UNMASKING THE BOSTON POLICE DEPARTMENT'S GANG DATABASE: HOW AN ARBITRARY SYSTEM CRIMINALIZES INNOCENT CONDUCT

A teenager in East Boston walks to school wearing a blue wind-breaker — a gift from his mother — and a Chicago Bulls hat. Along the way, he crosses paths with a friend and a classmate he does not know, who walk with him. Once at school, he rushes to class and stops briefly to talk with a peer about their school project. When the school day ends, he and a group of friends walk back to the apartment building where one of them lives. They laugh and talk, sharing stories from the day, before everyone returns home. Under the Boston Police Department's (BPD) current policies, this series of interactions could be enough for the teenager to be listed as a gang member.

Per the point system the BPD gang database utilizes, the youth need only earn ten points to be verified as a gang member.[1] Blue clothes and Chicago Bulls gear earn the teenager four points for possessing gang "paraphernalia."[2] Any interaction with another "verified" gang member earns him another two points.[3] If the classmate he met in the park, his school project partner, and one person from the group he joined after school were "verified" gang members, he would earn six points — two for each interaction. These peers could have been "verified" through the same process that earned the youth ten points. Now that the teenager has reached ten points, anyone seen interacting with him would also receive two points. Registration in the gang database could have dev-astating consequences, such as arrest by U.S. Immigration and Customs Enforcement (ICE),[4] or subjection to government searches.[5]

Yet, despite the gravity of being categorized in the BPD gang data-base, it relies on seemingly arbitrary factors. The BPD does not explain

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[1] Bos. Police Dep't, Rules and Procedures r.335, § 4.2 (June 8, 2021) [hereinafter 2021 Rule 335].

[2] *See* Enamorado-Rodriguez v. Barr, 941 F.3d 589, 599 (1st Cir. 2019); Complaint ¶¶ 25, 32, ACLU of Mass., Inc. v. Bos. Police Dep't, No. 1884CV03561 (Mass. Super. Ct. filed Nov. 15, 2018) [hereinafter ACLU Complaint]; Mary Holper & Claire Valentin, *Boston Police Has a Secret Point System that Turns Normal Teenage Behavior into Gang Membership*, ACLU MASS. (Nov. 21, 2018), https://www.aclu.org/news/immigrants-rights/boston-police-has-secret-point-system-turns-normal-teenage-behavior-gang [https://perma.cc/5P58-CRPL]; Sarah Betancourt, *Boston Police Face Lawsuit over Listing Hats and Selfies as Gang Symbols*, THE GUARDIAN (Nov. 22, 2018, 8:05 PM), https://www.theguardian.com/us-news/2018/nov/21/boston-police-gang-assessment-database-immigrants-lawsuit [https://perma.cc/L8HQ-4K9M].

[3] 2021 Rule 335, *supra* note 1, § 5.

[4] *See* Diaz Ortiz v. Garland, 23 F.4th 1, 3 (1st Cir. 2022) (en banc); *Enamorado-Rodriguez*, 941 F.3d at 594; Shannon Dooling, *A Minor Fight in a Boston School Landed One Student in ICE Custody, Advocates Fear*, WBUR (Jan. 26, 2018), https://www.wbur.org/news/2018/01/26/boston-student-ice-custody [https://perma.cc/CF5J-7CKG]; Phillip Marcelo, *Inside the Boston Police Gang Database*, GBH NEWS (July 30, 2019), https://www.wgbh.org/news/local-news/2019/07/30/inside-the-boston-police-gang-database [https://perma.cc/E27P-V83A].

[5] *See* Commonwealth v. Sweeting-Bailey, 178 N.E.3d 356, 361–62, 369–70 (Mass. 2021); Commonwealth v. Henley, 171 N.E.3d 1085, 1110–11 (Mass. 2021).

why these factors and their associated point values are a reliable metric for gang affiliation. Moreover, innocent conduct — such as wearing particular clothing items or interacting with classmates — can be sufficient to verify someone as a gang member. This Note contends that reliance on this arbitrary database to justify police interactions or as evidence of gang affiliation in court violates individual rights to privacy. At minimum, the BPD gang database should not be used to support a finding of probable cause or reasonable suspicion, nor should it factor into federal immigration consequences. The detrimental impact that this arbitrary system has caused warrants dismantling the BPD gang database entirely.

Part I provides an overview of the gang database's history and describes the point system used to verify individuals as gang members. Part II analyzes cases of individuals who have entered the database. The vast majority of these individuals were "verified" as gang members through attenuated and unsubstantial interactions. Finally, Part III considers the constitutional and federal regulatory implications of the BPD's gang database given that the database is used to justify encroaching on individuals' rights to privacy.

I. THE BPD GANG DATABASE

A. History and Management

In the early 1990s, the BPD implemented a series of policies that sought to target individuals seen to be most dangerous to communities: violent offenders and gang members.[6] The BPD's gang database was born out of two initiatives that emerged from this movement toward more targeted policing: the Youth Violence Strike Force (YVSF) and the Boston Regional Intelligence Center (BRIC). Launched in 1993,[7] the YVSF — commonly known as the "gang unit"[8] — has been tasked with

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[6] *See* Anthony A. Braga et al., *Losing Faith? Police, Black Churches, and the Resurgence of Youth Violence in Boston*, 6 OHIO ST. J. CRIM. L. 141, 145–47 (2008) [hereinafter Braga, *Losing Faith?*] (discussing initiatives BPD implemented in the 1990s, such as the Anti–Gang Violence Unit, the Boston Gun Project, and Operation Ceasefire); *see also* Anthony A. Braga et al., *Problem-Oriented Policing, Deterrence, and Youth Violence: An Evaluation of Boston's Operation Ceasefire*, 38 J. RSCH. CRIME & DELINQ. 195, 201 (2001) (describing how Operation Ceasefire targeted "a relatively small audience (all gang-involved youth in Boston) rather than a general audience (all youth in Boston)").

[7] Prior to the YVSF, Boston created an Anti–Gang Violence Unit (AGVU) in 1991. Braga et al., *Losing Faith?*, *supra* note 6, at 145. This unit evolved into the YVSF, which adopted a broader mission focused on youth violence prevention in general rather than gang violence alone. *Id.*; 2021 Rule 335, *supra* note 1, § 1.

[8] Yawu Miller, *Are There Really 160 Gangs in Boston?*, BAY ST. BANNER (July 30, 2019), https://www.baystatebanner.com/2019/07/30/are-there-really-160-gangs-in-boston [https://perma.cc/659C-X8MQ].

reducing gun violence by targeting young gang members.[9] These offi-
cers often patrol in plainclothes and drive unmarked vehicles.[10]

BRIC was later established in 2005 as a hub for gathering strategic
and tactical intelligence.[11] BRIC oversees the BsPD's gang database
and works alongside the YVSF "to gather and analyze data and infor-
mation pertaining to criminal activity that often result in cycles of retal-
iatory violence perpetrated against rival gangs and groups."[12]

B. *The Point-Based Verification System*

BRIC utilizes a point-based system to verify individuals as gang
members in the database.[13] In June 2021, the BPD amended Rule 335,
which outlines how officers may add individuals to the gang database.[14]
Among these changes was a clarification of the database's purpose: (1)
to "identify[] individuals and groups that associate as a 'gang'[15] and thus
are likely to engage in or perpetrate criminal activity for the furtherance
of the criminal organization" and (2) to "[a]ssist in the investigation of
gang related criminal activity in the City of Boston."[16]

Under the old rule promulgated on March 23, 2017,[17] an individual
who accrued six points could have been added into the system as a "gang
associate" and an individual with ten points was considered to be a
"gang member."[18] However, the 2021 Rule includes only one designa-
tion, "gang associate," and requires that an individual accrue ten points
in order to be added to the database.[19] While the 2017 Rule included

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[9] 2021 Rule 335, *supra* note 1, § 1.

[10] ACLU MASS., BOSTON CITY COUNCIL CANDIDATES PUBLIC SAFETY QUESTIONNAIRE: CANDIDATE: HÉLÈNE VINCENT 10 (2019), https://www.aclum.org/sites/default/files/field_documents/district_8_-_helene_vincent.pdf [https://perma.cc/ALN9-NHFH].

[11] 2021 Rule 335, *supra* note 1, § 2. The BPD's Bureau of Intelligence and Analysis oversees the BRIC. *Id.*

[12] *Id.* §§ 2, 4.3.

[13] *Id.* § 5.

[14] *See generally id.*

[15] The Rule defines a "gang" as "an ongoing organization" that "[h]as a common name or common identifying signs or colors or symbols or frequent[s] a specific area or location and may claim it as their territory" and that "has associates who, individually or collectively, engage in or have engaged in criminal activity which may include incidents of targeted violence perpetrated against rival gang associates." *Id.* § 4.1.

[16] *Id.* § 3.

[17] Versions of BPD Rule 335 prior to March 23, 2017, are not publicly available. However, reports and court decisions from before this period indicate that BPD utilized a similar system. ANTHONY A. BRAGA, DAVID M. HUREAU & LEIGH S. GROSSMAN, NAT'L NETWORK FOR SAFE CMTYS., MANAGING THE GROUP VIOLENCE INTERVENTION 15 n.2 (2014), https://cops.usdoj.gov/RIC/Publications/cops-p305-pub.pdf [https://perma.cc/B4UG-4KUJ]; *see also* Commonwealth v. Gray, 978 N.E.2d 543, 550 n.8 (Mass. 2012); Transcript of Detention Hearing at 36, United States v. Vick, No. 16-10126 (D. Mass. Feb. 28, 2017) (federal agent testifying that "[f]rom my understanding, [BRIC] use[s] a point system to rank whether or not someone's verified as a gang member").

[18] Bos. Police Dep't, Rules and Procedures r.335, at 2 (Mar. 23, 2017) [hereinafter 2017 Rule 335].

[19] 2021 Rule 335, *supra* note 1, § 4.2.

both "active" and "inactive" gang associates and members,[20] the 2021 Rule states that inactive individuals "will be purged from the system."[21] Table 1 lists the eighteen ways individuals accrue points[22]:

Table 1: Point Values for Entry into the BPD Gang Database[23]

CONDUCT	POINT VALUE
Contact with Known Gang Associate (Field Interrogation and Observations)	2 points per interaction
Court and Investigative Documents	9 points
Documented Association (Police Incident Report)	4 points per interaction
Group Related Photograph	2 points
Information Developed During Investigation and/or Surveillance	5 points
Information from Anonymous Informant/Tipster	1 point
Information from Reliable, Confidential Informant	5 points
Known Group Tattoo or Marking	8 points
Membership Documents	9 points
Named in Documents as an Associate/Member	8 points
Participation in Publications	8 points
Possession of Documents	8 or 3 points[†]
Possession of Gang Publications	2 points
Prior Validation by a Law Enforcement Agency	9 points

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[20] 2017 Rule 335, *supra* note 18, at 2 (definitions of "active status" and "inactive status"). Under the rule, an individual becomes "inactive" if they have no "documented contact with another gang member/associate, [or] law enforcement agency within the past 5 years." *Id.*

[21] 2021 Rule 335, *supra* note 1, § 4.4. An individual is no longer "active" if they have not been "reasonably suspected of participating in gang related criminal activity within the past five years." *Id.* Recently, the BPD removed 609 "inactive" individuals from the gang database. Danny McDonald, *Police Removed 600-Plus Names from a Boston Gang Database. For Some Councilors, It's Not Enough*, BOS. GLOBE (Feb. 17, 2022, 5:41 PM), https://www.bostonglobe.com/2022/02/14/ metro/police-removed-600-plus-names-boston-gang-database-some-councilors-its-not-enough [https:// perma.cc/TY84-D7MK]. As of February 2022, approximately 3,340 individuals were logged in the database. *Id.*

[22] These categories appear in both the 2017 and 2021 versions of Rule 335. The 2017 Rule 335 also included two additional categories: "Information Received from an Unaffiliated Law Enforcement Agency (8 points)" and "Information Not Covered by Other Selection Criteria (1 point)." 2017 Rule 335, *supra* note 18, at 3. The 2017 Rule clearly stated that this list was "not meant to be all inclusive." *Id.* at 2. The 2021 Rule does not indicate whether it is also intended to be nonexclusive. *See* 2021 Rule 335, *supra* note 1, § 5.

[23] 2021 Rule 335, *supra* note 1, § 5.

[†] Eight points if the individual is not in custody or incarcerated. Three points if the individual is in custody or incarcerated.

Published News Accounts	1 point
Self Admission	8 points
Use and/or Possession of Group Paraphernalia or Identifiers	4 points
Victim/Target Affiliated with Associate of Rival Group	8 or 3 points[†]

The new Rule 335 added the requirement that Field Interrogation and Observations (FIO) reports may not be the sole basis for including an individual in the database.[24] FIO reports are records of police interrogations, observations, stops, searches, and other interactions.[25] Figures from 2020 FIO stops indicate that a large majority of police interactions were with racial minorities.[26]

C. *Critique of the Database and Failed Reform*

Activists have criticized the BPD gang database for its lack of transparency.[27] Little is known about how individuals are added to the database, or how someone can discover they are in the database and challenge their inclusion.[28] Even attorneys have encountered difficulty accessing records explaining how their clients, many of whom have never had a criminal charge or gang affiliation, became "verified" as gang members in the database.[29]

Additionally, the role of the database at the intersection of the criminal justice system, immigration, and surveillance of youth of color has received criticism. Public scrutiny of the BPD database increased in 2018 after a Central American teenager was detained by ICE when the

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[24] 2021 Rule 335, *supra* note 1, § 5. FIO and Field Interrogation/Observation/Encounter (FIOE) reports are used interchangeably. *See Boston Police Accountability and Transparency Data*, CITY BOS. (Nov. 22, 2023), https://www.boston.gov/civic-engagement/boston-police-accountability-and-transparency-data [https://perma.cc/Y3AK-E94M].

[25] *See* Bos. Police Dep't, Rules and Procedures r.323, §§ 3–4 (July 2, 2015).

[26] *See* Associated Press, *Racial Disparities Persist in Boston Police Interactions*, WBUR (Apr. 23, 2021), https://www.wbur.org/news/2021/04/23/boston-police-street-investigations-racial-disparity-data [https://perma.cc/3G99-87SM].

[27] Yawu Miller, *Cops Missing Information on Surveillance*, BAY ST. BANNER (Nov. 23, 2022), https://www.baystatebanner.com/2022/11/23/cops-missing-information-on-surveillance [https://perma.cc/3DP8-JF3M]; Sarah Betancourt, *Boston Center's Gang Database Lists 3,853 People*, COMMONWEALTH BEACON (Mar. 9, 2021), https://commonwealthbeacon.org/criminal-justice/boston-centers-gang-database-lists-3853-people [https://perma.cc/JRM5-85Y2]; Editorial, *The Boston Police Gang Database Gets Overdue Attention*, BOS. GLOBE (Jan. 24, 2022, 4:00 AM), https://www.bostonglobe.com/2022/01/24/opinion/boston-police-gang-database-gets-overdue-attention [https://perma.cc/Y3EK-42BH].

[28] ACLU Complaint, *supra* note 2, ¶ 3; Miller, *supra* note 8.

[29] ACLU Complaint, *supra* note 2, ¶ 52 (claiming BPD refused an immigration attorney's request for FIOE files that led to their client being entered into the gang database); Shannon Dooling, *ACLU Sues Boston Police for Access to Gang Database*, WBUR (Nov. 15, 2018), https://www.wbur.org/news/2018/11/15/aclu-boston-police-gang-database-lawsuit [https://perma.cc/K8KN-ESGF] (reporting that an individual and his attorney did not know he had been labeled as a gang associate until the government introduced a document labeling him as a gang associate in immigration court).

federal agency received records from BPD's gang database alleging that the youth was a gang member.[30] The teenager was included in the database in part because a school police officer sent a report of a nonviolent incident with other students at school to BRIC.[31] This criticism culminated in legislation passed in 2019 and 2020, including updates to the Boston Trust Act[32] and certain provisions in the Massachusetts Police Reform Act.[33] The new Boston Trust Act now prohibits sharing certain information with ICE.[34] The Police Reform Act also prohibits the Boston School Police Department (BSPD) from sharing students' information, including suspected gang affiliations, with BRIC and other law enforcement agencies.[35] Shortly thereafter, the BPD was pressured to make changes to the gang database as well,[36] and modified its point-based verification system in June 2021.[37] However, these changes have failed to resolve two key issues of the point-value system: arbitrariness and bias against communities of color.

II. ANALYSIS OF THE BPD GANG DATABASE

The BPD's point system appears to rely on arbitrary factors that may be prone to bias, which raises questions about the BPD's ability to accurately identify gang members. There is no explanation as to why particular factors are included in the database or why certain ones receive greater weight than others. Nor is there guidance cautioning officers to consider the broader circumstances of the documented interaction, such as whether the officers suspect criminal activity is taking place, before assigning point values. Rather, to be verified as a gang member, an individual must simply accrue ten points.[38]

As the cases below illustrate, the point categories are also broad enough to encompass innocent conduct. Someone could enter the database based solely on their appearance, without any other indicator that they are attempting to engage in criminal activity. Under the current system, having a "known group tattoo" (eight-point offense) and

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[30] Betancourt, *supra* note 27.

[31] Dooling, *supra* note 4; Rebecca E.J. Cadenhead, *The State of Surveillance in Boston Public Schools*, HARV. CRIMSON (Nov. 11, 2021), https://www.thecrimson.com/article/2021/11/11/boston-school-surveillance [https://perma.cc/B44T-BLL3].

[32] BOS., MASS., MUN. CODE ch. 11, § 1.9 (2019).

[33] 2020 MASS. ACTS ch. 253, https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter253 [https://perma.cc/SGX9-RJXS] (codified in scattered sections of MASS GEN. LAWS ch. 3 (2021)).

[34] BOS., MASS., MUN. CODE ch. 11, § 1.9(4)(a)(C) (2019).

[35] 2020 MASS. ACTS ch. 253, § 78.

[36] The Boston City Council's Committee on Public Safety & Criminal Justice held a hearing regarding the gang database on March 9, 2021. *Docket #0143 — Hearing Regarding the Boston Police Department's Gang Database Before the Boston City Council Committee on Public Safety & Criminal Justice* (Mar. 9, 2021), https://www.youtube.com/watch?v=52TQ7t7_FAs [https://perma.cc/D6DQ-CEBN].

[37] 2021 Rule 335, *supra* note 1.

[38] *Id.* § 4.2; 2017 Rule 335, *supra* note 18, at 2.

possessing clothing items considered to be "group paraphernalia" (four-point offense) would be sufficient for an officer to enter someone in the gang database.[39]   Similarly, being the *victim* of gang-related violence may earn an individual eight of the ten points required to be entered into the database.[40]   Finally, simply associating with "verified" gang members — who were "verified" through this arbitrary system — can play a significant role in adding an individual to the gang database. Under the previous 2017 Rule, five interactions with a "known gang member," often recorded through FIO reports, would be sufficient for an individual to be verified as a "gang member."[41]   While, under the revised 2021 Rule, FIO reports alone cannot form the sole basis for qualification as a "gang member," they can still form a substantial part.[42] Thus, concerns about the system's arbitrariness and bias, as well as its impact on implicated individuals, remain.

Though the ways in which individuals are added to the gang database are poorly understood,[43] there are several publicly available cases describing the information used to verify individuals as gang members. The following sections analyze such cases and evaluate whether the criteria used reliably establish a nexus between the activity described and gang affiliation.   They conclude that, at least in these cases, the BPD gang database uses unreliable factors to identify gang membership.

A. *Gang Apparel: Chicago Bulls Hats and Nike Shoes*

Apparel, a seemingly innocuous form of expression, may trigger entry into the BPD gang database if individuals wear common items that are considered to be "gang paraphernalia."   Both the 2017 and 2021 versions of Rule 335 allocate four points under the category, "Use and/or Possession of Group Paraphernalia or Identifiers."[44]   Items like Chicago Bulls gear,[45] Air Jordan or Nike brand sneakers, black rosaries, and blue

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[39] *See* 2021 Rule 335, *supra* note 1, § 5.

[40] *Id.* (assigning "8 points if not in custody or incarcerated" for "Victim/Target Affiliated with Associate of Rival Group").

[41] *See* 2017 Rule 335, *supra* note 18, at 3. FIO reports are considered "constitutionally insignificant" and may be conducted without reasonable suspicion that the individual is engaged in criminal activity. Commonwealth v. Narcisse, 927 N.E.2d 439, 443 (Mass. 2010).

[42] *See* 2021 Rule 335, *supra* note 1, § 5.

[43] *See supra* notes 27–29 and accompanying text.

[44] 2021 Rule 335, *supra* note 1, § 5; 2017 Rule 335, *supra* note 18, at 3.

[45] Chicago Bulls caps are believed to be gang paraphernalia because they resemble the "devil horns" sign adopted by MS-13. Betancourt, *supra* note 2. In 2022, the popular basketball team sold the most gear of any NBA team and was the top-selling team in twenty-eight states. *Chicago Bulls Top All NBA Teams in Offseason Lids Gear Sales*, CBS NEWS (Oct. 19, 2022, 12:10 PM), https://www.cbsnews.com/chicago/news/chicago-bulls-lids-gear-jerseys-apparel-top-nba-team [https://perma.cc/4R7B-TUZY].

shirts have been identified as "group paraphernalia."[46]   Individuals
wearing these items — or who are seen wearing these items in photos —
have accrued points under this category.[47]   The fact that the individuals
described below are all youth of color raises concerns that this method
of identifying gang membership is tainted by racial bias.

In at least two cases, Latino youth were entered into the gang
database for wearing Chicago Bulls gear. Darlin Eleazar Enamorado-
Rodriguez, an immigrant from Honduras, was detained by ICE in 2018
"because of his alleged association with MS-13 street gang members."[48]
His identification as a gang member was partially based on his "wearing
apparel bearing gang symbols such as the Chicago Bulls logo."[49]   Yet
there is no indication that Enamorado-Rodriguez was observed engag-
ing in suspicious behavior; his verification otherwise appears to be based
on his interactions with other teenagers, frequenting areas in the neigh-
borhood where he lived, and wearing a hat for a popular sports team.[50]
Likewise, an immigrant from El Salvador — referred to publicly under
the pseudonym "Juan Perez" — was entered into the gang database in
part because of photos of him wearing a Chicago Bulls cap.[51]   He also
allegedly used gang signs on his social media and was seen with other
teenagers who were believed to be gang members during a traffic stop.[52]
Like Enamorado-Rodriguez, Perez was not observed engaging in suspi-
cious or criminal activity.[53]   Perez was detained by ICE in 2018 and
denied bond because he was deemed a gang member under the BPD
gang database.[54]   In a similar case, a redacted gang database file de-
scribed a young man born in 1996 who was listed as a "gang associ-
ate" — a category that existed under the 2017 Rule 335 for individuals
who accrued six points.[55]   He was entered into the database after he was
seen in East Boston with three other "verified" gang members (two-point

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[46] ACLU Complaint, *supra* note 2, ¶¶ 32–33 ("[T]he BPD has deemed Chicago Bulls caps to be
gang apparel . . . . Central American youth in Boston have also been assigned points for wearing or
having pictures of Air Jordan or other Nike brand sneakers."); Holper & Valentin, *supra* note 2; *see
also* Thomas Nolan, *The Trouble with So-Called "Gang Databases": No Refuge in the "Sanctuary,"*
Am. Const. Soc'y (June 27, 2018), https://www.acslaw.org/expertforum/the-trouble-with-so-
called-gang-databases-no-refuge-in-the-sanctuary [https://perma.cc/TKR8-9RC3].

[47] Betancourt, *supra* note 2.

[48] Enamorado-Rodriguez v. Barr, 941 F.3d 589, 594 (1st Cir. 2019).

[49] *Id.* at 599. He also "was seen interacting with certain other individuals" and "was seen in
certain areas of East Boston." *Id.*

[50] *Id.* at 594, 599. If these individuals were "verified" gang members, each interaction would
accrue two points. 2017 Rule 335, *supra* note 18, at 3. If the Chicago Bulls cap were considered to
be "Gang Paraphernalia or Identifiers," this would accrue four points. *Id.*

[51] Betancourt, *supra* note 2.

[52] *Id.* The officer claimed that Perez was "only known to me as being a student, although he
was in the motor vehicle at this time." *Id.*

[53] *See id.*

[54] *Id.*

[55] Shannon Dooling, *Here's What We Know About Boston Police's Gang Database*, WBUR (July
26, 2019), https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration [https://
perma.cc/85KM-LGQL].

offense) and wore a brand of hat "known to be worn by gang members" (four-point offense).[56]   Ultimately, he was deported.[57]   Yet the report provides no indication that the man or his associates otherwise engaged in suspicious activity.[58]   These examples demonstrate that in several cases, apparel has been a significant factor in verifying youth of color in the BPD database, triggering their deportation.

In another case, an individual's appearance and apparel seemed to play a greater role in his being entered into the database than other factors more relevant to gang activity.   Henri Salvador Gutierrez entered the gang database in part due to his apparel, namely "a blue and white bandana" — colors representing MS-13 — and his tattoo with the number "503" — El Salvador's telephone country code.[59]   He was also seen with alleged MS-13 members when he was arrested for carrying a knife.[60]   Although carrying a weapon may warrant reasonable suspicion, his arrest with a knife earned fewer points than his appearance.   Even if the encounter was considered to be "Documented Association (Police Incident Report)" (four points) rather than a mere FIO contact with gang members (two points), Gutierrez's tattoo alone earned him eight points, and his bandana earned him four.[61]   Thus, his arrest with a weapon while he was with other alleged gang members was not sufficient for Gutierrez to be verified as a gang member, but his appearance alone — a twelve-point offense altogether — was.   While Gutierrez was later connected with a suspected gang-related crime, an immigration court judge found the basis for his inclusion in the gang database — which was largely drawn from his appearance — to be so flimsy that he was released from ICE custody shortly before the crime was committed.[62]   Had the BPD used a less arbitrary system to verify Gutierrez as a gang member, the judge in Gutierrez's case may have found his gang membership to be based on a more credible foundation, and may have decided not to release him.   This intersection of the BPD's method for identifying gang membership and real-world jurisprudence highlights the consequences of this system: even in cases where an individual may

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[56] *Id.*

[57] *See id.* (citing BOS. REG'L INTEL. CTR., GANG ASSESSMENT DATABASE DOCUMENT (2019), https://s3.documentcloud.org/documents/6219676/Gang-Assessment-Database-document.pdf [https://perma.cc/55WC-FKPJ] (redacted document provided by BPD to WBUR)).

[58] *See* BOS. REG'L INTEL. CTR., *supra* note 57.

[59] Maria Cramer, *BPD Gives Gang Intel to ICE. A Lawsuit Wants to Know How Much*, BOS. GLOBE (Nov. 15, 2018, 2:56 PM), https://www.bostonglobe.com/metro/2018/11/15/boston-police-have-been-giving-gang-intel-ice-lawsuit-wants-know-how-much/giZWh1eKrf9kcJB7KmRKaM/story.html [https://perma.cc/FB2G-WSCJ].

[60] *Id.*

[61] *See* 2021 Rule 335, *supra* note 1, § 5; *see also* 2017 Rule 335, *supra* note 18, at 3.

[62] Cramer, *supra* note 59; Maria Cramer, *Alleged MS-13 Member Accused of Murder Was Once Identified in Boston Gang Database*, BOS. GLOBE (Dec. 1, 2018, 7:28 PM), https://www. bostonglobe.com/metro/2018/12/01/alleged-member-accused-murder-was-once-identified-boston-gang-database/aB4dHthBXDADdLXi9rLtRJ/story.html [https://perma.cc/JPE5-Y25N].

be a gang affiliate, the reason for their inclusion in the database may not be attributable to the most relevant factors.

In other cases, apparel along with incidents that would not give rise to suspicion of criminal activity was sufficient for officers to enter an individual into the gang database. In 2018, a young immigrant from El Salvador — known publicly as "Orlando" — was "verified" as a gang member due to a BSPD incident report, and because he was seen wearing a blue soccer jersey and Chicago Bulls hat.[63] Although this report involved a nonviolent interaction at school and did not provide evidence linking Orlando to gang activity, the report noted that "this incident will also be sen[t] to the BRIC."[64] Though Orlando had no arrests or pending charges against him, he was later detained by ICE.[65]

In these cases, appearance played a significant role in verification as a gang member. This practice of assigning point values based on wearing a particular clothing item is problematic for several reasons. First, the Massachusetts State Police Gang Unit has noted that while some gangs wear certain team logos, "[w]earing sportswear in & of itself is obviously insufficient" as evidence of gang membership.[66] Yet an individual can garner four out of the ten points required for gang verification based on a method that state policing practices — and common sense — would find to be inadequate. Wearing a particular color or sports team gear alone is a flimsy basis for inferring gang membership, and an even less reliable basis for the reasonable suspicion needed to justify heightened surveillance. Second, reliance on appearance to justify an individual's association with criminality is doubly concerning given the racial dynamics of these examples, which all involve Latino youth. Sociologists and activists have commented on how the criminalization of fashion trends and personal expression popular among Black and Latino youth subjects them to heightened suspicion.[67] In most of the cases above, the BPD saw a particular style of dress as an indicator of criminality. This conclusory way of identifying gang membership dehumanizes Black and Brown youth and stigmatizes their ability to express themselves through their appearance. As discussed in Part III,

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[63] Dooling, *supra* note 4; Cadenhead, *supra* note 31; Dooling, *supra* note 29.

[64] BOS. SCH. POLICE, DEP'T OF SAFETY SERVS., INCIDENT REPORT SYSTEM, https://d279m997dpfwgl.cloudfront.net/wp/2018/01/0126_bps-police-report-redacted.pdf [https://perma.cc/2YL2-P8E7]; *see also* Cadenhead, *supra* note 31.

[65] Dooling, *supra* note 4.

[66] GREGG A. NADEAU, MASS. STATE POLICE GANG UNIT, STREET GANGS: INTELLIGENCE & AWARENESS TRAINING 2 (2013), https://learningfirstcharter.org/wpup/gang-awareness-ma-state-police1.pdf [https://perma.cc/A4HX-UTXC].

[67] *See, e.g.*, KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 48–80 (2021); ERICA RODARTE, ACLU IDAHO, PROUD TO BE BROWN: PUNISHING LATINE CULTURE IN IDAHO SCHOOLS 5–6 (2023), https://www.acluidaho.org/sites/default/files/field_documents/aclu_id_proud_to_be_brown_july_2023.pdf [https://perma.cc/HYT4-UFBA] (describing how school dress codes tended to identify fashion trends popular among Latino youth as gang attire).

the BPD's reliance on these criteria, combined with the possibility that an individual could be verified based on appearance alone, raises serious questions about the constitutionality of using its gang database to support a finding of probable cause or reasonable suspicion.

B. Victims of Assault

Cases involving victims of assault further illustrate how the point system — which does not set parameters for considering additional, commonsense factors — criminalizes innocent conduct. Per BPD's point-based system, an individual can receive eight points — more than three-quarters of the ten points required to be verified as a gang member — simply because they were the *victim* of an allegedly gang-related assault.[68]

Even if gang members are more likely to target rival gang members, several cases illustrate the ways in which the BPD's applications of this factor fail to account for innocent conduct. First, a teenager from El Salvador — known as "Martin" — was verified as a gang member after he was the victim of an assault at school and was seen associating with his classmates who were "verified" gang members.[69] Notably, Martin had come to the United States with his mother and sister because they were fleeing gang violence.[70] The BPD "refused his attorney's request for the [FIO] records that caused Martin to be in the gang database,"[71] and it's unclear why the BPD thought that this altercation — which occurred at school — was gang related.[72] While the content of the two-point FIO encounters is unclear, the principal basis for Martin's inclusion in the gang database was his being a victim of an allegedly gang-related assault at school.[73] In a similar case, Boston high school student Alex Ponte-Capellan believed he entered the gang database because he was stabbed in a fight at school, though he was not able to access his file to confirm this information.[74] Ponte-Capellan was not affiliated with a gang at the time and was subject to heightened police surveillance and searches of his person because of his suspected gang affiliation.[75] Finally, another man from El Salvador, who claimed he was never affiliated with MS-13, was harassed and bullied by Blood

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[68] 2021 Rule 335, *supra* note 1, § 5; ACLU Complaint, *supra* note 2, ¶¶ 23, 52; Holper & Valentin, *supra* note 2; Marcelo, *supra* note 4.

[69] ACLU Complaint, *supra* note 2, ¶ 52; Holper & Valentin, *supra* note 2.

[70] ACLU Complaint, *supra* note 2, ¶ 52; Holper & Valentin, *supra* note 2.

[71] ACLU Complaint, *supra* note 2, ¶ 52.

[72] *See id.*

[73] *See id.*

[74] Jule Pattison-Gordon, *"Gang" Label Poorly Understood, Brings Serious Consequences for Hub Teens*, BAY ST. BANNER (Sept. 23, 2015), https://www.baystatebanner.com/2015/09/23/gang-label-poorly-understood-brings-serious-consequences-for-hub-teens [https://perma.cc/QA8K-7Q5Z]. Ponte-Capellan was told by police that officers "had a file on me and all of my friends, picture, and basic information about all of us." *Id.*

[75] *Id.*

gang members as a teenager.[76] He reported this altercation to the police and aided in their investigation.[77] Nonetheless, he was "verified" as a gang member, in part because he was the victim of gang violence.[78]

All three cases demonstrate how this eight-point factor — being the victim of a gang-related attack — may be overbroad in the conduct it captures. First, the category does not account for victims who were randomly attacked. An individual who is attacked by gang members, calls the police for help, and aids officers in their investigation may receive eight of the ten points required for them to be verified as a gang member. The frequency with which the BPD uses this category is u nknown, and officers have wide discretion in specifying who receives points under this category.[79] Second, the BPD does not define what constitutes a "Rival Group"[80] and thus fails to provide clear guidelines for when being the victim of an assault amounts to being the victim of a gang-related crime. This category has included fights between youth who attended the same school but were from different neighborhoods — with no independent verification that the individuals involved were members of a gang.[81] This suggests that youth who live in neighborhoods where gang-related activity is more prevalent — predominantly communities of color[82] — are more likely to be surveilled when they are the victims of attacks. What may be labeled a school fight in an affluent area like Cambridge could be a gang-related attack in East Boston. The BPD's system thus may subject select individuals to heightened surveillance without a reason to suspect they are gang-affiliated.

C. Gang Member by Association

A third factor that demonstrates the arbitrariness and bias of the point system is the fact that individuals can be placed on the list by association with "verified" gang members — which is often recorded through FIO reports.[83] Under the 2021 version of Rule 335, FIO reports alone, which give an individual two points, would not be sufficient for an individual to be verified as a gang member.[84] However, reports carrying essentially the same information as FIOs can be admitted as non-FIO evidence and, along with only three FIO reports, can be sufficient to verify an individual as a gang member. For example, a youth may

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[76] Marcelo, *supra* note 4.

[77] *Id.*

[78] *Id.* The man was also seen associating with alleged gang members and was charged with assault and battery following a fight at school. *Id.*

[79] *See* Dooling, *supra* note 4.

[80] *See* 2021 Rule 335, *supra* note 1, § 5.

[81] *See* Pattison-Gordon, *supra* note 74.

[82] *See National Youth Gang Survey Analysis: Demographics*, NAT'L GANG CTR., https:// nationalgangcenter.ojp.gov/survey-analysis/demographics [https://perma.cc/PM35-HM6U].

[83] *See* 2021 Rule 335, *supra* note 1, § 5.

[84] *Id.*

receive five points for "[i]nformation developed during investigation and/or surveillance" solely "because school police have surveilled them talking to or walking with classmates who are alleged to have gang ties."[85]

Several cases illustrate how individuals have been entered into the database based solely on their association with other individuals. In one case, a Central American migrant was detained for thirty months without criminal charges after being seen "socializing with alleged gang members."[86] A second Central American youth with no criminal record was "verified" because he "was seen associating with other young people who are in the gang database."[87] A third Central American youth was detained by ICE despite "never [having] been arrested or charged with any adult or juvenile offense."[88] He was added to the database because of "FIO[] reports by BPD and school police, who saw him with alleged gang members."[89] Finally, Lamory Gray was entered into the database after eleven FIO reports indicated that he was seen with gang members in the neighborhood where he grew up.[90] Gray denied gang involvement[91] and claimed that he was accused of being a gang member simply "because of where he lived."[92]

These cases illustrate alarming trends in how the BPD's gang database has been utilized to verify gang members through mere association. First, when a significant amount of points are assigned for being seen with a "verified" gang member, youth who live in neighborhoods with known gang members are more likely to be added to the gang database, potentially from innocent interactions.[93] Moreover, as the First Circuit has noted, there's a reasonable possibility that the "gang members" these individuals were seen with were themselves "verified" using the flawed BPD point system.[94] This system may not accurately predict gang membership in many instances, thus perpetuating a vicious cycle.

Moreover, a second conspicuous trend is the *race* of those who were verified through association or apparel, or by being the victim of a

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[85] ACLU Complaint, *supra* note 2, ¶ 38; *see also* Diaz Ortiz v. Garland, 23 F.4th 1, 10, 18 (1st Cir. 2022) (en banc).

[86] Maurizio Guerrero, *How Police "Gang Databases" Are Being Used to Wage War on Immigrants*, IN THESE TIMES (Apr. 29, 2021), https://inthesetimes.com/article/gang-databases-ice-immigration-sanctuary-cities [https://perma.cc/8KRY-3NV4].

[87] Kade Crockford, *From Gang Allegations to Deportation: How Boston Is Putting Its Immigrant Youth in Harm's Way*, THE APPEAL (Jan. 18, 2018), https://theappeal.org/from-gang-allegations-to-deportation-how-boston-is-putting-its-immigrant-youth-in-harms-way-de3b0edc9327 [https://perma.cc/5UAG-UGER].

[88] ACLU Complaint, *supra* note 2, ¶ 52.

[89] *See id.*

[90] Commonwealth v. Gray, 978 N.E.2d 543, 551 n.9 (Mass. 2012).

[91] *Id.* at 553.

[92] *Id.* at 551 n.9.

[93] *See* Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 210 (2015).

[94] Diaz Ortiz v. Garland, 23 F.4th 1, 18–19 (1st Cir. 2022) (en banc); *see also infra* section II.D, pp. 1394–96.

gang-related assault. All cases described in this Part involved Black and Hispanic young men. The racial bias of BPD's system resounds through these limited examples and is illustrative of a larger trend: these youth were likely labeled gang members in part because they went to school with other youth of color, wore clothing popular among young men of color, and lived in neighborhoods that were predominantly made up of people of color. Moreover, the interactions reported above are largely FIO reports from police surveillance encounters. Police are more likely to conduct FIO reports for minorities than for white individuals.[95] As the examples illustrate, no actual criminal activity — or even *suspicion* of criminal activity — is needed to justify a FIO report indicating gang affiliation. Simply existing as a Black or Hispanic youth is often enough to warrant intrusion and surveillance under BPD's current point-based system. This systemic arbitrariness and bias, as well as its implications for individuals' rights, necessitate, at the very least, further scrutiny.

D. BPD's Point System Under Scrutiny: The Diaz Ortiz Case

A recent First Circuit opinion, *Diaz Ortiz v. Garland*,[96] further highlights the arbitrariness and bias underlying how the BPD gang database verifies youth as gang members. The case concerned Cristian Josue Diaz Ortiz, a young immigrant from El Salvador who was verified as a gang member after he was assigned twenty-one points from nine encounters.[97] Eight incidents were FIO reports, each carrying two points, where Diaz Ortiz was seen with other Hispanic teenagers or teenagers described as "verified MS-13 gang members."[98] These incidents took place at Diaz Ortiz's school, a park, a building where one teenager lived — which was described as "a known hangout and address" for MS-13 members — and East Boston Stadium — an area allegedly "notorious for MS-13 gang activity."[99] At the time, Diaz Ortiz lived in East Boston with relatives, and several encounters took place in his neighborhood.[100] The ninth incident, reported by BSPD, incurred five points.[101] A student "wearing a 'full face mask'" that BSPD officers

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[95] *See* Associated Press, *Racial Disparities Persist in Boston Police Interactions*, *supra* note 26; JEFFREY FAGAN ET AL., FINAL REPORT: AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 8 (2015), http://raceandpolicing.issuelab.org/resources/25203/25203.pdf [https://perma.cc/R7FD-M9N9].

[96] 23 F.4th 1.

[97] *See id.* at 9–10.

[98] *Id.* at 10–11.

[99] *Id.* at 11. In some FIO reports, Diaz Ortiz was observed smoking marijuana, and on one occasion he also had a small amount of marijuana on his person, which is a civil offense in Massachusetts. *Id.* at 10. One FIO report indicates that Diaz Ortiz was carrying a chain with a padlock, which he told officers he used as a bike lock, in his backpack. *Id.* at 11.

[100] *Id.* at 3, 11.

[101] *Id.* at 10.

identified as a member of MS-13 walked up to a group of teenagers, which included Diaz Ortiz.[102] Diaz Ortiz was later detained by ICE because he was listed as a gang member in the BPD's gang database.[103]

In an en banc opinion, the First Circuit held that Diaz Ortiz's inclusion in the gang database was not a reliable basis for determining that Diaz Ortiz was in fact a gang member.[104] The court expressed concerns with the point system in effect at the time — the 2017 version of Rule 335 — which was "shockingly wide-ranging."[105] The court also noted Diaz Ortiz was assigned points "in a haphazard manner," with Diaz Ortiz receiving two points for associating with alleged gang members in some instances, but five points for a BSPD report describing essentially the same behavior.[106] The court further observed that the issues present in Diaz Ortiz's classification as a gang member raised questions about the reliability of FIO reports identifying the teenagers he was seen with as gang members.[107] The reports did not explain the basis for believing these other youth were MS-13 members, and the court inferred that "the only basis for that identification [was] the possible use of the same problematic point system that identified Diaz Ortiz as a member."[108] Moreover, the court found the BSPD report to be concerning because in that incident Diaz Ortiz did not directly interact with the student "identified as a member of MS-13."[109] Rather, the alleged gang member simply walked up to Diaz Ortiz in a group of several other teenagers, none of whom were alleged to be gang members.[110]

The court found that Diaz Ortiz's reported conduct did not include "any threatening, 'gang-like' activities," nor did "the reports support an inference that he had participated in any criminal activity at all."[111] Rather, his activities were "quintessential teenage behavior — hanging out with friends and classmates" in his local park and stadium, his school, and another teenager's home.[112]

Diaz Ortiz highlights what may be growing legal consternation with the BPD gang database's point system. Although the court asserted that the new 2021 version of Rule 335 provided some safeguards that "should diminish the potential for criminalizing ordinary behaviors of minority youth,"[113] Diaz Ortiz could have been verified as a gang member under the new Rule as well. While many of the points he accumulated

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[102] *Id.*

[103] *See id.* at 3, 7.

[104] *See id.* at 22.

[105] *Id.* at 17.

[106] *Id.* at 18.

[107] *Id.*

[108] *Id.* at 19.

[109] *See id.* at 18.

[110] *Id.*

[111] *Id.* at 19.

[112] *Id.*

[113] *Id.* at 25.

came from FIO reports, which can no longer be the sole basis for an individual's inclusion in the database, the single non-FIO report, the documented "investigation" from BSPD officers, would still have been sufficient for Diaz Ortiz to be verified under the 2021 system.[114] Still, the defects highlighted in the Diaz Ortiz case underscore the unreliability of the BPD gang database, which identifies gang members through arbitrary and biased methods that criminalize innocent conduct.

III. THE BPD GANG DATABASE VIOLATES RIGHTS TO PRIVACY

The cases in Part II illustrate how innocent conduct, and seemingly arbitrary factors, can form the sole basis for verifying individuals as gang members in the BPD gang database. This Part argues that because the BPD gang database relies on arbitrary factors to verify gang membership, the database interferes with an implicated individual's right to privacy in two ways. First, to the extent that information in the database is shared with federal agencies, the database fails to comply with federal regulations mandating that criminal intelligence systems collect information about a person only if there is reasonable suspicion that such person is engaging in criminal activity.[115] Second, regardless of whether the BPD shares information with the federal government, the BPD gang database arguably violates constitutional rights to privacy when a person's inclusion in the database is used to support an inference of reasonable suspicion or probable cause to justify police interaction.

A. BPD's Gang Database Collects Information
Without Reasonable Suspicion

The BPD fails to comply with federal regulations mandating how intelligence systems like BRIC may share information with federal agencies because it does not require reasonable suspicion of criminal activity to enter individuals into the database. "Interjurisdictional intelligence system[s]," such as BRIC, that share information with federal agencies must meet the requirements of 28 C.F.R. § 23.[116] Adopted in 1980,[117] 28 C.F.R. § 23 seeks to ensure that criminal intelligence systems "are utilized in conformance with the privacy and constitutional rights of individuals."[118] The regulation mandates that criminal intelligence systems "collect and maintain criminal intelligence information concerning

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[114] *See* 2021 Rule 335, *supra* note 1. Although the Boston School Police can no longer share students' information with BRIC under the 2020 Police Reform Act, *see supra* notes 33–35 and accompanying text, it is unknown if reports from Boston School Police officers that were previously shared with ICE, such as the report on Diaz Ortiz that was shared before the Police Reform Act, can still be used to verify individuals in BPD's gang database.

[115] 28 C.F.R. § 23.20(a) (2022).

[116] *Id.* § 23.3(b); *see Diaz Ortiz*, 23 F.4th at 11.

[117] Criminal Intelligence Systems Operating Policies, 45 Fed. Reg. 61612, 61612 (Sept. 17, 1980) (codified at 28 C.F.R. pt. 23).

[118] 28 C.F.R. § 23.1.

an individual *only if there is reasonable suspicion that the individual is involved in criminal conduct or activity* and the information is relevant to that criminal conduct or activity."[119] Reasonable suspicion "is established when information exists which establishes sufficient facts to give [the officer or investigator] a basis to believe that there is a reasonable possibility that an individual or organization is involved in a definable criminal activity or enterprise."[120] The Department of Justice (DOJ) clarified that "[t]he concept of a 'basis to believe' requires reasoning and logic coupled with sound judgment based on experience in law enforcement rather than a mere hunch, whim, or guess."[121] The regulation's legislative history also suggests that the DOJ considered the reasonable suspicion requirement to be crucial to protect individual rights. In response to a comment that a reasonable suspicion standard is unnecessary, the DOJ maintained that "the potential for national dissemination of information in intelligence information systems, coupled with the lack of access by subjects to challenge the information, justifies the reasonable suspicion standard."[122] The DOJ also maintained that this requirement improved "the quality and utility of 'hits' in an information system" and ensured that "[s]carce resources are not wasted by agencies in coordinating information on subjects for whom information is vague, incomplete and conjectural."[123]

The regulation also establishes protections for individuals' freedom of association. In addition to this general requirement for reasonable suspicion, 28 C.F.R § 23 specifies:

> [P]roject[s] shall not collect or maintain criminal intelligence information about the political, religious or social views, *associations*, or activities of any individual or any group, association, corporation, business, partnership, or other organization unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.[124]

This emphasis on ensuring that an individual is not surveilled merely due to their beliefs or associations may indicate a concern with protecting individuals' First Amendment association rights.[125] The statute's text reflects a presumption against including individuals based on their association *unless* there is a reason to believe such association is related to criminal activity. This may indicate that when individuals are added in part due to their association, a higher showing of reasonable suspicion is needed to avoid First Amendment issues.

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[119] *Id.* § 23.20(a) (emphasis added).

[120] *Id.* § 23.20(c).

[121] Final Revision to the Office of Justice Programs, Criminal Intelligence Systems Operating Policies, 58 Fed. Reg. 48448, 48451 (Sept. 16, 1993) (codified at 28 C.F.R. pt. 23).

[122] *Id.*

[123] *Id.*

[124] 28 C.F.R. § 23.20(b) (emphasis added).

[125] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

The BPD gang database fails to comport with these requirements. While recent changes to the City of Boston Trust Act have limited how BRIC shares information with the federal government,[126] the impact of these changes is narrow and opaque. The BPD has publicly claimed that BRIC may share information with federal agencies "to support criminal investigation matters," but "NO information can be shared with ICE for purposes of the enforcement of civil violations of U.S. immigration laws."[127] From this, it is not clear whether information that was previously sent to ICE can still be accessed by the federal government, or what data is currently sent to ICE as "support [for] criminal investigation matters."[128] Public record requests show "at least 135 school incident reports were entered into the BRIC between 2014 and 2017 alone."[129] Records from BSPD in the BPD gang database have been used to uphold adverse immigration rulings as recently as 2020.[130] Moreover, the new legislation does not prevent BPD from sharing information with other federal agencies, such as the Federal Bureau of Investigation (FBI).[131] It is unclear whether the FBI may then pass on information it receives from BPD's gang database to ICE.

Additionally, the structure of the point-based system and evidence about how it has been implemented show that the BPD gang database is arguably not in compliance with 28 C.F.R. § 23, as an officer need not have reasonable suspicion to enter an individual into the database. To be verified as a gang member, an individual must simply accrue ten points.[132] Of the eighteen categories through which an individual may accrue points,[133] none require that an individual be near the scene of a crime or fleeing from the police, or other indicators that would support an inference that the individual may be engaging in criminal behavior. Individuals can be — and have been — verified as gang members based on innocent conduct.[134] Of the thirteen individuals described in Part II, only two accrued points as a result of being suspected of a crime.[135] In

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[126] *See supra* notes 32–35 and accompanying text.

[127] Jason Law, *Boston City Council Wants More Transparency with Police Gang Database*, BOS. 25 NEWS (June 15, 2021, 12:07 AM), https://www.boston25news.com/news/boston-city-council-wants-more-transparency-with-police-gang-database/VSPPLAAMSJBZTNHUZ5ZHK3XT2E [https://perma.cc/JCU7-KXE7] (quoting BPD spokesperson Sergeant Detective John Boyle).

[128] *Id.*

[129] Cadenhead, *supra* note 31.

[130] Diaz Ortiz v. Barr, 959 F.3d 10, 12, 18–19 (1st Cir. 2020), *rev'd en banc sub nom.* Diaz Ortiz v. Garland, 23 F.4th 1 (1st Cir. 2022).

[131] *See* BOS., MASS., MUN. CODE ch. 11, § 1.9(4) (2019).

[132] 2021 Rule 335, *supra* note 1, § 5; 2017 Rule 335, *supra* note 18, at 2.

[133] *See supra* Table 1, pp. 1384–85.

[134] *See supra* Part II, pp. 1386–96.

[135] (1) Gutierrez was entered into the BPD database after being arrested with a knife. Cramer, *supra* note 59. He received more points for his appearance than for this arrest. *See supra* note 61 and accompanying text. (2) An unknown Hispanic youth who was entered into the database was

both cases, the suspected criminal offense alone was insufficient to earn them ten points, and the other occasions that formed the basis of their inclusion in the database were not connected with suspected criminal activity.[136]

Further, given the regulation's concern with identifying individuals based on association alone, the BPD's seemingly widespread reliance on known gang member association to identify gang members is particularly problematic. Although FIO reports alone are now insufficient for entering an individual into the database under the 2021 rule, association with other individuals in the database can still be sufficient. As *Diaz Ortiz* exemplifies, the vague catchall category — "Information Developed During Investigation and/or Surveillance"[137] — can include the same information as that included in an FIO report.[138] Two FIO observations of an individual associating with individuals alleged to have gang ties under this five-point category are sufficient for an individual to be verified as a gang member. The situations where individuals, such as Diaz Ortiz, were verified under this category cannot muster a low showing of reasonable suspicion, let alone the higher standard that the statute implicitly requires for situations where individuals are added merely due to their association with another group. This is even more concerning considering that the individuals they are seen associating with may not even be gang members, as they were presumably "verified" using this same unreliable point system.

B. *BPD's Gang Database Violates*
Constitutional and State Rights to Privacy

BPD's gang database also arguably violates individuals' rights to be free from unreasonable searches and seizures. Both the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights confer the right to be secure from "unreasonable searches and seizures" of one's "person[], houses, papers, and effects."[139] The Fourth Amendment requires that the police have probable cause before obtaining a warrant or arresting someone for a crime. Probable cause exists when an officer has a reasonable basis to believe that an

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charged with assault and battery after a fight at school. Marcelo, *supra* note 4. However, he would not have accrued enough points to enter the database until he was the victim of a gang-related attack and cooperated with the police (eight points) and was seen associating with gang members (two points), who were presumably "verified" using this same flawed process. *See id.*

[136] *See supra* notes 59–62, 76–78 and accompanying text.

[137] 2021 Rule 335, *supra* note 1, § 5.

[138] *See* note 106 and accompanying text.

[139] U.S. CONST. amend. IV; *see also* MASS. CONST. pt. 1, art. XIV. Because Massachusetts courts have found that article 14 is more protective of defendants' rights than the Fourth Amendment, this section combines the analysis of the BPD's constitutionality under federal and state law. *See* Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985) ("We conclude that art. 14 provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause.").

individual has committed a crime or that items related to criminal activity may be found in a certain place.[140] A lower burden than probable cause — reasonable suspicion — is required for police to conduct informal stops.[141] Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[142] "A mere 'hunch' is not enough" to support a finding of reasonable suspicion.[143]

Inclusion in gang databases has been used to justify findings of reasonable suspicion and probable cause. For example, in *Commonwealth v. Sweeting-Bailey*,[144] the Massachusetts Supreme Judicial Court upheld a finding of reasonable suspicion to stop and search a driver and passenger in a vehicle based in part on the fact that some occupants of the vehicle were identified as gang members in a gang database.[145] Likewise, in *Commonwealth v. Henley*,[146] Henley's status as an "active, primary member" of a gang in the BDP gang database, in combination with the victim's status as an active member of a rival gang in the database, contributed to a finding of probable cause in an application for a search warrant.[147] Thus, inclusion in BPD's gang database can be used to support a finding of reasonable suspicion or probable cause and subject individuals to heightened police interactions.

Because the BPD's gang "verification" process is riddled with inconsistencies and arbitrary factors, it provides inadequate justification for reasonable suspicion or probable cause. As discussed in Part II, individuals may be assigned points regardless of whether there is a reasonable basis to suspect that they were engaged in criminal activity or that they are affiliated with a gang. Inclusion in the BPD gang database does not support an inference of gang affiliation, and thus the database is not a reasonable factor upon which officers can rely in determining whether probable cause or reasonable suspicion exists that an individual is engaged in criminal activity. And if the database is an unreliable basis for reasonable suspicion or probable cause, it should not be used to justify issuing warrants or conducting stop and frisks.

Furthermore, if the BPD gang database were considered to be an informant for the police, providing tips for potential criminal activity,

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[140] *See* Commonwealth v. Pridgett, 116 N.E.3d 549, 551 (Mass. 2019) (quoting Commonwealth v. Storey, 391 N.E.2d 898, 904–05 (Mass. 1979)); Commonwealth v. Perkins, 82 N.E.3d 1024, 1030 (Mass. 2017).

[141] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[142] *Id.* at 21; *see also* Commonwealth v. Silva, 318 N.E.2d 895, 898 (Mass. 1974).

[143] *Silva*, 318 N.E.2d at 898. In assessing reasonable suspicion, courts must engage in an objective inquiry that considers the totality of the circumstances involved. *Terry*, 392 U.S. at 21.

[144] 178 N.E.3d 356 (Mass. 2021).

[145] *Id.* at 361–62, 369–70; *see also* Brief Amici Curiae for the Committee for Public Counsel Services et al. in Support of the Defendant & Reversal at 35, *Sweeting-Bailey*, 178 N.E.3d 356 (No. SJC-13086).

[146] 171 N.E.3d 1085 (Mass. 2021).

[147] *Id.* at 1110–11.

the information contained therein would not be sufficient to justify police interaction under state law. To support a finding of probable cause, Massachusetts courts require that information from informants pass the *Aguilar-Spinelli*[148] test.[149] This two-pronged test requires that the government show "the underlying circumstances from which (a) the informant gleaned his information . . . , and (b) the law enforcement officials could have concluded the informant was credible or reliable."[150] The database fails both prongs. First, officers can likely verify individuals through conclusory statements. For example, the widely used category, "Contact with Known Gang Associate,"[151] does not require that officers specify how they know that the individuals a person is observed with are also gang members. Likewise, officers need not explain how they know an assault is gang related to award eight points for being the victim of assault. Given that these categories can make up a substantial portion of an individual's point values, this is crucial information that the gang database lacks. Second, the cases in Part II indicate that BPD's gang database likely uses arbitrary and unreliable information to verify gang members. A designation of gang membership in the BPD database is a conclusory label that serves as a better proxy for race or socioeconomic status than for actual gang affiliation, but could still be used as a reasonable basis for probable cause and reasonable suspicion.

Moreover, the gang database fails to satisfy reasonable suspicion standards for an informant's tip. The Supreme Judicial Court has held that in order to establish reasonable suspicion, "both the informant and the basis of the informant's knowledge must be shown to be reliable."[152] Even if a lower bar for reliability satisfies reasonable suspicion, the database fails this standard as well. As the First Circuit observed in *Diaz Ortiz*, BPD's gang database assigned point values to a group of activities that was "shockingly wide-ranging," "applied . . . in a haphazard manner," and "simply not 'of a "kind and quality" that a reasonable factfinder could find sufficient'" to show that an individual is a gang member.[153] Points are assigned for wearing particular clothes, a practice that the state's own gang unit has deemed "obviously insufficient" on its own.[154] Being in the same neighborhood or attending the same school as someone "verified" in the system can lead to a cascade of new individuals being "verified" from innocent interactions with this one alleged

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[148] Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

[149] Commonwealth v. Upton, 476 N.E.2d 548, 556–57 (Mass. 1985).

[150] Commonwealth v. Tapia, 978 N.E.2d 534, 542 (Mass. 2012) (quoting Commonwealth v. Cast, 556 N.E.2d 69, 73 (Mass. 1990)).

[151] 2021 Rule 335, *supra* note 1, § 5.

[152] Commonwealth v. Comita, 803 N.E.2d 700, 704 (Mass. 2004) (citing, inter alia, Commonwealth v. Cheek, 597 N.E.2d 1029, 1030–32 (Mass. 1992)).

[153] Diaz Ortiz v. Garland, 23 F.4th 1, 17–18, 22 (1st Cir. 2022) (en banc) (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021)).

[154] NADEAU, *supra* note 66, at 2.

gang member. Thus, the BPD gang database's designation of an individual as a "verified" gang member is just as unreliable as an untrustworthy police informant. Using information from a database that relies on an arbitrary and conclusory point system constitutes an unconstitutional invasion of the right to privacy.

CONCLUSION: AVENUES FOR REFORM

While beyond the scope of this Note, advocates have noted that gang databases implicate other constitutional concerns, such as the Due Process Clause,[155] the First Amendment,[156] and the Equal Protection Clause.[157] Given the potential violations of individuals' statutory and constitutional rights, the City of Boston should conduct an independent audit of the database to assess its criteria and the reliability of its entries. Until the reliability of the database is established, it should not be used in court proceedings as evidence of actual gang membership.

Considering the privacy concerns associated with inclusion in the database, more transparency is needed. There should be clear criteria for inclusion in the database, mechanisms for notifying individuals of their registration in the database, and avenues of appeal to challenge allegations of gang membership. Given the widespread inaccuracies and constitutional concerns of gang databases nationwide and alternative methods of curbing gang violence, perhaps the most effective reform would be to do away with BPD's gang database altogether.

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[155] *See* Brief of Amici Curiae Constitutional and Immigration Law Professors in Support of Petitioner's Petition for Rehearing and Rehearing En Banc at 3–12, *Diaz Ortiz*, 23 F.4th 1 (No. 19-1620) (arguing that the introduction of BPD gang database evidence in Diaz Ortiz's removal proceedings violated his rights under the Due Process Clause).

[156] *See* State v. Scott, 213 P.3d 71, 74 (Wash. Ct. App. 2009) (citing Dawson v. Delaware, 503 U.S. 159, 166–67 (1992)) (noting that membership in a gang is not a crime in itself, as gang affiliation "is protected by our First Amendment right of association"). *See generally* Law, *supra* note 127 (noting concerns that BPD casts too wide a net in classifying individuals as gang members, and that BPD has identified 101 gangs).

[157] *Massachusetts AG Investigating Boston Police Gang Unit, Database amid Racial Bias Claims*, WCVB (May 15, 2023, 10:16 PM), https://www.wcvb.com/article/massachusetts-ag-investigation-boston-police-gang-unit/43897683 [https://perma.cc/SYR6-LAN9] (describing how the Civil Rights Division of the Massachusetts Attorney General's Office opened an investigation probing whether the BPD gang unit engages in a pattern or practice of discriminatory policing).