. *Id.*

37. *See id.* (discussing gang information that is shared only because two departments have a personal relationship).

38. *See* NAT'L GANG INTEL. CTR., *supra* note 20, at 45.

39. Sam Charles, *Unverified, Outdated Police Gang Database Lists 134,000 Names, Watchdog Says*, CHI. SUN TIMES (Apr. 11, 2019, 10:00 AM), <https://chicago.suntimes.com/2019/4/11/18355005/unverified-outdated-police-gang-database-lists-134-000-names-watchdog-says> [<https://perma.cc/EEB2-X7DT>].

40. Parascandola et al., *supra* note 28.

41. Emmanuel Felton, *Gang Databases Are a Life Sentence for Black and Latino Communities*, PAC. STANDARD (Mar. 15, 2018), <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities> [<https://perma.cc/7XGC-JHNK>].

42. *Id.* *Compare* CRIME CONTROL AND SOCIAL JUSTICE, *supra* note 1, at 121 (describing a report from the Los Angeles District Attorney which “note[d] the possibility that police harassment would result in more frequent identification of African-American youths as gang members, but concluded that the problem was *underreporting* of other racial groups rather than *overreporting* of African-American gang members”), *with* Nick Pinto, *NYPD Added Nearly 2,500 New People to Its Gang Database in the Last Year*, INTERCEPT (June 28, 2019, 10:15 AM), <https://theintercept.com/2019/06/28/nypd-gang-database-additions> [<https://perma.cc/9KYB-6FJ5>] (“The racial composition of the database reflects patterns of gang membership, not police biases . . .”), *and* Nick Rummell, *Groups Demand to See Criteria for NYPD Gang Database*, COURTHOUSE NEWS SERV. (Aug. 8, 2018), <https://www.courthousenews.com/groups-demand-to-see-criteria-for-nypd-gang-database> [<https://perma.cc/6PUL-W93Z>] (“Organized crime

black box that, like stop-and-frisk before them, have subjected thousands of young people of color . . . over the past several years to police surveillance, harassment, and worse.”⁴³ “Both the expansiveness and secretive nature of these databases means that communities of color must live in fear”⁴⁴ Portland recognized these flaws in its own system and in 2017, the city terminated its gang database after finding that 81 percent of the 359 gang members on the list were part of a minority racial group.⁴⁵

In addition to racial biases, critics argue gang databases do not offer enough protections to ensure those who are added to the system are in fact gang members.⁴⁶ In some jurisdictions, individuals can be added to the list by mere “suspicion or association, rather than only after they’ve committed a gang-related crime.”⁴⁷ Several jurisdictions apply a point-based system that law enforcement personnel use to classify individuals as gang members.⁴⁸ Some criteria used to identify potential gang members include, “having a known gang tattoo,” “wearing gang paraphernalia,” and “interacting with a known gang member or associate.”⁴⁹ These criteria can be “overly vague and broad.”⁵⁰ When individuals are identified as gang members by reaching a certain number of points, “[d]atabases unfairly put innocent people on the radar of law enforcement and make them more likely to be arrested.”⁵¹

Furthermore, individuals do not receive any form of notification when they are added to the database.⁵² Unlike conviction records, these individuals

outfits—which include gangs and crews—are not typically diverse organizations. They are generally comprised of members of a single demographic group.”).

43. Rummell, *supra* note 42.

44. Felton, *supra* note 41.

45. Maxine Bernstein, *Portland Police to Halt, Purge All Gang Designations*, OREGONLIVE.COM (Apr. 22, 2019), https://www.oregonlive.com/portland/2017/09/portland_police_to_halt_purge.html [<https://perma.cc/9NVY-7WH4>].

46. See Felton, *supra* note 41.

47. *Id.*; see also MUÑIZ & MCGILL, *supra* note 3, at 4 (“Most people are added to the database without having been arrested or accused of criminal activity. Sometimes the data is added during active crime investigations. But most often, data is collected through routine police stops or stop and frisks” (emphasis omitted)).

48. Philip Marcelo, *Gang Database Made Up Mostly of Young Black, Latino Men*, AP NEWS (July 30, 2019), <https://www.apnews.com/dd5643e358c3456dbe14c16ade03711d> [<https://perma.cc/3AZ2-59K5>]; Mary Holper & Claire Valentin, *Boston Police Has a Secret Point System That Turns Normal Teenage Behavior into Gang Membership*, ACLU (Nov. 21, 2018, 2:15 PM), <https://www.aclu.org/blog/immigrants-rights/boston-police-has-secret-point-system-turns-normal-teenage-behavior-gang> [<https://perma.cc/RVG7-U5Q7>]; Larry Smith, *Former Baltimore Police Officer Criticizes the Department’s Gang Database*, APPEAL (July 23, 2018), <https://theappeal.org/former-baltimore-police-officer-unloads-on-departments-gang-database> [<https://perma.cc/KJH2-WN26>].

49. Marcelo, *supra* note 48.

50. Teigen, *supra* note 2.

51. Kanno-Youngs & Porter, *supra* note 26.

52. Felton, *supra* note 41.

cannot expunge their gang records.⁵³ Without protections in place, individuals may remain on the gang list forever.⁵⁴ Even if an individual is aware that their name is “included in a gang database, many jurisdictions have no process for a person to appeal” their status.⁵⁵ This can lead to many long-term problems. As explained by Marne Lenox from the NAACP Legal Defense Fund,

[O]nce you are arrested, this affects you in court. Prosecutors can use it against you during plea bargaining and in bail negotiations. And if you go to trial, they can use inclusion on a gang database to paint you as a violent criminal. In some jurisdictions, you are even subjected to longer sentences.⁵⁶

Despite claims that prosecutors do not have access to New York’s gang database, criminal defense attorneys in New York have found that the information is shared with the prosecutors through police reports, and prosecutors then use the information against the individual listed in the database.⁵⁷

Another concern with gang databases involves individuals who have immigrated to the United States. According to civil rights activists, legal immigrants have been “deport[ed] based largely on their status on the gang database.”⁵⁸ Police officials are suspected of sharing gang database information with U.S. Immigration and Customs Enforcement (“ICE”).⁵⁹ In Boston, a 24-year-old immigrant from El Salvador faced deportation because he was listed as a verified gang member in the gang database.⁶⁰ He was placed in the database “because he was seen associating with known MS-13 members, had feuded with members of the rival Bloods street gang, and was even charged with assault and battery following a fight at school.”⁶¹ Although he met some of the criteria to be placed in Boston’s gang database, he maintains that he was not a gang member.⁶²

Critics are also troubled by the accessibility of gang database information.⁶³ An attorney for the American Civil Liberties Union in Massachusetts, Adriana Lafaille, stated, “After all this time, we still don’t have an understanding about who can access this information and how it’s

53. *Id.*

54. *Id.*

55. Teigen, *supra* note 2.

56. Felton, *supra* note 41.

57. Pinto, *supra* note 42.

58. Marcelo, *supra* note 48.

59. *See id.*

60. *Id.*

61. *Id.*

62. *See id.* (providing an example of a “Central American youth[] . . . being wrongly listed as [an] active gang member[]”).

63. *Id.*

shared That’s something the public has a right to know.”⁶⁴ As previously discussed, many believe the information is shared with prosecutors and ICE.⁶⁵ Some are also concerned that the information is shared with landlords and employers.⁶⁶ As of 2012, prior to legislative reforms, “over 6,000 law enforcement officers in at least 58 counties” accessed California’s gang database, CalGang.⁶⁷ In 2018, activists launched a campaign in New York City encouraging people to file requests under the state’s Freedom of Information Law so local officials would release information explaining who has access to the gang database.⁶⁸ Finally, a recent investigation of Chicago’s gang database revealed that the data stored in the system is shared “with over 500 external agencies, including education, immigration, and criminal justice agencies.”⁶⁹

In response to these concerns, law enforcement personnel have stated “entry into the database is not proof of criminal behavior. It is a lead. It alone is not grounds for a stop, arrest, or any other enforcement action.”⁷⁰ New York officials claim their database “[is] not made public, it doesn’t show up in criminal histories or rap sheets, it’s not shared with public housing or potential employers, it doesn’t lead to sentencing enhancements, and prosecutors don’t have access to the database.”⁷¹ Similarly, California law enforcement personnel expressed, “a name in the database ‘does not prove or disprove’ that the person is a gang member or associate” and “[t]he database is a ‘pointer system,’ not a justification for arrest.”⁷² “The idea is to catch murderers and criminals, not to persecute people”⁷³

C. GANG DATABASES: A COMPROMISE

The apprehensions presented by those who oppose gang databases have not gone unnoticed. Indeed, Massachusetts gang unit supervisor Lt. John Goodwin acknowledged that gang databases can be concerning for known

64. *Id.*

65. *See supra* text accompanying notes 56–59.

66. Felton, *supra* note 41.

67. MUÑIZ & MCGILL, *supra* note 3, at 3.

68. Felton, *supra* note 41.

69. CITY OF CHI. OFF. OF INSPECTOR GEN., REVIEW OF THE CHICAGO POLICE DEPARTMENT’S “GANG DATABASE” 3 (2019) [hereinafter CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL], <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf> [<https://perma.cc/V2GU-U55K>]. According to the report from the Inspector General, the Chicago Police Department not only shares information with several other agencies, but the Department receives gang information from outside agencies as well. *Id.*

70. Rummell, *supra* note 42.

71. Pinto, *supra* note 42.

72. *He’s a Gang Intervention Worker. But California Police Call Him a Gang Member*, NBC NEWS (Aug. 19, 2019, 9:27 AM), <https://www.ksby.com/news/california-news/hes-a-gang-intervention-worker-but-california-police-call-him-a-gang-member>.

73. *Id.*

and suspected gang members.⁷⁴ During the implementation of MassGangs he said, “You don’t want every cop out there stopping every kid with an attitude and saying he’s a gang member.”⁷⁵ Instead, Lt. Goodwin said the gang database should be used for major offenses and not minor incidents.⁷⁶

Following criticism, several departments have undertaken initiatives to correct errors in their gang databases.⁷⁷ In 2014, the New York Police Department (“NYPD”) improved its gang database.⁷⁸ The database previously maintained records of 34,000 individuals, but after the NYPD reviewed and evaluated each person on the list, the database was reduced to around 17,500 individuals.⁷⁹ In June 2018, New York also reduced the number of juveniles in the database from 1,460 to 494 individuals.⁸⁰ According to Chief of Detectives Dermot Shea from the NYPD, “[w]e are in the era of precision policing. Saturating the database with non-gang members limits its usefulness.”⁸¹ Instead, it is the NYPD’s goal to make sure that those listed on the database are truly gang members.⁸²

In 2015, California passed Assembly Bill 829, which “requires police to notify minors who are included in the Cal-gang database.”⁸³ In August 2016, the state conducted an audit of the statewide database, and several errors were found within the CalGang system.⁸⁴ The “state auditor concluded that law enforcement agencies entered and tracked some people into that database without adequate evidence that they were in a gang.”⁸⁵ The report indicated “[f]orty-two people were younger than one year of age when they were entered into the database” and over half of those under the age of one were considered gang members because they admitted membership to the police.⁸⁶ Following the audit, the California State Legislature passed the Fair and Accurate Gang Database Act of 2017, which once again reformed the CalGang system.⁸⁷ The focus of the Act was “to bring more accountability”⁸⁸ by changing the criteria used to identify gang members and by publishing quarterly reports on the database.⁸⁹ The Fair and Accurate Gang Database

74. McKay, *supra* note 35.

75. *Id.*

76. *Id.*

77. See, e.g., Kanno-Youngs & Porter, *supra* note 26; Charles, *supra* note 39.

78. See Kanno-Youngs & Porter, *supra* note 26.

79. *Id.*

80. Pinto, *supra* note 42.

81. Parascandola et al., *supra* note 28.

82. *Id.*

83. Teigen, *supra* note 2.

84. Kanno-Youngs & Porter, *supra* note 26.

85. *Id.*

86. *Id.*

87. Assemb. B. 90, 2017 Leg., Reg. Sess. (Cal. 2017); Felton, *supra* note 41.

88. Felton, *supra* note 41.

89. Kanno-Youngs & Porter, *supra* note 26.

Act instructed the California Department of Justice to establish the new regulations for CalGang.⁹⁰

Nevertheless, in July 2020, “[t]hree Los Angeles police officers were charged . . . with falsifying records and obstructing justice by claiming without evidence that people they stopped were gang members or associates.”⁹¹ The California Attorney General Xavier Becerra “‘revoked access to CalGang records generated by the Los Angeles Police Department (LAPD),’ and suggested the state Legislature should consider more reforms to the troubled system.”⁹² Three years have passed since “the Legislature gave the Department of Justice authority to revamp the database.”⁹³ “DOJ regulations were expected in January, but they are still pending. The attorney general asked for a six-month extension, and delays from the coronavirus have pushed the rules even further out.”⁹⁴ As a result, the citizens of California have not seen the reform they were promised.

Chicago’s database, described as “a disorganized hodgepodge of outdated and often unverified information,”⁹⁵ has also faced criticism. From January 1997 to November 2018, 134,000 individuals were added to Chicago’s gang database.⁹⁶ Of those added, 88 percent admitted to police officers that they were a gang member.⁹⁷ However, over 15,000 individuals were added to the gang database without any reason listed.⁹⁸ An investigation by the City of Chicago’s Office of the Inspector General revealed that Chicago maintained its “gang-related data in at least 18 different forms, records, and systems of records in the past 10 years.”⁹⁹ This, according to the Inspector General,

90. Cal. Assemb. B. 90.

91. Kevin Rector & Leila Miller, *3 LAPD Officers Charged with Falsifying Records to Claim People Were Gang Members, Associates*, L.A. TIMES (July 10, 2020, 5:11 PM), <https://www.latimes.com/california/story/2020-07-10/3-lapd-officers-charged-with-falsifying-records-to-claim-people-were-gang-members-associates>.

92. Anita Chabria, Kevin Rector & Cindy Chang, *California Bars Police from Using LAPD Records in Gang Database. Critics Want It Axed*, L.A. TIMES (July 14, 2020, 7:22 PM), <https://www.latimes.com/california/story/2020-07-14/california-bars-police-from-using-lapd-records-in-gang-database-as-scandal-widens>.

93. *Id.*

94. *Id.*

95. Charles, *supra* note 39.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*; see also *Review of the Chicago Police Department’s “Gang Database,”* CITY OF CHI. OFF. OF INSPECTOR GEN. (Apr. 11, 2019) [hereinafter *CPD Review*], <https://igchicago.org/2019/04/11/review-of-the-chicago-police-departments-gang-database> [<https://perma.cc/23VH-TR2K>] (“OIG’s review found that while the Chicago Police Department . . . deploys a host of strategies, tactics, and technology in relation to gangs, it does not have a unified, stand-alone ‘gang database’ as publicly perceived. Instead, the Department collects and stores information on individual and geographic gang involvement through a multitude of internal databases, forms, visualization tools, and repositories.”).

“exacerbate[s] the already strained relationship between law enforcement and minority communities.”¹⁰⁰

To cure the relationship between law enforcement and minority communities, the Inspector General made several suggestions for Chicago to improve its system.¹⁰¹ The Inspector General’s report did note, however, that the recommendations apply to newly collected information, and the “unverified, outdated information” currently in Chicago’s gang database “will remain available to any officer or department that currently has access to this information.”¹⁰² The Chicago Police Department agreed to the majority of the Inspector General’s recommendations and is working to execute the new plan.¹⁰³ “After [the] audit, Chicago Police officials proposed creating a new system, dubbed the Criminal Enterprise Database that they touted as a ‘single, unified system’ that would only include ‘updated and vetted’ information and provide an opportunity for individuals listed to be notified and allowed to appeal their designation.”¹⁰⁴ The Inspector General and Mayor rejected this proposal because it did not offer enough protections to individuals.¹⁰⁵ As of August 2020, “the flawed database[] . . . remain[ed] active and available to hundreds of law enforcement agencies” and the Office of the Inspector General was conducting a follow-up audit.¹⁰⁶

Notwithstanding the changes made by jurisdictions in the past few years, there are still flaws in the gang databases being used throughout the country today.¹⁰⁷ While law enforcement personnel maintain that gang databases are necessary for safety in the community, critics argue gang databases should be eliminated completely.¹⁰⁸ As aptly stated by Chicago Police Department spokesman Anthony Guglielmi,

Quality policing has always been predicated on data and backed up by the positive relationship between police and the community It would be irresponsible for [police departments] not to use

100. Charles, *supra* note 39.

101. *Id.*

102. *Id.*

103. *Id.*

104. Heather Cheron, *Follow-Up Audit of CPD’s Gang Database Almost Complete. City Council Has Yet to Examine Original Findings*, WTTW.COM (Aug. 24, 2020, 3:54 PM), <https://news.wttw.com/2020/08/24/follow-audit-cpd-s-gang-database-almost-complete-city-council-has-yet-examine-original> [<https://perma.cc/29HG-9PX9>].

105. *Id.*

106. *Id.*

107. Kanno-Youngs & Porter, *supra* note 26.

108. See THE HANDBOOK OF GANGS, *supra* note 1, at 72 (rejecting the “abolitionist” position); Pinto, *supra* note 42; Chabria et al., *supra* note 92.

information to ensure public safety. It is just as important to ensure the validity, accuracy, and quality of that data.¹⁰⁹

Likewise, some scholars reject abolition, explaining “the crimes committed by gang members often occur in multiple jurisdictions . . . making it advisable for law enforcement agencies to share information and to collaborate in prevention, intervention, and suppression efforts.”¹¹⁰

With this in mind, how can the advantages that law enforcement obtains from these systems be maintained while simultaneously protecting individuals who face the negative consequences from the flaws in the system? The solution comes in the form of a compromise: a universal enhancement of state regulations which eliminate the stereotypical identifiers and instead focus on concrete evidence of gang association, yet which still allow law enforcement officers to access critical information for protecting the community.

III. COMPARING CURRENT STATE GANG DATABASE LEGISLATION

Although multiple states have implemented legislation regarding gang databases, their statutes vary widely. For the purpose of this Note, the current state statutes will be divided into two categories: (1) those that provide a general outline to law enforcement for the use of a gang database, and (2) those that provide more detailed regulations for the formation and utilization of databases. Colorado, Florida, Georgia, Illinois, South Carolina, and Virginia’s statutes will be discussed in the first category. California, Texas, Minnesota, and Washington’s statutes will be discussed in the latter category. After addressing the text of each state’s statute, Section III.C will discuss the proposed and effectuated reforms in various jurisdictions concerning gang databases.

A. STATES THAT GIVE A GENERAL OVERVIEW

Several states have enacted gang database legislation, but most do not provide the comprehensive regulation needed for law enforcement personnel. The states discussed in the following paragraphs—Colorado, Florida, Georgia, Illinois, South Carolina, and Virginia—have passed laws providing the authority to implement a gang database. These states provide a general framework, rather than detailed guidance, for law enforcement’s use of the database.

109. Matt Masterson, *Gang Database ‘Strains Police-Community Relations’ City Watchdog Says*, WTTW.COM (Apr. 11, 2019, 3:12 PM), <https://news.wttw.com/2019/04/11/gang-database-strains-police-community-relations-city-watchdog-says> [https://perma.cc/3SCF-SG7S].

110. THE HANDBOOK OF GANGS, *supra* note 1, at 72–73.

1. Colorado

Colorado enacted its gang database statute after gang-related crimes “bec[a]me a matter of statewide concern.”¹¹¹ The Legislature created a statewide database “to improve the consistency of data shared by the different law enforcement and judicial elements of the criminal justice system.”¹¹² The Legislature determined the database would be created and maintained by the Colorado Bureau of Investigation.¹¹³ The information for the database is collected based on reports sent to the Bureau and should include the name of the individual, their last-known address, their birthdate, all dates of arrest and related case numbers, and “[a]ny information relevant to the person’s association or affiliation with a gang or with gang activities.”¹¹⁴ Beyond these basic guidelines, law enforcement has discretion in decisions regarding the gang database.

2. Florida

The Florida Legislature enacted a statute granting the Department of Law Enforcement the authority to “[d]evelop and manage a statewide criminal gang database” and “[n]otify all law enforcement agencies that reports of criminal gang members or associates shall be entered into the database as soon as the minimum level of data specified by the department is available.”¹¹⁵ Under Florida law, the database must be “compile[d] and retain[ed] . . . in a manner that allows the information to be used by law enforcement . . . for investigative purposes” and “to develop and improve techniques used by law enforcement agencies and prosecutors in the investigation, apprehension, and prosecution of members and affiliates of criminal gangs.”¹¹⁶ Finally, law enforcement agencies may update the information in the system, and “[n]otify the prosecutor of the accused individual’s suspected criminal gang membership or associate status.”¹¹⁷

3. Georgia

The Georgia Street Gang Terrorism and Prevention Act¹¹⁸ granted the Georgia Bureau of Investigation authority to establish the Georgia Criminal Street Gang Database.¹¹⁹ The database is used “to facilitate the exchange of information between federal, state, county, and municipal law enforcement,

111. COLO. REV. STAT. ANN. § 24-33-5-415.3(1)(a) (West 2015).

112. *Id.* § 24-33-5-415.3(1)(d).

113. *Id.* § 24-33-5-415.3(3).

114. *Id.* § 24-33-5-415.3(3)(e).

115. FLA. STAT. ANN. § 874.09(1)(a)–(b) (West 2014).

116. *Id.* § 874.09(1)(e)–(d).

117. *Id.* § 874.09(2)(a)–(b).

118. GA. CODE ANN. § 16-15-1 (2018).

119. *Id.* § 16-15-11(a).

prosecution and corrections agencies, offices, and departments . . . for investigative, prosecutorial, and corrections purposes.”¹²⁰ However, the Georgia Legislature did not provide much additional guidance to the Bureau under the Act. “The statute fails . . . to specify quality control guidelines, such as access rights, training requirements, and audit and purge procedures.”¹²¹ The only direction given to the Bureau is that “a uniform reporting format” shall be created, all of the above named agencies and offices may send the information to the Bureau, and the information is not accessible by the public.¹²² Additionally, Georgia does not “have to comply with federal regulations governing criminal intelligence systems” because it “accepts no federal funding for the creation and maintenance of its gang database.”¹²³

4. Illinois

Illinois’s gang database legislation became effective on January 1, 2000.¹²⁴ Under Illinois law, the Department of State Police¹²⁵ created and maintains the Statewide Organized Criminal Gang Database (“SWORD”) to track gang members in the state.¹²⁶ The Illinois Legislature provided very little direction as to the structure and use of SWORD. The Legislature simply said the Department of State Police could consult with the Criminal Justice Information Authority to construct the new database, the information would be “electronically available to prosecutors and to other law enforcement agencies,” and that “[i]nformation in the database may include, but not be limited to, the name, last known address, birth date, physical descriptions (such as scars, marks, or tattoos), officer safety information, organized gang affiliation, and entering agency identifier.”¹²⁷

5. Virginia

Similarly, Virginia’s Legislature outlined the process for criminal street gang reporting in state legislation.¹²⁸ According to Virginia law, when a law enforcement agency determines an individual is a member of a gang, “the agency shall enter the person’s name and other appropriate gang-related information” into the state database, the Organized Criminal Gang File of the Virginia Criminal Information Network.¹²⁹ In order to determine that an individual is a gang member, (1) the individual must admit membership,

120. *Id.*

121. THE HANDBOOK OF GANGS, *supra* note 1, at 68.

122. GA. CODE ANN. § 16-15-11 (e).

123. THE HANDBOOK OF GANGS, *supra* note 1, at 68.

124. 20 ILL. COMP. STAT. ANN. 2605/2605-305 (West 2018).

125. “‘Department’ means the Department of State Police.” *Id.* § 2605/2605-5.

126. *Id.* § 2605/2605-305.

127. *Id.*

128. VA. CODE ANN. § 52-8.6 (2013).

129. *Id.*

(2) law enforcement personnel must observe the individual regularly visiting “a known gang area, associat[ing] with known gang members and demonstrat[ing] gang style of dress, tattoos, hand signals, or symbols,” or (3) the individual must “[be] arrested on more than one occasion with known gang members for offenses consistent with gang activities.”¹³⁰

6. South Carolina

Like several other states, South Carolina enacted gang database legislation when it passed the Criminal Gang Prevention Act in 2007.¹³¹ Pursuant to the goals of the Act, the state legislature required the State Law Enforcement Division to create and maintain “a statewide criminal gang database.”¹³² The information for South Carolina’s gang database is furnished by “[a]ll state, county, and municipal law enforcement agencies,” but the State Law Enforcement Division decides which information provided by the agencies will be included in the database.¹³³ The South Carolina Legislature gave discretion to the State Law Enforcement Division “to promulgate emergency regulations” until permanent regulations were approved, to create and amend permanent regulations, and to create “regulations concerning the punishment associated with intentional misuse of the database.”¹³⁴

The South Carolina Legislature provided some protections within its gang statute. The Legislature expressly noted that the criminal information used in the database “must be consistent with the criteria required . . . by the Violent Gang and Terrorist Organization File of the Federal Bureau of Investigation’s National Crime Information Center.”¹³⁵ The Legislature also stated the database was not subject to the Freedom of Information Act, thereby shielding the information from public view.¹³⁶ Additionally, the Legislature made clear that “[i]nformation relating to a person who does not have a criminal arrest record and is not a member of a criminal gang must be used only for intelligence, investigative, and tracking purposes.”¹³⁷

B. STATES THAT PROVIDE A MORE DETAILED FRAMEWORK

Several state legislatures offer a more comprehensive framework in their gang database laws. These detailed regulations provide more rights and safeguards for those individuals who are entered into the database. Although the following states—Texas, California, Minnesota, and Washington—supply

130. *Id.*

131. S.C. CODE ANN. § 16-8-210 (2015).

132. *Id.* § 16-8-330(A).

133. *Id.* § 16-8-330(B)–(C).

134. *Id.* § 16-8-330(D)(1), (3).

135. *Id.* § 16-8-330(D).

136. *Id.* § 16-8-330(F).

137. *Id.* § 16-8-330(E).

a more structured set of regulations, none individually address all of the problems presented by opponents of gang databases.

1. Texas

The Texas Legislature recently repealed its prior gang database legislation and enacted new legislation, Texas Criminal Procedure Chapter 67, concerning the use of a gang database within the state.¹³⁸ According to state statute, law enforcement agencies in municipalities “with a population of 50,000 or more or in a county with a population of 100,000 or more,” must create local gang databases for use by the agency.¹³⁹ The Texas statute provides various guidelines for the database. Notably, each individual who is permitted to enter information into the gang database must receive operation training prior to use and “continuing education . . . at least once for each continuous two-year period the person has primary responsibility for performing [that] function.”¹⁴⁰

When outlining the submission criteria for all information entered into Texas’s gang database, the legislature states the information must “be relevant to the identification of an organization that is reasonably suspected of involvement in criminal activity.”¹⁴¹ The information must also entail (1) “a judgment under any law that includes, as a finding or as an element of a criminal offense, participation in a criminal street gang; [(2)] a self-admission by an individual of criminal street gang membership that is made during a judicial proceeding; or”¹⁴² (3) at least two of eight possible forms of corroborating evidence listed in the statute that indicate the individual is a member of a criminal street gang.¹⁴³

138. See H.B. 2931, 85 Leg., Reg. Sess. (Tex. 2017) (“Title 1, Code of Criminal Procedure, is amended by adding Chapter 67 to read as follows: CHAPTER 67. COMPILATION OF INFORMATION PERTAINING TO COMBINATIONS AND CRIMINAL STREET GANGS[.]”).

139. TEX. CODE CRIM. PROC. ANN. art. 67.051 (West 2018).

140. *Id.* art. 67.053 (b).

141. *Id.* art. 67.054 (b) (1).

142. *Id.* art. 67.054 (b) (2) (A)–(B).

143. *Id.* art. 67.054 (b) (2) (C). Under Texas law, the following pieces of evidence can be used to show gang membership:

- (i) a 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 . . . ;
- (ii) an identification of the individual as a criminal street gang member by a reliable informant or other individual;
- (iii) a corroborated identification of the individual . . . by an informant or other individual of unknown reliability;
- (iv) evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members;
- (v) evidence that the individual uses . . . criminal street gang dress, hand signals, tattoos, or symbols, including expressions of letters, numbers, words, or marks

The Texas Legislature added an important restriction to the forms of corroborating evidence that may be used—although two pieces of evidence can be combined to identify a gang member, “evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members,” and “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,” cannot be used together to qualify an individual as a gang member absent another piece of evidence from the defined list.¹⁴⁴

The Texas Legislature also regulated the release of gang database information to individuals who are not law enforcement. The Legislature provided criminal justice agents the authority to release the information to other criminal justice agencies, the court, or “a defendant in a criminal proceeding who is entitled to the discovery of the information.”¹⁴⁵ Furthermore, the Legislature placed restrictions on the use of that information, stating that the criminal justice agency or court that receives the information may use it “only for the administration of criminal justice” and the defendant may only use it as a defense tool in a criminal proceeding.¹⁴⁶ Finally, the Legislature declared that an individual may be charged with a Class A misdemeanor if that individual uses information from the gang database “for an unauthorized purpose” or if the individual “releases the information to a person who is not entitled to the information.”¹⁴⁷

Under Texas law, information placed in the database for agencies other than the Texas Department of Criminal Justice and the Texas Juvenile Justice Department must be removed after five years if: “(1) the information relates to the investigation or prosecution of criminal activity engaged in by an individual other than a child; and (2) the individual who is the subject of the information has not been arrested for criminal activity reported to the department.”¹⁴⁸ However, the five-year period does not include time spent in

. . . that are associated with a criminal street gang that operates in an area frequented by the individual . . . ;

(vi) 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;

(vii) 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; or

(viii) evidence of the individual’s use of technology, including the Internet, to recruit new criminal street gang members.

Id.

144. *Id.* art. 67.054(b)–(c).

145. *Id.* art. 67.101(a)(3).

146. *Id.* art. 67.101(b)–(c).

147. *Id.* art. 67.103.

148. *Id.* art. 67.151(a)–(b)(1).

a correctional facility run by the Texas Department of Criminal Justice or the Texas Juvenile Justice Department, or the time an individual spends in county jail.¹⁴⁹

Gang information regarding a child must be removed after two years if: “(1) the information relates to the investigation or prosecution of criminal activity engaged in by a child; and (2) the child who is the subject of the information has not been: (A) arrested for criminal activity . . . or (B) taken into custody for delinquent conduct.”¹⁵⁰ Like the restriction placed on adults, the two-year period does not include time “(1) committed to the Texas Juvenile Justice Department for conduct that violates a penal law of the grade of felony; or (2) confined in the Texas Department of Criminal Justice.”¹⁵¹ To easily identify this information, the law enforcement agencies must apply a code in the system to distinguish juveniles from adults.¹⁵²

Finally, Texas law expressly permits individuals to request information from a law enforcement agency to “determine whether the agency has collected or is maintaining” criminal information about that individual.¹⁵³ The agency must reply within ten business days of the request.¹⁵⁴ If the agency reports they have collected information on the individual, the individual may then make a written request that the agency review that information.¹⁵⁵ The head of the agency or a designee must review the information “to determine if: (1) reasonable suspicion exists to believe that the information is accurate; and (2) the information complies with the submission criteria.”¹⁵⁶ If these two elements are not met, the records containing the information must be destroyed.¹⁵⁷ If both are met, then the agency must notify the individual, who may then seek judicial review if desired.¹⁵⁸

2. California

California also provides a structured outline for law enforcement utilizing a gang database. California began using its database, CalGang, in 1997.¹⁵⁹ In August 2016, Elaine Howle, the California State Auditor, released

149. *Id.* art. 67.151(c).

150. *Id.* art. 67.152(b).

151. *Id.* art. 67.152(c).

152. *Id.* art. 67.052(b).

153. *Id.* art. 67.201(a).

154. *Id.*

155. *Id.* art. 67.202(a). However, individuals who are in the Texas Juvenile Justice Department and the Texas Department of Criminal Justice do not have this right while they are committed or confined. *Id.* art. 67.202(e).

156. *Id.* art. 67.202(a).

157. *Id.* art. 67.202(d).

158. *Id.* art. 67.202(c).

159. MUÑIZ & MCGILL, *supra* note 3, at 3.

the results of an audit conducted on CalGang.¹⁶⁰ According to Howle, “CalGang’s . . . oversight structure [did] not ensure that law enforcement agencies (user agencies) collect[ed] and maintain[ed] criminal intelligence in a manner that preserve[d] individuals’ privacy rights.”¹⁶¹ At that time, the California Department of Justice funded the database, but “CalGang [was] not established in state statute and consequently receive[d] no state oversight. Instead, the CalGang Executive Board and the California Gang Node Advisory Committee (CalGang’s governance) overs[aw] CalGang and function[ed] independently from the State and without transparency or meaningful opportunities for public input.”¹⁶² The California Gang Node Advisory Committee “assert[ed] compliance with federal regulations and state guidelines [but] little evidence exist[ed] that CalGang’s governance ha[d] ensured [those] standards [were] met.”¹⁶³ Due to the lack of state oversight, the state auditor recommended that the California Legislature enact a law governing CalGang.¹⁶⁴ The California Legislature followed this recommendation when it passed the Fair and Accurate Gang Database Act of 2017.¹⁶⁵

California’s gang database statute says that as of January 2018, the Department of Justice “shall administer and oversee the CalGang database,” thus taking oversight out of the CalGang Executive Board’s control.¹⁶⁶ The legislature also declared that “[t]he department shall establish the Gang Database Technical Advisory Committee,” made up of individuals who have “[s]ubstantial prior knowledge of issues related to gang intervention, suppression, or prevention efforts,” “[d]ecisionmaking authority for, or direct access to those who have decisionmaking authority for, the agency or organization he or she represents,” and “[a] willingness to serve on the committee and a commitment to contribute to the committee’s work.”¹⁶⁷ The Gang

160. Letter from Elaine M. Howle to Governor and Legislative Leaders (Aug. 11, 2016), *in* CAL. STATE AUDITOR, THE CALGANG CRIMINAL INTELLIGENCE SYSTEM (Aug. 2016), <https://auditor.ca.gov/pdfs/reports/2015-130.pdf> [<https://perma.cc/LW66-YQA2>].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See Anita Chabria, *A Routine Police Stop Landed Him on California’s Gang Database. Is It Racial Profiling?*, L.A. TIMES (May 9, 2019, 3:00 AM), <https://www.latimes.com/politics/la-pol-ca-california-gang-database-calgang-criminal-justice-reform-20190509-story.html>; Assemb. B. 90, 2017 Leg., Reg. Sess. (Cal. 2017).

166. CAL. PENAL CODE § 186.36(b) (West 2020).

167. *Id.* § 186.36(c)–(d). Under the California statute, the members of the Gang Database Technical Advisory Committee include:

- (1) The Attorney General, or his or her designee.
- (2) The President of the California District Attorneys Association, or his or her designee.
- (3) The President of the California Public Defenders Association, or his or her designee.

Database Technical Advisory Committee was established to advise the department in forming new regulations.¹⁶⁸ Although the legislature gave the department discretion in maintaining the database, it outlined the minimum regulations the department must adopt. These include ensuring “[t]he system integrity of a shared gang database,” requiring “comprehensive and standardized training” for all persons with access to the database, maintaining proper criteria and reviews of the database, “locat[ing] equipment related to the operation of a shared gang database in a secure area in order to preclude access by unauthorized personnel,”¹⁶⁹ limiting access to the database,¹⁷⁰ and limiting the disclosure of the information within the database.¹⁷¹

The California Legislature also enacted a provision that provides protection to those individuals who were placed in the CalGang database prior to 2018. California Penal Code section 186.36(r)(1) states:

The department shall instruct each CalGang node agency to purge from a shared gang database any record of a person entered into the database designated as a suspected gang member, associate, or affiliate that does not meet criteria for entry or whose entry was

(4) A representative of organizations that specialize in gang violence intervention, appointed by the Senate Committee on Rules.

(5) A representative of organizations that provide immigration services, appointed by the Senate Committee on Rules.

(6) The President of the California Gang Investigators Association, or his or her designee.

(7) A representative of community organizations that specialize in civil or human rights, appointed by the Speaker of the Assembly.

(8) A person who has personal experience with a shared gang database as someone who is or was impacted by gang labeling, appointed by the Speaker of the Assembly.

(9) The chairperson of the California Gang Node Advisory Committee, or his or her designee.

(10) The President of the California Police Chiefs Association, or his or her designee.

(11) The President of the California State Sheriffs' Association, or his or her designee.

Id. § 186.36(e).

168. *See id.* § 186.36(k).

169. *Id.*

170. *Id.* § 186.36(k)(6). The database may only be accessed by “sworn law enforcement personnel, nonsworn law enforcement support personnel, or noncriminal justice technical or maintenance personnel, including information technology and information security staff and contract employees, who have been subject to character or security clearance and who have received approved training.” *Id.*

171. *Id.* § 186.36(k)(7)–(8). The legislature expressly noted that “[a]ny records contained in a shared gang database are not disclosed for employment or military screening purposes” and “[a]ny records contained in a shared gang database are not disclosed for purposes of enforcing federal immigration law, unless required by state or federal statute or regulation.” *Id.*

based upon the following criteria: jail classification, frequenting gang neighborhoods, or on the basis of an untested informant. Unsupported criteria shall be purged and the records of a person shall be purged if the remaining criteria are not sufficient to support the person's designation.¹⁷²

During that time, new information could not be added to the CalGang system.¹⁷³ Furthermore, the Legislature offered safeguards for those who may be added to the gang database in the future. Those safeguards come in the form of a written notice to the individual, or the individual's parent or guardian if they are a minor, when their name is added to the database.¹⁷⁴ The notice must include "the reason for his or her designation in the database," and the process to contest placement on the database.¹⁷⁵

If an individual is designated as a gang member, they may file a written challenge of the designation to the department.¹⁷⁶ Upon receiving the challenge, the department "shall review the documentation" and determine if the designation is appropriate.¹⁷⁷ The department must then deliver "written verification of the agency's decision within 30 days."¹⁷⁸ If the department maintains the gang member's designation, the individual may file a petition with the court to review the decision.¹⁷⁹ If the petition is properly filed within 90 days of the agency's decision, the court may perform a "de novo review of the record"¹⁸⁰ to determine if the designation is appropriate.¹⁸¹ The department must establish that the individual is a gang member based on clear and convincing evidence.¹⁸² If the court finds that the department fails to meet this standard, the record must be cleared from the database immediately.¹⁸³

As of 2018, the Department of Justice is required to publish a report of CalGang by February 15th of each year.¹⁸⁴ The report must include the total number of individuals in the database and the number added to the database within that year, the number of requests the department received from individuals who wish to be removed from the database over the preceding year and how many of those requests the department granted, and the results from

172. *Id.* § 186.36(r)(1).

173. *Id.* § 186.36(s)(1).

174. *Id.* § 186.34(c)(1).

175. *Id.* § 186.34(c)(2). For more information on the process for an appeal of a placement in the gang database, see *id.* § 186.35.

176. *Id.* § 186.34(e).

177. *Id.*

178. *Id.*

179. *Id.* § 186.35(a).

180. *Id.* § 186.35(d).

181. *Id.* § 186.35(b).

182. *Id.* § 186.35(d).

183. *Id.*

184. *Id.* § 186.36(p).

each agency's audit.¹⁸⁵ The Department of Justice is obligated to display the reports on its website annually and "shall invite and assess public comments following the report's release."¹⁸⁶ Although CalGang has been used in California for more than ten years, the regulations created under the Fair and Accurate Gang Database Act of 2017 now offer greater protections for individuals in the state of California.¹⁸⁷

3. Minnesota

In 1997, the Minnesota Legislature enacted a statute which requires the Bureau of Criminal Apprehension to "administer and maintain a computerized criminal gang investigative data system for the purpose of assisting criminal justice agencies in the investigation and prosecution of criminal activity by gang members."¹⁸⁸ Under this statute, juveniles and adults known or suspected of gang activity are entered into one criminal gang database,¹⁸⁹ known as the Minnesota Criminal Gang Pointer File.¹⁹⁰ To satisfy the minimum requirements to be entered into the Minnesota Criminal Gang Pointer File, the individual suspected of gang membership must be at least 14 years old, must "ha[ve] been convicted of a gross misdemeanor or felony or ha[ve] been adjudicated or has a stayed adjudication as a juvenile for an offense that would be a gross misdemeanor or felony if committed by an adult," and must "[meet] at least three of the criteria or identifying characteristics of gang membership."¹⁹¹

The Criminal Gang Oversight Council outlined the criteria and identifying characteristics which were initially used by law enforcement in Minnesota.¹⁹² The criteria were reaffirmed in 2007, but shortly after, the legislature decided those measures should be reviewed.¹⁹³ The legislature directed the Violent Crime Coordinating Council to "adopt narrowly tailored, objective criteria and identifying characteristics for use in determining whether individuals are or may be members of gangs involved in criminal activity."¹⁹⁴ The criteria must be approved by the Commissioner of Public

185. *Id.* § 186.36(p)(1)-(2).

186. *Id.* § 186.36(p)(3)-(4).

187. *CalGang*, STATE OF CAL. DEP'T OF JUST., <https://oag.ca.gov/calgang> [<https://perma.cc/R5XK-F6HL>]; see Assemb. B. 90, 2017 Leg., Reg. Sess. (Cal. 2017).

188. MINN. STAT. § 299C.091 subd. 1 (2018); UNIV. OF ST. THOMAS SCH. OF L., EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 2 (2010), <https://www.leg.mn.gov/docs/nonmnpub/oclc476283924.pdf> [<https://perma.cc/QC8Q-J97Y>].

189. MINN. STAT. § 299C.091 subd. 1.

190. UNIV. OF ST. THOMAS SCH. OF L., *supra* note 188, at 1.

191. MINN. STAT. § 299C.091 subd. 2(b)(1)-(2).

192. MINN. VIOLENT CRIME COORDINATING COUNCIL, GANG CRITERIA RECOMMENDATION TO THE COMMISSIONER OF PUBLIC SAFETY 1 (2012), <https://www.leg.state.mn.us/docs/2012/mandated/120536.pdf> [<https://perma.cc/U84H-4T5E>].

193. *Id.* at 2.

194. MINN. STAT. § 299A.642 subd. 3(8).

Safety, and they must be reviewed every two years.¹⁹⁵ According to the criteria adopted in June 2012, law enforcement personnel in Minnesota may use the following to determine gang membership: the individual (1) “Admits Gang Membership,” (2) is “Arrested with a Gang Member,” (3) “Displays a Gang Tattoo or Brand,” (4) “Wears Clothing or Symbols Intended to Identify with a Gang,” (5) “Appears in a Photograph or Image with a Gang Member Engaging in Gang-Related Activity or Displaying Gang Signs or Symbols,” (6) “Name Appears On a Gang Roster,” (7) is “Identified as a Gang Member by a Reliable Source,” (8) “Is Regularly Observed or Communicates with a Gang Member in Furtherance or Support of Gang-Related Activity,” or (9) “Produces Gang-Specific Writing or Graffiti in Furtherance or Support of Gang-Related Activity.”¹⁹⁶ If an individual “is 14 years of age or older and meets at least three of the nine criteria,” the individual is listed as a gang member.¹⁹⁷ To be a confirmed gang member, an individual must “[be] adjudicated or convicted of a crime of violence.”¹⁹⁸

Although the information in the gang database is confidential, law enforcement agencies may release the information to criminal justice agencies.¹⁹⁹ Every three years, the gang database undergoes a random audit by the Bureau.²⁰⁰ The Bureau is obligated to send a report discussing the result of the audit to the Commissioner of Public Safety by October 1st of that year.²⁰¹ If at least three years have passed and information remains in the database regarding an individual, the data shall be destroyed unless “the individual has been convicted as an adult, or has been adjudicated or has a stayed adjudication as a juvenile for an offense that would be a crime if committed by an adult, since entry of the data into the system.”²⁰² In those cases, the data shall remain in the system until three years from the date of conviction or adjudication.²⁰³ If, however, the law enforcement agency that provided the information makes a request to have the information removed from the database, the Bureau must remove the information.²⁰⁴

195. *Id.*

196. MINN. VIOLENT CRIME COORDINATING COUNCIL, *supra* note 192, at 6–8. If an individual admits gang membership, the “[a]dmission must be documented with date of admission and name of officer or investigator who heard the admission in a police report, corrections report, field contact memo, or recorded statement.” *Id.* at 6. Likewise, “[a]rrests must be documented in a police report, corrections report or field contact memo and include the date, time, and location of the arrest.” *Id.* For additional information on the specific requirements of each criterion, see *id.* at 6–8.

197. *Id.* at 6.

198. *Id.*

199. MINN. STAT. § 299C.091 subd. 2(a).

200. *Id.* § 299C.091 subd. 4.

201. *Id.*

202. *Id.* § 299C.091 subd. 5.

203. *Id.*

204. *Id.*

While Minnesota's gang database has been endorsed by scholars,²⁰⁵ "recent developments have resulted in the stagnation of a comprehensive and coordinated response to gangs."²⁰⁶ Minnesota's state database was once "used . . . as an alert system to notify peace officers if they had stopped a confirmed gang member" but "the 'feeder' system" was shut down and "no new information [has been] added" to the state system since then.²⁰⁷ Nevertheless, the Minnesota database still provides a strong framework that can be partly replicated in other jurisdictions today.

4. Washington

The Washington Legislature enacted a statute which allows the state patrol and the Washington Association of Sheriffs and Police Chiefs ("WASPC") to adopt a shared gang database within the state.²⁰⁸ The Washington gang database is known as WAGang.²⁰⁹ Together, the state patrol and WASPC "adopt[ed] uniform state criteria for entering . . . gang members . . . into the database."²¹⁰ According to the Washington statute, law enforcement personnel must have "reasonable suspicion of criminal activity or actual criminal activity" before entering an individual.²¹¹ That suspicion of activity "must be supported by documentation, where documentation is available."²¹²

Several agencies have access to the database, including "all local, state, and federal general authority law enforcement agencies, the Washington department of corrections, and the juvenile rehabilitation administration of the Washington department of social and health services."²¹³ The information is confidential, not available for public use, and it is only to be used for enforcement tracking purposes.²¹⁴ Although the data cannot be used as evidence in a court proceeding, it may be used to form probable cause for a stop or an arrest.²¹⁵ Public and government employees are immune from civil damages for incidents involving the database unless the individual can show the "employee acted with gross negligence or bad faith."²¹⁶ Washington's laws

205. Julie Barrows & C. Ronald Huff, *Gangs and Public Policy: Constructing and Deconstructing Gang Databases*, 8 CRIMINOLOGY & PUB. POL'Y 675, 687-93 (2009).

206. THE HANDBOOK OF GANGS, *supra* note 1, at 69.

207. *Id.* at 70.

208. WASH. REV. CODE § 43.43.762 (2019).

209. WAGang, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, <https://www.waspc.org/wagang> [<https://perma.cc/C4XH-HYMS>].

210. WASH. REV. CODE § 43.43.762(2).

211. *Id.*

212. *Id.*

213. *Id.* § 43.43.762(3).

214. *Id.* § 43.43.762(5), (8).

215. *Id.* § 43.43.762(5). Although the data can be used as a factor to form probable cause, the existence of the information in the database alone is not enough to form probable cause. *Id.*

216. *Id.* § 43.43.762(9).

also provide a check on the length of time the information is stored in the database. If (1) law enforcement has not entered new or updated data within five years for a given individual; (2) the individual does not have any pending charges in any jurisdiction; (3) the individual has not since been convicted of a crime in any jurisdiction; and (4) at least five years have passed since the individual was confined, the gang database information must be automatically expunged.²¹⁷

The Washington Legislature placed limitations on agencies that access the database. In order to use the database, each agency must choose an “administrator that is responsible for annually auditing the use of the system.”²¹⁸ Each agency must additionally provide training to each individual who will use and enter information into the database.²¹⁹ According to WASPC, the gang experts who undergo this specialized training are known as the WAGang Gatekeepers.²²⁰ Only WAGang Gatekeepers may enter information into the database; however, patrol officers and detectives may “directly access the system with read-only privileges.”²²¹ Finally, each agency must “[a]nnually produce a gang threat assessment report including available data sources such as uniform crime reports, record management systems, and entries into the statewide gang database.”²²²

C. PROPOSED AND EFFECTUATED REFORMS

Numerous local law enforcement agencies, such as the New York, Boston, and Chicago Police Departments, have conducted gang database reforms following criticism from the public in recent years. Although the State of New York does not have a gang database statute, New York City has implemented a database as a policing tool.²²³ While responding to disapproval from activist groups, Chief of Detectives Dermot Shea conveyed that “the NYPD was taking steps to make sure its list is current and to delete any wrongly included names from its database.”²²⁴ Now, the NYPD reviews the gang database every three years to ensure there is sufficient information to keep an individual in the database.²²⁵ In addition to the three-year check, the department also reviews the status of each individual on their 23rd and 28th birthday.²²⁶

217. *Id.* § 43-43.762(6).

218. *Id.* § 43-43.762(7)(a).

219. *Id.* § 43-43.762(7)(b).

220. *WAGang*, *supra* note 209.

221. *Id.*

222. WASH. REV. CODE § 43-43.762(7)(d).

223. Pinto, *supra* note 42.

224. Parascandola et al., *supra* note 28.

225. *Id.*

226. *Id.*

While Massachusetts does not have a gang database statute, both the state and the city of Boston employ a gang database.²²⁷ Both offer various protections to citizens who may be entered into the system. In Boston, an individual may be listed as either “active” or “inactive” gang associates or as a “full-fledged gang member.”²²⁸ The city uses a point system in which an individual earns a point for each gang characteristic they display.²²⁹ People that accumulate ten points are considered “full-fledged gang member[s]” while those receiving “at least six points [are] classified as a ‘gang associate.’”²³⁰ To be characterized as an “active” associate rather than an “inactive” associate, the individual must have “participated in some form of gang activity in the past five years.”²³¹

In Massachusetts, gang information enters the state database in two manners. “One is through the electronic exchange of information between agencies via existing lines of communication . . .”²³² The second route is for law enforcement personnel to enter the information directly into MassGangs, after which a supervisor reviews the data and signs off on the information.²³³ Additionally, the records maintained within the MassGang database are removed every 60 months if the individual has not participated in a gang activity.²³⁴ The combination of the supervisory review and the removal period provides an added layer of protection for the people of Massachusetts.

Like several other cities throughout the country, Chicago has faced criticism in the past year for its gang database.²³⁵ In April 2019, the City of Chicago’s Office of the Inspector General published a review of the Chicago Police Department’s (“CPD”) gang database.²³⁶ The report gave four findings: “1) CPD lacks sufficient controls for generating, maintaining, and sharing gang-related data; 2) CPD’s gang information practices lack procedural fairness protections; 3) CPD’s gang designations raise significant data quality concerns; and 4) CPD’s practices and lack of transparency regarding its gang designations strain police-community relations.”²³⁷ In response to these problems, the Office of the Inspector General offered 30 recommendations to the CPD to improve its database.²³⁸ Some of the key recommendations include: “requiring evidentiary support” before designating an individual as a gang member; “notifying individuals that they have been designated as a gang

227. McKay, *supra* note 35; Marcelo, *supra* note 48.

228. Marcelo, *supra* note 48.

229. *Id.*

230. *Id.*

231. *Id.*

232. McKay, *supra* note 35.

233. *Id.*

234. *Id.*

235. Masterson, *supra* note 109.

236. CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL, *supra* note 69, at 1.

237. *Id.*

238. *Id.* at 3.

member;” “establishing processes for contesting or appealing one’s gang designation;” “regularly reviewing gang designations to identify inaccurate or outdated designations;” and “providing regular public reports on CPD’s collection, storage, use, and sharing of gang-related data.”²³⁹ The CPD has agreed to implement some of the 30 recommendations.²⁴⁰

IV. THE CRIMINAL STREET GANG DATABASE ACT

Although there are multiple gang database statutes throughout the United States, they provide disproportionate amounts of discretion to police departments, and the safeguards they guarantee citizens vary. While some statutes are more comprehensive than others, individuals throughout the country may still suffer due to information sharing by departments in different states. Therefore, a model statute that offers a compromise between the interests of both parties should be enacted by every state in order to achieve consistency throughout the country. In Section IV.A, this Note will analyze the shortcomings of current state regulations. Section IV.B will highlight the favorable aspects of existing state gang database statutes. Section IV.C will discuss the importance of adopting a universal definition for the term “gang.” Finally, Section IV.D proposes a model act which combines provisions from several existing state statutes. Each state should adopt this model act to allow law enforcement to utilize an important tool in combatting crime, to offer comprehensive protections for individuals who may be placed in a gang database, and to achieve uniformity throughout the United States.

A. SHORTCOMINGS OF CURRENT STATE REGULATIONS

Though guidance from the state legislature is an important aspect of protecting individual interests, several state legislatures have provided merely a general outline of the maintenance and utilization of the gang database rather than offering a comprehensive structure for law enforcement to follow. It is not surprising the legislature wants to provide law enforcement with discretion in maintaining its gang database; however, certain guidelines should be expressly given to protect individuals. There are several concerns that are prevalent due to the current administration of gang databases in the country, including the criteria used by law enforcement personnel to identify gang members, the accessibility of the database, and the compulsory use of a database.

First, states that employ only a point-based system may be more likely to include innocent individuals in the gang database.²⁴¹ Activists argue that the “gang characteristics” used in this type of system are not clear indicators of

239. *Id.* For the remaining recommendations of the Inspector General, see *id.* at 52–59.

240. See Charles, *supra* note 39.

241. See *supra* text accompanying notes 46–51.

gang membership.²⁴² Some of these characteristics include wearing a certain color, being seen with a gang member, or having a known gang tattoo.²⁴³ An individual who wears a certain color or has contact with a gang member may be participating in innocent behavior.²⁴⁴ While having a gang tattoo may seem to indicate a greater likelihood of gang membership, a tattoo is permanent, and the individual may have since left the gang.²⁴⁵ Therefore, characteristics of gang membership may be relevant, but reaching a certain number of points should not be the only requirement for inclusion in a gang database.

Another concern lies in the fact that some states have not placed limitations on access to the gang database or how that information may be used. As previously discussed, this causes individuals to fear the possibility that potential employers, landlords, and ICE officials may gain access to records within the gang database.²⁴⁶ If that information is not correctly maintained, innocent individuals may face “dire consequences.”²⁴⁷ Therefore, the proposed universal statute will limit database access to certain law enforcement positions.

Furthermore, although many states allow law enforcement to create and maintain a database, some states *require* the utilization of a gang database. South Carolina compels “[a]ll state, county, and municipal law enforcement agencies” to send information relating to gangs and gang incidents to the database.²⁴⁸ Similarly, Texas demands the implementation of a gang database for cities and counties above a certain population.²⁴⁹ Gang databases, however, may be costly and difficult to maintain, and some police departments may prefer to eliminate the use of a database in order to prevent racial profiling.²⁵⁰ The use of a gang database should therefore be permitted but not mandatory.

242. See Holper & Valentin, *supra* note 48 (“What is particularly troubling is that these Central American youth are being accused of gang membership using evidence no stronger than a house of cards. . . . [T]he way police assign ‘points’ enables law enforcement to label people as gang members even if they’ve never been suspected of any wrongdoing.”).

243. Marcelo, *supra* note 48; Smith, *supra* note 48; see also Rebecca J. Marston, Note, *Guilt by Alt-Association: A Review of Enhanced Punishment for Suspected Gang Members*, 52 U. MICH. J.L. REFORM 923, 926 (2019) (describing the Chicago Police Department’s criteria for identifying gang members).

244. See Holper & Valentin, *supra* note 48.

245. See SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, U.C. IRVINE SCH. OF L. IMMIGRANT RTS. CLINIC, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 10 (Sameer Ashar & Annie Lai eds., 2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> [<https://perma.cc/K8RL-8MW3>].

246. See *supra* Section II.B.

247. Holper & Valentin, *supra* note 48.

248. S.C. CODE ANN. § 16-8-330(B) (2015).

249. TEX. CODE CRIM. PROC. ANN. art. 67.051(b) (West 2018).

250. See Bernstein, *supra* note 45 (“Portland police next month will end their more than 20-year-old practice of designating people as gang members or gang associates in response to strong community concerns about the labels that have disproportionately affected minorities.”).

B. ADVANTAGES OF CURRENT STATE REGULATIONS

Although there are several shortcomings with the current legislation, there are also numerous favorable aspects of state gang database laws that should be replicated in future database legislation. One such advantage is the state's ability to offer strong procedural safeguards on the use and maintenance of this data which cannot always be secured by the federal government.²⁵¹ While the federal government often regulates the use and maintenance of state gang databases, it does not have complete control over the actions of local law enforcement.²⁵² "The [federal] regulations . . . set forth requirements for training system users, maintaining documentation to support entries into the system, disseminating information, safeguarding the system against unauthorized access and other potential hazards, performing periodic audits, and purging information older than five years."²⁵³ The problem, however, is states must only comply with the federal regulations if they receive funding from the federal government to create and maintain their systems.²⁵⁴ Federal regulation thus cannot by itself fix all issues with state gang databases.

Beyond federal regulations, many states have added safeguards within their own statutes that should be reflected in any future model statute. For example, Texas has implemented training and continuing education for each officer that accesses the database.²⁵⁵ While some states require initial training,²⁵⁶ continuing education is very valuable. Changes in society will inevitably occur over the years and departments should respond by educating law enforcement personnel on how those changes will affect the officers' jobs.

Furthermore, California requires state law enforcement to regularly audit its gang database.²⁵⁷ Routine audits should be mandatory for all gang databases. Studies have shown that "youth are generally only gang members for a year or two"²⁵⁸ and most gang members leave a gang within four years.²⁵⁹ By conducting reviews of the entire system every few years, law enforcement personnel may reduce the number of records in their system and ensure that

251. See *supra* text accompanying note 123.

252. See THE HANDBOOK OF GANGS, *supra* note 1, at 68.

253. *Id.*

254. See *id.*; 28 C.F.R. § 23.30 (2019); Barrows & Huff, *supra* note 205, at 691–92.

255. TEX. CODE CRIM. PROC. ANN. art. 67.053(a)–(b) (West 2018).

256. See, e.g., WASH. REV. CODE § 43.43.762(7)(b) (2019) (“[A]ll users of the database [must] receive training on the use of the database before granting the users access to the database” but requiring no continual training).

257. CAL. PENAL CODE § 186.36(n), (p)(2) (West 2020).

258. *Gangs: Special Feature*, *supra* note 12.

259. Huebner et al., *supra* note 25, at 845 n.3.

those records are accurate.²⁶⁰ Individuals who were once gang members will thereby be protected from some of the long-term consequences of inclusion on the database if no new information on their gang membership status has emerged in the preceding years.

California also requires a report to be published on the department's website after an audit occurs.²⁶¹ The public has time to review and comment on the report, and the department "shall summarize . . . the actions taken in response to [those] comments."²⁶² Transparency is critical for the relationship between law enforcement and the public. Several activists have argued the process and criteria used by law enforcement to enter an individual into the gang database is unclear.²⁶³ By regularly publishing reports on the gang database, and by addressing public concerns, the community would have a better understanding of the way law enforcement operates.²⁶⁴

Finally, several state legislatures have provided procedures for holding law enforcement personnel liable for violating state regulations.²⁶⁵ These states recognize violations of state law when an individual shares information with an unauthorized person and when an individual uses information in a prohibited manner.²⁶⁶ Law enforcement personnel are therefore more likely to follow state guidelines in order to avoid punishment. This, in turn, acts as a safeguard for citizens.

C. CREATING A UNIVERSAL DEFINITION OF THE TERM "GANG"

As of 2015, only "[s]ix states—Hawaii, Maine, New Mexico, Rhode Island, Vermont, and West Virginia—ha[d] yet to enact a gang definition as part of their criminal code."²⁶⁷ Though 44 state legislatures defined the term "gang" in their database statutes, their definitions are not consistent with each other.²⁶⁸ While common terms are used throughout the country in defining

260. See, e.g., Parascandola et al., *supra* note 28 ("[T]he current database contains 17,441 names—down from 34,000 after a four-year NYPD winnowing that reviewed every person listed.").

261. CAL. PENAL CODE § 186.36(p)(2)–(3).

262. *Id.* § 186.36(p)(4).

263. Jillian Jorgensen, *Activists Urge Inspector General to Probe NYPD's Gang Policing Tactics*, N.Y. DAILY NEWS (May 16, 2017, 6:13 PM), <https://www.nydailynews.com/new-york/manhattan/activists-urge-inspector-general-probe-nypd-gang-databases-article-1.3171323> ("The NYPD has not been very forthcoming about the tactics that they're using as the basis for these investigations, the outcomes of the cases, et cetera.").

264. CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL, *supra* note 69, at 49–50, 58.

265. CAL. PENAL CODE § 186.36(u)–(x); WASH. REV. CODE § 43.43.762(9) (2019); TEX. CODE CRIM. PROC. ANN. art. 67.103(b) (West 2018).

266. CAL. PENAL CODE § 186.36(u); WASH. REV. CODE § 43.43.762(9); TEX. CODE CRIM. PROC. ANN. art. 67.103(b).

267. THE HANDBOOK OF GANGS, *supra* note 1, at 66.

268. *Id.*; see, e.g., FLA. STAT. ANN. § 874.03(1) (West 2020); GA. CODE ANN. § 16-15-3(2) (West 2018); S.C. CODE ANN. § 16-8-230(2) (2015); TEX. PENAL CODE ANN. § 71.01(d) (West 2011); CAL. PENAL CODE § 186.34(a)(1).

the term “gang,” there is not a universal definition of the term.²⁶⁹ According to the National Gang Center, 36 states say that a gang entails three or more individuals, “30 states include a common name, identifying sign, or symbol as identifiers of gangs in their definitions,” and “43 states refer to a gang as an ‘organization, association, or group.’”²⁷⁰ Federal law defines “criminal street gang” as:

an ongoing group, club, organization, or association of 5 or more persons—(A) that has as 1 of its primary purposes the commission of 1 or more . . . criminal offenses . . . ; (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses . . . ; and (C) the activities of which affect interstate or foreign commerce.²⁷¹

Although each jurisdiction applies a different definition, a “close examination reveals that legislative definitions of ‘gang’ exhibit more similarities than differences across the 44 states and the District of Columbia. The main differences that do exist . . . do not seem significantly different enough to conclude that building a consensus is impossible.”²⁷²

According to the U.S. Department of Justice and the U.S. Department of Health and Human Services, law enforcement personnel may overidentify gang problems in their community.²⁷³ They encourage the use of “a validated, consistent definition (with specific criteria) of what constitutes gang membership.”²⁷⁴ “Consistent definitions that are uniformly applied across agencies and settings will prevent the use of misleading and sensationalized assessments of the size or extent of a gang problem. The use of a consistent approach will also lead to cooperation across law enforcement and public health agencies.”²⁷⁵ The FBI also recognized a problem in the varying definitions of the term “gang” when attempting to implement the federal database.²⁷⁶ At that time, the Department of Justice stated:

269. Maritza Perez, *Mistaken Identity: The Dangers of Sweeping Gang Labels for Black and Latino Youth*, CTR. FOR AM. PROGRESS (Sept. 13, 2018, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/09/13/457854/mistaken-identity> [<https://perma.cc/JZ99-LDBY>].

270. NAT’L GANG CTR., BRIEF REVIEW OF FEDERAL AND STATE DEFINITIONS OF THE TERMS “GANG,” “GANG CRIME,” AND “GANG MEMBER” 2 (2016), <https://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf> [<https://perma.cc/W6BR-L2C3>].

271. 18 U.S.C. § 521 (2018).

272. THE HANDBOOK OF GANGS, *supra* note 1, at 66.

273. U.S. DEP’T OF JUST. & U.S. DEP’T OF HEALTH & HUM. SERVS., CHANGING COURSE: PREVENTING GANG MEMBERSHIP 55 (Thomas R. Simon, Nancy M. Ritter & Reshma R. Mahendra eds., 2013), <https://www.ncjrs.gov/pdffiles1/nij/239234.pdf> [<https://perma.cc/gRAP-SSJG>].

274. *Id.*

275. *Id.*

276. ANTI-GANG INTELLIGENCE, *supra* note 17, at 14.

Unless NGIC obtains a technical solution for bridging between federal and state databases, NGIC's ability to use existing gang information will be limited. The FBI has stated that a major problem contributing to the technical solution is that there is no standard nationwide definition of what constitutes a "gang" or "gang member," making uniform entry into a database problematic. . . . The lack of clarity in defining gangs and what constitutes gang membership has resulted in states creating their own gang definitions and disparate databases using various state standards of gang membership.²⁷⁷

To cure this widely recognized problem, the statute that this Note proposes will implement a single definition of the term "gang" that may be used by each jurisdiction throughout the country.

D. PROPOSED STATUTORY LANGUAGE

After analyzing the numerous benefits and concerns regarding gang databases, this Note now proposes a model gang database statute that can be adopted throughout the United States. Some may argue that adopting this model statute will be costly for states. It is true that gang databases are "expensive technologies," but states can "invest in more cost-effective strategies" in other areas of crime control.²⁷⁸ Funds must be allocated for gang databases to address the concerns of both law enforcement personnel and individuals in the community.

The universal statute, as constructed below, draws from the current legislation of California, Colorado, Washington, Texas, South Carolina, Minnesota, and Virginia. The proposed statute combines the best features of each of the preceding states to create legislation that allows law enforcement to conduct investigations while simultaneously offering protection to the individuals whose names may be added to the database. For the numerous reasons described above, each state should adopt this model act.²⁷⁹

An Act

Outlining the use of the statewide gang database.

Section 1: Short Title

This chapter shall be known as "The Criminal Street Gang Database Act."

Section 2: Definitions

For the purpose of this chapter,

- (a) "[Gang]" means an ongoing group, club, organization, or association of 5 or more persons," (1) "that has as [one] of its

²⁷⁷. *Id.*

²⁷⁸. HARRIS & HAMILTON, *supra* note 34, at 187.

²⁷⁹. *See supra* Sections IV.A–C.

- primary purposes the commission of [one] or more . . . criminal offenses,”²⁸⁰ (2) “who[se] [members] have a common identifying sign, symbol, or name, and [(3)] whose members individually or collectively engage in . . . a pattern of definable criminal activity.”²⁸¹
- (b) “‘Gang Database’ means [an electronic] database accessed by a law enforcement agency that designates a person as a gang member”²⁸²

Section 3: Gang Database Implementation

- (a) “In order to contain the spread of gang violence, the development of a computerized data base tracking system is necessary to improve the consistency of data shared by . . . law enforcement . . . both within the state and among various states confronted with similar gang violence.”²⁸³
- (b) The database shall be overseen by the State Bureau of Investigation (“Bureau”).²⁸⁴
- (c) The Bureau shall establish an advisory committee to aid in gang database oversight.²⁸⁵ The committee shall be made up of the Attorney General or a representative thereof, the president of both the district attorneys association and the public defenders association or representatives thereof, the president of the police chief and sheriffs associations or representatives thereof, a representative specializing in gang intervention, and any other individuals the Bureau deems appropriate.²⁸⁶
- (d) “The [B]ureau shall . . . cooperate with other such [databases] in the United States in order to track gangs and gang members involved in interstate activities.”²⁸⁷
- (e) “The gang database shall comply with federal regulations for state law enforcement databases shared with other law enforcement agencies, including auditing and access to data.”²⁸⁸

Section 4: Gang Database Users and Education

- (a) All law enforcement personnel in this state who are permitted to enter information into the gang database must complete educational training on the database before they are granted access to the system

280. 18 U.S.C. § 521(a)(A) (2018); NAT’L GANG CTR., *supra* note 270, at 1.

281. CAL. PENAL CODE § 186.34(a)(1) (West 2020).

282. *Id.* § 186.34(a)(2).

283. COLO. REV. STAT. § 24-33-5-415.3(1)(d) (2015).

284. This language may be changed so the relevant state department maintains control over the database.

285. CAL. PENAL CODE § 186.36(c).

286. *Id.* § 186.36(c)–(e).

287. COLO. REV. STAT. § 24-33-5-415.3(4).

288. WASH. REV. CODE § 43-43-762(1) (2019).

- and “at least once for each continuous two-year period” in which the person is permitted to enter information.²⁸⁹
- (b) Before data entered by law enforcement personnel appears in the database, a department supervisor must review and approve of the information offered by the officer.²⁹⁰
 - (c) Law enforcement personnel that do not have the authority to enter information into the gang database may be granted “access [to] the system with read-only privileges.”²⁹¹
 - (d) State officials “may determine if information relating to criminal gangs, gang-related incidents, patterns of gang activity, or members or associates of criminal gangs received from federal law enforcement agencies and law enforcement agencies of other states is to be included in the database.”²⁹²

Section 5: Criteria for Submission

- (a) An individual may be entered into the gang database if:
 - (1) They are at least 14 years old;²⁹³
 - (2) They “ha[ve] been convicted of a gross misdemeanor or felony or ha[ve] been adjudicated or ha[ve] a stayed adjudication as a juvenile for an offense that would be a gross misdemeanor or felony if committed by an adult”;²⁹⁴ and
 - (3) They meet one of the following requirements:
 - (A) “[A] judgment under any law that includes, as a finding or as an element of a criminal offense, participation in a criminal street gang;”²⁹⁵
 - (B) “[A] self-admission by an individual of criminal street gang membership that is made during a judicial proceeding; or”²⁹⁶
 - (C) They possess at least three characteristics of gang membership under subsection (b).
- (b) Characteristics of gang membership:
 - (1) The individual has “[been] arrested on more than one occasion with known gang members for offenses consistent with gang activities”;²⁹⁷

289. TEX. CODE CRIM. PROC. ANN. art. 67.053(b) (West 2018); *see* WASH. REV. CODE § 43-43-762(7)(b).

290. McKay, *supra* note 35.

291. *WAGang*, *supra* note 209.

292. S.C. CODE ANN. § 16-8-330(C) (2015).

293. MINN. STAT. § 299C.091 subdiv. 2(b) (2018).

294. *Id.* § 299C.091 subdiv. 2(b)(2).

295. TEX. CODE CRIM. PROC. ANN. art. 67.054(b)(2)(A) (West 2018).

296. *Id.* § 67.054(b)(2)(B).

297. VA. CODE ANN. § 52-8.6 (2013).

- (2) “[A] 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;”²⁹⁸
 - (3) “[A]n identification of the individual as a criminal street gang member by a reliable informant or other individual;”²⁹⁹
 - (4) The individual “Appears in a Photograph or Image with a Gang Member Engaging in Gang-Related Activity or Displaying Gang Signs or Symbols”;³⁰⁰
 - (5) The individual’s “Name Appears On a Gang Roster”;³⁰¹
 - (6) “[E]vidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members;”³⁰²
 - (7) “[E]vidence 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 . . . ;”³⁰³
 - (8) “[E]vidence of the individual’s use of technology, including the Internet, to recruit new criminal street gang members.”³⁰⁴
- (c) “Data on individuals may be entered only based on reasonable suspicion of criminal activity or actual criminal activity and must be supported by documentation, where documentation is available.”³⁰⁵
- (d) “A law enforcement agency may submit data on an individual to the criminal gang investigative data system only if the agency obtains and maintains the documentation required under this subdivision.”³⁰⁶

Section 6: Information Included in Database and Use

- (a) The information collected in the database shall include, when available:

298. TEX. CODE CRIM. PROC. ANN. art. 67.054(b)(2)(C)(i).

299. *Id.* art. 67.054(b)(2)(C)(ii).

300. MINN. VIOLENT CRIME COORDINATING COUNCIL, *supra* note 192, at 7.

301. *Id.*

302. TEX. CODE CRIM. PROC. ANN. art. 67.054(b)(2)(C)(iv).

303. *Id.* art. 67.054(b)(2)(C)(v).

304. *Id.* art. 67.054(b)(2)(C)(viii).

305. WASH. REV. CODE § 43-43.762(2) (2019).

306. MINN. STAT. § 299C.091 subd. 2(a) (2018).

- (1) The individual's name;³⁰⁷
 - (2) The individual's last known address;³⁰⁸
 - (3) The individual's date of birth;³⁰⁹
 - (4) "The date of any arrest and the arrest numbers, the investigating agency's case number, the final disposition of any criminal case filed with a court, and the court number;"³¹⁰
 - (5) "Any information relevant to the person's association or affiliation with a gang or with gang activities";³¹¹ and
 - (6) A code to designate if the criminal information relates to a minor or an adult.³¹²
- (b) The information in the database may only be used:
- (1) "[F]or intelligence, investigative, and tracking purposes";³¹³
 - (2) "[T]o obtain information external to the database to formulate the probable cause necessary to make a [n] . . . arrest. The mere existence of information relating to an individual within the database does not by itself justify a [n] . . . arrest."³¹⁴
- (c) The information "shall not be used as evidence in any criminal, civil, or administrative proceeding,"³¹⁵ nor for housing, employment, military, or immigration purposes.³¹⁶
- (d) The information in the database is available to all federal, state, county, and municipal law enforcement departments.
- (e) The gang database information is confidential and is not available to the public.³¹⁷
- (f) "The information contained in this database is not subject to the provisions of the Freedom of Information Act."³¹⁸

Section 7: Appeal Process

- (a) For each individual added to the database, "the local law enforcement agency shall provide written notice to the person, and shall, if the

307. COLO. REV. STAT. ANN. § 24-33.5-415.3(3)(a) (West 2015).

308. *Id.* § 24-33.5-415.3(3)(b).

309. *Id.* § 24-33.5-415.3(3)(c).

310. *Id.* § 24-33.5-415.3(3)(d).

311. *Id.* § 24-33.5-415.3(3)(e).

312. *See* TEX. CODE CRIM. PROC. ANN. art. 67.052(b) (West 2018) ("The department shall designate a code to distinguish criminal information relating to a child and contained in the department's intelligence database from criminal information relating to an adult offender and contained in the database.").

313. S.C. CODE ANN. § 16-8-330(E) (2015).

314. WASH. REV. CODE § 43-43-762(5) (2019).

315. *Id.*

316. CAL. PENAL CODE § 186.36(k)(7)-(8) (West 2020); *see supra* Section II.B.

317. WASH. REV. CODE § 43-43-762(8).

318. S.C. CODE ANN. § 16-8-330(F).

person is under 18 years of age, provide written notice to the person and his or her parent or guardian, of the designation and the basis for the designation, unless providing that notification would compromise an active criminal investigation or compromise the health or safety of the minor.”³¹⁹

- (b) “A person, or, if the person is under 18 years of age, his or her parent or guardian, or an attorney working on behalf of the person, may request information of any law enforcement agency as to whether the person is designated as a . . . gang member” in the database and the reason for the designation.³²⁰ Law enforcement must respond to the written request within 30 days, “unless doing so would compromise an active criminal investigation or compromise the health or safety of the person if the person is under 18 years of age.”³²¹
- (c) If an individual is listed in the gang database, the individual may file a written challenge to the gang member designation with law enforcement agency.³²² A law enforcement supervisor shall review the designation and send “written verification of the agency’s decision within 30 days of submission of the written documentation contesting the designation. If the law enforcement agency denies the request for removal, the notice of its determination shall state the reason for the denial.”³²³
- (d) If an individual’s challenge to their gang member designation is denied, the individual “may petition the court to review the law enforcement agency’s denial of the request for removal and to order the law enforcement agency to remove the person from the shared gang database.”³²⁴ “The petition shall be filed and served within 90 calendar days of the agency’s mailing or personal service of the verification of the decision to deny the request for removal from the shared gang database”³²⁵
- (e) Upon receiving a petition from an individual designated as a gang member in the database, the court shall conduct a *de novo* review based only on “the agency’s statement of the basis of its designation . . . and the documentation provided to the agency by the person contesting the designation.”³²⁶ If the court finds the law enforcement agency did not have clear and convincing evidence of the individual’s

319. CAL. PENAL CODE § 186.34(c)(1).

320. *Id.* § 186.34(d)(1)(A).

321. *Id.* § 186.34(d)(2).

322. *Id.* § 186.34(e).

323. *Id.*

324. *Id.* § 186.35(a).

325. *Id.* § 186.35(b).

326. *Id.* § 186.35(c).

status as a gang member, the law enforcement agency shall remove the individual's records from the database immediately.³²⁷

Section 8: Record Review and Audit

- (a) “[T]he bureau shall destroy data entered into the system when three years have elapsed since the data were entered into the system,”³²⁸ unless (1) the individual has been convicted of a new charge in the preceding three years, (2) there is a pending criminal charge against the individual in any court, or (3) new or updated information regarding the individual has been entered into the database within the preceding three years.³²⁹ If any of the three preceding conditions have occurred, the individual's record must be cleared three years from the date of that condition.³³⁰
- (b) The Bureau shall also review each individual's records on their 23rd and 28th birthdays to determine if their gang member designation is appropriate.³³¹
- (c) “At least once every three years, the [B]ureau shall conduct random audits of [the database]”³³² Following the audit, by January 1st of the following year, the Bureau shall publish a report on its website discussing the results of the audit.³³³
- (d) After publishing the report, the department shall conduct a meeting to address concerns about the database.³³⁴ The meeting shall be open to the public.³³⁵
- (e) The report shall include:

327. *Id.* § 186.35(d).

328. MINN. STAT. § 299C.091 subdiv. 5 (2018).

329. *See* WASH. REV. CODE § 43.43.762(6) (2019) (“Information about specific individuals in the database shall be automatically expunged if: (a) No new or updated information has been entered into the database within the previous five years; (b) there are no pending criminal charges against such person in any court in this state or another state or in any federal court; (c) the person has not been convicted of a new crime in this state, another state, or federal court within the last five years; and (d) it has been five years since the person completed his or her term of total confinement.”).

330. MINN. STAT. § 299C.091 subdiv. 5.

331. *See* Parascandola et al., *supra* note 28.

332. MINN. STAT. § 299C.091 subdiv. 4(a).

333. *See* CAL. PENAL CODE § 186.36(n)–(p)(3) (West 2020) (“The department, with the advice of the committee, no later than January 1, 2020, shall promulgate regulations to provide for periodic audits of each CalGang node and user agency to ensure the accuracy, reliability, and proper use of the CalGang database. . . . The department shall post the report on the department's Internet Web site.”).

334. *See id.* § 186.36(p)(4) (“Commencing February 15, 2018, and annually on February 15 thereafter, the department shall publish an annual report on the CalGang database. . . . The department shall invite and assess public comments following the report's release, and each report shall summarize public comments received on prior reports and the actions taken in response to comments.”).

335. *Id.*

- (1) “The number of persons included in the . . . database on the day of reporting”;³³⁶
- (2) “The number of persons added to the . . . database during the immediately preceding 12 months”;³³⁷
- (3) “The number of requests for removal of information about a person from the . . . database . . . received during the immediately preceding 12 months,”³³⁸ and the number of such requests “that were granted during the immediately preceding 12 months”³³⁹ and
- (4) “The number of times an agency did not provide notice or documentation” to the individual “because providing that notice or documentation would compromise an active criminal investigation, in the immediately preceding 12 months” or because providing notice would compromise the safety of another individual.³⁴⁰

Section 9: Penalty for Violation of Regulations

- (a) An individual who “knowingly . . . uses [gang database] information . . . for an unauthorized purpose; or . . . releases the information to a person who is not entitled to the information” is liable for punishment under subsection (b).³⁴¹
- (b) “The [bureau] may enforce a violation of a state or federal law or regulation with respect to a shared gang database . . . by any of the following methods” or a combination thereof:³⁴²
 - (1) “Letter of censure”;³⁴³
 - (2) “Temporary suspension of access privileges to the shared gang database system”;³⁴⁴
 - (3) “Revocation of access privileges to the shared gang database system”;³⁴⁵
 - (4) A Class A misdemeanor.³⁴⁶

336. *Id.* § 186.36(p)(1)(A).

337. *Id.* § 186.36(p)(1)(B).

338. *Id.* § 186.36(p)(1)(C).

339. *Id.* § 186.36(p)(1)(D).

340. *Id.* § 186.36(p)(1)(G)–(H).

341. TEX. CODE CRIM. PROC. ANN. art. 67.103(a) (West 2018).

342. CAL. PENAL CODE § 186.36(u).

343. *Id.* § 186.36(u)(1).

344. *Id.* § 186.36(u)(2).

345. *Id.* § 186.36(u)(3).

346. TEX. CODE CRIM. PROC. ANN. art. 67.103(b).

V. CONCLUSION

Activists have reason to be concerned about the use of gang databases due to the absence of legislation in some states and the lack of proper safeguards in jurisdictions where legislation has already been enacted. However, abolishing the use of gang databases throughout the country may hinder the investigative efforts of law enforcement agencies. Database opponents and law enforcement agencies must reach a compromise. By adopting the proposed model statute, state legislatures can achieve needed reform within their law enforcement system. Law enforcement will face more procedural steps in using a database, but a useful tool in combating gang violence will not be removed from their toolbox. Furthermore, individuals will receive the rights and protections needed to address their concerns. Although neither gang database opponents nor law enforcement agencies win their position outright, both compromise and reach a solution that is better for the entire community.