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How Do I Divorce My Gang?: Modifying the Defense of Withdrawal for a Gang-Related Conspiracy

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HOW DO I DIVORCE MY GANG?: MODIFYING THE DEFENSE OF WITHDRAWAL FOR A GANG-RELATED CONSPIRACY

I. INTRODUCTION

“As for all Aryan Brotherhood defectors, you are on a hit list and you’re going to die one day. You might have divorced the Brand[,] but the Brand hasn’t divorced you.”¹ Casper Crowell, a former Aryan Brotherhood member, echoes a popular creed promised by many gangs: “blood in, blood out.”² In translation, a recruit’s gang initiation may begin with instructions to be physically beaten or commit a violent crime.³ Once a bona fide gang member, the only way out is blood.⁴ As punishment for wanting out, a defector may be severely beaten or murdered by other loyal gang members.⁵ With no available exit strategy to leave the gang, or discontinue the criminal liability incurred within the gang conspiracy, members are forced to remain in a perpetuating cycle of gang violence.⁶

Although there are standards and guidelines established for the average criminal to properly abandon a conspiracy using the withdrawal defense, a criminal with gang affiliation does not have the same clear

¹ *Prison Quotes*, PRISON OFFENDERS, http://www.prisonoffenders.com/prison_quotes.html [<http://perma.cc/3TYD-GRM2>]. Gang membership is a lifetime commitment making it analogous to a marriage. See *infra* Part II (explaining the complexities of gang membership). However, the existence of an exit strategy is the critical distinction between a gang and a marriage. In the event of a marital demise, a simple trip to the courthouse to file for divorce publicizes the intent for a legal separation. On the contrary, gangs, by design, provide virtually no escape. Moreover, throughout this Note, the term “defector” is utilized to describe an exiting gang member and the term “gang-related conspiracies” is used to describe those conspiracies that are brought to fruition collectively by a gang where the gang and the conspiracy are essentially one item, not two.

² See Young, *Privileged and in a Deadly Gang*, DR. PHIL (Aug. 19, 2014), <http://drphil.com/shows/show/2154/> [<http://perma.cc/WFH4-79QS>] (describing the term “blood in, blood out” as a slang phrase referring to entry and exit into a gang). See also *Aros v. Ryan*, No. CV 11-2565-PHX-SRB (LOA), 2013 WL 2317647, at *3 (D. Ariz. May 28, 2013) (discussing “blood in, blood out” in terms of a prison gang initiation). A prospective member must violently stab or kill another person to be admitted and “bleed out” to leave the gang. *Id.*

³ See KAREN LATCHANA KENNEY, *THE HIDDEN STORY OF GANGS AND CRIME* 16 (2014) (describing the brutality of gang initiations).

⁴ See *id.* at 12 (explaining the inability of gang members to exit the gang because of the threat of violence and death).

⁵ See *id.* at 12-16 (showing the brutal, if not deadly, entry and exit to a gang). According to Merriam-Webster, the definition of “defector” is “a person who abandons a cause or organization usually without right.” *Defector*, MERRIAM-WEBSTER DICTIONARY (2015), <http://www.merriam-webster.com/thesaurus/defector> [<http://perma.cc/4UXA-YCQH>].

⁶ See *infra* Part III.A (discussing the endless cycle of criminal liability, which for members in a gang-related conspiracy, is virtually interminable because the current standard does not provide a legal exit).

guidelines.⁷ In the federal judicial system, the standard for successful withdrawal from a gang-related conspiracy is unclear and practically non-existent.⁸ Withdrawing from a gang conspiracy is especially challenging because gang culture is imbedded into the member's daily life.⁹ A true withdrawal from a conspiracy would force a member to disassociate from the gang, which could be a death sentence in itself.¹⁰ Gang life and a member's personal life overlap each other—the two are often inseparable.¹¹ Consequently, the inseparability creates additional problems when determining what actions the gang member must complete and prove to satisfy a legal withdrawal.¹² Under the current standard, a defecting member terminates the criminal liability from a continuing conspiracy by cooperating with law enforcement or informing all the gang members of the intent to leave, which puts the member in even greater danger.¹³ Thus, the defense of withdrawal to a gang-related conspiracy is rendered useless because the standard is unclear and the requirements are nearly impossible to achieve.¹⁴

Examining the unusable withdrawal defense from a gang-related conspiracy, this Note modifies the defense to facilitate a legal exit and therefore, censure the cycle of gang violence.¹⁵ First, Part II establishes a foundation on gang culture, conspiracy theory, and the defense of withdrawal.¹⁶ Next, Part III analyzes the current shortcomings of the

⁷ See *infra* Part II.E (showcasing the unusable defense of withdrawal for defecting gang members); Part III.A (examining the reasons why the defense of withdrawal is unusable for gang members exiting a gang-related conspiracy).

⁸ See *infra* Part III (illustrating the issues with gang members utilizing the defense of withdrawal from conspiracy).

⁹ See *infra* Part II.A (noting the depths of gang culture and the impact it has on the surrounding community); Part III.A (analyzing the specific barriers that prevent gang members from withdrawing under the current standards).

¹⁰ See *infra* Part III.A (displaying the difficulties a gang member faces when utilizing the defense of withdrawal from a conspiracy).

¹¹ See *infra* Part II.A (detailing the violent or deadly consequences that act like strong deterrents, essentially keeping members confined within the gang).

¹² See *infra* Part III.A (considering the difficulties a gang member faces withdrawing from a gang-related conspiracy).

¹³ See *infra* Part II.D (reviewing the requirements for the defense of withdrawal, including the obligation to thwart the conspiracy or inform law enforcement of the ongoing conspiracy to stop it).

¹⁴ See *infra* Part II.E (showcasing the unusable defense of withdrawal for defecting gang members); Part III.A (examining the unusable, essentially dead, defense of withdrawal within a gang-related conspiracy).

¹⁵ See *infra* Part III (describing that without a refinement of the current standard, members will be continually linked to gang-related conspiracies because the conventional exit, the defense of withdrawal, is impractical and useless); Part IV (introducing the proposed statute modifying the current unusable withdrawal defense to a gang-related conspiracy).

¹⁶ See *infra* Part II (discussing individually gang culture, conspiracy theory, and the

withdrawal defense as pertaining to defecting gang members and gang-related conspiracies.¹⁷ Then, Part IV introduces the proposed statute modifying the current unusable withdrawal defense to a gang-related conspiracy and responds to anticipated counterarguments.¹⁸ Finally, Part V concludes that the proposed solution will help combat gang violence.¹⁹

II. BACKGROUND

Writing for the majority, Supreme Court Justice Ginsburg stated that, “The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder.”²⁰ Gang membership is a lifestyle of constant war where members use guns as a tool, drugs as a source of revenue, and violence as a means for power.²¹ This Part explores the complexities of gang culture, conspiracy theory, and the defense of withdrawal respectively.²² First, Part II.A explores gang life and culture.²³ Second, Part II.B studies the gang

defense of withdrawal from conspiracy).

¹⁷ See *infra* Part III (analyzing gang culture in conjunction with conspiracy theory and the defense of withdrawal from conspiracy).

¹⁸ See *infra* Part IV (introducing and defending this Note’s contribution, which is a proposed federal statute).

¹⁹ See *infra* Part III (providing a solution to the proposed problem as a statute only applied to gang-related conspiracies and the withdrawal defense).

²⁰ *Johnson v. California*, 543 U.S. 499, 532 (2005).

²¹ See KENNEY, *supra* note 3, at 25 (illustrating the dangerous tools that gangs use and shows that the gang lifestyle is a constant struggle with no end). Gangs are acquiring high-powered, military style weapons and ammunition. See Federal Bureau of Investigation, *2011 National Gang Threat Assessment – Emerging Trends*, NAT’L GANG INTELLIGENCE CTR. 10 (2011), <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends>

[<http://perma.cc/5L8J-EPGB>] (showing that gangs use military-grade weapons that inflict maximum damages). Because of the deadly nature of these firearms, these weapons pose a significant risk to law enforcement, gang members, and civilians. *Id.* “Typically firearms are acquired through illegal purchases; straw purchases via surrogates or middle-men; and thefts from individuals, vehicles, residences, and commercial establishments. Gang members also target military and law enforcement officials, facilities, and vehicles to obtain weapons, ammunition, body armor, police gear, badges, uniforms, and official identification.” *Id.* “Monster” of the Crips said:

I lived for the power surge of playing God, having the power of life and death in my hands. Nothing I knew could compare with riding in a car with three other homeboys with guns, knowing that they were as deadly and courageous as I was. To me, at that time in my life, this was power.

Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 488 (1994).

²² See *infra* Part II (describing gangs, conspiracy theory, and the defense of withdrawal separately so that they may be analyzed together in Part III).

²³ See *infra* Part II.A (displaying modern gang culture and consequences of gang violence).

problem and the negative effects of gangs.²⁴ Next, Part II.C examines federal conspiracy theory.²⁵ Then, Part II.D illustrates the defense of withdrawal to a conspiracy.²⁶ Finally, Part II.E reviews the withdrawal defense as a broken, unusable defense for gang members.²⁷

A. Nuances of Gang Culture & Statistics

Federal prosecutors, law enforcement agencies, and Congress have not agreed upon a conclusive, universal definition of a gang, even with the assistance of academia.²⁸ Although many unsuccessful attempts have been made to create such a definition, many jurisdictions and agencies differ on the precise wording and description.²⁹ In 2013, the U.S. House of Representatives attempted, to no avail, to codify the term “criminal street gang,” but the bill never progressed to the Senate.³⁰ However, five

²⁴ See *infra* Part II.B (reviewing the problem, caused by gangs, that impacts nearly everyone in the United States).

²⁵ See *infra* Part II.C (examining conspiracy theory rooted in common law and statutes).

²⁶ See *infra* Part II.D (discovering the defense of withdrawal to conspiracy).

²⁷ See *infra* Part II.E (exploring the reasons causing the defense to be unusable for gang-related conspiracies).

²⁸ See Michael Cannell, Comment, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027, 1031 (2014) (“[T]here is no general agreement as to what precisely constitutes a gang.”); G. David Curry & Scott H. Decker, *What’s in a Name?: A Gang by Any Other Name Isn’t Quite the Same*, 31 VAL. U. L. REV. 501, 501 (1997) (“There is considerable debate in contemporary society over the definition of a gang.”); *Frequently Asked Questions About Gangs*, NAT’L GANG CTR., <http://www.nationalgangcenter.gov/About/FAQ#q1> [<http://perma.cc/VAU5-MG5T>] (noting that a uniform definition of “gang” does not exist because various jurisdictions and agencies at all levels have differing definitions for the word “gang”).

²⁹ See G. DAVID CURRY ET AL., *CONFRONTING GANGS: CRIME AND COMMUNITY 2* (Oxford Univ. Press 3d ed. 2014) (showing the United States’ effort to create a cohesive gang definition). However, in the United States, the gang definition became so “muddled” that the U.S. Department of Justice (“DOJ”) assembled a series of meetings attempting to define a gang in the 1990s. *Id.* The DOJ invited “police, researchers, policy makers, community activists,” and scholars. *Id.* The meetings were unsuccessful at producing a cohesive gang definition. *Id.* Additionally, Black’s Law Dictionary defines “gang” as “[a] group of persons who go about together or act in concert, esp[ecially] for antisocial or criminal purposes.” *Gang*, BLACK’S LAW DICTIONARY (3d pocket ed. 2006). Furthermore, the Federal Bureau of Investigation (“FBI”) defined a gang as “a group of recurrently associating individuals or close friends with identifiable leadership and internal organization, identifying with or claiming control over territory in a community, and engaging either individually or collectively in violent or other forms of illegal behavior.” *Gang Statistics*, STATISTIC BRAIN (Jan. 16, 2015), <http://www.statisticbrain.com/gang-statistics/> [<http://perma.cc/QE3V-CMA2>].

³⁰ See H.R. 1860, 113th Cong. (1st Sess. 2013) (proposing the Criminal Code Modernization and Simplifications Act of 2013). The bill classified a “criminal street gang” as:

[A]n ongoing group, club, organization, or association of 5 or more persons—

core concepts are consistently conveyed throughout various academic and law enforcement gang definitions: (1) the group must be comprised of three or more members; (2) the members share a unified identity through a name or symbol; (3) the members consider themselves a gang and are acknowledged by others as a gang; (4) the group has a stabilized, organized structure; and (5) the group actively participates in criminal activity.³¹

Gang member demographics are analyzed by age, gender, and race.³² First, the majority of members are over the age of eighteen; however, approximately thirty-five percent of members are minors.³³ Second, gang

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- (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);
 - (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and
 - (C) the activities of which affect interstate or foreign commerce.

Id.

³¹ See CURRY ET AL., *supra* note 29, at 3-5 (stating that a common gang definition has six components: group, symbols, communication, permanence, street orientation, and crime involvement); KENNEY, *supra* note 3, at 4 (stating that gangs are “large organized groups” who join together for a common, usually criminal, purpose); *Frequently Asked Questions About Gangs*, *supra* note 28 (listing five core common elements of most gang definitions); *supra* notes 29, 30 (illustrating a few of the many gang definitions). Gangs typically have a signature color, symbol, name, handshake, or graffiti tag to identify themselves to each other and outsiders. KENNEY, *supra* note 3, at 4. For example, the Bloods, wearing red, and the Crips, wearing blue, are infamous rival gangs from Los Angeles, California, dating back to the 1960s that are known for their signature colors. *Id.* at 9. Tattoos also show commitment with letters, numbers, symbols, or pictures that are commonly placed on the “face, neck, chest, and hands.” *Id.* at 20-21. For example, the East Side Locos in Idaho tattoo the letters ESL and the Latin Kings tattoo a five-point crown. *Id.* at 21. In addition, brands, logos, and certain types of clothing also symbolize gang membership. *Id.* A baseball-style hat maker sold a new style of New York Yankees logo in 2007 that seemed to be geared toward gang affiliation because some had crowns for the Latin Kings, some were red for the Bloods, and others were blue for the Crips. *Id.* at 20. Community members protested, thinking the hats would create more strife and violence, thus the hats were removed from stores later that year. KENNEY, *supra* note 3, at 20. In addition to the colors and clothing, hand symbols are also used to communicate gang membership and threats. *Id.* at 21.

³² See generally *infra* Part II.A (exploring the age, gender, and racial demographics of gang members). A study conducted in Chicago from 1990 to 1994 revealed that African American males were nearly fifteen times more likely and Hispanic males were nearly fourteen percent more likely to be victims of a gang-related homicide. See Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 112-13 (2000) (illustrating the effects of prevalent gang violence).

³³ See KENNEY, *supra* note 3, at 6 (discussing that most gang members, two in five, have reached the age of majority or are legal adults over the age of eighteen). An increased number of adult members are likely to be found in larger cities with a history of gang problems. See *National Youth Gang Survey Analysis: Demographics*, NAT'L GANG CTR., <http://www.nationalgangcenter.gov/Survey-Analysis/Demographics> [<http://perma.cc/>

members are generally male, but females have more recently begun to play an active role and currently approximately 60,000 to 80,000 gang members are female.³⁴ Third, gang members can be further classified by race as approximately forty-six percent of members are Hispanic, thirty-five percent are African American, eleven percent are Caucasian, and seven percent classify as other.³⁵ In conclusion, the majority of gang members are either African American or Hispanic adult males.³⁶

Gangs prey upon impoverished communities with underfunded school systems and unstable family structures.³⁷ Vulnerable teens find

YS34-MXTC] (analyzing specifically the demographics of the National Youth Gang Survey). On the other hand, an increased number of juvenile members are likely to be found in rural areas. *Id.* Additionally, ninety percent of teenage boys in juvenile correctional facilities have gang affiliations. *See Gang Statistics, supra* note 29 (relaying the connection between juvenile males, correctional facilities, and gang affiliation).

³⁴ *See* KENNEY, *supra* note 3, at 22 (noting that the female glass ceiling seems to be cracking with regard to gang participation). Law enforcement officers often underestimate female gang members. *Id.* Consequently, female members tend to “get away with more violence.” *Id.* Female gang members are drawn to gangs for the same reasons as male members or for love because “their boyfriends [are] gang member[s].” *Id.* Women play a variety of roles within a gang because they may hide drugs or guns, deal in drugs, “lure men from rival gangs into traps,” or spy on rival gangs. *Id.* at 23.

³⁵ *National Youth Gang Survey Analysis: Demographics, supra* note 33 (analyzing racial demographics of gangs). In the United States, the Latin Kings are known as the largest Hispanic gang with 18,000 members spanning across thirty-four states. *See* KENNEY, *supra* note 3, at 9 (discussing the infamous Hispanic gang, the Latin Kings). The Black Gangster Disciples is an African American gang maintaining one of the most extensive and violent enterprises in the country, specializing in drug distribution. *See* James C. Howell, *The Impact of Gangs on Communities*, NAT’L YOUTH GANG CTR. (NYGC) BULL. 5 (2006) (discussing the Black Gangster Disciples); *see also* KENNEY, *supra* note 3, at 9 (examining the infamous African American gang, the Black Gangster Disciples).

³⁶ *See supra* notes 33–35 and accompanying text (discussing age, gender, and racial demographics). “In criminal courts, the statement ‘the defendant is in a gang’ often reduces or eliminates the possibility of release on reasonable bail regardless of the merits of the case, or the severity of charges against a defendant.” *See* K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 621 (2011) (discussing the challenges that arise from accusations of being a gang member at pretrial bail hearings).

³⁷ *See* KENNEY, *supra* note 3, at 10–11 (implying that gangs fill a communal desire for new recruits, something that is lacking in their personal life or community, especially in communities with elevated high school dropout rates or little to no advanced educational opportunities). Also, many young people are determined to escape second-generation poverty. *See* Boga, *supra* note 21, at 489 (examining the neighborhoods that gangs tend to infiltrate). Because of a lack of legitimate opportunities, many teens participate in lucrative drug distribution or criminal activity. *Id.* Youth join gangs because of the “lack of legitimate opportunities for self-fulfillment and ‘life enhancement’ in low-income urban areas.” *Id.* at 487. Furthermore, sociologists attempt to explain gang membership with various theories such as criminal propensity theory, social bond theory, general strain theory, social learning theory, gang membership trait theory, integrated gang membership theories, and the like. *See* CURRY ET AL., *supra* note 29, at 34–37 (analyzing sociological theories to explain gang

gang membership hard to resist because it fills an emotional void by promising a collective sense of belonging, familial-like support, and power that many teens crave.³⁸ Yet, there are still other motives for joining a gang, aside from the need for community.³⁹ Teens see their friends joining gangs and succumb to peer pressure to be popular.⁴⁰ Further, gang membership is necessary to survive in high-crime neighborhoods because teens may be physically assaulted or killed without gang protection.⁴¹

membership trends).

³⁸ See KENNEY, *supra* note 3, at 13–15 (illustrating the void that gangs fill in the lives of their members); Boga, *supra* note 21, at 487 (discussing how gangs fulfill a void that recruits are searching for). Prospective members are lured with promises of community domination, power, and money. See KENNEY, *supra* note 3, at 13–14 (noting the motivating factors for gang membership and the alluring qualities of gangs). “Gangs are, and always have been, groups of youths formed for many of the same motives that youths have always organized themselves – friendship and social identity as well as the pursuit of delinquent or criminal activities.” Boga, *supra* note 21, at 498. The social and emotional appeal of gangs are synonymous to collegiate fraternities because both provide “peer approval,” “companionship,” identifiable clothing and signals, and considerable money spent at parties. *Id.* at 487–88. These purported benefits help teens justify gang membership. *Id.* at 489.

³⁹ See generally *infra* Part II.A (identifying peer pressure and protection-based motivation for joining gangs joining gangs).

⁴⁰ See KENNEY, *supra* note 3, at 15 (noting that peer pressure may force some juveniles into gang membership). A gang investigator said, “In my opinion, gangs are a form of domestic terrorism, completely changing the communities and the people in it. Their presence breeds fear into the community, brings down property values, and destroys lives.” Vincent Goggins, *Focusing on Gang-Related Crimes*, INVESTIGATING GANG CRIMES LAW ENFORCEMENT OFFICIALS ON EXAMINING GANG CRIME TRENDS AND DEVELOPING EFFECTIVE ENFORCEMENT STRATEGIES 2 (2012).

⁴¹ See KENNEY, *supra* note 3, at 14 (noting gang membership “can be a way for teens to survive the tough streets where they live”). Patrick Sabaitis is a former member of the Almighty Latin King Nation, who formally recruited children for his gang, and is currently reformed into a community activist in Hammond, Indiana, boldly says that:

We need to quit looking at gangs as just some neighborhood nuisance. They are a terrorist organization looking to make your child a domestic terrorist.

Gangs will teach your children how to use guns, clean them, take them apart and reassemble them. With them, your child will even learn how to make bombs; invade and rob homes; how to injure and/or kill someone using different methods; and make, smuggle and sell drugs.

When caught by law enforcement for the deeds, your child will know exactly what to say and what not to say. They are taught how to die for their mission. Their mission (entails) killing, stealing and destroying anyone who gets in their way, it does not matter who it is.

Patrick Sabaitis, *Former Member: Gangs Are Terrorist Organizations*, NW. IND. TIMES (Feb. 2, 2014), http://www.nwitimes.com/news/former-member-gangs-are-terrorist-organizations/article_ba27633b-66b6-5f56-987b-551ade816740.html [http://perma.cc/M3SC-UFM3].

From initiation to exit, the gang controls the member.⁴² To become a full-fledged member and earn respect, a recruit must first prove his loyalty and worthiness through initiation.⁴³ Each gang has a specified initiation; however, all initiations are extremely violent, brutal, and can be fatal in some instances.⁴⁴ One form is to be “rolled or jumped in,” during which the recruit fights other gang members for a period of time to prove that he can withstand a beating.⁴⁵ Similarly, when being “lined in,” a prospective member ventures down the middle of two lines of members while being beaten.⁴⁶ “Jacked in” requires recruits to commit a crime, such as burglarizing a house or stealing a car.⁴⁷ A more extreme initiation is “blood in,” meaning the recruit is severely beaten or required to commit murder.⁴⁸

Once the recruit survives initiation, he is considered a member and is more likely to be an active participant in criminal activity, abuse drugs

⁴² See generally *infra* Part II.A (explicitly detailing the control the gang possesses over the member from initiation until attempted exit).

⁴³ See CURRY ET AL., *supra* note 29, at 68–69 (showcasing a variety of gang member initiation testimonials from physical violence to crimes); KENNEY, *supra* note 3, at 13 (noting that some gangs document violent initiations with videos). In Wisconsin, a video originally posted on Facebook, showing a sixteen-year-old boy being beaten by other members for initiation, went viral. KENNEY, *supra* note 3, at 13; see Associated Press, *Wis. Juvenile Face Charges in Gang Initiation Beating*, WMTV (June 4, 2013), <http://www.nbc15.com/home/headlines/Juveniles-face-charges-in-gang-initiation-beating-210082581.html> [<http://perma.cc/9CK3-V4TP>] (discussing the violent video that went viral).

⁴⁴ See generally *infra* Part II.A (illustrating the brutal and dangerous methods of gang initiation).

⁴⁵ See KENNEY, *supra* note 3, at 16 (noting that some initiations require that the recruit must be physically assaulted). Michael, known as “Puppet,” joined Chicago’s Two-Six gang, one of the largest, most infamous gangs, when he was thirteen years old. *Id.* at 12. Michael decided to join a gang because his father was absent, his mother worked a lot, and his friends were joining gangs. *Id.* For his initiation, other gang members brutally beat him up and when they were finished, they welcomed him into the gang by giving him hugs. *Id.* Michael said that, “You got to take a beat down by your homies just to show them you’re tough. And either you’re in or you’re not. That’s it.” *Id.*

⁴⁶ *Id.* at 16 (discussing the brutality of gang initiation). In rare cases, a prospective member may be “courted in” and not required to endure a violent initiation because the gang wants the recruit’s talents, skills, or connections. KENNEY, *supra* note 3, at 17. Female recruits are often “sexed in” which requires them to have sex with several male members. *Id.* at 16.

⁴⁷ See *id.* (revealing that some recruits may be required to complete criminal acts as a form of initiation).

⁴⁸ See *id.* (stating that a form of beating may depend upon the amount of blood shed by the recruit). Depree Mims, a fourteen-year-old boy from Indiana, was never involved with gang activity. *Id.* In March 2013, Depree got up from his living room couch to get a blanket. *Id.* at 17. In front of his siblings, Depree was shot in the head by a bullet that passed through a window. KENNEY, *supra* note 3, at 17. The shooting was executed as a gang initiation. *Id.* A rival gang recruit was attempting to kill another boy in the neighborhood that was part of another gang but instead, mistook Depree for that boy. *Id.*

and alcohol, and has a greater risk of imprisonment or death.⁴⁹ The gang will also restrict the member's behavior by discouraging or limiting social interactions with non-members, formal education, or gainful employment.⁵⁰ Additionally, the gang controls the member's exit from the gang.⁵¹ Gang members are trapped in the gang by a rational, realistic fear that they will be beaten or killed before they are allowed to leave.⁵²

⁴⁹ See KENNEY, *supra* note 3, at 30 (finding that gang members are more likely to partake in criminal activity); Howell, *supra* note 35, at 6 (noting that gang members are significantly more likely to engage in criminal activity than non-gang members).

⁵⁰ See Howell, *supra* note 35, at 6 (exploring how a gang controls the member's social and personal interactions). Most gangs have a "book of knowledge." Goggins, *supra* note 40, at 1. The book educates members, especially new recruits, similar to a policy and procedure book for a company. *Id.* This book contains the "gang's history, purpose, codes, signs/symbols, and other identifiers, rules of the gang, rank structure, and may include prayers, pledges to their flag (which is typically the bandana they carry inside their pocket), and so on." *Id.* For instance, the number one rule in the rulebook states that, "[n]o King shall stand idle when another King is in need of assistance." See *Prison Quotes*, *supra* note 1 (displaying convicted criminals' quotes regarding gang affiliation and gang culture).

⁵¹ See CURRY ET AL., *supra* note 29, at 77 (finding that the threat of severe violence or death prevents members from exiting the gang). In a study, eighty-four former juvenile inmates were questioned about their motives to leave the gang; two-thirds left because of the push factors of the gang. *Id.* at 75. "[G]ang members did not leave the gang because of social intervention, jobs, babies, or girlfriends; most left because of the very factors that made the gang enticing in the first place—action, parties, fights, violence." *Id.*

⁵² See David S. Rutkowski, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 161 (1996) (discussing the barriers preventing gang members from exiting the gang). Rutkowski further explains that, "At least in theory, a street gang member can escape the reaches of the gang by moving to another location." *Id.* However, "This is not a realistic possibility for most street gang members . . . because the poverty that necessarily subjects them to the gang environment often precludes them from the means to change residence." *Id.* In addition to the violent threat of exiting a gang, informing the police of gang-related activity also has deadly consequences. Katie M. McDonough, *Combating Gang-perpetrated Witness Intimidation with Forfeiture by Wrongdoing*, 43 SETON HALL L. REV. 1283, 1283 (2013). McDonough further explains that:

Gangs are an extreme threat to the communities in which they operate and to the criminal justice system. Central to gang culture is strong loyalty among gang members coupled with "no snitching" policies enforced through intimidation and retaliation. Witnesses to crime, gang members who have knowledge of misdeeds, and even entire neighborhoods are fearful about cooperating with law enforcement in gang-controlled communities. The risk run by cooperating with law enforcement is real: many witnesses are attacked or killed, and residents in gang-controlled communities who report crimes to law enforcement face the prospect of retaliatory crimes against their person, property, and family members. Criminal gangs benefit from enforcing "no snitching" policies with intimidation and retribution. Successful witness intimidation or murder renders a witness unavailable, which means that the witness's information is likely to be inadmissible in court.

Studies in Los Angeles and St. Louis report that the only way to leave a gang is to be nearly beaten to death, shoot a relative, often times one's mother, or commit a crime against a rival gang.⁵³ The astounding facts about gang life and accompanying statistics lead to a larger issue—the growing gang problem within the United States.⁵⁴

B. Magnitude of the Gang Problem

Contrary to common knowledge, the United States has a prevalent, expensive, violent, and deadly gang problem.⁵⁵ Gangs are involved in a

Id.

⁵³ See CURRY ET AL., *supra* note 29, at 77 (noting that after the member completes the brutal exit routine, often brutal, and survives, they will be let go). After the exiting member successfully performs whatever act the gang mandates before permitting an exit, the member's debts are considered paid, and he or she is free to go. *Id.*; see also KENNEY, *supra* note 3, at 12 (showcasing the brutal "blood in, blood out" theory of gang membership).

⁵⁴ See *infra* Part II.B (detailing the ever-expanding gang problem across America); see also 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 9 ("Gangs are expanding, evolving and posing an increasing threat to US communities nationwide."). Tom Branson, a twenty-three-year veteran of the Gary Police Department, says that, "In the gang world, you can be assured of three outcomes: incarceration, serious bodily injury or death. Tom Branson, *Gang Members on Path of "Assumed Destiny" – Dying by Age 20*, NW. IND. TIMES (Feb. 5, 2014), http://www.nwitimes.com/news/gang-members-on-path-of-assumed-destiny-dying-by-age/article_a9110339-5381-56dc-af4c-8d1224a162a9.html [<http://perma.cc/B5RL-TK47>]. "I have yet to see a successful gang member who stayed in the game." *Id.* He further elaborates that gang members embrace their "assumed destiny" that they will not live to be nineteen or twenty years old so they "ride as hard as they can, while they can." *Id.* Statistics show that this "destiny" is a realistic outcome as "the average life expectancy for a gang member is 20 years and 5 months." *Id.*

⁵⁵ See Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATT'Y'S BULL. 1, 2 (May 2006) (USA) (describing the illusory media frenzy surrounding gangs). Mr. Lyddane writes:

The news media and entertainment industry have sensationalized gang crimes and the gang lifestyle to the point that it has become part of mainstream America. This has contributed to the emergence, migration, and growth of a popular "gangsta" subculture. Music, magazines, movies, and the Internet serve as training vehicles on how to be a "gangsta." Increasingly, young teens are at great risk of being seduced by, and recruited into, this way of life. The promises of respect, money, expensive clothes, cars, and other inducements, put youths from all backgrounds, neighborhoods, and income levels at risk.

Id. In California alone, gang violence costs taxpayers over \$2 billion per year. Jeff Tyler, *Combating Gangs at High Costs*, MARKETPLACE (Feb. 7, 2007), <http://www.marketplace.org/topics/life/combating-gangs-high-costs> [<http://perma.cc/NE4S-LSTJ>]. In addition to the pecuniary cost, gangs are attributed to forty-eight percent of violent crime in most jurisdictions. See 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 9 (illustrating that on average gangs are responsible for forty-eight percent of crime, but in some jurisdictions as much as ninety percent); see, e.g., KENNEY, *supra* note 3, at 25 (noting specifically in the cities of Chicago and Los Angeles nearly half of all homicides are attributed to gang violence).

variety of criminal initiatives from minor to violent crimes, such as automobile theft, retail theft, drug distribution, unlawful gun possession, assault, burglary, and murder.⁵⁶ Gang members perpetrate these crimes “to obtain quick money, increase their rank or stature within the gang, and further” the gang’s criminal agenda.⁵⁷ However, gangs are evolving and becoming more violent, thus making them a significant threat to communities nationwide.⁵⁸ Additionally, gangs are expanding their criminal enterprises beyond drug and weapon distribution by focusing on less labor-intensive and risky crimes.⁵⁹ For example, alien smuggling, human trafficking, prostitution, and other various white-collar crimes are becoming increasingly common because they have lucrative qualities without a high risk of detection or severe criminal consequences associated with other crimes.⁶⁰

⁵⁶ See KENNEY, *supra* note 3, at 19 (stating that gangs do not discriminate against crimes and perform a variety of criminal acts). For example, vandalism is a common, minor crime, done by members to tag buildings, bridges, and signs with spray paint as a sign of territory. *Id.* On the other hand, murder, drug distribution, and human trafficking are considered more dangerous crimes. *Id.*

⁵⁷ See Goggins, *supra* note 40, at 1 (noting the reasons gang members commit crimes). “[G]angs represent a considerable problem, particularly in light of the violence they commit and its impact on communities.” Curry & Decker, *supra* note 28, at 501. Describing the gang’s criminal activity and orientation, a gang member stated, “A gang is something you follow behind the leader. Do different things just like a family. Hang out together, rob, steal cars, fight other gangs like for competition.” *Id.* at 506.

⁵⁸ See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 9 (discussing how gang crime is becoming more advanced and diversified). John Hagedorn, a gang ethnographer, commented on the ignorance of the current gang problem:

To deny that gangs today are predominantly a minority problem inevitably leads to a failure to analyze the impact of our changing economy on various classes within minority communities. The significance of the formation of a minority urban underclass and the simultaneous emergence and entrenchment of gangs is completely overlooked.

Rosenthal, *supra* note 32, at 114.

⁵⁹ See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 9 (showing that due to increased organization and methodology, gangs are becoming less detectable and more dangerous). Of all the countries, including China with the world’s largest population, the United States houses the largest number of prisoners at 2.2 million costing \$60 million per year. See KENNEY, *supra* note 3, at 40 (examining the prison population of the United States in comparison to other countries). A majority of the prisoners in the United States have gang affiliations. *Id.* Through the help of family members, many gang members continue gang-related criminal activity while incarcerated in prison. See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 10 (discussing how gang-related activities continue while the member is incarcerated).

⁶⁰ See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 9 (stating that motives for gang-related criminal activity are evolving to become more efficient and less detectable). For example, white-collar crime such as counterfeiting, identity theft, and mortgage fraud are becoming more common. *Id.* Additionally, gangs have become more

Additionally, gang-related homicides increase in cities with a notable history of “persistent gang problems and a greater number of documented gang members.”⁶¹ In jurisdictions with a significant gang presence, gang activity causes roughly forty-eight percent of violent crime.⁶² For instance, Los Angeles and Chicago reported a combined 1000 homicides in 2004 and more than half were attributed to gang violence.⁶³ In the remaining 171 major metropolitan areas nationwide, about one-fourth of the reported homicides were classified as gang-related.⁶⁴

Gang violence terrorizes communities, wastes taxpayer money, and disrupts school systems.⁶⁵ Communities are forced to live in fear of gang

organized and sophisticated, thereby creating additional obstacles for law enforcement combatting gang activity and violence. *Id.* at 18; *see* Goggins, *supra* note 40, at 1 (explaining that social media enables gangs to be “stronger and more complex,” which creates increased challenges for law enforcement).

⁶¹ *See* Howell, *supra* note 35, at 3 (discussing the relationship between gang-related homicides and gang presence in a metropolitan area); Arlene Egle, Jr. et al., *Highlights of the 2012 National Youth Gang Survey*, U.S. DEP’T OF JUST. 3, <http://www.ojjdp.gov/pubs/248025.pdf> [<http://perma.cc/GCV8-YPCQ>] (“Estimates of the number of gangs, gang members, and gang-related homicides all increased in 2012 as compared with 2011 and with the previous 5-year average.”).

⁶² *See* 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 9 (discussing the staggering amount of crime that is attributed to gang violence and that gang-related violence accounts for ninety percent of the crime in some jurisdictions). “Homicides by gang members are more likely to take place in public settings (particularly on the street), involve strangers and multiple participants, and involve automobiles (drive-by shootings). Gang homicides are three times more likely than non-gang homicides to involve fear of retaliation.” Rosenthal, *supra* note 32, at 109. However, blatant, public illegal activity “signals to the community that the police must be either corrupt or inept” and only builds the gang’s confidence to silence the law abiding community. *Id.* at 11. For instance, “when witnesses are too scared to testify and officers seem helpless to stop drug trafficking, the police and community alike become hopeless about their ability to restore community stability.” *Id.*

⁶³ *See* Howell, *supra* note 35, at 3 (showing the homicide rates attributed to gang violence in the cities with the most gang presence). “[G]ang members have homicide victimization rates that are 100 times greater than the general public . . .” CURRY ET AL., *supra* note 29, at 79. In a gang study in Chicago, Milwaukee, and St. Louis, ten to thirty percent of the gang members interviewed for the study were deceased within just years of the study’s completion. *Id.*

⁶⁴ *See* Howell, *supra* note 35, at 3 (noting that cities with less of a gang presence still suffer from gang violence). It is not disputed that the rate of “gang violence has escalated dramatically in recent decades.” *See* Rosenthal, *supra* note 32, at 108 (discussing the increase in nationwide gang violence).

⁶⁵ *See generally infra* Part II.B (discussing the monetary and deadly effects gangs have upon society). Because it allows for a quick attack and retreat, drive-by shootings tend to be the method of choice for gang members to their intended target, typically a rival gang member. *See* Rosenthal, *supra* note 32, at 109 (reviewing the brutal affects of gang drive-by shootings). Innocent bystanders are often injured or killed by botched drive-by shootings; as unskilled marksmen, gang members cannot accurately shoot from a moving car. *Id.* Most often, innocent drive-by victims caught in the crossfire are young children or elderly persons. *Id.*

violence and this “domestic terrorism” spreads “fear into the community, brings down property values, and destroys lives.”⁶⁶ Gang violence also causes a substantial financial burden on taxpayers.⁶⁷ Each year, it is estimated that the financial consequences of crime cost Americans approximately \$655 billion, and gangs are responsible for a significant portion of this billion-dollar figure.⁶⁸ In addition, gang activity negatively influences community schools.⁶⁹ Gang presence within a school district provides students with greater access to guns and drugs and doubles the likelihood of violence, disruptions, and fear.⁷⁰

Several factors have contributed to the rise in gang violence, including aggressive juvenile recruitment, alliances and wars between gangs, release of imprisoned gang members, and technological advances.⁷¹

In June 2013, eleven year-old Taylani Mazyck was walking in a Bronx neighborhood with her mother. KENNEY, *supra* note 3, at 39. A bullet, meant for a gang member hit Taylani in the neck. *Id.*

⁶⁶ Goggins, *supra* note 40, at 1. “Violent gangs are now having a major impact on the quality of life of communities throughout the nation.” Rosenthal, *supra* note 32, at 109. In Orange County, California, residents were interviewed about their fear of gang activity. See Howell, *supra* note 35, at 3 (examining the fear that gangs use to threaten the communities they inhabit). In the lower-income neighborhoods, the fear of gang crime was found “immediate” on a daily basis. *Id.* Many of those residents reported avoiding areas such as streets or places known to be affiliated with gang activity. *Id.*

⁶⁷ See generally Howell, *supra* note 35, at 5 (noting that gangs are responsible for a significant portion of the cost of crime in the United States); *infra* Part II.B (discussing the great financial impact of gang violence). For example, a study found that Los Angeles trauma hospitals spent \$5 million to care for gang-related gunshot patients. Howell, *supra* note 35, at 5.

⁶⁸ See Howell, *supra* note 35, at 5 (showing the burdensome expense caused by crime committed in the United States). For a one criminal career, lasting approximately ten years, taxpayers can expect to pay total \$1.7 million to \$2.3 million. *Id.* In October 2014, David Capp, the United States Attorney for the Northern District of Indiana, announced that the United States Department of Justice awarded \$300,000 to several Northwest Indiana cities to “reduce youth gang and gun crime.” Associated Press, *NW Indiana Police Agencies Get Federal Grant*, WLFI (Oct. 16, 2014), <http://wlfi.com/2014/10/16/nw-indiana-police-agencies-get-federal-grant/> [<http://perma.cc/VT25-HEZT>] (detailing the sizeable federal grant given to combat gang violence).

⁶⁹ See Howell, *supra* note 35, at 5 (noting that gangs have detrimental affects upon schools). When gangs are present in schools, students significantly report higher instances of knowing a student who brought a gun to school. *Id.* “Gang membership significantly increases the likelihood of carrying a gun.” Alan J. Lizotte et al., *Patterns of Illegal Gun Carrying Among Young Urban Males*, 31 VAL. U. L. REV. 375, 388 (1997).

⁷⁰ See Howell, *supra* note 35, at 5 (showing that a gang presence increased the student victimization rates). In public schools, anywhere from five to ten percent of students claim to be gang members. Rosenthal, *supra* note 32, at 107.

⁷¹ 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 11. Gangs campaign on social media websites, such as Facebook, Twitter, and YouTube, to entice recruits by making “gang life look glamorous.” KENNEY, *supra* note 3, at 14. Additionally, just as social media has increased communication and efficiency throughout the world, it had the same effect on gangs. See Goggins, *supra* note 40, at 1 (describing that the social

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Additionally, gang violence is also fueled by the desire to control lucrative drug markets and to defend against rival turf encroachments.⁷² From 2000 to 2014, gang membership in the United States nearly doubled from 750,000 gang members to 1,400,000 members.⁷³ Not only is the number of members increasing, but the total number of gangs is increasing as well.⁷⁴ As of 2014, there is an estimated 33,000 different gangs currently operating in the United States, a number that has been steadily increasing since 2003.⁷⁵ While gang membership and the number of gangs continue to grow, gang territory is also expanding.⁷⁶ Traditionally, gangs have been

media craze has also been utilized by gangs). Gangs also use social media for recruitment, incitement, education, discrete communication, and organization. *Id.*; see 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 42 (stating that social media and technology have made gangs more sophisticated). Gangs also use social media to brag about their criminal activity and taunt rival gangs. 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 15, 26. Via internet communication, gangs are spreading information about “gang-related activity, structure, guidance, and/or changes in the gang’s policies and procedures’ manual.” Goggins, *supra* note 40, at 1. A St. Louis gang member said, “YouTube is a big deal . . . rapping on videos . . . fights on videos.” CURRY ET AL., *supra* note 29, at 145. Gang members often forget that social media posts can be used as evidence against them in a criminal proceeding. KENNEY, *supra* note 3, at 27. In 2013, the New York City Police Department used social media posts and text messages to arrest gang members. *Id.*

⁷² See Boga, *supra* note 21, at 489 (showing the greedy motives behind gang aggression). Gangs establish “territorial monopolies” that are “organized around an identifiable geographic territory.” Rosenthal, *supra* note 32, at 132 (discussing the territorial war between gangs). Consequently, “[e]ach street corner, dopehouse, salesperson, distributor, or customer is part of the territory. Anyone who attempts to enter the territory becomes the invader, the intruder, the enemy. Unlike the legitimate business world, gangs use physical violence as their only enforcement tool to stop competition and opposition.” *Id.* at 137.

⁷³ See Gang Statistics, *supra* note 29 (showing the expanding gang population and encompassing territory); see also 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 11 (noting that in just three years there was a forty percent increase in gang members from one million in 2009 to 1.4 million in 2011).

⁷⁴ See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 11 (examining the trend that the number of gangs is increasing). Additionally, some states such as Arizona, California, Colorado, Illinois, Massachusetts, Oklahoma, and Texas, reported that gangs are “responsible for at least 90 percent of crime.” *Id.* at 15. The United States Attorney for the Northern District of Illinois estimated that Chicago has nearly 125 gangs with more than 100,000 members. See Rosenthal, *supra* note 32, at 107 (discussing the gang problem within the United States).

⁷⁵ See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 9, 11 (stating that the gang population and number of gangs are increasing within the United States); National Youth Gang Survey Analysis, NAT’L GANG CTR., <http://www.nationalgangcenter.gov/About/FAQ#q1> [<http://perma.cc/S5ZL-VEK2>] (illustrating the increasing trend of the number of gangs within the United States). As the number of gangs are expanding, nearly every type of gang is expanding, including neighborhood-based, national-level, hybrid, and ethnic gangs. See 2011 National Gang Threat Assessment – Emerging Trends, *supra* note 21, at 9 (noting that ethnic-based gangs include African, Asian, Caribbean, Eurasian, and Caucasian ethnicities).

⁷⁶ See generally *infra* Part II.B (detailing the expanding gang territory trend).

more prevalent in urban settings; however, territorial expansion is evident because gangs are populating rural areas where they have historically been absent.⁷⁷ Currently, gangs operate in urban, suburban, and rural regions throughout the United States and are located anywhere from million-dollar homes in the suburbs to community housing projects within inner cities.⁷⁸ Consequently, progressive territorial expansion and growing membership cause gangs to become a widespread, resilient problem that is increasingly more difficult to combat.⁷⁹

C. *Federal Conspiracy Theory*

The crime of conspiracy is “the agreement to commit a crime,” not the attempt to commit a crime.⁸⁰ Thus, the crime of conspiracy does not merge into the completed substantive crime.⁸¹ Conspiracy theory seeks to punish

⁷⁷ See 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 9 (noting the historical territory of gangs and their recent territorial expansion).

⁷⁸ See Goggins, *supra* note 40, at 2 (providing that gang members are present in varying socioeconomic classes). Nationally recognized gangs particularly threaten major cities and suburban areas; whereas, local neighborhood-based gangs pose a substantial threat to rural communities nationwide. 2011 *National Gang Threat Assessment – Emerging Trends*, *supra* note 21, at 9 (evaluating the difference in threat level based upon geography).

⁷⁹ See Susan Emery, *Police Seek Help From Community to Fight Gangs*, NW. IND. TIMES (Sept. 9, 2014), http://www.nwitimes.com/news/police-seek-help-from-community-to-fightgangs/article_b18077d7-b356-5d25-b159-2bd32c6bb694.html [http://perma.cc/N6CQ-UEMS] (exploring the migrating gang problem from Chicago to Valparaiso). *Id.* Near Valparaiso, Indiana, Sergeant Jeremy Chavez of the Porter County Sheriff’s Department stated Chicago replaced Los Angeles as the “gang capital of America.” *Id.* Because of Porter County’s close geographical proximity to Chicago, the county has seen an increase in gang activity from the “Latin Kings, Gangster Disciples, Insane King Cobras, Imperial Gangsters, Vice Lords[,] . . . [and] various motorcycle gangs . . .” *Id.* Particularly, Portage High School, also in Porter County, has more than fifty active Gangster Disciples gang members. *Id.*

⁸⁰ See GREGORY D. LEE, *CONSPIRACY INVESTIGATIONS: TERRORISM, DRUGS, AND GANGS 3* (Pearson Education, Inc., 2005) (“The agreement to commit a crime is the crime of conspiracy.”). “The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish.” *Dennis v. United States*, 351 U.S. 494, 573 (1951).

⁸¹ See LEE, *supra* note 80, at 3 (noting the drafter’s intent behind conspiracy theory that it be punished separately from the attempt to commit the crime and the completed substantive offense); *United States v. Rabinowich*, 238 U.S. 78, 85 (1915) (stating that “conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy”). Further, even if the conspiracy’s end criminal object will never be completed, the conspiracy is still punishable if it was earnestly pursued. *Rabinowich*, 238 U.S. at 86. In *Callanan v. United States*, the United States Supreme Court notes:

[The law of conspiracy is a] settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will

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only those who have a “sincere intent” to commit crime.⁸² In 1948, Congress codified the common law rule of conspiracy.⁸³ The statute made it a federal offense for two or more people to conspire to commit a violation of any federal law.⁸⁴ Even though the elements are not specifically mentioned in the general conspiracy statute, the common law elements still apply to the application and interpretation of the law.⁸⁵ In

depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

364 U.S. 587, 593–94 (1961).

⁸² See LEE, *supra* note 80, at 9–13 (explaining that investigators can prove a person’s sincerity in agreeing to the conspiracy by proving the person committed overt acts). The federal crime of conspiracy is rooted in the common law. See Francis B. Syre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394 (1922) (discussing the history of the criminal offense of conspiracy). “The origin of the crime of conspiracy goes back to the very early pages of the history of our common law.” *Id.* Furthermore, although conspiracy is often thought of as an “uncertain doctrine,” it “should be seized upon, perhaps because of its very vagueness, as one of the principal legal weapons with which lawyers press their attack in labor controversies and in which judges find an easy and frequent support for their decisions in nothing short of misfortune.” *Id.* at 393–94. It has been referred to as the “darling of the modern prosecutor’s nursery.” *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). More recently in fact, spiritedly commenting on the prevalence of conspiracy charges, the Seventh Circuit Court of Appeals stated that, “prosecutors seem to have conspiracy on their word processors as Count I.” *United States v. Reynolds*, 919 F.2d 439, 435 (7th Cir. 1990).

⁸³ See 18 U.S.C. § 371 (2012) (“If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”); see also *United States v. Shabani*, 513 U.S. 10, 16 (1994) (“[T]he law does not punish criminal thoughts and contends that conspiracy without an overt act requirement violates this principle because the offense is predominantly mental in composition.”); *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (“Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.”).

⁸⁴ See 18 U.S.C. § 371 (stating it is a federal crime for two individuals to conspire to commit another federal crime). Black’s Law Dictionary defines “conspiracy” as “[a]n agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers that agreement; a combination for an unlawful purpose.” *Conspiracy*, BLACK’S LAW DICTIONARY (3d ed. 2006).

⁸⁵ See generally *infra* Part II.C (detailing the four common law elements to conspiracy). The Racketeer Influenced and Corrupt Organizations Act (“RICO”) is a federal statute that was designed to eradicate organized crime, specifically the Mafia, but has been a recent legal maneuver to curtail gang crime. See Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 579–80 (1993) (discussing RICO as applied to gang-related crime); Gail A. Feichtinger, *RICO’s Enterprise Element: Redefining or Paraphrasing to Death?*, 22 WM. MITCHELL. L. REV. 1027, 1055

addition to the general conspiracy statute, there are more than twenty other federal statutes targeting specific types of conspiracies.⁸⁶

In *United States v. Hirsch*, the Supreme Court held that the essence of conspiracy is “the combination of minds in an unlawful purpose.”⁸⁷ In other words, the agreement between persons must be to violate the law.⁸⁸ To be convicted of a federal crime of conspiracy, the prosecution must prove each of the four common law elements beyond a reasonable doubt:

(1996) (discussing RICO as applied to organized crime). Even though RICO is not the focus of this Note, withdrawal is still an applicable defense to a RICO conspiracy. See *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (discussing the defendant’s withdrawal defense to a RICO conspiracy charge).

⁸⁶ See, e.g., 15 U.S.C. § 1 (2012) (making it a federal crime to conspire to restrain trade); 18 U.S.C. § 224 (2012) (making it a federal crime to conspire to use bribes to influence sporting events); *id.* § 241 (making it a crime to conspire to deprive someone of their civil rights); *id.* § 286 (making it a federal crime to conspire to defraud federal government with fraudulent claims); *id.* § 351(d) (making it a federal crime to conspire to “kill or kidnap” a member of Congress and members-elect); *id.* § 372 (making it a federal crime to conspire to “impede or injure” a federal officer”); *id.* § 794 (making it a federal crime to conspire to provide defensive information to a foreign government); 18 U.S.C § 1201(c) (2012) (making it a federal crime to conspire to kidnap); *id.* § 1962 (making it a federal crime to conspire to violate any provision of RICO).

⁸⁷ 100 U.S. 33, 34 (1879). Justice Holmes defined conspiracy as a “partnership in criminal purpose.” *United States v. Kissel*, 218 U.S. 601, 608 (1910). This partnership description was later used in many landmark cases. See *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) (“A conspiracy is a partnership in crime.”).

⁸⁸ *Iannelli*, 420 U.S. at 777; see *United States v. Rabinowich*, 238 U.S. 78, 85–86 (1915) (finding that the crime of conspiracy is the agreement to commit a crime). In conspiracy cases, United States District Court Judge John Martin of the Southern District of New York uses the following jury instruction to explain conspiracy to the jury:

Simply defined, a conspiracy is an unlawful agreement by two or more persons to violate the law. Whether or not the person accomplished what they conspired do is immaterial to the question of guilt or innocence in regard to a conspiracy. The success or lack of success of the conspiracy doesn’t matter, for a conspiracy is a crime entirely separate and distinct from the substantive crime that may be the goal of the conspiracy.

A conspiracy has sometimes been called a partnership in crime in which each partner becomes the agent of every other partner. However, to establish the existence of a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a formal agreement, orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the means by which it was to be carried out or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or special agreement.

Thus, it is sufficient if two or more persons, in any manner, through any contrivance, either implied or tacitly, came to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

LEE, *supra* note 80, at 4.

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(1) agreement; (2) illegal goal; (3) knowledge; and (4) an overt act.⁸⁹ First, an agreement must be made between the coconspirators.⁹⁰ Second, the agreement must be made to achieve an illegal goal.⁹¹ Third, the agreement must be made with the knowledge of the conspiracy and with actual participation within the conspiracy.⁹² Fourth, at least one conspirator must commit an overt act in furtherance of the conspiracy.⁹³

⁸⁹ See *United States v. Terselich*, 885 F.2d 1094, 1097 (3d Cir. 1989) (holding that each of the four elements of conspiracy must be individually proven beyond a reasonable doubt); *United States v. Wexler*, 838 F.2d 88, 90 (3d Cir. 1988) (holding that the four elements may be proven only by circumstantial evidence, but each element must be proven beyond a reasonable doubt); see also *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988) (“[T]he evidence must establish an agreement between two or more persons to act together in committing an offense and an overt act in furtherance of the conspiracy.”); *United States v. Alvarez*, 837 F.2d 1024, 1027 (11th Cir. 1988) (“[T]he government must prove that two or more persons agreed to commit a crime, that the defendant knew of the agreement, and voluntarily became a part of the conspiracy.”).

⁹⁰ See *Iannelli*, 420 U.S. at 777 (holding that the most important part of the conspiracy was the element of agreement to commit a crime); *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988) (finding that the agreement must be between two or more persons); *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988) (“The agreement need not be formal or express, and may consist of nothing more than tacit understanding.”); *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988) (“A tacit or mutual understanding between or among the alleged conspirators is sufficient to show a conspiratorial agreement.”); *United States v. Bavers*, 787 F.2d 1022, 1026 (6th Cir. 1985) (“A conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan.”). “The agreement to commit a crime is the crime of conspiracy,” thereby, “[c]onspiracy does not become a lesser-included offense of the crime the conspirators set out to commit” and “[i]t is not an attempt to commit a crime.” LEE, *supra* note 80, at 3.

⁹¹ See *Iannelli*, 420 U.S. at 777 (holding that the agreement must be “to commit an unlawful act”). A conspiracy charge is easier for the jury to understand than a RICO charge because it has simpler requirements. See LEE, *supra* note 80, at 34–35 (comparing the crimes of conspiracy and RICO).

⁹² See *United States v. Chambers*, 985 F.2d 1263, 1270 (4th Cir. 1993) (stating that the conspirators must have knowledge and voluntary participation); *Alvarez*, 837 F.2d at 1027 (11th Cir. 1988) (“Proof of acts committed in furtherance of the conspiracy may be sufficient to show knowing participation in the conspiracy.”); see also LEE, *supra* note 80, at 9 (“Conspirators do not have to know each other. There is no requirement that the prosecution prove that each conspirator knew all the other members of the same conspiracy or what their individual roles were in achieving the object of the conspiracy.”). In *United States v. Wexler*, the court overturned a conspiracy conviction because the defendant was not proven to have knowledge of the illegal conspiracy. 838 F.2d 88, 91 (3d Cir. 1988). Relying on *United States v. Cooper*, the court in *Wexler* stated that, “The inferences rising from ‘keeping bad company’ are not enough to convict a defendant for conspiracy.” *Id.*

⁹³ See *United States v. Buena-Lopez*, 987 F.2d 657, 659 (9th Cir. 1993) (finding that an overt act of the conspiracy must be proven); *United States v. Tansley*, 986 F.2d 880, 885 (5th Cir. 1993) (holding that the prosecution must prove the existence of an overt act in furtherance of the conspiracy); *United States v. Wallach*, 935 F.2d 445, 470 (2d Cir. 1991) (reasoning that each overt act must be found to have been done in furtherance of the conspiracy’s ultimate goal); *Reifsteck*, 841 F.2d at 704 (“[E]ach overt act taken to effect the illegal purpose of the conspiracy need not be illegal in itself.”). At least one member is often required to complete

In addition to the statute and common law elements of conspiracy, there are several other legal concepts surrounding conspiracy law.⁹⁴ First, conspiracy is a continuing offense, and therefore conspirators continue to violate the law until the conspiracy ends.⁹⁵ Furthermore, under the landmark precedent set forth in the Supreme Court case *Pinkerton v. United States*, criminal liability within a conspiracy is vicarious and all-inclusive.⁹⁶ Under the *Pinkerton* doctrine:

an overt act in furtherance of the conspiracy's goal to "consummate" the crime. See LEE, *supra* note 80, at 3 (describing the overt act for a conspiracy). Not all statutes contain the overt act requirement; however, a federal prosecutor is unlikely to indict a conspiracy without an overt act from one of the conspirators. *Id.*

⁹⁴ See *supra* note 89 (discussing the four common law elements of conspiracy). Another concept surrounding conspiracy is Wharton's Rule, which prevents defendants from receiving double the punishment for one crime because the number of conspirators involved must exceed the number of persons needed to commit the substantive offense. See generally *Iannelli*, 420 U.S. at 779-87 (discussing Wharton's Rule). Wharton's Rule is named after Francis Wharton who authored the criminal law treatise that pioneered the doctrine and rationale. *Wharton's Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014). Further, Black's Law Dictionary defines "Wharton's Rule" as:

The doctrine that an agreement by two or more persons to commit a particular crime cannot be prosecuted as a conspiracy if the crime could not be committed except by the actual number of participants involved. Classic examples include dueling and prostitution, crimes that cannot be committed alone. But if additional people participate, as duelists' seconds or the prostitute's pimp, for example, all the actors might be charged with conspiracy.

Id.

⁹⁵ See *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (referencing *Hyde v. United States* by stating that a conspirator violates the law throughout the entire conspiracy's existence); *Hyde v. United States*, 225 U.S. 347, 369 (1911) (stating that conspiracy is a continuing offense). The crime of conspiracy runs "from the time an agreement is made until the object of the conspiracy ends in either success or failure." LEE, *supra* note 80, at 18. "[J]ust because the police have arrested some members of a conspiracy, this does not mean the conspiracy had ended. It only ends when the object of the conspiracy has been completed or the attempts of the conspirators to reach the goal of the conspiracy have failed." *Id.*

⁹⁶ See 328 U.S. 640, 646-48 (1946) (holding that a coconspirator may be criminally liable for actions of his coconspirators). In the seminal case, two bootlegging brothers, Walter and Daniel Pinkerton were convicted of illegally dealing whisky and conspiring to defraud the federal revenue service. *Id.* at 641. However, no evidence was presented that Daniel directly participated in the substantive offenses or even had knowledge Walter committed them. *Id.* at 645. After the United States Court of Appeals for the Fifth Circuit affirmed their convictions, Daniel appealed to the United States Supreme Court. *Id.* at 642. The majority found that the brothers entered into a conspiracy to defraud the Internal Revenue Service ("IRS") and that any acts committed by Walter in furtherance of the conspiracy, Daniel was equally as guilty for those acts. *Id.* at 646-47. Writing for the majority in two paragraphs of discussion, Justice Douglas swiftly vetoed Daniel's argument and created a new two-pronged vicarious liability test for conspiracies. *Id.* at 646-48. Justice Douglas relied upon the idea that within a criminal conspiracy, "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Pinkerton*, 328 U.S. at 646-47. However, *Pinkerton* was not a unanimous decision. *Id.* at 648 (Rutledge, J., dissenting). In

Each member of a conspiracy acts as an agent for other members and is liable for any crime committed in furtherance of the original conspiracy. It's irrelevant whether other members knew the crimes were going to be committed or even if they discouraged other members from committing those crimes.⁹⁷

Moreover, vicarious liability causes every conspirator to be criminally liable for all overt acts or crimes of other conspirators that are "foreseeable" and were completed "in furtherance of the conspiracy."⁹⁸

his dissent, Justice Rutledge referred to the majority opinion as "a dangerous precedent to establish." *Id.*

⁹⁷ LEE, *supra* note 80, at 14–15. The broad *Pinkerton* vicarious liability doctrine "is not universally followed," but remains precedent in the federal system and in many states. See Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1, 4 (2006) (stating that the *Pinkerton* rule is still "good law" in many jurisdictions); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1951 n.115 (1993) (indicating that the *Pinkerton* rule "is not universally followed"). In fact, the Model Penal Code and courts in North Carolina and New York rejected the *Pinkerton* doctrine, Massachusetts never adopted it, and other states rejected it by statute. See, e.g., *Commonwealth v. Stasiun*, 206 N.E.2d 672, 680 (Mass. 1965) (deciding to not adopt the *Pinkerton* doctrine); *State v. Small*, 272 S.E.2d 128, 135 (N.C. 1980) (rejecting the *Pinkerton* doctrine in North Carolina); *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979) (rejecting the *Pinkerton* doctrine in New York state). Many states, through statute, require the conspirator to have more than membership in the substantive crimes committed within that conspiracy. See Dale E. Bennett & Cheney C. Joseph, Jr., *The Louisiana Criminal Code of 1942 – Doctrinal Provisions, Defenses, and Theories of Culpability*, 52 LA. L. REV. 1083, 1099 (1992) (expressing the view that "the so-called 'Pinkerton Doctrine' may have no force in Louisiana"). Aside from statutory and common law, the academic community criticized the *Pinkerton* decision and rarely used it until the 1970s. See Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 597 (2008) (discussing the unpopularity of the *Pinkerton* doctrine).

⁹⁸ See *United States v. Williams*, 986 F.2d 86, 90 (4th Cir. 1993) (holding that a defendant is criminally liable for his individual conduct and reasonably foreseeable conduct of his coconspirators in furtherance of the conspiracy); *Pinkerton*, 328 U.S. at 646 (cementing conspiracy's vicarious liability standard). For example, gang members Larry, Moe, Curley, and Shemp agree to commit a drive-by shooting to kill Ronald, a rival gang member. See LEE, *supra* note 80, at 14–15 (describing an example of the rule of vicarious liability set forth in *Pinkerton*); see also *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 996–97 (1959) (discussing a *Pinkerton* liability hypothetical). To minimize the chance of getting caught, Larry tells Moe to borrow a SUV from someone living in another neighborhood. LEE, *supra* note 80, at 14. Unknown to Larry, Curley, or Shemp, Moe instead steals a car, instead of borrowing one. *Id.* Before Moe can pick up Larry, Curley, and Shemp, he is caught in the stolen car and tells police he stole it so they could do the drive-by shooting as planned. *Id.* While arresting Larry, Curley, and Shemp, the police find them in possession of seven loaded handguns. *Id.* Then, they all admit to police they were going to use the car and the guns for a drive-by shooting, aimed at killing Ronald. *Id.* Because of vicarious liability set forth in *Pinkerton*, Larry, Curley, and Shemp are criminally liable for the auto theft because it was a foreseeable consequence of the crime they conspired to commit together. See *id.* at 14. On the other hand, if Moe kidnapped and raped a woman on his way to steal the car, Larry,

The Supreme Court has historically and consistently deemed conspiracy a great threat to society because of the strength in numbers concept.⁹⁹ The more individuals continuing criminal activity, the harder it will be to stop the criminal activity.¹⁰⁰ Specifically, the dangers created by conspiracy are the collective “division of labor, efficient organization, and the decreased probability for a ‘change of heart.’”¹⁰¹ As such, conspiracy may be punished more harshly than the completed crime because of its threat to society.¹⁰² *United States v. Rabinowich* further explained the concept when the Supreme Court specified that:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes

Curley, and Shemp would not be criminally responsible because those crimes were not foreseeably related to the object of the conspiracy, the drive-by shooting. LEE, *supra* note 80, at 15.

⁹⁹ See *United States v. Feola*, 420 U.S. 671, 693 (1975) (stating that the law of conspiracy first strives to protect society from the “dangers of concerted criminal activity”); *Callanan v. United States*, 364 U.S. 587, 593–94 (1961) (finding that a conspiracy threatens the public beyond the threat of the substantive crime because the “[c]ombination in crime makes more likely the commission of [other] crimes” and it also “decreases the probability that the individuals involved will depart their path of criminality”).

¹⁰⁰ See *Salinas v. United States*, 522 U.S. 52, 65 (1997) (holding that an agreement to achieve a criminal purpose is “a distinct evil”). “The risks to society posed by concerted group activity are obviously greater than those posed by a single individual.” JOSEPH F. MCSORLEY, *A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW 2* (2d ed. 2003).

¹⁰¹ See Linda Cantoni, *Withdrawal From Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 *FORDHAM L. REV.* 438, 438 (1982) (discussing the policy reasoning that motivates the threat of a conspiracy to society). The goal of conspiracy theory has also been described as:

Criminals increase their likelihood of success when they organize. People acting alone are more likely to change their minds about committing crimes than people who are involved with others in a criminal conspiracy. Because of the far-reaching effects of conspiracy laws, including the ability to attach criminal liability to all members of the conspiracy equally, they have been used for years by the federal government to successfully dismantle entire criminal organizations. Conspiracy laws are one of the most potent legal tools an investigator can use against . . . gang members.

LEE, *supra* note 80, 19–20.

¹⁰² See *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (stating that courts have held that the conspiracy may be punished “more harshly” than the completed substantive offense); *supra* note 81 (describing the greater threat society incurs because of the nature of a criminal conspiracy). Furthermore, the court in *United States v. Wallach* stated:

The law of conspiracy serves two independent values: (1) it protects society from the dangers of concerted criminal activity, and (2) it serves a preventive function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom.

935 F.2d 445, 470 (2d Cir. 1991).

quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.¹⁰³

Consequently, the withdrawal defense developed to remedy the societal threat of conspiracies by encouraging conspirators to disband.¹⁰⁴

D. Defense of Withdrawal to Federal Crime of Conspiracy

The withdrawal defense to conspiracy is an affirmative defense rooted in the common law.¹⁰⁵ Referring to the withdrawal defense, the Supreme Court stated in *United States v. Hyde* that, “[a]s he has started evil forces, he must withdraw his support from them or incur the guilt of their continuance.”¹⁰⁶ Upon joining a conspiracy, the rebuttable common law presumption provides that a conspirator remains a member until he or she performs an unequivocal act that “defeat[s] or disavow[s]” the conspiracy’s purpose.¹⁰⁷ In other words, a conspirator’s membership to a

¹⁰³ 238 U.S. 78, 88 (1915).

¹⁰⁴ See Cantoni, *supra* note 101, at 438 (discussing the policy reasons for the withdrawal defense in that it helps to dissemble a conspiracy, which poses a great threat to society). The defense of withdrawal “encourage[s] conspirators to weaken the criminal combination by lessening its numbers, for in numbers is the primary danger of conspiracy: concerted action leading to the division of labor, efficient organization and the decreased probability of a ‘change of heart.’” *Id.*

¹⁰⁵ See *id.* at 439 (noting that the withdrawal is an affirmative defense); *Withdrawal Defense*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the “withdrawal defense” as “[a] conspirator’s affirmative defense that he or she has renounced participation in the conspiracy”).

¹⁰⁶ 225 U.S. 347, 369–70 (1912). Several defenses to the crime of conspiracy exist at the common law. See Julia Cheung, Maria T. Pelaia & Christopher J. Sullivan, *Federal Criminal Conspiracy*, 31 AM. CRIM. L. REV. 591, 613–21 (1994) (noting that there are other defenses to a conspiracy charge including: insufficiency of the indictment, variance, multiplicitous indictment, insufficient evidence, incompetence, coercion, and entrapment). This Note will only focus on the defense of withdrawal as it is the most applicable to gang-related conspiracies.

¹⁰⁷ See *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989) (stating that the conspirator must affirmatively renounce his membership to withdraw). The Supreme Court in *Hyde* held:

It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is

conspiracy, and thus criminal liability, continues until he or she withdraws from the illegal plot.¹⁰⁸

To effectively withdraw from a conspiracy, the conspirator must show “[a]ffirmative acts inconsistent with the object of the conspiracy and committed in a manner reasonably calculated to reach coconspirators”¹⁰⁹ To withdraw, the defecting conspirator must either reveal the conspiracy to law enforcement or communicate the intent to withdraw in a way that is “reasonably calculated to reach the coconspirators.”¹¹⁰ A withdraw is not successful if the conspirator merely stops his or her involvement to evade the police or does not participate in

in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending . . . As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.

225 U.S. at 369–70.

¹⁰⁸ See *Smith v. United States*, 133 S. Ct. 714, 717 (2013) (noting that a conspirator’s criminal liability continues until he or she withdraws from the “unlawful scheme”). Under the rule set forth in *Pinkerton*, all conspirators are criminally liable “regardless of their knowledge or participation in those crimes.” See *Cantoni*, *supra* note 101, at 439 (discussing the implications the defense of withdrawal has on the conspirators future criminal liability of the conspiracy); see also *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (stating that the criminal intent of the unlawful act is “established by the formation of the conspiracy” and that each conspirator is then vicariously responsible for the acts of the other conspirators).

¹⁰⁹ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464–65 (1978); see *United States v. Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983) (stating that a conspirator must denounce the conspiracy effectively and affirmatively to withdraw). The Model Penal Code describes withdrawing as “a complete and voluntary renunciation of [his] criminal purpose.” See MODEL PENAL CODE § 5.01(4) (AM. LAW INST., PROPOSED OFFICIAL DRAFT 1962) (describing the withdrawal defense). In *United States v. Carneglia*, the court affirmed the following jury instruction that gave examples of permissible withdrawals. 403 F. App’x 581, 585 (2d Cir. 2010). The jury instruction read:

By way of example, a defendant may withdraw from a conspiracy by giving a timely warning to the proper law enforcement officials; or by wholly depriving his prior efforts of effectiveness in the commission of the crime; or by putting himself in a position where he could not participate in the conspiracy; or by doing acts which are inconsistent with the objects of the conspiracy and by making reasonable efforts to communicate those acts to his coconspirators.

Id.

¹¹⁰ See *McSORLEY*, *supra* note 100, at 176 (summarizing the holdings in several conspiracy cases). In other words, not all coconspirators must be reached. *U.S. Gypsum Co.*, 438 U.S. at 464–65. Speaking for the Supreme Court in *Smith*, Justice Scalia said, “It is his withdrawal that must be active, and it was his burden to show that.” 133 S. Ct. at 717.

the targeted crime.¹¹¹ Additionally, the affirmative action requirement prevents fraudulent claims of withdrawal after the fact.¹¹²

Before *Smith v. United States*, there was a circuit split in determining which party carried the burden of proof because conspiracy statutes were silent on the issue.¹¹³ In 2013, the Supreme Court in *Smith* cured this by holding that the defendant has the burden to prove at trial, beyond a reasonable doubt, the defense of withdrawal to a conspiracy.¹¹⁴ *Smith* solidified the defense of withdrawal as an affirmative defense and accordingly, the burden of proof shifted from the prosecution to the defense.¹¹⁵ As an affirmative defense, withdrawal is a partial defense

¹¹¹ See *United States v. Pippin*, 903 F.2d 1478, 1481 (11th Cir. 1990) (stating that “[m]erely ending one’s activity in a conspiracy” does not satisfy the requirements of withdrawal); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976) (describing that “hibernation” does not constitute withdrawal); *United States v. Bastone*, 526 F.2d 971, 988 (7th Cir. 1975) (stating that “laying low” does not constitute withdrawal); *United States v. Chester*, 407 F.2d 53, 55 (3d Cir. 1969) (holding that non-participation in the target crime is not sufficient to withdrawal). In *Pippin*, in the summer of 1987, the defendant told his coconspirators that he would no longer engage in the conspiracy of “bid rigging.” 903 F.2d at 1481. To prove his withdrawal, he continued to refuse participation within the conspiracy throughout the fall of 1987. *Id.* Although he allegedly told his fellow coconspirators he did not wish to continue to participate, he did not adequately show “steps to disavow or defeat the conspiratorial objectives . . .” *Id.*

¹¹² See *United States v. Greenfield*, 44 F.3d 1141, 1150 (2d Cir. 1995) (stating that the affirmative action requirement ensures that the “withdrawal did occur and is not simply being invented ex post”). The court in *Mansfield v. United States* stated that an acceptable jury instruction on withdrawal states a jury needs only “to find some evidence that would create a doubt in their minds as to whether or not the [defendants] remained in the scheme or conspiracy to defraud before they would be justified in acquitting them of the conspiracy on the basis of such evidence.” 76 F.2d 224, 230 (8th Cir. 1935).

¹¹³ See *Smith*, 133 S. Ct. at 718 (curing the circuit split and finding that allocating the defendant the burden of proof does not violate the Due Process Clause). In *United States v. Finestone*, the court stated that the defense of withdrawal “can overcome the presumption of his continued participation in the conspiracy;” however, the defendant’s burden “in this regard is substantial.” 816 F.2d 583, 589 (11th Cir. 1987).

¹¹⁴ See *Smith*, 133 S. Ct. at 720 (determining, in accordance with the common law before the defense was codified, that the defendant bears the burden of proof for the defense of withdrawal). *Smith* states that the current standard must be proved beyond a reasonable doubt. *Id.* at 719. However, other evidentiary standards, such as preponderance of the evidence and clear and convincing evidence, also exist. See KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTION § 12:10 (6th ed. 2014) (showing the evidentiary standard of “reasonable doubt” in model federal jury instructions); *Id.* § 104:01 (illustrating the evidentiary standard of “preponderance of the evidence” in model federal jury instructions); *Id.* § 104:02 (describing the evidentiary standard of “clear and convincing evidence” in model federal jury instructions).

¹¹⁵ See *Smith*, 133 S. Ct. at 719 (finding that the allocation of the burden of proof to the defendant for the defense of withdrawal does not violate the Due Process Clause). At the common law, the defendant must prove affirmative defenses. *Martin v. Ohio*, 480 U.S. 228, 235 (1987). Elaborating further, the Court in *Smith* stretches *Martin* further by assuming that Congress intended to preserve the common law’s burden of proof for withdrawal. *Smith*,

because it does not “negate an element of the conspiracy crimes charged.”¹¹⁶ A conspirator’s liability for post-withdrawal acts of coconspirators terminates; however, the guilt remains for the conspiracy and any other crimes committed before the withdrawal.¹¹⁷ As such,

133 S. Ct. at 720. The burden should rightfully be the defendant’s because the defendant has primary knowledge of the events and must take steps to actively withdraw from a conspiracy. *Id.* However, the government must prove every necessary fact to constitute the crime the defendant is charged with, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361–62 (1970). The Court found that the government can shift the burden to the defendant when the affirmative defense does not “negate an element of the crime.” *Martin*, 480 U.S. at 237.

¹¹⁶ *Smith*, 133 S. Ct. at 719. Speaking for the Supreme Court in *Smith*, Justice Scalia said, “[h]is individual change of heart (assuming it occurred) could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved.” *Id.* at 721. According to Black’s Law Dictionary, an affirmative defense is “[a] defendant’s assertion of facts and arguments that, if true, will defeat the . . . prosecution’s claim, even if all the allegations in the complaint are true.” *Affirmative Defense*, BLACK’S LAW DICTIONARY (3d ed. 2006).

¹¹⁷ See *Smith*, 133 S. Ct. at 719 (stating that “[w]ithdrawal does not negate an element of the conspiracy crimes charged here”). The defense of withdrawal is an affirmative defense, along with many others such as, duress, necessity, self-defense, and entrapment. *Id.*; Angela R. Saad, *Federal Criminal Defenses Outline*, OFF. OF THE FED. PUB. DEFENDER W. DISTRICT OF TEX. 18–35, <https://txw.fd.org/sites/default/files/Materials%20Angelas%20Updated%20Federal%20Defenses%2012.30.10.pdf> [<https://perma.cc/TDD2-BBJU>]. Concerning the defense of entrapment, the classic definition was written by Justice Roberts in *Sorrells v. United States*, in the first Supreme Court case to recognize the defense of entrapment, by saying: “Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.” 287 U.S. 435, 454 (1932); see also *United States v. Blasingame*, 197 F.3d 271, 279 (7th Cir. 1999) (stating that entrapment is a defense). To establish the defense of entrapment, a defendant must prove that the government improperly induced the crime and that the defendant did not have a predisposition to commit the crime. See *Mathews v. United States*, 485 U.S. 58, 62–63 (1988) (reviewing the entrapment defense); *United States v. Luisi*, 482 F.3d 43, 52–53 (1st Cir. 2007) (discussing the rationale behind the entrapment defense). In certain instances, the entrapment defense is adjudicated in a pretrial hearing, similar to an evidence suppression hearing. See *Minnesota v. Grilli*, 230 N.W.2d 445, 455 (Minn. 1975) (explaining a pretrial method for determining the entrapment defense). Following the complaint or indictment but before the trial, a defendant has the option to present his entrapment defense to either a jury or judge, similar to a *Rasmussen* evidence suppression hearing, thereby waiving the right to a jury trial on that issue. *Id.* The court in *Rasmussen v. Tahash* created a pretrial evidentiary hearing, known as a *Rasmussen* hearing, similar to an omnibus hearing. See 141 N.W.2d 3, 13–14 (Minn. 1965) (creating a pretrial evidentiary hearing precedent); 8 MINN. PRAC., *Criminal Law & Procedure* § 21:4 (4th ed. 2014) (explaining the scope and purpose of *Rasmussen*). According to Black’s Law Dictionary, an omnibus hearing is “[a] hearing designed to bring judicial oversight to a criminal case at an early stage to make certain that the case is being handled expeditiously and properly” to ensure that “discovery is being conducted properly, that any necessary evidentiary hearings have been scheduled, and that all issues ripe for decision have been decided.” *Omnibus Hearing*, BLACK’S LAW DICTIONARY (10th ed. 2014). Then, the entrapment issue will then be decided by a judge in a pretrial evidentiary hearing, similar to a hearing to suppress evidence. *Grilli*, 230 N.W.2d at 455. The judge will make the necessary findings of

withdrawal presumes that the defendant committed the offense and thus the defendant must essentially admit guilt for the conspiracy to claim the withdrawal defense terminated criminal liability.¹¹⁸ Nevertheless, withdrawal acts as a complete defense when combined with the statute of limitations or if it is completed before the overt act of the conspiracy is accomplished.¹¹⁹ However, when a gang member attempts to withdraw from a gang-related conspiracy, the guidelines become blurred.¹²⁰

E. *The Defense of Withdrawal and Gang Members*

Courts have struggled to find whether gang members have sufficiently withdrawn from the gang-related conspiracy, essentially rendering the defense useless.¹²¹ To withdraw, the common law requires the defecting conspirator to either reasonably communicate the exit to the

fact and law. *Id.* If the trial court finds that the defendant was sufficiently entrapped, further prosecution of that charge will be terminated. *Id.* If the trial court finds that there was no entrapment, the defendant is barred from presenting the defense during the jury trial. *Id.*

¹¹⁸ See *Smith*, 133 S. Ct. at 719 (“Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense.”); *Cantoni*, *supra* note 101, at 458, 465 (discussing that a defendant must first admit guilt to the conspiracy to raise the defense of withdrawal). In his petition for writ of certiorari to the United States Supreme Court, the appellant stated that “Withdrawal from a conspiracy is something the law should encourage. If the price of doing so is to implicate oneself in the very criminal activity he seeks to disavow, then there will be little to no incentive to cease voluntarily from the activity.” Petition for Writ of Certiorari at 21, *Battle, Jr. v. United States*, (No. 09-290) 2009 WL 2876190 (describing the admission of guilt problem with the defense of withdrawal).

¹¹⁹ See *Cantoni*, *supra* note 101, at 438 (“The defense is only complete when coupled with the statute of limitations, or when withdrawal occurs before the overt act that completes the conspiracy.”). “Withdrawal also starts the clock running on the time within which the defendant may be prosecuted, and provides a complete defense when the withdrawal occurs beyond the applicable statute-of-limitations period.” *Smith*, 133 S. Ct. at 719. Combining the withdrawal defense and a statute-of-limitations defense “can free the defendant of criminal liability,” but the burden is on the defendant, as with all other affirmative defenses. *Id.* at 720. The court in *United States v. Read* explained the statute of limitations for conspiracy:

Prosecution for conspiracy is also subject to a five-year statute of limitations, which runs from the date of the last overt act. In practice, to convict a defendant the prosecution must prove that the conspiracy existed and that each defendant was a member of the conspiracy at some point in the five years preceding the date of the indictment.

658 F.2d 1225, 1232 (7th Cir. 1981) (citations omitted).

¹²⁰ See *infra* Part II.E (outlining why the defense of withdrawal is an unusable defense for gang members).

¹²¹ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464–65 (1978) (holding that to effectuate an effective withdrawal, the conspirator needs to conduct and prove “[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators”); *United States v. Garrett*, 720 F.2d. 705, 714 (D.C. Cir. 1983) (stating that to effectually withdraw from a conspiracy, the conspirator must take affirmative action to “defeat and disavow the purpose of the conspiracy”).

other conspirators or inform law enforcement of the conspiracy.¹²² As applied to gang-related conspiracies, little case law exists because the standard is nearly impossible for gang members to accomplish.¹²³ In 1995, in *United States v. Starrett*, the defendant gang member moved to another state, amended his gang tattoo, and ceased interactions with former members.¹²⁴ However, the court held that he did not withdraw because the defendant did not cooperate with law enforcement or communicate his withdrawal to the other members.¹²⁵ Similarly in 2009, the defendant in *United States v. Morales* was a “retired” member of the Insane Deuces as

¹²² See *United States v. Powell*, 982 F.2d 1422, 1435 (10th Cir. 1992) (“In order to withdraw from a conspiracy an individual must take affirmative action, either by reporting to the authorities or by communicating his intentions to the coconspirators.”). Furthermore, “[m]ere cessation of one’s participation in a conspiracy is insufficient to demonstrate withdrawal.” *United States v. Hughes*, 191 F.3d 1317, 1321 (10th Cir. 1999).

¹²³ See generally *infra* Part II.E (listing the cases that have been found where gang members attempted to use the withdrawal defense). In addition to the withdrawal difficulties, courts have found that evidence of gang affiliation is admissible to prove the member was a part of the gang-related conspiracy. See, e.g., *United States v. King*, 627 F.3d 641, 649 (7th Cir. 2010) (holding that gang-related evidence was admissible as direct evidence to conspiracy); *United States v. Montgomery*, 390 F.3d 1013, 1018 (7th Cir. 2004) (admitting the evidence of the defendant’s gang membership); *United States v. Westbrook*, 125 F.3d 996, 1007 (7th Cir. 1997) (reasoning that gang affiliation evidence can be admitted “to demonstrate the existence of a joint venture or conspiracy and a relationship among its members”); *United States v. Sargent*, 98 F.3d 325, 328 (7th Cir. 1996) (“[G]ang membership can be key to establishing criminal intent or agreement to conspire.”); *United States v. Irvin*, 87 F.3d 860, 864 (7th Cir. 1996) (holding that although “under the appropriate circumstances, gang evidence has probative value warranting its admission over claims of prejudice,” that evidence of gang affiliation creates a “substantial risk” that the affiliation will damage the defendant in the “eyes of the jury”); *United States v. Lewis*, 910 F.3d 1367, 1372 (7th Cir. 1990) (holding that evidence of defendant’s gang membership was properly admitted to prove the conspiracy).

¹²⁴ See *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (finding that the defendant did not withdraw from the gang’s conspiracy). The leader of the Florida-based motorcycle gang, the Outlaws, forbade retirement and any attempt to do so was dangerous. See Initial Brief for Appellant Timothy Kevin Duke at 52, *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (No. 89-5669) 1991 WL 11251387 (detailing the appellant’s arguments of his withdrawal defense).

¹²⁵ See *Starrett*, 55 F.3d at 1550 (explaining the court’s reasoning). Once, a member attempting to quit the gang was visited by eight members of the gang who threatened to kill him and his wife. Initial Brief at 23, *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (No. 89-5669), 1991 WL 11011097, at *23. To escape the best way he could, defendant Duke amended his gang tattoo with an “out date,” sold his gang-related motorcycle, joined a church, got a legitimate job, moved states away to Kentucky, and terminated all contact with gang members. *Starrett*, 55 F.3d at 1550. Duke “demonstrated his determination to abandon the conspiracy in the manner best calculated to convey his intentions to the Outlaws” when he “affixed what was known as an ‘out-date’ tattoo onto his Outlaws tattoo,” known as “an approved method of withdrawing from the Club.” Initial Brief at 51, *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (No. 89-5669), 1991 WL 11011097, at *24 (detailing the defendant’s attempted exit from the gang and the gang-related conspiracy).

permitted by the gang's bylaws.¹²⁶ Nevertheless, the court held that he did not withdraw from the gang conspiracy.¹²⁷ Likewise in *United States v. Randall*, both the defendant and a gang expert testified that he "matured out" of the gang and was no longer involved in any gang-related activity.¹²⁸ The court rejected his argument in 2011 and found that he failed to meet the communication requirement or inform law enforcement, and therefore did not sufficiently withdraw from the gang.¹²⁹ In *United States v. Harris*, a case from 2012, the defendant became a devout Muslim and no longer associated with gang members.¹³⁰ However, the court found that he did not meet the withdrawal requirements and would not allow him to instruct the jury on the withdrawal defense.¹³¹

¹²⁶ See *United States v. Morales*, No. 03-CR-90, 2009 WL 14506567, at *7-8 (N.D. Ill. May 22, 2009) (holding that even though the member successfully retired from the gang, he did not complete a legal withdrawal). The gang's bylaws stated:

Once a member of the organization, always a member. If you retire, then you shall be a retired member, non-active member, unless the member disrespects the Nation in such a way that its intolerable to become addicted to drugs or is a homosexual or trick, trick meaning telling on another member of this organization.

Id. at *8.

¹²⁷ See *id.* at *7 (holding that even though the gang did not consider him an active member, the court held that he did not withdraw from the gang conspiracy).

¹²⁸ See 661 F.3d 1291, 1294 (10th Cir. 2011) (noting that because the Tenth Circuit had not yet applied the withdrawal standard to a gang member, the court looked to the Eleventh Circuit case, *United States v. Starrett*). Defendant joined the Crips before he was sixteen years old and when he was in prison as a teenager, he distanced himself from the gang, covered up gang tattoos, and informed prison officials that he was no longer a gang member. *Id.* at 1293.

¹²⁹ See *id.* at 1294 (holding that the defendant did not sufficiently withdraw). When he was released from prison, he began working as a mechanic, had children, and attended church, but years later he began using drugs and bought drugs from some Crips members. *Id.* A gang expert testified that members can sometimes leave by "maturing out" or "getting a good job, having children, or just getting more involved in other activities in life" and Randall testified that he matured out so he thought he did not need to communicate his withdrawal to other members. *Id.* at 1295.

¹³⁰ See 695 F.3d 1125, 1138 (10th Cir. 2012) (noting that in addition to other action, the defendant notified police of the conspiracy). Mr. Harris converted to the Muslim faith, rejected the gang's lifestyle since the early 1990s, no longer frequented the gang's park and bar, and cooperated with police after his arrest. *Id.* at 1137-38. Mr. Harris unsuccessfully argued that gang withdrawal "is not done so much by words as by actions." *Id.* at 1138. The court stated even though the evidence showed that "Harris no longer considered himself a member of the Insane Crips, and even if other Crips believed Harris was no longer an Insane Crip" he was still a part of the conspiracy. *Id.* The court reasoned that Mr. Harris failed to "present sufficient evidence for a reasonable jury to find that he had withdrawn from the alleged conspiracy . . ." *Id.*

¹³¹ See *id.* at 1138 (holding that although the defendant informed law enforcement of past gang membership, he should have provided more "information with sufficient particularity to enable the authorities to take some action to end the conspiracy").

Along with gang violence, conspiracies pose a great threat to society and the defense of withdrawal helps combat that threat by making the conspiracy weaker.¹³² However, when a former gang member uses the defense of withdrawal against a gang-related conspiracy, the already complicated conspiracy theory becomes even more muddled.¹³³ An exceptional countermeasure to conspiracies, the defense of withdrawal, is rendered useless against some of the most sinister and aggressive gang conspiracies.¹³⁴ Practically speaking, if a gang member is seeking to egress, defense of withdrawal to a criminal gang conspiracy can provide a legal exit strategy.¹³⁵ Therefore, a statute creating a practical standard for gang members utilizing the withdrawal defense to terminate criminal liability from a gang-related conspiracy is needed.¹³⁶

III. ANALYSIS

Justice Ebel of the Tenth Circuit Court of Appeals said “[g]etting involved in a conspiracy, particularly a gang, is a risky endeavor because of the difficulty to get out.”¹³⁷ Gangs, and their increasing populations, have become prosperous, ever-expanding enterprises, which are continually diversifying, leaving federal and state law enforcement behind.¹³⁸ The withdrawal defense could potentially combat the growing

¹³² See *supra* Part II.A–B (illustrating the negative consequences of violence of gang culture); Part II.D (explaining the primary rationale behind the defense of withdrawal to combat the societal risks posed by a conspiracy).

¹³³ See *supra* Part II.E (discussing the complicated legal standard created when combining three difficult subjects, gang culture, conspiracy theory, and defense of withdrawal).

¹³⁴ See *supra* Part II.A (examining the dangers of gang affiliation upon members and neighborhoods alike); Part II.D (reporting that the defense of withdrawal was created to combat the dangerous of conspiracies to society); Part II.E (noting that the defense of withdrawal is useless as applied to gang-related conspiracies).

¹³⁵ See *supra* Part II.E (detailing the benefits the defense of withdrawal can have upon a gang member’s exit from the gang). Additionally, it is a myth that the “gang problem is too complex to be solved . . .” JAMES C. HOWELL, *GANGS IN AMERICA’S COMMUNITIES* 49 (SAGE Publications, Inc., 2012).

¹³⁶ See *infra* Part III (analyzing the need for modification of the current withdrawal defense as applied to a gang-related conspiracy). Additionally, this Note is focused on federal law and as such, the proposed solution should be implemented at the trial court level, known in federal court as the district court. *Court Role & Structure*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourt.s.aspx> [<http://perma.cc/82SA-282H>].

¹³⁷ See *United States v. Randall*, 661 F.3d 1291, 1294 (10th Cir. 2011) (holding that even though the former gang member told a Department of Corrections officer he left the gang, became a father, got a good job as a mechanic, and became religious, he did not withdraw from the gang’s conspiracy).

¹³⁸ See *supra* Part II.A (stating that gangs are expanding across the United States throughout geographical areas and socioeconomic statuses). Law enforcement agencies throughout the country maintain detailed records of gang identifiers and corresponding members. See

epidemic of gang violence and terror.¹³⁹ However, the current withdrawal standard requires the defecting conspirator to prove beyond a reasonable doubt that he or she informed law enforcement or the other conspirators of his or her intentions to leave the conspiracy.¹⁴⁰ To cure this defect and modify the withdrawal defense, the threshold requirements of the burden of proof and the adjudication procedure must be altered and a factor test created.¹⁴¹ First, Part III.A examines the difficulties surrounding gang-related conspiracies and the defense of withdrawal.¹⁴² Second, Part III.B analyzes the need for a uniform gang definition.¹⁴³ Third, Part III.C discusses the required modifications to the withdrawal defense.¹⁴⁴

A. *The Unusable Withdrawal Defense for Gang Members*

Unlike non-gang-affiliated criminals, gang members cannot use the current withdrawal standard because the eccentricities of gang life create additional barriers in the withdrawal process.¹⁴⁵ To begin, the nature and longevity of the crime of conspiracy and vast criminal affiliations of gangs creates an environment where members are legally linked to many continuing crimes.¹⁴⁶ This combination creates a relentless cycle because

CURRY ET AL., *supra* note 29, at 6 (“When an individual has made the decision and taken the steps to leave a gang, but is still in a police gang database and is treated by the police as a gang member, rival members may continue to perceive that individual as an active member and attack him as if he were still a gang member.”). However, the information contained in gang databases is not guaranteed to be current or systemically accurate due to misinformation or changes in a gang member’s status with the gang. *Id.*

¹³⁹ See *supra* Part II.B (showcasing the vast, expanding gang problem across the United States).

¹⁴⁰ See *supra* Part II.C (examining the current conspiracy law of notice and thwarting requirements).

¹⁴¹ See *supra* Part III (analyzing the current problem with the withdrawal defense and the necessary modifications to make the defense usable for defecting gang members).

¹⁴² See *infra* Part III.A (scrutinizing gang-related conspiracy’s implications for the defense of withdrawal and the impractical current standard that prevents members from withdrawing from a gang-related conspiracy).

¹⁴³ See *infra* Part III.B (examining the need for a universally accepted gang definition and necessary changes to the withdrawal defense, but not to conspiracy theory).

¹⁴⁴ See *infra* Part III.C (detailing the necessary changes to the withdrawal defense to make it usable for defecting gang members).

¹⁴⁵ See *supra* Part II.D (showcasing the vast common law principles of the withdrawal defense).

¹⁴⁶ See *supra* Part II.A–C (illustrating the nature of gang-related crime and the continual criminal liability associated with conspiracy theory); see also *Hyde v. United States*, 225 U.S. 347, 369 (1912) (stating that conspirators are liable for each other’s actions in furtherance of the conspiracy until the criminal enterprise has ended). Professor Katyal at Georgetown School of Law explains the various legal concepts linked to conspiracy:

Imagine that Joe and Sandra agree to rob a bank. From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it’s called “inchoate liability”). Even if the bank

conspiracy is a continuing offense with vicarious liability.¹⁴⁷ Additionally, courts have held that evidence of gang affiliation is admissible as direct evidence to prove that the member was a conspirator in the gang-related conspiracy.¹⁴⁸ A conspiracy proved by gang affiliation, rather than individual action, further creates an endless cycle if a legal withdraw is not available.¹⁴⁹ In addition to the captivating cycle of conspiracy theory, gang members are unable to escape from gang life because of the gang's tight grasp on their lives.¹⁵⁰ Without the opportunity to utilize a practical

goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense). Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (called *Pinkerton* liability, after a 1946 Supreme Court case involving tax offenses). He can't evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative step to "withdraw"). And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the crime of conspiracy doesn't "merge" with the underlying crime).

Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L. J.* 1307, 1309 (2003).

¹⁴⁷ See *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) (describing continuing liability theory under the conspiracy theory umbrella). "Some criminal organizations have been involved in the same conspiracy for decades; others engage in new conspiracies one after another." LEE, *supra* note 80, at 17. Furthermore, *United States v. Sophie* synthesized several additional aspects of conspiracy theory relevant to gang-related conspiracies: (1) "A single conspiracy does not exist just because a number of people committed illegal acts with the same person[;]" (2) "The government must show some connection between the participants[;]" and (3) "[A] person does not need to know or participate in every detail of the conspiracy, or to know all the conspiracy's members." *United States v. Sophie*, 900 F.2d 1064, 1080–81 (7th Cir. 1990).

¹⁴⁸ See *supra* note 123 (displaying the cases where evidence of gang affiliation was admissible to prove the defendant's conspiracy charge).

¹⁴⁹ See *United States v. King*, 627 F.3d 641, 649 (7th Cir. 2010) ("Gang-related evidence can be especially troublesome."). "Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior . . . [g]uilt by association is a genuine concern whenever gang evidence is admitted." *United States v. Irving*, 87 F.3d 860, 865 (7th Cir. 1996). "We are fully cognizant of the powerful nature of [gang-related] evidence; when introduced by the government against a criminal defendant, it can taint a defendant in the eyes of the jury and also can establish criminal intent or agreement to conspire." *United States v. Westbrook*, 125 F.3d 996, 1007 (7th Cir. 1997).

¹⁵⁰ See *supra* notes 37–54 (describing the inability for gang members to exit the gang because of the threat of violence and death). "Perhaps the most fundamental aspect of gang culture is the strong loyalty it both inspires and demands." McDonough, *supra* note 52, at 1291. In addition, gangs vigorously enforce ban their members from assisting the police. *Id.* at 1292. Gangs also use "intimidation and retaliation" tactics against community members in "gang-controlled communities necessitates willful blindness[;]" which then "increases the frequency of unreported criminality and lessens the likelihood of convincing violent [gang] perpetrators." *Id.* at 1295.

withdrawal defense, gang members are hopelessly in an endless criminal conspiracy.¹⁵¹

In addition to being controlled by an ongoing criminal liability, gang members also face significant barriers when retreating from a gang-related conspiracy.¹⁵² First, withdrawing from a gang-related conspiracy requires the additional step of the gang member withdrawing from the gang.¹⁵³ In essence, the choice to withdraw must result in a lifestyle change because renewing one's gang membership results in a forfeiture or cancelation of the withdrawal defense.¹⁵⁴ Second, the current

¹⁵¹ See *supra* notes 145–50 (describing the relationship between the *Pinkerton* doctrine concerning conspiracy liability and barriers gang members face when exiting the gang); see also *Pinkerton*, 328 U.S. at 646 (stating that without an effective withdrawal, the conspirators are continually liable for the acts of the other conspirators); Part II.A (describing the barriers gang members face when they attempt to exit the gang). Therefore, a never-ending cycle of crime and violence is created because the gang members are forced to remain a part of the gang and are then continually linked to new crimes. See *supra* Part II (discussing that gangs are intense crime-fueled groups, that conspiracy theory continually links offenders to new crimes within the group, and that the defense of withdrawal has not been utilized by defecting gang members).

¹⁵² See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464–65 (1978) (requiring the “affirmative act” standard for the defense of withdrawal). When gang culture, elements of conspiracy theory, and the requirements for defense of withdrawal are analyzed together, four steps must be completed. See *infra* Part II.A (describing the eccentricities of gang culture); *infra* Part II.B (showing the purpose and requirements of conspiracy); *infra* Part II.C (examining the defense of withdrawal and its requirements). First, the conspirator must have a change of heart and muster the courage to act. See *Smith v. United States*, 133 S. Ct. 714, 721 (2013) (stating that the conspirator’s “individual change of heart could not put the conspiracy genie back into the bottle”). This step will be hard because gang culture keeps members from leaving out of fear for what may happen if they attempt to leave. See *supra* Part II.A (describing the brutal consequences for wanting to leave a gang). Second, the conspirator must then affirmatively act inconsistently with the objective of the conspiracy. See *U.S. Gypsum Co.*, 438 U.S. at 464–65 (describing that defecting members must conduct and prove an “affirmative act” that is “inconsistent” with the substantive goal of the conspiracy and reasonably inform the other members). Third, the conspirator must prove this action. See *supra* Part II.C (discussing that the defendant must prove his withdrawal with affirmative action). Fourth, the proof must then be validated or corroborated so the trier of fact has evidence to reasonably believe it to be true. See *supra* Part II.C (examining the standard to which a withdrawal from conspiracy must be proven). These steps may seem straightforward, but that perception is deceiving because these steps will take courage, conviction, and strength.

¹⁵³ See *supra* Part II (illustrating the nuances of gang life, conspiracy theory, and the defense of withdrawal). The gang member would no longer be able to be a member of the gang because, by definition, gangs are criminal enterprises. See *infra* Part II.E (illustrating the useless defense of withdrawal as applied to gang members).

¹⁵⁴ See *Cantoni*, *supra* note 101, at 442 (discussing the court’s finding in *Hyde*). The “voluntary confession” to the government established an effective withdrawal. *Id.* However, after the confession, the defendant committed overt acts in furtherance of the conspiracy, thus undoing the withdrawal. *Id.* In turn, by rejoining the gang and the criminal purpose, the formally defected gang member also rejoins the conspiracy. *Id.* Nevertheless,

withdrawal standard is a challenging threshold to overcome because gang culture is heavily imbedded in their lives and thus, nearly inescapable.¹⁵⁵ In the neighborhood where a gang is territorially located, the gang is heavily influential and is an oppressive tyrant.¹⁵⁶ As a result, the community ostracizes defectors because the gang is the community.¹⁵⁷ In addition to the cultural backlash, withdrawing from a gang poses a severe threat of harm or death to the gang member and the member's family.¹⁵⁸ These extra, life-threatening barriers must be considered when determining the defense of withdrawal from the conspiracy.¹⁵⁹

Furthermore, unlike non-gang-affiliated conspirators, the required actions needed to complete a successful withdrawal are unknown, and thus the evidence needed to prove withdrawal is also unsettled.¹⁶⁰ In gang-related withdrawals, the communication method and quantity

the member must either withdraw or stay in the gang, as there is no happy medium between the two options because they are mutually exclusive. *Id.* Additionally, there is not a manual or how-to guide for conspirators who want to withdraw from a conspiracy. *See supra* Part II.C (discussing the statutory and common law requirements for the crime of conspiracy). Consequently, these steps will likely need to be gathered post-action when proof is harder to garner or may no longer exist. Additionally, actions and intentions tend to be chaotic in the midst of a conspiracy because nothing seems concrete or tangible. As a result, these aforementioned challenges often make affirmative actions inconsistent with the conspiracy's objectives and difficult to prove and verify to the court.

¹⁵⁵ *See supra* Part II.A (illustrating that a gang is heavily embedded into everyday culture of the members' lives because the gang is all consuming throughout the neighborhood). The ambiguous defense of withdrawal must overcome the high legal standard of conspiracy theory. *See supra* Part II.C (discussing conspiracy theory); *supra* Part II.D (examining the defense of withdrawal to a conspiracy); *supra* Part II.E (illustrating the additional struggles for gang members attempting to withdraw). The defense's requirements theoretically could refer to any number of actions as the only requirement is that the conspirator affirmatively proves action "inconsistent" with the conspiracy's objectives. *Supra* Part II.D. This standard was likely created to purposefully be vague to encompass a variety of actions, which in turn gives the defendant a variety of choices for withdrawal. *See supra* Part II.D (explaining the purpose of the defense of withdrawal). On the other hand, it can be problematic when determining if the ambiguous standard has been satisfied.

¹⁵⁶ *See supra* Part II.A (describing the tight grasp that a gang has upon its members).

¹⁵⁷ *See supra* notes 37-41 and accompanying text (detailing that a member's gang membership is interdependent of his or her relation to the community as both are unrecognizably intertwined).

¹⁵⁸ *See supra* notes 42-48 and accompanying text (showing that a gang member incurs great physical risk and societal backlash from attempting to withdraw from a gang-related conspiracy).

¹⁵⁹ *See supra* notes 52-53 and accompanying text (discussing the grave risk a defendant encounters when attempting to exit a gang-related conspiracy).

¹⁶⁰ *See supra* Part II.D (detailing the vast quantity of common law for the defense of withdrawal). However, unlike non-gang conspirators, the successful standard for a gang-related withdrawal is unknown, which consequently makes the acceptable evidence needed also unknown. *See supra* Part II.E (showcasing a variety of cases where courts found that the defendant did not successfully withdraw from the gang-related conspiracy).

needed to sufficiently display intent to withdraw is unclear.¹⁶¹ Moreover, the formula for what action, or combination of actions, that must be completed is also intangible.¹⁶² It remains undetermined whether the number of fellow members or the rank of the members contacted is important to the withdrawal process.¹⁶³ Since the above standards remain aloof, likewise, the evidentiary requirements remain undefined.¹⁶⁴ Consequently, the unknown withdrawal standard and the subsequent unsettled evidentiary requirements prevent gang members from successfully withdrawing from gang-related conspiracies.¹⁶⁵

The current withdrawal defense is unusable for gang members.¹⁶⁶ Gang members are trapped in ongoing conspiracy liability, threatened with retaliation, trapped by additional barriers preventing members from withdrawing, and are faced with unknown sufficiency standards and

¹⁶¹ See generally *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464 (1978) (stating that the conspirator must show “[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a matter reasonably calculated to reach co-conspirators”).

¹⁶² See *supra* Part II.E (examining a variety of cases where the defendant seemingly withdrew, however, a court found that the legal withdrawal was not complete); see, e.g., *United States v. Harris*, 695 F.3d 1125, 1138 (10th Cir. 2012) (holding that even though the defendant informed law enforcement of the conspiracy, became a devout Muslim, and no longer associated with gang members, he did not withdraw); *United States v. Randall*, 661 F.3d 1291, 1295 (10th Cir. 2011) (holding that even though the defendant and a gang expert testified that he “matured out” of the gang and was no longer involved in any gang-related activity, the defendant did not withdraw); *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (holding that the defecting gang member who moved states away, amended his gang tattoo, and ceased interactions with former members did not withdraw); *United States v. Morales*, No. 03-CR-90, 2009 WL 1456567, at *7–8 (N.D. Ill. May 22, 2009) (holding that all Insane Deuces gang members who formally “retired” from the gang by satisfying the gang’s bylaws did not legally withdraw).

¹⁶³ See *supra* notes 122–31 and accompanying text (displaying that the type of communication and actions required to effectuate a legal withdrawal from a gang-related conspiracy remains unknown for gang members).

¹⁶⁴ See *id.* (noting that if the actions and communication requirements are unknown, the evidence needed to prove the given actions and communications is likewise unknown).

¹⁶⁵ See *supra* notes 160–64 and accompanying text (noting the difference in known standards for non-gang-affiliated withdrawals and gang-affiliated withdrawals). Additionally, various issues of witness credibility and willingness, availability of records, safeguarding from fraud and manipulation, and other evidentiary concerns arise. See *supra* Part II.C (discussing the evidentiary concerns of conspiracies); Part II.D (examining the evidentiary concerns of the defense of withdrawal). However, these concerns are nearly impossible to remedy with a bright-line-rule because the available evidence is extremely situation dependent.

¹⁶⁶ See *supra* notes 146–65 and accompanying text (describing that the endless cycle of criminal liability, increased danger a withdrawal creates, and the unknown standard are the three basic reasons why the defense of withdrawal is unusable for gang members).

subsequent evidentiary requirements.¹⁶⁷ To afford gang members the opportunity to utilize the withdrawal defense, the requirements must be modified to accommodate extraordinary circumstances that surround gang-related conspiracies.¹⁶⁸ However, before the withdrawal standard can be appropriately modified, a universal gang definition must be created.¹⁶⁹

B. The Need for a Universally Adopted Gang Definition

Creating and universally adopting a gang definition is the first step in curing the current unusable withdrawal defense as applied to gang-related conspiracies because one does not currently exist.¹⁷⁰ Many attempts have been made to produce a gang definition; however, these efforts have been to no avail because scholars, policing agencies, and the legal community have never universally adopted a definition.¹⁷¹ One

¹⁶⁷ See *supra* notes 146–51 and accompanying text (explaining that gang members, unlike non-gang-affiliated criminals, are continually linked to new crimes through the gang which makes it harder to leave the conspiracy).

¹⁶⁸ See *supra* notes 146–65 and accompanying text (showcasing the three basic reasons preventing the withdrawal defense from being applicable to gang-related conspiracies and thereby a modification must occur before the defense can be used).

¹⁶⁹ See *infra* Part III.B (illustrating the need for the universally adopted gang definition in order to remedy the defense of withdrawal).

¹⁷⁰ See *supra* Part II.A (discussing the fact that academia, federal prosecutors, policing agencies, and Congress have not agreed upon a single definition for the term gang). Legislation on gang-related issues is not lacking as gang-related legislation had been enacted in all fifty states, and the District of Columbia. See *National Youth Gang Survey Analysis: Highlights of Gang-Related Legislation*, *supra* note 33 (examining the number of laws in effect regarding gang-related activities). In addition, twenty-eight states have laws regarding gang-prevention, thirty-one states have enhanced penalties for gang-related crimes, twenty-seven states have laws concerning gangs and schools, twelve states have laws in connection with gang-related databases, and thirty-one states have “gang activity” definitions, and fourteen states have “gang member” definitions. *Id.* However, the legislative “efforts are best characterized as piecemeal rather than comprehensive.” CURRY ET AL., *supra* note 29, at 156. The statutes increased penalties for being a gang member involved in the commission of a crime by increasing the maximum sentence and enabling the use of gang databases, or raise funding for gang-prevention programs. *Id.* Furthermore, the weakness is found within implementation and a lack of law enforcement resources, particularly with labor for gang investigations. See Goggins, *supra* note 40, at 2 (acknowledging that more officers are needed to concentrate on gang investigations). Specifically, officers and budgets have been limited, often leaving areas of gang prevention in need. *Id.* Specialized officers are needed to effectually combat gang activity: “gang investigation, community service, outreach and education, intelligence gathering, and street suppression.” *Id.* Properly funding gang units must be a priority for lawmakers. *Id.*

¹⁷¹ See *supra* notes 28–30 and accompanying text (describing the many attempts at creating a gang definition); see also Coramae Richey Mann, *We Don't Need More Wars*, 31 VAL. U. L. REV. 565, 566 (1997) (“Before addressing any issue, it is necessary to define the major terms and the problem that is being addressed. We first need an operational definition of a gang.”).

definition is not exponentially better than the next, but the issue rests in that all three necessary parties failed to align into a unified front and support a single definition.¹⁷² The interested entities are not competing per se, but are at a stalemate when their collective force could be powerful.¹⁷³ With all interested parties using the same terminology to classify gangs, a consistent, collaborative effort can begin to decrease gang violence.¹⁷⁴ After creation, the gang definition must then be cogently adopted not only throughout the legal community, but also codified by Congress, accepted by sociologists, criminologists, and jurists, and implemented by law enforcement.¹⁷⁵

The universally adopted gang definition must be broad enough to encompass all gangs, but narrow enough to encompass only gang activity.¹⁷⁶ At its most basic definition, a gang is a hierarchically organized group of individuals banded together for a common illegal purpose.¹⁷⁷ However, this definition is overbroad in that it will include more groups than gang-related conspiracies; and therefore, a list of factors should be used to differentiate gangs from other unlawful societal groups.¹⁷⁸ These

¹⁷² See *supra* note 29 and accompanying text (detailing the troubled, unsuccessful history of the gang definition).

¹⁷³ See *Frequently Asked Questions About Gangs*, *supra* note 28 (recognizing that a uniform, universal definition of a gang does not exist). Throughout the criminal justice system, the collective entities enforcing gang-related crimes and conspiracies have no uniform definition of a gang. See CURRY ET AL., *supra* note 29, at 2 (commenting that the criminal justice community and academia have not been able to agree on a single definition of a gang). However, several common threads in most gang definitions include a group, symbols, active communication, permanence, street orientation, and criminal activity. *Id.* at 3-5.

¹⁷⁴ See *supra* note 29 and accompanying text (showcasing the previous attempts to band together and create a unified gang definition). Further, a cohesively recognized definition ensures that arrests, prosecutions, and statistical reporting will be uniform across the country. *Id.*

¹⁷⁵ See *supra* notes 170-73 and accompanying text (demonstrating the need for all entities to work together to create a universally adopted gang definition).

¹⁷⁶ See *supra* note 38 and accompanying text (noticing the evolution of the gang definition from Fredrick Thrasher's 1927 definition, Malcolm Klein's 1971 definition, Walter Willer's 1980 definition, and James F. Short's 1996 definition).

¹⁷⁷ See Bonney, *supra* note 85, at 606 (noting that gangs are "criminal entities that have hierarchical management structures and use violence... to evade prosecution"). Feichtinger also recognizes the hierarchical component when describing gangs:

Urban street gangs resemble traditional organized crime organizations based on the following characteristics: continuity of operations over an extended time period; a hierarchical management structure; common purpose for which members join the organization; continued criminal activity as an important source of income; violence and threats of violence as a means of maintaining control; and a motivation to increase influence in the community in order to obtain more power and profits.

Feichtinger, *supra* note 85, at 1055 n.176.

¹⁷⁸ See *supra* Part II.A (discussing the lack of a gang definition). For instance, a gang

factors should be the five reoccurring concepts that are generally found in most academic and law enforcement definitions: (1) a group comprised of more than three members; (2) the members share a unified “identity” though a name or symbol; (3) the members consider themselves a gang and are acknowledged by others as a gang; (4) the group actively and regularly participates in criminal activity; and (5) the group is substantially feared by others or considered dangerous.¹⁷⁹ A broad definition supplemented with specific factors allows gangs to be captured under the definition, rather than other groups.¹⁸⁰

Gang members cannot use the current withdrawal standard because it does not accommodate the eccentricities of gang life that create withdrawal barriers.¹⁸¹ Creating and adopting a universal gang definition is the first step in remedying the unusable standard.¹⁸² The suggested definition is the type of gang definition that should be adopted by scholars, law enforcement agencies, and the legal community to collectively fight gang violence.¹⁸³ Practically speaking, a modified withdrawal procedure will only apply to gangs because the current standard for non-gang members does not need alteration.¹⁸⁴ Therefore, the revised standard cannot be applied consistently if the qualifying foundation premise, the gang, is not universally understood.¹⁸⁵

definition such as “a hierarchically organized group of individuals banded together for a common illegal purpose” could describe a college sorority collaborating to buy underage members alcohol. *See generally* CURRY ET AL., *supra* note 29, at 5 (noting that a gang definition must encompass a criminal component or it will incorrectly describe other groups). A broad definition does not fulfill the targeted purpose behind the definition, and thus, the proposed definition was created to capture only criminal gangs, with inherent danger to the community. *Id.*

¹⁷⁹ *See supra* notes 28–31 and accompanying text (discussing that even though a central definition of “gang” is lacking, most lay definitions contain five similar points).

¹⁸⁰ *See supra* note 178 and accompanying text (describing that the definition needs to be specific enough to only capture gangs, not other large groups).

¹⁸¹ *See supra* Part III.A (detailing the reasons the current defense of withdrawal is not usable for defecting gang members).

¹⁸² *See supra* note 170 and accompanying text (noting that before the withdrawal standard can be altered, a gang definition must first be established).

¹⁸³ *See supra* notes 177–78 and accompanying text (illustrating the type of gang definition that would be the most efficient at only capturing gang-related activity).

¹⁸⁴ *See infra* Part III.C (explaining the necessary modification to the defense of withdrawal only required for exiting gang members).

¹⁸⁵ *See supra* note 170 and accompanying text (stating that in order to change the withdrawal standard for gangs, the cart cannot come before the horse, and therefore, the definition of a gang must first be determined).

C. *Required Modification to the Withdrawal Defense, Not Conspiracy Theory*

Even though a gang definition needs to be created and universally adopted, conspiracy law does not need alteration because the current statutory and common law principles are not the cause of the withdrawal conundrum.¹⁸⁶ However, unlike conspiracy law, the requirements for the withdrawal defense must be modified.¹⁸⁷ The defense of withdrawal has been established and is effective for non-gang-related conspiracies; however, the current standard is unusable for gang-related conspirators.¹⁸⁸ Specifically, the following subparts explain what parts of the defense need to be reformed.¹⁸⁹ First, Part III.C.1 outlines the needed modifications to the withdrawal requirements.¹⁹⁰ Then, Part III.C.2 details

¹⁸⁶ See *supra* Part II.C (examining the current working common law and statutory principles behind conspiracy theory). In accordance with conspiracy theory, concepts such as continuing criminal liability and pre-withdrawal liability should still apply to gang members using the defense of withdrawal. See *supra* Part II.D (discussing the legal implications of the withdrawal defense). According to conspiracy theory, a coconspirator is liable for all actions of other conspirators, even if the conspirator is not actively participating in the criminal conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (holding that because of vicarious liability, every conspirator is liable for any overt act that is “foreseeable in furtherance of the conspiracy”). By withdrawing from the conspiracy, a conspirator’s criminal liability for post-withdrawal acts is terminated. See *supra* Part II.C (explaining that the defense of withdrawal terminates the continuing, vicarious liability of the conspiracy). In accordance with traditional common law principles, the proposed solution does not absolve the defendant of prior criminal liability. See *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (finding that the defense of withdrawal does not “negate an element of the conspiracy crimes charged”). Rather, it only ensures that the defendant effectually withdrew from the conspiracy and therefore cannot be criminally liable for future crimes. *Id.* In essence, the statute reaffirms the common law conspiracy principle that withdrawal terminates future criminal liability, but does not absolve the conspirators from criminal liability accrued within the conspiracy. *Id.* Under the rule set forth in *Pinkerton*, all conspirators are criminally liable “regardless of their knowledge or participation in those crimes.” See *Cantoni*, *supra* note 101, at 439 (discussing the implications the defense of withdrawal has on the conspirators future criminal liability of the conspiracy).

¹⁸⁷ See *supra* Part II.E (showcasing the shortcomings of the defense of withdrawal as applied to gang-related conspiracies); Part III.A (illustrating the three reasons why the current withdrawal standard is unusable).

¹⁸⁸ See *Hyde v. United States*, 225 U.S. 347, 369–70 (1912) (“As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.”); see also *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989) (stating that a conspirator remains a member until he or she performs an unequivocal act that “defeat[s] or disavow[s] the purpose of the scheme”).

¹⁸⁹ See *infra* Part III.C.1 (outlining the required changes to the defense’s requirements); Part III.C.2 (showing the required changes to the defense’s burden of proof); Part III.C.3 (demonstrating the required changes to the defense’s procedure).

¹⁹⁰ See *infra* Part III.C.1 (depicting the necessary alterations to the withdrawal defense’s current notice and law enforcement cooperation requirements).

the necessary alterations to the burden of proof.¹⁹¹ Finally, Part III.C.3 illustrates the required procedure modifications.¹⁹²

1. Modification of the Withdrawal Requirements

Most importantly, the notice and thwarting requirements of the withdrawal defense need to be replaced.¹⁹³ In an ordinary conspiracy, the conspirator must either inform the other conspirators of his clear intention to exit the conspiracy or cooperate with law enforcement to thwart the conspiracy's objective.¹⁹⁴ However, in a gang-related conspiracy, these two requirements are nearly impossible and create dangerous, even fatal, risks to the defecting member.¹⁹⁵ Notifying all members of the intention to leave is virtually impossible; because of the large network of gang members, it would be unreasonably difficult to contact every member.¹⁹⁶ Further, the defecting member compromises the safety and well-being of himself, and possibly the lives of family and friends, simply by attempting to exit the gang.¹⁹⁷ These added threats and barriers, which are nonexistent for non-gang conspirators wanting to exit a conspiracy, act as a proxy for the notice and law enforcement thwarting requirements.¹⁹⁸

Nevertheless, the common law affirmative action requirement should still be used to prevent fraudulent claims by showing that the conspirator made a concerted effort to disassociate from the conspiracy, rather than

¹⁹¹ See *infra* Part III.C.2 (illustrating the need for the burden of proof to be changed from "beyond a reasonable doubt" to "clear and convincing evidence").

¹⁹² See *infra* Part III.C.3 (detailing the necessary procedure modifications to a pretrial adjudication procedure modeled from the entrapment defense).

¹⁹³ See *supra* Part II.D (examining the current withdrawal defense that includes notice and thwarting requirements); Cantoni, *supra* note 101, at 442 ("[N]otification alone is inadequate in that '[i]t is seriously doubted that the withdrawer can remove from the minds of his co-conspirators a germ which he helped plant and nourish.'").

¹⁹⁴ See MODEL PENAL CODE § 5.01(4) (AM. LAW INST., PROPOSED OFFICIAL DRAFT 1962) (requiring that a coconspirator "thwart" the conspiracy to withdraw); *supra* Part II.C (discussing the defense of withdrawal).

¹⁹⁵ See *supra* Part II.A (describing the clutching control gangs have over the members and the physically harmful or even deadly consequences for attempting to leave the gang); *supra* notes 52-53 and accompanying text (stating, more specifically, that the gang beat the defecting member or require the defecting member to kill someone before the member is allowed to leave).

¹⁹⁶ See *supra* Part II.A (describing the physical risk incurred when a gang member attempts to exit a gang).

¹⁹⁷ See *supra* Part III.C.1 (examining the grave risk defecting gang members encounter when withdrawing from a gang-related conspiracy). Not only does the member have to exit the gang, which often has grave consequences, the member also must leave the conspiracy and live to prove both. *Supra* Part III.C.1.

¹⁹⁸ See generally *supra* notes 195-97 (discussing the added hardships and barriers gang members incur defecting from a gang).

happenstance or a coincidental event.¹⁹⁹ In addition to the affirmative action requirement, the language “complete and voluntary renunciation of criminal purpose” should be borrowed from the Model Penal Code to replace the notice and thwarting requirements.²⁰⁰ In other words, the decision to withdraw should be a voluntary “change of heart” to depart from the criminal purpose, rather a steadfast requirement.²⁰¹ Therefore, the absence of specific notice and thwarting requirements allows the member to affirmatively disassociate safely and reasonably; however, this alone is not sufficient, as the burden of proof also needs to be modified.²⁰²

2. Necessary Alterations to the Burden of Proof

In addition to modifying the withdrawal requirement language, the current burden of proof, beyond a reasonable doubt, is not sufficient and must be altered to accommodate the idiosyncrasies of gang life.²⁰³ Although the Supreme Court cured the circuit split in *Smith*, a serious problem remains concerning the expectations that the burden demands.²⁰⁴

¹⁹⁹ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464–65 (1978) (“Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.”). Speaking for the Supreme Court in *Smith*, Justice Scalia said, “[i]t is his withdrawal that must be active, and it was his burden to show that.” *Smith v. United States*, 133 S. Ct. 714, 717 (2013); see *supra* Part II.C (discussing the requirements of the defense of withdrawal). “Mere cessation” of the conspirator’s involvement, “hibernation,” “laying low” to evade the police, or non-participation in the targeted crime are not a sufficient, affirmative withdrawal. See *United States v. Pippin*, 903 F.2d 1478, 1481 (11th Cir. 1990) (stating that “merely ending one’s activities in the conspiracy” does not satisfy the requirements of withdrawal); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976) (describing that “hibernation” does not constitute withdrawal); *United States v. Bastone*, 526 F.2d 971, 988 (7th Cir. 1975) (stating that “laying low” does not constitute withdrawal); *United States v. Chester*, 407 F.2d 531, 555 (3d Cir. 1969) (holding that non-participation in the target crime is not sufficient to withdraw).

²⁰⁰ See MODEL PENAL CODE § 5.01(4) (AM. LAW INST., PROPOSED OFFICIAL DRAFT 1962) (borrowing the language “a complete and voluntary renunciation of criminal purpose”). Missing from the traditional defense of withdrawal should be the requirements of thwarting or law enforcement cooperation. See *United States v. Gonzalez*, 596 F.3d 1228, 1234 (10th Cir. 2010) (stating that the defendant must prove that he or she has performed an act to “disavow or defeat [or thwart] the purpose of the conspiracy”).

²⁰¹ See *United v. Piva*, 870 F.2d 753, 758 (1st Cir. 1989) (stating that affirmative action indicates that the conspirator, of his or her own recognizance, have a “change of heart to sustain the defense of withdrawal”).

²⁰² See *supra* Part III.C.1 (describing the added barriers and dangers the current defense of withdrawal poses upon defecting members).

²⁰³ See *supra* note 114 (discussing the current burden of proof, beyond a reasonable doubt, for the withdrawal defense).

²⁰⁴ See *Smith*, 133 S. Ct. at 719 (determining, in accordance with the common law, that the defendant bears the burden of proof for the defense of withdrawal). The conspirator must show “[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in

According to *Smith*, the defendant must affirmatively prove beyond a reasonable doubt that the necessary steps were taken to withdraw from the conspiracy.²⁰⁵ However, for this type of proceeding, the burden of proof should be a slightly lower standard—clear and convincing evidence.²⁰⁶ The “goldilocks standard” of clear and convincing evidence reconciles beyond a reasonable doubt, which is too high, and preponderance of the evidence, which is too low.²⁰⁷ The standard should

a manner reasonably calculated to reach co-conspirators” *U.S. Gypsum Co.*, 438 U.S. at 464.

²⁰⁵ See *Smith*, 133 S. Ct. at 719 (holding that the defendant must prove the affirmative act of withdrawing from the conspiracy). Furthermore, the Court in *In re Winship* stated:

Let there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. 358, 364 (1970).

²⁰⁶ See *supra* note 114 (stating that clear and convincing evidence is another evidentiary standard). Black’s Law Dictionary defines “burden of proof” as “[a] party’s duty to prove a disputed assertion or charge. The burden of proof includes both the burden of persuasion and the burden of production.” *Burden of Proof*, BLACK’S LAW DICTIONARY (3d ed. 2006). The “burden of persuasion” is defined as “[a] party’s duty to convince the fact-finder to view the facts in a way that favors that party.” *Burden of Persuasion*, BLACK’S LAW DICTIONARY (3d ed. 2006). The “burden of production” is defined as “[a] party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” *Burden of Production*, BLACK’S LAW DICTIONARY (3d ed. 2006).

²⁰⁷ See *In re Winship*, 397 U.S. at 363–64 (describing the importance of the reasonable doubt evidentiary standard). *In re Winship* explained the reasonable doubt standard by stating:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”

Id. at 364. The “reasonable doubt” standard is explained as follows by a model federal jury instruction:

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

FEDERAL JURY PRACTICE AND INSTRUCTION, *supra* note 114, at § 12:10. Additionally, the “clear and convincing evidence” standard is explained as follows by a model federal jury instruction:

“Clear and convincing evidence” is evidence that produces in your mind a firm belief or conviction as to the matter at issue. Clear and convincing evidence involves a greater degree of persuasion than is

be lowered because the secretive nature of a conspiracy makes evidence production difficult, in addition to the potentially fatal or physical risk that the defector automatically assumes when exiting the gang.²⁰⁸ In particular, gang-related withdrawals have a limited supply of evidence because witnesses, including fellow gang members, are not willing to cooperate or provide information.²⁰⁹ Also, many of the agreements and communications are not tangible given the notorious chaotic and secretive circumstances of conspiracies.²¹⁰ Thus, the evidentiary standard of withdrawal should be lowered to accommodate the additional barriers

necessary to meet the preponderance of the evidence standard. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Id. § 104:02; *see also* *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 285 n.11 (1990) (describing "clear and convincing evidence" as an intermediate standard, often protecting important interests). In addition, the "preponderance of the evidence" standard is explained as follows by a model federal jury instruction:

"Establish by a preponderance of the evidence" means evidence, which as a whole, shows that the fact sought to be proved is more probable than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

FEDERAL JURY PRACTICE AND INSTRUCTION, *supra* note 114, at § 104:01; *see also* *United States v. Montague*, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994) (noting that the "preponderance of the evidence" standard is sometimes more easily explained when it is referred to by the phrase "more probably true than not true").

²⁰⁸ *See supra* Part II.A (explaining the life-threatening consequences for attempting to leave a gang); *CURRY ET AL.*, *supra* note 29, at 155 (discussing the proof issues of whether the crime is gang-related). In addition to the gang's threatening pressures dissuading a member's exit, proving the exit is also difficult:

Generally, the lack of solid information about motives combined with lack of cooperation by both victims and witnesses make gang prosecutions more difficult. Many victims of gang crimes are intimidated and unwilling to come forward and report their crimes, much less appear in court. The group nature of most gang crime makes it less likely that fellow gang members will testify against one another.

CURRY ET AL., *supra* note 29, at 155.

²⁰⁹ *See* *CURRY ET AL.*, *supra* note 29, at 155 (noting the many difficulties surrounding gang prosecutions including unknown motives, lack of cooperation by witnesses, and unwilling fellow gang members).

²¹⁰ *See* *LEE*, *supra* note 80, at 15 ("Prosecutors do not have to prove that as a member of a conspiracy, a defendant either participated in, or even knew of the existence of the crimes. They only must prove that he was a member of the conspiracy at the time the crimes were committed.").

caused by gang life, while maintaining a reasonable threshold preventing fraud.²¹¹

3. Procedure Modification: Using the Entrapment Defense as a Guide

Similar to the burden of proof and withdrawal standard, the current adjudication procedure needs to be modified to be more practical and efficient.²¹² Under the current standard, the affirmative defense of withdrawal is adjudicated during trial.²¹³ However, a pretrial adjudication modeled from the suggested, but rarely used, common law treatment of the defense of entrapment would be more successful.²¹⁴ The

²¹¹ See *supra* note 112 (discussing that the primary reason for the affirmative action requirement is to prevent after-the-fact fraudulent claims of the defense). With a defense such as withdrawal, the court is always concerned with fraudulent claims and therefore, proactive measures should be implemented whenever possible to prevent fraudulent withdrawal claims. *Id.*

²¹² See *supra* Part II.E (showcasing the ineffectiveness of the withdrawal defense for gang members); Part III.A (detailing the specific problems with the current withdrawal defense as applied to gang-related conspiracies).

²¹³ See *supra* Part II.D (illustrating, at length, the withdrawal defense to a crime of conspiracy).

²¹⁴ See *supra* note 117 (comparing the entrapment defense and the withdrawal defense). See, e.g., *Minnesota v. Grilli*, 230 N.W.2d 445, 455 (Minn. 1975) (explaining a method for determining the entrapment defense at a pretrial hearing, similar to an evidence suppression hearing). The court in *Grilli* stated:

We hold that, following complaint or indictment and at a time prior to the commencement of trial, a defendant shall elect whether to have his claim of entrapment presented in the traditional manner as a defense to the jury, or to have it heard and decided by the court as a matter of law. He shall give notice of such election to the court and prosecution, setting forth the basis for the claim of entrapment in reasonable detail. If the defendant elects to have the court hear the claim, he must in open court or in writing waive a jury trial as to that issue. Such a matter can be heard at a pretrial evidentiary hearing similar to that held for suppression of evidence as set forth in *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965). Trial judges may consider the entrapment issue at the so-called “Rasmussen” hearing if one is held. Hearing and consideration of the issue will take place at the “omnibus” hearing under the soon-to-be effective Rules of Criminal Procedure. The trial court shall make findings of fact and conclusions of law on the record. If the court decides that defendant was entrapped into the commission of the crime charged, this will be a bar to further prosecution for that charge. The state may appeal this decision under Minn. St. 632.11. If the court holds that there was no entrapment, the issue is closed and defendant may not present the defense to the jury. However, as always, the defendant pursuant to Minn. St. 632.01 has the right to appeal from any resultant conviction with the pretrial denial of his entrapment claim a possible ground for reversal. In the alternative,

entrapment defense is very similar to the withdrawal defense as both are conservative, affirmative defenses that require the defendant to admit guilt to the substantive offense before the defense can take effect.²¹⁵

Using the entrapment defense as a guide, a gang-member defendant should have the option to waive his or her right to a jury trial and opt for an efficient pretrial adjudication.²¹⁶ A pretrial adjudication procedure allocates authority to the federal district judge, deciding both issues of fact and law, to solely determine the issue of withdrawal.²¹⁷ If the judge finds the defendant sufficiently withdrew, criminal liability ends at the time of withdrawal.²¹⁸ By finding that a withdrawal occurred, the judge determines when criminal liability ceased and the defendant may only be criminally liable for pre-withdrawal crimes, rather than all crimes charged.²¹⁹ Thus, conspiracy and foundational withdrawal law remain unaltered because only post-withdrawal crimes will be expunged, not pre-withdrawal crimes.²²⁰ If the charged crime occurred pre-withdrawal, the defendant may still be criminally liable and the case will continue to trial,

defendant may elect to have his claim presented as a defense to be decided by the jury.

Id.

²¹⁵ See *supra* note 117 and accompanying text (explaining the vast similarities between the withdrawal defense and the entrapment defense). For instance, both defenses are affirmative defenses that do not negate past criminal liability and require the defendant to admit guilt of the charged offense. *Id.*

²¹⁶ See *supra* note 214 and accompanying text (detailing the pretrial adjudication procedures of the entrapment defense).

²¹⁷ See *Grilli*, 230 N.W.2d at 455 (following the charging document but during pretrial a defendant can waive the right to a jury trial on that issue and present the entrapment defense to a judge to make the necessary findings of fact and law at a hearing similar to an omnibus hearing). With the 1965 case *Rasmussen v. Tahash*, the Minnesota Supreme Court established a pretrial proceeding, similar to an omnibus hearing, to determine admissibility of evidence before it is presented to the jury. See 141 N.W.2d 3, 13–14 (explaining *Rasmussen's* admissibility of evidence standard). The scope of the hearing is limited to:

“[A]ll motions” relating to probable cause, evidentiary issues, discovery, other crimes or wrongs or relationship evidence, prior sexual conduct, constitutional issues, procedural issues, aggravated sentences, and any other issues relating to a fair and expeditious trial.

8 MINN. PRAC., CRIMINAL LAW & PROCEDURE § 21:4 (4th ed. 2014).

²¹⁸ See *supra* note 117 and accompanying text (stating that criminal liability for the conspiracy is terminated at the time a legal withdraw occurs and that guilt remains for the illegal conspiracy before the withdrawal occurred).

²¹⁹ See *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (holding that “[w]ithdrawal does not negate an element of the conspiracy crimes charged here”).

²²⁰ See *supra* Part II.C (explaining that liability for the illegal conspiracy is continuous); Part II.D (stating that a legal withdrawal does not erase criminal liability from pre-withdrawal liability, only post-withdrawal liability).

but post-withdrawal crimes will not be included.²²¹ On the other hand, if the judge finds the defendant did not sufficiently withdraw, then the conspiracy charge proceeds to trial, but the defendant is precluded from raising the defense during trial.²²² A pretrial adjudication process allows the withdrawal analysis to be flexible to accommodate each gang member's unique situation, rather than a bright-line rule, while still providing a relatively uniform result.²²³

Additionally, a pretrial adjudication procedure creates several incentives for the gang member defendant to withdraw.²²⁴ First, a judge adjudicates with the understanding that the admission of guilt is a requirement, thereby eliminating a confusing matter for the jury while simultaneously preserving the foundational principle.²²⁵ Second, a pretrial adjudication alerts both parties as to whether the defense will be used during trial, which can lead to pretrial settlements.²²⁶ Third, a pretrial adjudication by a district judge accommodates many of the defendant's unique, situational variables, such as gang culture, criminal background, and the gang member's personal challenges and circumstances.²²⁷ Fourth, pretrial adjudication creates an incentive for members to leave the gang because the proposed adjudication molds the withdrawal requirements to be conducive to gang-related conspiracies.²²⁸ In all, modifications to the withdrawal requirements, burden of proof, and

²²¹ See *Smith*, 133 S. Ct. at 719 ("Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense.").

²²² See *Grilli*, 230 N.W.2d at 455 (noting that upon a finding that there was no entrapment, the defendant is then precluded from raising the defense during trial).

²²³ See *supra* Part II.E (stating the need for a flexible withdrawal defense analysis to accommodate the barriers and eccentricities of gang life, in addition to the withdrawal requirements).

²²⁴ See *infra* Part III.C.3 (illustrating the incentives for all parties involved to adjudicate the defense of withdrawal in a pretrial setting with a judge).

²²⁵ See *supra* note 118 (discussing the admission of guilt problem for defendants attempting to use the withdrawal defense). With the pretrial adjudication, important admission of guilt requirement is enduring, but is adjudicated in a more practical fashion for defecting gang members. *Id.*

²²⁶ See *supra* Part II.D (examining the withdrawal defense's advantages to trial adjudication). The previous knowledge will then lead the defendant and prosecution to pretrial settlements, which streamlines the adjudication process. *Supra* Part II.D.

²²⁷ See *supra* Part III.A (demonstrating the current unusable withdrawal defense for gang members); Part II.E (showing the need for a flexible analysis when determining gang withdrawal).

²²⁸ See *Cantoni*, *supra* note 101, at 439 ("The withdrawal defense affords conspirators the opportunity to reduce the impact of group danger by limiting their liability for crimes committed by co-conspirators in furtherance of the conspiracy subsequent to the withdrawal."); *supra* Part II.E (illustrating the need for gang members to have a legal avenue to escape the continuing legal responsibility of gang membership).

trial adjudication process refine the societally important legal doctrine within the gang context: the defense of withdrawal.²²⁹

IV. CONTRIBUTION

Although statutes and common law established standards and guidelines for the average criminal to properly abandon a conspiracy using the withdrawal defense, a criminal with gang affiliation does not have the same clear guidelines.²³⁰ This Note proposes a federal statute to refine the current legal standard specifically pertaining to a gang member's use of the defense of withdrawal to conspiracy.²³¹ The proposed statute creates a functioning guide for the defense of withdrawal as applied to gang-related conspiracies by outlining the requirements, burden of proof, and adjudication procedure. Utilizing the proposed statute, gang-members will have the opportunity to successfully withdraw from the gang-related conspiracy.²³² First, Part IV.A proposes federal legislation.²³³ Second, Part IV.B offers commentary on the proposed legislation.²³⁴

A. Proposed Legislation

The United States Congress should codify the following proposed statute in the United States Code, Title 18, entitled Crimes and Criminal Procedure:

Pretrial Adjudication of Gang-Related Conspiracy to the Defense Withdrawal

I. Purpose

A. *This statute is applicable only to gang members raising the defense of withdrawal to a conspiracy charge.*

²²⁹ See generally *supra* Part III.C (examining the need for modification of the current withdrawal defense).

²³⁰ See *supra* Part II.E (showcasing the unusable defense of withdrawal for defecting gang members); Part III.A (examining the reasons the defense of withdrawal is unusable for gang members exiting a gang-related conspiracy).

²³¹ See *supra* Part III (describing the necessary addition and modifications that need to be made to render the defense of withdrawal usable to defecting gang member).

²³² The goal of the proposed statute was to create a pretrial adjudication procedure that focused on case-by-case analysis, but permitted a semblance of order and custom.

²³³ See *infra* Part IV.A (proposing a federal statute that would solely govern gang member withdrawal claims and adjudicate them accordingly).

²³⁴ See *infra* Part IV.B (commenting on the proposed federal statute and responding to anticipated counterarguments).

B. *This statute provides a federal district court judge the authority to adjudicate a gang-related defense of withdrawal to conspiracy on a case-by-case basis at a pretrial hearing.*

II. *Definitions*

A. *Gang – A hierarchically organized group of individuals banded together for a common illegal purpose. Factors used to determine whether a group is a gang:*

- (1) a group comprised of more than three members;*
- (2) the members share a unified “identity” though a name or symbol;*
- (3) the group members consider themselves a gang and are acknowledged by others as a gang;*
- (4) the group actively and regularly participates in criminal activity; and*
- (5) the group is substantially feared by others or considered dangerous.*

B. *Conspiracy – Applicable statutes and common law should be used to determine if a conspiracy has been formed.*

C. *Defense of Withdrawal – A complete and voluntary renunciation of criminal purpose that is manifested through an affirmative action.*

III. *Burden of Proof and Notice*

A. *Notice – The defendant has the burden of production and must promptly notify the court and opposing counsel.*

B. *Burden of Proof*

- i. The defendant has the burden to prove that he or she withdrew from the conspiracy by clear and convincing evidence.*
- ii. Once the defendant has proven that he or she withdrew from the conspiracy, the burden shifts to the prosecution to prove, by clear and convincing evidence, that the defendant did not withdraw from the conspiracy.*

IV. *Pretrial Adjudication Procedure*

A. *The district court judge must be sufficiently convinced that the defendant withdrew from the conspiracy.*

B. *In determining a legal withdrawal, the judge should follow the prescribed structure, but may deviate for good cause or discretionary purposes.*

- i. *The defendant must raise the defense of withdrawal following the complaint or indictment, but prior to the trial.*
 - a. *The defense should be raised within the customary time restrictions for motions in limine.*
 - b. *The structure, thoroughness, and timeliness requirements of the motion are at the discretion of the district court judge.*
 - ii. *The defendant must motion the court to adjudicate the defense of withdrawal at a pretrial hearing. By motioning and beginning a pretrial hearing, the defendant waives the right to a jury trial on the defense.*
 - iii. *The district court judge will adjudicate both the necessary findings of fact and law.*
 - a. *If the district court finds that the defendant has sufficiently withdrawn, criminal liability terminates at the point of withdrawal.*
 - b. *If the district court finds that the defendant has not sufficiently withdrawn, the defendant is barred from presenting the defense during the jury trial.*
 - iv. *If the defense is unsuccessful, an attempt to raise the defense cannot be construed during the trial as a palpable admission of guilt to the substantive conspiracy.*
 - v. *Both the prosecution and the defendant may preserve an issue with the findings for appeal.*
- V. *Effect Upon Continuing Criminal Liability*
- A. *Continuing criminal liability extending from the conspiracy will be terminated once the judge determines if and when the withdrawal was successfully completed.*
 - B. *The defense of withdrawal is an affirmative defense, not a complete defense, and therefore, does not erase past criminal liability extending from the conspiracy before the successful withdrawal.*
- VI. *Judicial Application: Factors Applicable to the Proposed Statute*
- A. *The district court judge, in determining whether a legal withdrawal has been effectuated according to this statute, should analyze the following set of factors:*
 - (1) *length of time in the gang;*

- (2) *type of evidence offered;*
- (3) *cooperation with law enforcement;*
- (4) *traumatic event causing change of heart; and*
- (5) *other compelling evidence.*²³⁵

B. *Commentary*

The proposed federal statute modifies the withdrawal defense for gang members defecting from a gang-related conspiracy to accommodate the idiosyncrasies and barriers of gang life. However, the proposed statute does not alter conspiracy law for gang members nor does it alter the withdrawal defense for ordinary, non-gang-affiliated criminals. In addition to modifying the withdrawal standard and crafting a gang definition, a factor test is created to serve as a guideline for consistent judicial application. The district court judge, in determining whether a legal withdrawal has been effectuated, according to the proposed statute, should begin, not end, with the list of five factors. First, the length of time in the gang should be considered because it contemplates the strength of the member's tie to the gang; but may also serve as a benefit because the

²³⁵ The proposed statute is italicized and is the contribution of the author. The statement of purpose in Section I was included to ensure that the authority and narrow scope are clear and unambiguous. The definitions provided in Section II should be used as a framework when interpreting the remaining sections of the statute. Language for the gang definition in Section II.A was derived from the analysis in Part III.B. *See supra* Part III.B (suggesting a universal gang definition). Phrasing for the conspiracy definition in Section II.B was added to the statute to ensure that the conspiracy theory has not been altered. *See supra* Part II.C (exploring the core statutory and common law principles of federal conspiracy law). The language for the withdrawal defense definition in Section II.C was borrowed from the Model Penal Code and the affirmative action requirement was taken from existing common law. *See supra* Part III.C.1 (suggesting a new withdrawal standard for defecting gang members). The standard for the notice requirement in Section II.A was taken from the common law principles of the withdrawal defense. *See supra* Part II.D (noting the defendant must notify the court and the prosecution of the intent to use the withdrawal, an affirmative defense). The legal precedent and language for the burden of proof in Section III.B was taken from the analysis in Part III.C.2. *See supra* Part III.C.2 (finding that the burden of proof should be changed to clear and convincing evidence, rather than beyond a reasonable doubt). The legal precedent and phrasing for Section IV was derived from *Minnesota v. Grilli*. *See* 230 N.W.2d 445, 455 (Minn. 1975) (explaining a method for determining the entrapment defense before trial at a pretrial hearing, similar to an evidence suppression hearing); *see also supra* Part III.C.3 (outlining the suggested pretrial adjudication procedure). Language for Section V was borrowed from steadfast common law principles of the withdrawal defense. *See supra* Part II.D (discussing the withdrawal defenses as an affirmative defense ending continuous criminal liability of conspiracy law). The factor test for Section VI was created to provide a flexible analysis for the judiciary and will be discussed further in Part IV.B. *See infra* Part IV (outlining the demand for and purpose of the factor test).

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member may have more valuable information.²³⁶ Second, the type of evidence offered is important to ensure the standard is not compromised.²³⁷ Third, the level of cooperation with law enforcement should be considered, but is not a requirement.²³⁸ Fourth, weight should

²³⁶ The longer the member is in the gang, the more embedded the member becomes in the gang and the more the member will need to prove an affirmative withdrawal. See *supra* Part II.A (noting that the longer a member is within the gang, the higher the member advances within the hierarchical ranks). The increased need for proof stems from the concern that the member would be more loyal to gang and thus exiting would be more complicated the longer the length of time with the gang. See *supra* Part II.A (showing that a gang member's loyalty to the gang is strong because of societal pressures and the mortal threat of exiting the gang). However, the longer the member is within the gang, the more useful information the member could share with law enforcement. See *supra* Part II.A (noting that the longer a member is within the gang, the higher the member moves up within the hierarchical ranks, and the more information could be supplied to law enforcement). This factor hinges on the individuality of each gang member's situation, involvement within the gang, and willingness to leave. *Supra* Part II.A.

²³⁷ See CURRY ET AL., *supra* note 29, at 155 (illustrating the evidentiary problems of gang-related crimes because of the barriers of gang life prevent victims and witnesses from coming forward to help law enforcement); *supra* notes 103, 152 and accompanying text (describing that the secretive nature of conspiracies, coupled with the challenges of the gang lifestyle, makes evidence of them difficult to procure). In addition to evidentiary barriers, motives of the individuals who do come forward are often questioned. CURRY ET AL., *supra* note 29, at 155. Furthermore, witness testimony, as proof of withdrawal, is not reliable because anyone can say anything. *Id.* In addition to unreliability, a witness can easily be manipulated to be untruthful. *Id.* The defense of withdrawal to conspiracy must be overcome with concrete evidence. See *supra* Part II.D (discussing the evidentiary requirements of the withdrawal defense).

²³⁸ The gang member may cooperate with law enforcement, but, to be clear, it should not be required that the defendant cooperate with law enforcement. See *supra* note 235 and accompanying text (showcasing the new withdrawal standard that does not include law enforcement notice or cooperation). However, such cooperation should never be discouraged because cooperating with law enforcement would allow for an effectual withdrawal and would provide assistance in preventing ongoing and future gang crime. See *supra* Part III.A (discussing the unnecessary expense to society that is directly caused by the overwhelming rate of gang violence). The benefits for this method are twofold. First, the member is less likely to return to the gang after becoming involved with police. See *supra* Part II.A (studying the dangerousness of gang initiations and attempted escapes). If a defecting gang member attempts to withdraw and cooperates with law enforcement, the danger incurred would make it hard for the gang member to return to the gang and be viewed as trustworthy. *Id.* This will show that the member is serious, committed, and not likely to return. Second, the proof is more concrete because the law enforcement agency will have a record and a reliable witness to prove the member took this step. This factor not only sufficiently provides proof, but is also a win-win for both sides. The member can have affirmative proof of withdrawal and the government is given assistance in combating gang violence. Even though this is a good option, it creates even more risk for the defendant already exiting the gang. See *supra* Part II.A (noting the dangerous implications of wanting to exit a gang).

be given to a withdrawal motivated by a traumatic event.²³⁹ Fifth, as this factor test is not exhaustive, the judge has the complete discretion to take into consideration any other evidence that is helpful in determining whether or not the defendant withdrew from the conspiracy. Nevertheless, the test should by no means be exhaustive or exclusive but instead, discretionary upon the court because gang-related conspiracies are context specific with many accompanying variables. Accordingly, the factor test should not be mandatory upon a court, but rather an advisory tool because the judge should be persuaded by clear and convincing evidence that the member, in his particular circumstances, withdrew from the conspiracy. In all, the statute proposes an effective, flexible analysis, rather than a bright-line rule, which can be applied consistently across various jurisdictions to determine whether or not the defendant withdrew from the gang-related conspiracy.

Furthermore, critics may question whether the proposed statute will be effective because it still requires an “admission of guilt.”²⁴⁰ The withdrawal defense requires the defendant to admit guilt of the conspiracy in order to terminate the conspiracy liability when the withdrawal has been completed.²⁴¹ Because the defendant must

²³⁹ See CURRY ET AL., *supra* note 29, at 76 (displaying the problem gang members have exiting a gang-related conspiracy through the defense of withdrawal). For instance, a former gang member said, “[t]he crazy stuff wasn’t for me no more. I saw other guys go down and I knew it was just a matter of time before I paid the price, you know.” *Id.* If the defector witnesses a traumatic event, such as the death of a friend, stabbing, drive-by shooting, act of extreme violence or gore, or a similarly provoking incident, it can be taken into consideration by the district judge. See *generally id.* (illustrating that witnessing such acts can provoke a gang member to want to leave the gang).

²⁴⁰ See *supra* Part II.D (discussing the withdrawal defense’s admission of guilt requirement).

²⁴¹ See *supra* note 118 (detailing the admission of guilt requirement for the withdrawal defense). For a defendant to come forth to law enforcement to prove an affirmative act against the conspiracy, the defendant will essentially need to admit guilt for the conspiracy. See *Smith v. United States*, 133 S. Ct. 714, 717 (2013) (stating that the defense of withdrawal does not negate an element of the crime, withdrawal “presupposes that the defendant committed the offense”). This may be a hard pill for members to swallow, but the benefits of admitting guilt substantially outweigh the negatives. *Id.* Withdrawing from a conspiracy does not absolve the member of past criminal liability. *Id.* Instead, it only ensures that the defendant effectually withdrew from the conspiracy and therefore cannot be criminally liable for future crimes. See *Hyde v. United States*, 225 U.S. 347, 369–70 (1912) (“As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.”). Because a conspirator is liable for all actions of other conspirators, the defendant may not actively participate in the criminal conspiracy, but may still be criminally liable for crimes committed within the conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946) (holding that because of vicarious liability, every conspirator is liable for any overt act that is foreseeable “in furtherance of the conspiracy”). This potential benefit is that future criminal liability will be terminated. Seemingly, being liable for only past actions is more conducive than the alternative, being criminally liable for all past and future actions.

essentially admit to the conspiracy, this requirement is thought to be a deterrent for the withdrawal defense.²⁴² Current law on conspiracy and the withdrawal defense are sufficient for non-gang-affiliated criminals, and this Note is not attempting to fix an unbroken standard.²⁴³ However, the withdrawal standard for gang members needs to be modified to account for the nuances and challenges of gang life. This Note modifies the withdrawal defense for gang members, but does not alter the steadfast admission of guilt requirement. The admission of guilt requirement is an essential principle of withdrawal law; and if that specific requirement is eradicated, then the withdrawal defense would be destroyed.²⁴⁴ Therefore, to preserve the foundational elements of withdrawal law, the proposed statute modifies the law without altering the admission of guilt requirement. Further discussion regarding the deterrent effects of the admission of guilt requirement is beyond the scope of this Note and should be examined in a separate setting.

Nevertheless, critics may either deny the existence of a gang problem and its subsequent need for a remedy, or may question whether the proposed statute will be an effective remedy to combat gang violence.²⁴⁵ First, gang violence is a problem, either directly or indirectly, for everyone regardless of geographical location or socioeconomic status.²⁴⁶ Enabling gang members to utilize this defense holds gang members accountable for their actions while providing a legal exit from the confines of the gang-related conspiracy. Additionally, the modified defense will encourage gang members to escape gangs and to cease participating in crime, which weakens gang conspiracies and limits its negative effects. Second, the

For example, logically it would be better to be facing a five year sentence verses a fifty year to life sentence.

²⁴² See *supra* note 118 (explaining the admission of guilt requirement is necessary to the defense of withdrawal).

²⁴³ See *supra* Part II.D (detailing the current standard of withdrawal for non-gang-affiliated criminals is steadfast and does not need to be altered).

²⁴⁴ See *supra* Part II.D (explaining that the admission of guilt is essential to the withdrawal defense and thereby cannot be destroyed).

²⁴⁵ See Boga, *supra* note 21, at 503 (“The most serious mistake society can make is to give up on gang members.”). Furthermore, the gang problem is not too complex to be solved. See HOWELL, *supra* note 135, at 49 (describing the myths surrounding the gang problem within the United States). Gang problems are difficult to assess because gangs are “shrouded” in myths and stereotypes, coupled with the lack of research, combines to create ineffective community responses to gang violence. *Id.* “[A] balanced approach incorporating multiple stages of prevention, intervention, and suppression” are needed to work together in a community to combat the gang problem. *Id.*

²⁴⁶ See Sabaitis, *supra* note 41 (“Gangs are a huge challenge for our communities. They are everywhere—and I mean everywhere.”); *supra* Part III.B (discussing the growing gang problem within the United States that affects all regardless of socioeconomic status or geographical location).

proposed statute is not a guarantee to solve gang violence, but only advances the movement in the correct direction. The problem of gang violence is created by a multitude of interconnected problems: socioeconomic issues, lack of education, need for increased policing, discrimination, inadequate parenting, drug and alcohol abuse, and other legal complexities.²⁴⁷ Because several interdependent issues tangle to create gang violence, a single solution is not possible to instantaneously remedy such a widespread problem. Eradicating gang violence entirely will require a concerted, simultaneous effort from a variety of sources. The proposed statute is a solution designed to begin the movement to eliminate gang violence and the trail of negative consequences it leaves in its wake.

V. CONCLUSION

Although there are standards and guidelines established for the average criminal to remove himself or herself from a conspiracy using the defense of withdrawal, gang-affiliated criminals do not have the same clear guidelines. Gang culture prevents members from relinquishing gang membership because the consequences are likely violent assault or death. In addition to the barriers preventing gang renunciation, a gang member encounters further obstacles when terminating the conspiracy's criminal liability through the withdrawal defense. The current notice and thwarting standards of the withdrawal defense are nearly impossible for the gang member to complete and have potentially dangerous, often fatal consequences. Thus, rendering the withdrawal defense to a gang-related conspiracy has been rendered useless.

Through the proposed statute, the withdrawal defense will become an effective legal tool to erode perceived and tangible barriers for exiting gang members. To achieve this goal, the proposed statute is modeled after another affirmative defense, entrapment, which allows the issue to be adjudicated in a pretrial hearing. Furthermore, the proposed statute reconciles additional problems with the withdrawal defense as applied to gang-related conspiracies: threshold requirements, definitions, and burden allocation. Modifying the withdrawal defense creates an effective instrument for defecting gang members by providing them with an

²⁴⁷ See CURRY ET AL., *supra* note 29, at 190 ("The response to gangs and gang-related crime has hardly been well coordinated, and many interventions have only served to make the problem worse."). Community attempts to diminish gang activity categorically appear into five areas: "(1) community organization; (2) social intervention; (3) opportunities provision; (4) suppression; and (5) organizational development and change. Evaluation research has found few successes, but opportunities provision appears the most promising category." *Id.*

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opportunity to divorce the gang and terminate gang-related criminal liability, benefiting the member and society alike.

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