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SOUTH CAROLINA OR SOUTH CENTRAL? PROPOSING COMPREHENSIVE CRIMINAL GANG PREVENTION LEGISLATION FOR THE PALMETTO STATE

I. INTRODUCTION

In the heart of downtown Columbia on a sunny May afternoon, a 21-year-old man with a baby face opens the screen door of a diner and sits at a table near the back. You might have passed this kid, who [sic] we'll call John, on the way to pay your tax bill at the Richland County Administration Building about a block away. Or maybe you met his eye on the sidewalks of Five Points as you rushed to make a lunch appointment. You might have noted his slow swagger, or admired the yellow-and-gray striped shirt he wore. You might have shared a polite smile.

But if you had slowed to look closer at John, you might have spotted the red bandana tucked in his front jeans pocket. And if you had really examined him, you might have traced the outline of a 9 mm pistol stashed in his pants.¹

John is not a fictional character. He is a real young man who identifies himself as a member of the Blood Gangster Killers, a local sect of the national Bloods gang.² On any given day, he may stroll down the same sidewalk as a CEO, rest in the same lobby as university students, or eat lunch at the table next to a mother of three. His presence symbolizes the growing gang population in South Carolina.

Contrary to popular belief, gang members such as John are not fleeting rarities in South Carolina. Despite this state's reputation of insulating itself from the rest of the nation, South Carolina is not immune to the influence of criminal gangs.³ Since the late 1980s, "California-based gangs have migrated across the United States, infiltrating areas that never before had gang problems."⁴ Deadly criminal gangs are present in South Carolina and are becoming increasingly influential.⁵

Public perception commonly associates criminal gangs with violent crime.⁶ Unfortunately, as media reports of gang violence become more prevalent, this

1. Amanda Presley, *The End of Innocence: Opening the Midlands' Eyes to Gangs*, FREE TIMES (Columbia, S.C.), June 18, 2003, available at http://www.free-times.com/archive/coverstorarch/end_of_innocence.html (last visited Dec. 22, 2004).

2. *Id.*

3. See *infra* notes 36–37 and accompanying text.

4. Bart H. Rubin, *Hail, Hail The Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute*, 66 FORDHAM L. REV. 2033, 2033 (1998).

5. See *infra* Part II.

6. In contrast, some studies have concluded that most street gangs do not engage in violent crime by choice. These studies argue that individuals often turn to gangs out of necessity because gang participation is the only way to meet basic needs that would otherwise go unmet. See, e.g., RANDALL G. SHELDEN ET AL., YOUTH GANGS IN AMERICAN SOCIETY 50–62 (1997) (arguing that gangs alleviate many of the daily struggles with which young people cope). That most gangs engage in criminal activity, however, is undeniable—hence the phrase “criminal gang.” While an analysis of the sociological factors that lead to gang involvement would be useful both in developing legislation and in creating community programs to provide an alternative to gang participation, such an analysis is beyond the scope of this Comment.

public perception turns into public fear.⁷ Because most South Carolinians would agree that deterrence of violent crime is an admirable goal, it follows that South Carolinians would view the deterrence of criminal gangs as an admirable goal.⁸ The pressing questions, then, are how to suppress the criminal activity of existing gangs and how to prevent gang expansion through the addition of new members. These are questions the South Carolina legislature has tried to answer. While many other state legislatures have passed legislation aimed at punishing and deterring gang-related crime, South Carolina's lawmakers have been unsuccessful in adopting such a statutory scheme.⁹

Because state and local governments have a compelling interest in reducing gang activity and its associated violence, this Comment encourages the South Carolina General Assembly to follow the lead of other state legislatures in enacting a statutory scheme aimed at punishing and deterring gang-related crime.¹⁰ In offering this encouragement, this Comment seeks to show (1) that gang-related activity and its associated crime are increasing in South Carolina, (2) that the State has already put in place some programs aimed at suppressing gang-related crime, (3) that the General Assembly has enacted no specialized legislation even though traditional schemes of prosecution such as conspiracy and complicity are insufficient to combat the problem of gang-related crime, and (4) that a comprehensive "anti-gang" act would be a valuable part in a complete plan to deter gang-related criminal activity.

Part II of this Comment demonstrates that the presence of gangs is increasing in South Carolina and that this increase brings an inevitable elevation in gang-related crime. Part III discusses the current efforts in place to curb gang activity both through specialized law enforcement and community programs. This Comment points out, however, that South Carolina lacks any specialized criminal gang prevention legislation even though experience nationwide has shown that traditional criminal statutes are insufficient to deter the unique problem of gang crime. Part IV suggests that a comprehensive statutory scheme which specifically targets gang-related activity would fill this gap in the state's efforts to reduce gang-related crime. This Part discusses similar legislation that other states have passed since 1988 and how these numerous states are using such legislation effectively to

7. See, e.g., Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-Gang Legislation*, 21 J. CONTEMP. L. 259, 266 (1995) (providing Southern California, which one researcher has described as being "in the midst of an unprecedented gang holocaust," as an example of a community with increasing public fear of gangs).

8. Countless public policies other than deterrence of violent crime also support the suppression of criminal gangs. These policies, however, are beyond the scope of this Comment.

9. See *infra* Part III.

10. This Comment does not intend to present a solution to the problem of gangs in America. Gangs are a complex establishment that can only be eliminated through a comprehensive combination of law enforcement, community education and involvement, and legislation coupled with strict judicial enforcement:

Some analysts conceive gang problems to be issues of criminal behavior while others see them as manifestations of economic and social pathologies in inner cities or the society at large. With such wide differences in the starting points of analysis, the end points are also likely to be far apart. A perception of gangs as groups of criminals tends to be associated with recommendations that they be dealt with by a strict enforcement of existing laws. An economic or social perception tends to be associated with proposals that gang violence be addressed via social programs or structural changes in urban economies.

GANGS: A CRIMINAL JUSTICE APPROACH 146 (J. Mitchell Miller & Jeffrey P. Rush eds., 1996).

combat the universal problem of criminal gangs. Part V explains potential problems with the effectiveness and the constitutionality of such a comprehensive statutory scheme and explains ways in which states may overcome these problems. Finally, Part VI proposes a Criminal Gang Prevention Act for South Carolina that would be effective at discouraging criminal gangs and survive the constitutional challenges faced by similar legislation in other states.¹¹ This Part describes the primary features of the proposed Act and explains the purpose, effects, and underlying concepts of each. The proposed Act itself is presented in Appendix A.

This Comment concludes that, because South Carolina has a compelling interest in discouraging criminal gangs, the state has a pressing need to address its growing gang problem. By enacting a comprehensive statutory scheme specifically targeting gang-related activity, lawmakers can work with law enforcement officials and concerned citizens to ensure that the Palmetto State does not follow in the violent footsteps of South Central Los Angeles.

II. GANG-RELATED ACTIVITY IS INCREASING IN SOUTH CAROLINA

Certain regions in America are known for having problems with criminal gangs. Major urban centers such as Los Angeles, Chicago, and New York have developed reputations for having unsafe districts that are essentially controlled by gangs. The problem has spread farther than most individuals realize. Criminal gangs have increased and emerged in all fifty states, bringing with them drugs and violent crime.¹² Since the late 1980s, California-based gangs have extended across the United States, thereby entering areas with little or no history of gang problems.¹³ These criminal gangs are not limited to urban areas. They are “found both in big cities and small towns, and their members come from a wide variety of races and nationalities.”¹⁴ They are also not limited to adults. In a 2000 survey of police departments across the nation, ninety-five percent of the departments confirmed gang activity in area high schools,¹⁵ and ninety-one percent reported gangs in their intermediate schools.¹⁶

One commentator has stated that the gang problem in America “is rapidly reaching a crisis point,”¹⁷ citing a case study that found the gang problem in America, “like AIDS, is an epidemic and getting worse; nothing can be done to eliminate it entirely, all we can do at this juncture is cope, adapt, prevent, etc, [sic] essentially ‘damage control.’”¹⁸ For the most part, though, South Carolinians assume South Carolina is immune to this epidemic. This assumption is wrong. Gang-related activity has been increasing in South Carolina for a number of years.¹⁹

11. The author drafted the proposed Criminal Gang Prevention Act in Appendix A by adapting portions of other states’ existing statutes—particularly the California STEP Act—as well as elements of bills that died in the South Carolina General Assembly during the 2001–2002 and 2003–2004 legislative sessions. It has been modified to meet the specific needs of South Carolina while avoiding constitutional challenges.

12. David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 684 n.6 (1995).

13. Rubin, *supra* note 4, at 2033.

14. Truman, *supra* note 12, at 684–85.

15. *In the Spotlight Gangs Resources*, National Criminal Justice Reference Service, at <http://www.ncjrs.org/gangs/summary.html> (last visited Sept. 29, 2004).

16. *Id.*

17. GEORGE W. KNOX, AN INTRODUCTION TO GANGS 504 (5th ed. 2000).

18. *Id.* at 511 n.30.

19. See WALTER MILLER, U.S. DEP’T OF JUSTICE, THE GROWTH OF YOUTH GANG PROBLEMS IN THE UNITED STATES: 1970–98 21 fig.10 (2001).

Between 1990 and 1995 alone—over a decade ago—South Carolina reported thirteen new cities²⁰ having a “recognized crime problem.”²¹ Compared with the rate of increase in other states, this is alarming. Moreover, South Carolina was seventh in the nation²² in the magnitude of change in the number of gang cities from the 1970s through 1995.²³

While South Carolina gangs are concentrated most heavily in the cities of Charleston, Columbia, and Greenville,²⁴ state law enforcement agencies in 2001 reported over one hundred “street gang types” across the state.²⁵ These gangs come in all shapes and sizes. Some are nothing more than groups of friends with nothing to do;²⁶ others are affiliated with well-organized national gangs from Florida, Los Angeles, Chicago, and New York.²⁷ The notorious “Hell’s Angels” outlaw motorcycle gang (OMG) even operates its East Coast headquarters in Summerville.²⁸ These gangs all have one thing in common, though: crime is an essential part of their daily routines.²⁹ While the primary crime of most South Carolina gangs is selling illegal drugs,³⁰ recent data from the North Charleston Police Department shows that twenty-five percent of crime in its area is gang-related.³¹ The United States Attorney for the District of South Carolina confirms that the increase in gang activity has resulted in an increased crime rate—including both wholesale and retail drug distribution, home invasions, and robberies.³² Vandalism, car break-ins, and burglaries are also common.³³ These gangs are violent. In better organized gangs, operational manuals “often have written philosophies that justify violence to rival gangs, police, citizens, and basically anybody that opposes them.”³⁴ This predisposition to violence is seen across the state. For example, in Greenville County, turf wars have been cited as the reason for fighting and drive-by shootings.³⁵ In various locales, prosecutors have convicted gang members of gun sales, school shootings, and murder for hire.³⁶

20. *Id.* at 20 tbl.8.

21. *Id.* at 5.

22. *Id.* at 21 fig.10.

23. “The magnitude of change is the number of gang cities in 1995 divided by the number of gang cities in the 1970’s.” *Id.* at 21 fig.10.

24. NATIONAL DRUG INTELLIGENCE CENTER, U.S. DEP’T OF JUSTICE, SOUTH CAROLINA DRUG THREAT ASSESSMENT, at <http://www.usdoj.gov/ndic/pubs07/717/717p.pdf> (last visited Sept. 15, 2004).

25. South Carolina Gang Investigators’ Association, *Gang Overview*, at <http://www.scgia.com/overview.htm> (last visited Sept. 15, 2004).

26. MARK A. SMALL ET AL., INSTITUTE ON FAMILY AND NEIGHBORHOOD LIFE, CLEMSON UNIVERSITY, GANGS IN SOUTH CAROLINA: AN EXPLORATORY STUDY, EXECUTIVE SUMMARY 2 (2000), available at <http://www.scdps.org/ojp/execsummarygang.pdf>.

27. SOUTH CAROLINA DRUG THREAT ASSESSMENT, *supra* note 24 (As “more local gangs form ties to national gangs and outside gangs attempt to gain a foothold in the state, gang-related activity and violence are increasing.”).

28. James Richardson, Lecture to a Gang Awareness Class at the University of South Carolina School of Law (Sep. 16, 2004).

29. SMALL ET AL., *supra* note 26, at 3.

30. *Gang Overview*, *supra* note 25.

31. SOUTH CAROLINA DRUG THREAT ASSESSMENT, *supra* note 24.

32. *Id.*

33. *Gang Overview*, *supra* note 25.

34. *Id.*; see also Knox, *supra* note 17, at 509 n.11 (explaining that killing is a means of status elevation within criminal street gangs and gang members who have served time for murder are revered when they return to the streets.).

35. SOUTH CAROLINA DRUG THREAT ASSESSMENT, *supra* note 24.

36. *Gang Overview*, *supra* note 25.

South Carolina is a prime territory for criminal gangs for a variety of reasons. First, “gangs seek out towns with populations around 25,000 people.”³⁷ South Carolina is largely a state of small metropolitan centers surrounded by rural areas. In such areas, there is “less competition, no [specialized law enforcement units for gang-related activity], and often denial on the part of the police.”³⁸ Second, drug distribution is a main source of most gangs’ income,³⁹ and South Carolina is home to a notable stretch of Interstate 95, one of the major East Coast drug trafficking routes between Florida and New England.⁴⁰ Third, and perhaps most important, South Carolinians are in denial. In a 1998 study, a national gang center in Chicago found that South Carolina “‘had no less or more serious a gang problem than any other state’, but that ‘South Carolina stands out when it comes to gang denial.’”⁴¹ Citizens deceive themselves by assuming that this state, with its lack of major urban centers and its long-standing tradition of Bible-belt morality, could be susceptible to criminal gangs. Gangs thrive on denial.⁴²

III. EXISTING GANG DETERRENT MEASURES IN SOUTH CAROLINA

Effective deterrence of criminal gangs requires a comprehensive cadre of programs combining education, community involvement, law enforcement, and specialized legislation coupled with strict judicial enforcement. None of these programs can be completely effective, though, without each of the others. For example, even if tougher law enforcement puts more criminal gang members behind bars, a new gang recruit will be solicited to replace every one incarcerated.⁴³ To make matters worse, those incarcerated will take their gang loyalties with them into the prison system.⁴⁴

Despite the lack of gang prevention legislation in South Carolina, some law enforcement officials have recognized the need for relief more quickly than is typical in other states. Typically, law enforcement agencies become involved in gang deterrence after the public expresses a concern about a growing gang problem. The public’s perception of the presence of dangerous gangs is shaped by the news media.⁴⁵ Because the media chooses stories that “the public will probably find interesting,”⁴⁶ reporters focus on “interest-generating topics” that attract attention.⁴⁷ The result is often a public outcry against gangs, even if there is no real threat to the community. Community members look to their local officials for help. In turn,

37. *Id.*

38. *Id.*

39. SOUTH CAROLINA DRUG THREAT ASSESSMENT, *supra* note 24.

40. *Id.*

41. *Gang Overview*, *supra* note 25.

42. *Id.*

43. RANDALL G. SHELDEN ET AL., YOUTH GANGS IN AMERICAN SOCIETY 220–21 (1997).

44. See, e.g., John Gibeaut, *Gang Busters*, 84 A.B.A. J. 64, 65 (describing the Gangster Disciples as one of the “nation’s largest and best organized street gang[s], whose leader ran the gang’s \$100 million per year drug enterprise from prison); see also *In the Spotlight Gangs Resources*, *supra* note 15 (citing the 2001 National Youth Gang Survey, which reported that the national increase in violent gang crime was attributable in part to gang members released from incarceration who returned to the streets).

45. Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 269 (1996).

46. *Id.*

47. *Id.* (“Gang stories are one type of story that is valued because it gets people’s attention and creates enough interest so that people will continue to watch the rest of the news.” (quoting WILLIAM B. SANDERS, *GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE* 10 (1994))).

these local officials often approach the local law enforcement agency with an instruction: “Do something.”⁴⁸

In South Carolina, however, law enforcement agencies have taken initiatives to curb gang activity even in the absence of such public outcry.⁴⁹ They have implemented both law enforcement programs and community programs targeted specifically at discouraging gangs. For example, agencies across the state have organized alliances such as the South Carolina Gang Investigator’s Association (SCGIA) to address the unique challenges of gang-related crime. The SCGIA is a statewide network of specially trained criminal justice professionals “dedicated to the prevention, intervention, and suppression of criminal threat groups, extremist or terrorist groups, and outlaw gang activity within South Carolina.”⁵⁰ These professionals are committed to gang prevention at every level, from academic research regarding nationwide historical gang developments, to education of the public, to arrests and deterrence of gang members on the street.⁵¹ The Association includes experts such as the members of the Richland County Sheriff’s Department Gang Task Force, an example of programs implemented across the state to respond to the increased presence of gangs through law enforcement. The Task Force’s responsibilities are “to gather intelligence, conduct gang awareness classes and assist investigations with gang related crimes”⁵² and is staffed by investigators whose job is to maintain an awareness of the presence of gang activity in the county.⁵³

The State is also responding to gangs through concerned citizens’ community involvement. Multiple state agencies have spearheaded community awareness and involvement programs to discourage gang activity. Programs such as the Gang Resistance Education and Training program (G.R.E.A.T.), which is currently sponsored by the Richland County Sheriff’s Department Gang Task Force, focus on community involvement and education to prevent and deter gang-related activity.⁵⁴

Although law enforcement agencies and community members have taken action to discourage gangs, the South Carolina General Assembly has failed to support this movement by enacting legislation aimed at discouraging gang activity.⁵⁵ This lack

48. Michael Capizzi et al., *The Target Model—A New Approach to the Prosecution of Gang Cases*, 29 APR PROSECUTOR 18, 18 (1995).

49. See *Gang Overview*, supra note 25 (noting that South Carolina is in “gang denial”).

50. South Carolina Gang Investigators’ Association, *South Carolina Gang Investigator*, at <http://www.scgia.com/main.htm> (last visited Dec. 22, 2004).

51. Richardson, supra note 28.

52. Richland County Sheriff’s Department, *Gang Task Force*, at <http://www.rcsd.net/gangsmain.htm> (last visited Dec. 22, 2004).

53. Richardson, supra note 28.

54. *Gang Task Force*, supra note 52.

55. In both the 2001–02 and 2003–04 legislative sessions, the South Carolina General Assembly considered bills that would have created the Criminal Gang Prevention Act, a statutory scheme intended to discourage criminal gangs. The substance of these bills was similar to that of the California STEP Act. CAL. PENAL CODE §§ 186.20–.28 (West Supp. 2005). None of these bills were adopted as law. See H.R. 4977, 114th Gen. Assem., Reg. Sess. (S.C.), available at http://www.scstatehouse.net/sess114_2001-2002/bills/4977.htm. The bill was read once and referred to the House Judiciary Committee, where it died. The Attorney General believed this bill to be unconstitutional in that it violated rights to freedom of speech and association. Legislator’s modified the bill to correct these deficiencies, and it was reintroduced during the 2003–04 legislative session as Senate Bill 31. See S. 31, 115th Gen. Assem., Reg. Sess. (S.C.), available at http://www.scstatehouse.net/sess115_2003-2004/bills/31.htm. Senate Bill 31 was a companion to House Bill 3226. H.R. 3226, 115th Gen. Assem., Reg. Sess. (S.C.), available at http://www.scstatehouse.net/sess115_2003-2004/bills/3226.htm. Even though the Attorney General

of support makes South Carolina one of only thirteen states with no gang prevention legislation.⁵⁶ In theory, it may seem that this does not present a problem since all criminals—regardless of gang involvement—are subject to the same law and can be prosecuted for any crime in the existing criminal code. Prosecutors already have tools to respond to group criminality. The principles of traditional accomplice liability allow a person who assists in the commission of a crime to be prosecuted as a principle in the crime.⁵⁷ Further, conspiracy and the *Pinkerton* doctrine⁵⁸ make co-conspirators liable for each other's overt criminal acts.

In practice, however, law enforcement agencies nationwide have been unsuccessful in their attempts to deter criminal gang activity through the application of traditional criminal statutes.⁵⁹ For example, one professional acknowledges that conspiracy is "difficult to prove because gang members will almost never testify against each other regarding the presence of an agreement, and jurors are often uncomfortable convicting a defendant for crimes where he had little or no direct involvement other than entering into an agreement."⁶⁰ Experience has shown that even highly effective prosecution of individual gang members under established criminal codes has a limited effect in reducing overall gang activity.⁶¹

One commentator summarized the numerous sociological reasons for the ineffectiveness of traditional criminal statutes by attributing it to gang organizational structures,⁶² the nuances of group crime as opposed to individual crime,⁶³ and gangs' "willingness to use violence to achieve their ends."⁶⁴ Regardless of the sociological complexities, however, the underlying fact remains that "[g]angs are a unique problem in prosecution,"⁶⁵ and unique problems call for unique legislation.

approved the changes as reflected in the original version of Senate Bill 31, both of these companion bills died in committee. The bill was reintroduced yet again, with a few minor changes, as Senate Bill 1117. S. 1117, 115th Gen. Assem., Reg. Sess. (S.C.), available at http://www.scstatehouse.net/sess115_2003-2004/bills/1117.htm. Senate Bill 1117 was a companion to House Bill 4987. H.R. 4987, 115th Gen. Assem., Reg. Sess. (S.C.), available at http://www.scstatehouse.net/sess115_2003-2004/bills/4987.htm. Again, both of these companion bills died in committee.

56. Robert Walker, *South Carolina Gangs*, at <http://www.gangsor.us/sc.html> (last visited Dec. 22, 2004).

57. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 30.01–30.02 (3d ed. 2001) (providing an overview of the general principles of accomplice liability).

58. Under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946), "once co-conspirators have entered into an agreement with an unlawful purpose, 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.'" Jennifer Walwyn, Comment, *Targeting Gang Crime: An Analysis of California Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. REV. 685, 689 (2002) (quoting *Pinkerton*, 328 U.S. at 646–47).

59. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 31–32 (1998).

60. Walwyn, *supra* note 58, at 690 n.27 (citing Telephone Interview with Renee Meckler, Deputy District Attorney, Los Angeles County District Attorney's Office (Oct. 14, 2001)).

61. For example, in the early 1990s, the Orange County, California, District Attorney found that even experienced, accomplished prosecutors needed specialized programs to prosecute gang members in a way that effectively reduced gang activity on the streets. "After several years, the district attorney's Gang Unit developed into an outstanding trial team with an impressive conviction rate. Unfortunately, the gang crime rate continued to rise." Capizzi, *supra* note 48, at 18.

62. Truman, *supra* note 12, at 685.

63. *Id.* at 685 n.12.

64. *Id.*

65. *Id.* at 685 n.12. (quoting Michael Genelin, *Gang Prosecutions: The Hardest Game in Town*, in THE GANG INTERVENTION HANDBOOK 417, 417 (Arnold P. Goldstein & C. Ronald Huffeds., 1993)).

IV. A COMPREHENSIVE CRIMINAL GANG PREVENTION ACT WOULD FILL THE GAP IN CURRENT EFFORTS TO DISCOURAGE GANGS IN SOUTH CAROLINA

Criminal gang experts divide gangs into a variety of classifications in their analyses of the gang phenomenon. These experts draw distinctions between highly organized gangs of a national degree and local, homegrown groups; “street gangs,” “youth gangs,” and “outlaw motorcycle gangs” are just a few of the classifications in common use.⁶⁶ Once a community acknowledges the presence of gangs, however, such categories are unnecessary for purposes of discouraging gang activity through legislation. In creating criminal gang prevention legislation, two goals are consistent across all classifications: deterrence of crime committed by organized groups exhibiting criminal histories and deterrence of recruitment into criminal gangs.

The existing criminal code in South Carolina and its associated prosecutorial schemes are insufficient to effectively deter and prevent gang-related crime because they do not respond to the unique problems posed by organized gangs. Whereas the existing laws punish “only the manifestation of the gang problem, criminal activity, [they do not address] the problem itself, the pervasive presence of highly disciplined criminal organizations.”⁶⁷ A new statutory scheme that considers the unique problems posed by organized gangs and that is tailored to respond to these problems would be an effective alternative.

In most cases, creating an entire statutory scheme from scratch that meets its intended goals without violating constitutional protections is a difficult task. Fortunately, South Carolina needs not create any legislation from scratch; both the federal government and other states have already carried this burden by enacting various forms of legislation with the purpose of discouraging criminal gangs. According to the National Youth Gang Center, “[o]ver 70 percent of all states have enacted some form of legislation relating to gangs.”⁶⁸ These states cover every region of the nation.⁶⁹ In addition, two criminal gang prevention bills—one cosponsored by United States Senator Lindsay Graham of South Carolina—are currently pending in the United States Senate and would target criminal gangs for specialized prosecution and punishment.⁷⁰

States first began prosecuting gang-related activity under the federal Racketeering Influenced and Corrupt Organizations Act (RICO), a statute that was created in 1970 to deal with organized crime:

[This Act] prohibits the use of racketeering activities or profits to acquire, conduct, or maintain the business of an existing organization or enterprise. Racketeering activities are defined as

66. See, e.g., *Gang Overview*, *supra* note 25 (“street gang”); SOUTH CAROLINA DRUG THREAT ASSESSMENT, *supra* note 24 (“street gang,” “outlaw motorcycle gang”); Institute for Intergovernmental Research, National Youth Gang Center (NYGC), at <http://www.iir.com/nygc/default.htm> (last updated Dec. 8, 2004) (“youth gang”).

67. Truman, *supra* note 12, at 706.

68. National Youth Gang Center (NYGC), Institute for Intergovernmental Research, *Analysis of Gang-Related Legislation*, at <http://www.iir.com/nygc/gang-legis/analysis.htm> (last visited Sept. 29, 2004).

69. *Id.*

70. See S. 1735, 108th Cong. (2004) (creating the Gang Prevention and Effective Deterrence Act of 2004), available at <http://thomas.loc.gov>; S. 2358, 108th Cong. (2004) (creating the American Neighborhoods Taking the Initiative—Guarding Against Neighborhood Gangs (ANTI-GANG) Act of 2004), available at <http://thomas.loc.gov>.

any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics or dangerous drugs, fraud, and other crimes. The act provides for forfeiture of illegally obtained gains and interests in enterprises.⁷¹

While prosecutors have used RICO to prosecute gang crime, Congress originally created the Act for use against the mafia and similar organizations.⁷² RICO is insufficient on its own to deter gang crime. Particularly in California, home of the "street gang capital of the United States," legislators found that specialized legislation was necessary because existing law enforcement resources were incapable of managing the rapid growth of criminal gangs.⁷³ As a result, in 1988 California led the way in the statutory fight against gangs with its Street Terrorism Enforcement and Protection Act (STEP Act).⁷⁴ California's legislature adapted RICO to create the STEP Act, which addressed the unique criminal gangs problem. The Act is a comprehensive attempt to curb gang-related activity at all levels. Specifically, the legislation allows prosecutors to charge a defendant who commits a felony in furtherance of gang-related activity with two crimes: "(1) an underlying felony; and (2) committing this felony with the specific intent of aiding and abetting a gang's criminal activities."⁷⁵

Numerous states have followed California's lead in enacting gang prevention legislation, much of which is modeled after the STEP Act.⁷⁶ The gang prevention statutes of Georgia, Louisiana, and Missouri are nearly identical in structure to the California law.⁷⁷ Others are more loosely based on the California approach. For example, the Iowa gang statute "establishes the crime of street gang participation based on similar predicate crimes, but does not contain sentence enhancements, nuisance sections or weapon forfeiture provisions."⁷⁸

Rather than blazing new trails, South Carolina can and should follow the lead of Congress as well as other states in creating its criminal gang prevention legislation.

71. Michael K. Carlie, *Into The Abyss: A Personal Journey into the World of Street Gangs* ch. 13b, at [http://courses.smsu.edu/mkc096f/gangbook/what I learned about/legislation 2.htm](http://courses.smsu.edu/mkc096f/gangbook/what%20I%20learned%20about%20legislation%20.htm) (last visited Sept. 29, 2004) (quoting G.E. RUSH, *DICTIONARY OF CRIMINAL JUSTICE* (5th ed. 2000)).

72. Rubin, *supra* note 4, at 2048.

73. Truman, *supra* note 12, at 683 n.1.

74. *Id.* at 686.

75. Elizabeth N. de Vries, Comment, *Guilt By Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F. L. REV. 191, 196 (2002).

76. Truman, *supra* note 12, at 688. For examples of gang prevention legislation from other states, see ARK. CODE ANN. § 5-74-104 (Michie 1997); FLA. STAT. ANN. §§ 874.01-.08 (West 1999); GA. CODE ANN. §§ 16-15-1 to -5 (2003); 730 ILL. COMP. STAT. ANN. 5/5-5-3(c)(2)(J) (West 1998); IND. CODE ANN. §§ 35-45-9-1 to -4 (Michie 2004); IOWA CODE ANN. §§ 723A.1-.3 (West 2003); LA. REV. STAT. ANN. §§ 15:1401-.1407 (West Supp. 2004); MINN. STAT. ANN. § 609.229 (West 2003); MO. ANN. STAT. §§ 578.421-.437 (West 2003); NEV. REV. STAT. ANN. 193.168 (Michie 2001); OKLA. STAT. ANN. tit. 21, § 856 (West 2002); S.D. CODIFIED LAWS §§ 22-10-14 to -15 (Michie 1998). All gang-specific provisions of the Texas Organized Criminal Activity statute were repealed in 1993. See TEX. PENAL CODE ANN. § 71.01 (Vernon 2003).

77. See GA. CODE ANN. §§ 16-15-1 to -5 (2003); LA. REV. STAT. ANN. §§ 15:1401-.1405 (West Supp. 2004); MO. ANN. STAT. §§ 578.421-.430 (West 2003).

78. Truman, *supra* note 12, at 688 n.28; see also IOWA CODE ANN. § 723A.2 (West 2003) (declaring that any gang-related criminal act is a felony).

V. POTENTIAL PROBLEMS WITH CRIMINAL GANG PREVENTION LEGISLATION

In modeling gang prevention legislation after existing law in other jurisdictions, South Carolina must carefully avoid problems that are common to this type of legislation. In other states, such legislation has been susceptible to two primary problems: (1) clever gang leaders have discovered ways to circumvent the law as they became familiar with its intricacies,⁷⁹ and (2) alleged criminal gang members have challenged gang prevention statutes on constitutional grounds.⁸⁰

Three strategies are useful in avoiding problems common to gang prevention legislation: (1) understand and treat the problem rather than the symptoms, (2) pay attention to strategies that have been effective in other states, and (3) carefully craft legislation to withstand constitutional scrutiny.

A. Understand and Treat the Problem, Not Just the Symptoms

One of the best ways to avoid the problems that are common to gang prevention legislation is to understand the factors that motivate people—particularly young people—to join gangs and remain involved in criminal gang activity. If lawmakers seek to create a statute that effectively discourages gang activity, they must understand gang activity from a sociological perspective. Expecting a statute to achieve its intended goal is unrealistic unless “those crafting it . . . have knowledge of the behavior that they are attempting to alter.”⁸¹ For example, if the goal is to discourage gang growth, the drafters of the law must understand and counter the phenomena that foster gang growth.⁸² Otherwise, the resulting legislation will not address the source of the problem and will be ineffective at eliminating the cancer that is gang crime.

Eliminating gang crime is not an easy task because the environment that fosters the growth of criminal gangs is complex. Many factors contribute to gang development among young people, including “[c]onditions such as single-parent families, two working parents, latchkey kids, growing poverty, overcrowding, and racial conflict.”⁸³ Youths faced with these conditions will seek alternatives; some turn to gangs because they “not only provide protection, identity, respect, and companionship, but also provide[] a source of income.”⁸⁴ Unfortunately, this source of income is through the drug trade⁸⁵ and its associated crime.

B. Pay Attention to Strategies That Have Been Effective in Other States

Another way to avoid the problems common to gang prevention legislation is to pay attention to the evolution of legislative strategies employed by other states

79. See, e.g., Truman, *supra* note 12, at 732 n.258 (describing the practice of using children as lookouts or drug runners because the criminal law imposes lesser prison sentences on juveniles, thus allowing “a uniquely recyclable labor pool”) (quoting Jacob Lamar, *Kids Who Sell Crack*, TIME, May 9, 1988, at 20).

80. See generally Bjerregaard, *supra* note 59 (discussing the constitutionality of criminal gang prevention legislation with regard to the concepts of vagueness, overbreadth, and freedom of association).

81. Holland, *supra* note 7, at 278.

82. *Id.* at 279.

83. Lisa Rein, *Washington State Exceptional Sentences for Gang Members: An Analysis of State v. Johnson*, 30 GONZ. L. REV. 411, 412 (1995).

84. *Id.*

85. *Id.*

in order to determine which strategies have been consistently effective and which have been ineffective. By learning from the experience of other states, lawmakers can better craft operative legislation without the need for a trial-and-error search for effective deterrence.

As criminal gang prevention legislation has matured, the definition of the term “gang” has become more specific; yet, more specific definitions yield unexpected problems. For instance, the early California statutes’ gang definition included the use of “identifiers such as the wearing/displaying of certain colors, tattoos, and/or throwing of hand signs”:

The problem was that gang members became knowledgeable as to how the law reads and stopped using colors, didn’t get tattooed or had old tattoos removed. When arrested committing gang-related crimes, prosecutor’s [sic] were unable to prove the suspects were gang members because they didn’t fit the definition of the law.

For that reason, and others, gang legislation is once again changing and becoming less specific.⁸⁶

In addition, criminal gang prevention legislation has evolved to focus less on gang-related crime and more on recruitment of new gang members.⁸⁷ This focus has two purposes, both of which target prevention of child recruitment. First, by preventing the addition of future gang members, legislation that includes anti-recruitment provisions discourages gang growth.⁸⁸ Second, these provisions are intended to discourage gangs from acquiring cheap child labor by exploiting juvenile justice laws, which often include more relaxed enforcement and other protections for the benefit of minors.⁸⁹

C. Carefully Craft Legislation to Withstand Constitutional Scrutiny

Legislators can ensure their legislation withstands constitutional scrutiny by carefully designing and attending to detail in their statutes.⁹⁰ Even when other criminal gang prevention legislation has been effective, it has been subject to judicial examination on constitutional grounds. In most states, the challenged statutory schemes have passed constitutional scrutiny. Generally, where courts have found those statutes unconstitutional, however, they have found that the statutes contravene the First Amendment right to freedom of association because they are either excessively vague or overbroad. In addition, one commentator has suggested an interesting potential constitutional challenge that has not yet arisen in the courts: the idea that legislatures must narrowly tailor statutes so they present the least restrictive alternative.⁹¹ This subpart explains each of these potential constitutional challenges. Part VI demonstrates that the proposed Act in Appendix A would withstand any of these challenges.

86. Carlie, *supra* note 71, ch. 13a, at http://courses.smsu.edu/mkc096f/gangbook/what_I_learned_about/legislature.htm.

87. Holland, *supra* note 7, at 288–90.

88. Truman, *supra* note 12, at 732.

89. *Id.* at 732 n.258.

90. See Holland, *supra* note 7, at 278 (“History has proven that the drafting of effective, unambiguous, and constitutional statutes is a difficult task.”).

91. Bjerregaard, *supra* note 59, at 47.

First, some have criticized criminal gang prevention statutes as infringing on an individual's right to freedom of association by being unduly vague. The United States Supreme Court has declared that a statute is unconstitutionally vague when persons "of common intelligence must necessarily guess at its meaning and differ as to its application."⁹² This doctrine has at least four purposes. First, it "is designed to prevent arbitrary or discriminatory enforcement."⁹³ Second, the doctrine supports the principle that prosecutors should not prosecute citizens for violation of laws that are indecipherable; citizens should have fair warning as to the behaviors prohibited by the statute.⁹⁴ Third, excessively vague statutes do not provide law enforcement officers with sufficiently clear standards.⁹⁵ Vague statutes require officers to use their own discretion to interpret them, thus allowing arbitrary or even discriminatory application of the law.⁹⁶ Fourth, "[t]he Supreme Court has concluded that unduly vague statutes can have a 'chilling' effect on . . . freedom of association, as citizens may simply refrain from exercising their rights to free speech or association rather than risk violating a statute that they cannot interpret."⁹⁷

One of the principal reasons defendants launch vagueness challenges to criminal gang prevention legislation is the difficulty of defining essential terms that make up the core principles of the statutes. The terms "gang," "member," and "actively participate" are just a few that have been the subject of constitutional challenges in recent years.⁹⁸ Prosecution is difficult where the crime is not well defined.

Defendants also challenge criminal gang prevention statutes as being overbroad. A statute is overbroad if it regulates substantially more behavior than the Constitution allows.⁹⁹ Thus, "a statute must not be found to sweep so broadly as to make violators of persons involved in an otherwise lawful activity."¹⁰⁰ An overbroad statute is violative of constitutional principles for two reasons: first, overbreadth deters citizens from exercising their First Amendment rights; second,

92. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

93. *Truman*, *supra* note 12, at 713.

94. *Bjerregaard*, *supra* note 59, at 33.

95. *Id.*

96. *Id.* at 33–34.

97. *Id.*

98. *See, e.g., People v. Green*, 278 Cal. Rptr. 140, 145–46 (Cal. Ct. App. 1991) (finding that the terms "member" and "actively participates" as defined in California's STEP Act were not unconstitutionally vague), *abrogated as to the actual definition of "actively participates" in People v. Castenada*, 3 P.3d 278 (Cal. 2000). *See James C. Howell & Arlen Egle, Jr., Institute for Intergovernmental Research, Frequently Asked Questions Regarding Gangs*, at <http://www.iir.com/nygc/faq.htm> (last visited Dec. 22, 2004), for further discussion about terminology usage:

There is no single, accepted definition because of the varying characteristics of youth gangs. State and local jurisdictions tend to develop their own definitions. The terms *youth gang* and *street gang* are often used interchangeably, but use of the latter label can result in the confusion of youth gangs with adult criminal organizations. A youth gang is commonly thought of as a self-formed association of peers having the following characteristics: three or more members, generally ages 12 to 24; a gang name and some sense of identity, generally indicated by such symbols as style of clothing, graffiti, and hand signs; some degree of permanence and organization; and an elevated level of involvement in delinquent or criminal activity.

Id.

99. *See, e.g., NAACP v. Alabama*, 377 U.S. 288, 307–08 (1964) (explaining that legislators must narrowly tailor legislation to avoid suppressing individual liberties when they could achieve the purpose of the legislation through less oppressive means).

100. *Holland*, *supra* note 7, at 292.

an overbroad statute, like an overly vague statute, vests too much discretion in law enforcement officials, allowing for potentially arbitrary or discriminatory enforcement.¹⁰¹

For example, if a statute provides that gang membership itself is a crime the statute could be found overbroad because the Constitution prevents declaring mere membership to be unlawful.¹⁰² Indeed, one commentator has written that “[f]reedom of association protects the right to associate with others even if they are engaged in criminal activity.”¹⁰³ As a result, a criminal gang prevention statute that criminalizes the mere status of gang membership is likely to be overturned for overbreadth by a court applying strict scrutiny to the statute.

Finally, it is foreseeable that a defendant would challenge a criminal gang prevention statute as not sufficiently narrowly tailored so that it presents the least restrictive regulation available:

[I]t is doubtful that the use of an anti-gang statute always represents the least restrictive alternative. Although not yet challenged, it appears that unlawful activities covered by the statutes could also be addressed by traditional criminal laws such as aiding and abetting in a criminal offense, conspiracy, solicitation, loitering, etc. Prosecutors should be careful to ensure that they are using the least restrictive and appropriate means to handle these cases.¹⁰⁴

Since numerous constitutional challenges to criminal gang prevention legislation are foreseeable, legislators must draft legislation carefully. Fortunately, careful drafting is likely to yield success, as courts across the land appear poised to protect the safety of innocent citizens over the rights of criminal gang members. While the United States Supreme Court has not ruled on the constitutionality of criminal gang prevention statutes,¹⁰⁵ numerous state and federal courts have upheld well-drafted statutes against most common constitutional challenges.¹⁰⁶ The California Supreme Court perhaps best stated the principle behind its constitutional analysis: “To hold that the liberty of the peaceful, industrious residents . . . must be forfeited to preserve the illusion of freedom for those whose ill conduct is

101. Bjerregaard, *supra* note 59, at 35–36.

102. *Id.* at 37 (“[T]he Court has declared that mere membership in an association cannot be criminalized.”).

103. Truman, *supra* note 12, at 716.

104. Bjerregaard, *supra* note 59, at 47.

105. The United States Supreme Court has not reviewed any comprehensive gang prevention statute. The closest law the Court has reviewed was the city of Chicago’s “Gang Congregation Ordinance,” an anti-loitering law intended to hinder gang activity. The Court overturned the ordinance on grounds of vagueness, finding that it allowed police too much discretion. *See City of Chicago v. Morales*, 527 U.S. 41, 60–64 (1999). For a thorough analysis of *Morales*, see Kim Strosnider, *Anti-Gang Ordinances after City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002).

106. *See, e.g., Klein v. Indiana*, 698 N.E.2d 296 (Ind. 1998) (finding that the definition of “criminal gang” in Indiana’s statute was not unconstitutionally vague or overbroad); *State v. Walker*, 506 N.W.2d 430 (Iowa 1993) (finding that an Iowa criminal gang participation statute was not unconstitutionally vague or overbroad and did not violate due process).

deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense.”¹⁰⁷

VI. PROPOSED GANG PREVENTION ACT

This Comment contends that South Carolina should adopt legislation aimed at curbing the increasing presence of criminal gangs in the state. In order to discourage increasing violence and delinquency, the General Assembly, in upcoming legislative sessions, should reconsider legislation similar to that rejected in the 2001–02 and 2003–04 sessions.¹⁰⁸ Appendix A provides an example of the type of statute South Carolina should adopt. This proposed South Carolina Criminal Gang Prevention Act is based in part on the most effective provisions from other states’ legislation, such as the California STEP Act. This proposal also includes provisions from the bills that were introduced but did not pass the South Carolina General Assembly during the 2001–02 and 2003–04 legislative sessions.¹⁰⁹ Importantly, the proposed Act is tailored to fit existing South Carolina law and makes repeated reference to other sections of the South Carolina Code. The proposed Act would be an effective tool for prosecuting gang-related crime, and it would pass judicial scrutiny for constitutionality.

First, the proposed Act would be more effective in deterring and preventing criminal gang activity than the existing criminal code. Like the California STEP Act, the proposed Act is targeted at the source of the problem rather than at treating the symptoms. Section 2 of the proposed Act expressly declares criminal gang activity to be unlawful without succumbing to the temptation to criminalize the status of gang membership.¹¹⁰ Section 3 provides definitions used in the proposed Act, most notably the “pattern of criminal gang activity,” which includes violating any of fifteen provisions of South Carolina law twice within a five-year period.¹¹¹ To further discourage criminal gang activity, section 4 expressly declares that it is unlawful for a person to recruit another into criminal gang activity.¹¹² Because all effective criminal statutes establish both the prohibited act and the prescribed punishment, section 5 sets forth the respective penalty enhancements for conviction of a crime committed as part of a pattern of criminal gang activity.¹¹³

Importantly, the proposed Act would withstand the most common constitutional challenges to criminal gang prevention legislation that other states’ courts have encountered. Specifically, it does not infringe upon First Amendment freedoms of association and does not violate other constitutional principles with its sentence enhancement provisions. To circumvent a vagueness challenge, the Act makes use of several techniques that legislatures of other states have used effectively. First, other states have survived vagueness challenges by ensuring that the statute clearly defines all essential terms.¹¹⁴ The proposed Act approaches this problem directly by providing clear definitions of the terms “criminal gang,” “criminal gang

107. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 618 (Cal. 1997) (upholding a broad, comprehensive injunction prohibiting gang-related activity in the neighborhood of Rocksprings in San Jose, California).

108. *See supra* note 55.

109. *See supra* note 55.

110. *See infra* Appendix A, § 2.

111. *Id.* § 3.

112. *Id.* § 4.

113. *Id.* § 5.

114. Bjerregaard, *supra* note 59, at 41.

activity,” “criminal gang member,” “pattern of criminal gang activity,” “gang-related incident,” and “graffiti.”¹¹⁵

Second, section 1 of the proposed Act presents legislative findings on which the Act is based. This is a common means of clarifying legislative intent in order to avoid any potential constitutional challenges on grounds of vagueness.¹¹⁶ This Act includes the most common rationales for gang prevention legislation such as a clear expression that “[i]t is not the intent of this Act to interfere with the exercise of the constitutionally protected rights of freedom of expression and association.”¹¹⁷ But this section also includes additional ideas not found in other states, such as a declaration that criminal gang recruitment is a particularly reprehensible offense and a finding that in order to enjoin and disrupt criminal gang activities, buildings in which gangs conduct their operations may be declared nuisances.¹¹⁸

To ensure that it is not overbroad, the proposed Act also borrows techniques from other states. Section 2 expressly declares criminal gang activity to be unlawful without succumbing to the temptation to criminalize the status of gang membership. In other states, effective criminal gang prevention statutes require the following:

[Statutes require] active participation in the gang accompanied by knowledge of the gangs’ criminal behavior. This requirement ensures that only members who are aware of the gangs’ criminal activities and who actively participate in these enterprises are punished. Members who are either unaware of the gangs’ criminal involvement or who are nothing more than passive members will not fall within the scope of the statute.¹¹⁹

Finally, section 5 of the proposed Act provides for sentence enhancements without violating constitutional protections of individual rights.¹²⁰ The United States Supreme Court has scrutinized closely the use of sentence enhancements. In *Apprendi v. New Jersey*,¹²¹ the Court clarified that a court must submit to a jury any increase in statutory penalties, and the prosecution must prove its appropriateness beyond a reasonable doubt *unless* the increase is based on a prior conviction.¹²² The proposed Act thoroughly satisfies this requirement in two ways. First, it provides sentence enhancements for a “pattern of criminal gang activity,” which includes commission of at least two offenses, thus satisfying the requirement of a prior conviction.¹²³ Second, the Act requires that sentence enhancements for any conviction, other than a pattern of criminal gang activity, be submitted to a jury and proven beyond a reasonable doubt.¹²⁴ Therefore, the sentence enhancement provisions of the proposed Act satisfy and actually surpass the requirements set forth by the Supreme Court in *Apprendi*.

115. See *infra* Appendix A, § 3.

116. See FLA. STAT. ANN. § 874.02 (West 1999); GA. CODE ANN. § 16-15-2 (2003); LA. REV. STAT. ANN. § 15:1402 (West Supp. 2004).

117. See *infra* Appendix A, § 1(A).

118. For an example of an injunction based on nuisance, see generally *Gallo v. Acuna*, 929 P.2d 596, 618 (Cal. 1997).

119. Bjerregaard, *supra* note 59, at 34–35.

120. See *infra* Appendix A, § 5.

121. 530 U.S. 466 (2000).

122. *Id.* at 490 (declaring unconstitutional a New Jersey statute that permitted automatic sentence enhancement for defendants who committed hate crimes).

123. See *infra* Appendix A, § 5(A).

124. *Id.* § 5(C).

VII. CONCLUSION

This Comment argues that the South Carolina General Assembly should adopt criminal gang prevention legislation aimed specifically at punishing and deterring gang-related crime. Gang-related violent crime is increasing in South Carolina, and the violence is interrupting normal operation of schools;¹²⁵ innocent children are falling victim to the crossfire;¹²⁶ and families are not safe at public events.¹²⁷ Measures must be taken to prevent this crime.

South Carolina has already initiated a number of programs to address the increasing violence and related public fears. State law enforcement agencies are involved, and concerned citizens are doing their part. Programs such as the Gang Resistance Education and Training program (G.R.E.A.T.), offered by the Richland County Sheriff's Department, are perhaps the most effective response available. South Carolina's legislators are aware of the state's gang problem,¹²⁸ but the General Assembly has not yet acted. As some elected officials have already recognized, in the world of criminal gangs, South Carolina must make greater efforts to meet the traditional punishment goals of deterrence and retribution for criminal acts.¹²⁹ While no statutory provision alone can eliminate gangs, a criminal gang prevention statute, such as the one presented in Appendix A, would enable the South Carolina General Assembly to do its part.

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125. See, e.g., Lora Hines, *Police Move to Counter Gang Threat at Schools*, THE STATE (Columbia, S.C.), May 18, 2003, at A1 (describing a serious threat by members of the Bloods gang in Richland County to avenge the March 2003 murder of James "BayBay" Williams, a local high-ranking Bloods leader, by shooting rival gang members at school on the last day of the school year); see also *T-shirts Sign of Trouble*, THE HERALD (Rock Hill, S.C.), Sept. 2, 2004, at 6A (describing both a "neighborhood group" with uniform colors and outfits that was involved in a recent school brawl in Rock Hill, S.C. and a local gang member in York, S.C. who was recently arrested for having a pistol and ammunition in his car at school).

126. Courtney Dixon, twelve, and Terrence Merchant, sixteen, were killed on the evening of August 27, 2004, while playing on the front porch of Dixon's home. Chris Anthony Liverman, nineteen, was charged with the double homicide. Liverman is a known member of the Chicago-based Folk Nation gang and has also been affiliated with another gang known as the Insane Gangster Disciples. See Rick Brundrett, *Girl, 12, Boy, 16, Slain in City*, THE STATE (Columbia, S.C.), Aug. 28, 2004, at A1.

127. See, e.g., J.R. Gonzales, *Teen Shot at Fair Dies; Youth Arrested*, THE STATE (Columbia, S.C.), Oct. 16, 2004, at A1 (describing the murder of a teenager outside the gates of the South Carolina State Fair. Gang members were involved, and witnesses reported that people in the area were displaying gang symbols before shots were fired).

128. See, for example, Senator Ralph Anderson's guest column in the October 15, 2004 edition of the *Greenville News*. Ralph Anderson, *Let's Unite to Confront Our Growing Gang Problem*, GREENVILLE NEWS (Greenville, S.C.), Oct. 15, 2004, at 15A.

129. See *Going After Street Gangs*, GREENVILLE NEWS (S.C.), Jan. 8, 2005, at 4A (describing Attorney General Henry McMaster's intentions "to use the multijurisdictional state grand jury as a crime fighting tool against the growing problem of street gangs in South Carolina"); Mayor Bob Coble, *State of the City Speech* (Feb. 10, 2005), available at http://www.thestate.com/mld/thestate/news/breaking_news/10868106.htm.

APPENDIX A

PROPOSED SOUTH CAROLINA CRIMINAL GANG PREVENTION ACT*

Section 1 – Findings and Declaration.

- (A) This Act hereby finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, sexual orientation, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this Act to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. This Act recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.
- (B) This Act further finds that the State of South Carolina is facing a mounting crisis caused by criminal gangs whose members threaten, terrorize, and commit a multitude of crimes against peaceful citizens. The number of gang-related violent crimes in South Carolina is increasing. These criminal gang activities, both individually and collectively, present a clear and present danger to public order and are not constitutionally protected. The State has a compelling interest in preventing criminal gang activity, and the provisions of this Act are necessary to maintain the public order and safety.
- (C) This Act further finds the recruitment of minors into the violent world of criminal gangs to be a particularly reprehensible offense, especially when committed by use of physical violence.
- (D) This Act further finds that an effective means of punishing and deterring the criminal activities of criminal gangs is through enhanced penalties and forfeiture of the profits, proceeds, instrumentalities, and property facilitating criminal gang activity, including criminal gang recruitment.
- (E) This Act further finds that an effective means of punishing and deterring the criminal activities of criminal gangs is through the forfeiture of the weapons, profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal gangs.
- (F) This Act further finds that, in order to enjoin and disrupt criminal gang activities, buildings in which gangs conduct their operations may be declared public or private nuisances.
- (G) It is the intent of this Act to seek the eradication of criminal gang activity by focusing upon patterns of criminal gang activity and upon the organized nature of criminal gangs, which together are the chief source of terror created by criminal gangs.

* This proposed Act is designed to be incorporated within the South Carolina Code of Laws, 1976, as a new article in Title 16 – Crimes and Offenses. All references to code sections outside this proposed Act are to the South Carolina Code of Laws.

Section 2—Participation in Criminal Gang Deemed Unlawful.

- (A) It is unlawful for a person to actively participate in a criminal gang, as defined in section 3 of this Act, by knowingly promoting, furthering, assisting, or benefiting from the commission of a criminal offense or offenses by members of a criminal gang.
- (B) It is unlawful for a person to engage in a pattern of criminal gang activity, as defined in section 3 of this Act, or to engage in the commission of a criminal act for the purpose of benefiting, promoting, or furthering the interest of a criminal gang.
- (C) Any person who actively participates in any criminal gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who wilfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be guilty of a felony.
- (D) Any person who actively participates in any criminal gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who wilfully promotes, furthers, or assists in any misdemeanor criminal conduct by members of that gang, shall be guilty of a misdemeanor.
- (E) Nothing in this section limits prosecution under any other provision of law.

Section 3—Definitions.

As used in this article:

- (A) “Criminal gang” means any formal or informal ongoing organization, association, or group that consists of three or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity. “Criminal gang” includes, but is not limited to, racial extremist groups, outlaw motorcycle gangs, terrorist groups, and street gangs.
- (B) “Criminal gang member” means a person who is a member of a criminal gang, as defined in paragraph (A), and who meets two or more of the following criteria:
 - (1) admits to criminal gang involvement;
 - (2) is identified as a criminal gang member by a parent or guardian;
 - (3) is identified as a criminal gang member by a documented reliable informant;
 - (4) resides in or frequents a particular criminal gang’s area, adopts the gang’s style, dress, use of hand signs, or tattoos, and associates with known criminal gang members;
 - (5) is identified as a criminal gang member by an informant of previously untested reliability and such identification is corroborated by independent information;
 - (6) has been arrested more than once in the company of identified criminal gang members for offenses which are consistent with usual criminal gang activity; or
 - (7) is identified as a criminal gang member by physical evidence such as photographs or other documentation.

- (C) "Criminal gang activity" means criminal activity engaged in for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.
- (D) "Pattern of criminal gang activity" means the commission or attempted commission of, commission as an accessory before or after the fact, or solicitation or conspiracy to commit, by a criminal gang member, while knowingly and actively participating in criminal gang activity, two or more of the following offenses occurring within a five-year period, provided that at least one of these offenses occurred after the enactment of this Act, and the offenses were committed on separate occasions:
- (1) a violent offense as defined in section 16-1-60 committed as a part of criminal gang activity;
 - (2) financial transaction card crimes as defined in Chapter 14 of Title 16 committed as a part of criminal gang activity;
 - (3) first-degree lynching as defined in section 16-3-210 committed as a part of criminal gang activity;
 - (4) second-degree lynching as defined in section 16-3-220 committed as a part of criminal gang activity;
 - (5) breaking into a motor vehicle as defined in section 16-13-160 committed as a part of criminal gang activity;
 - (6) grand larceny as defined in section 16-13-30 committed as a part of criminal gang activity;
 - (7) blackmail as defined in section 16-17-640 committed as a part of criminal gang activity;
 - (8) malicious injury to property as defined in sections 16-11-510, 16-11-520, 16-11-530, and 16-11-535 committed as a part of criminal gang activity;
 - (9) a drug offense as defined in sections 44-53-370 and 44-53-375 committed as a part of criminal gang activity;
 - (10) harassment, stalking, or aggravated stalking as defined in Article 17, Chapter 3 of Title 16 committed as a part of criminal gang activity;
 - (11) disturbing schools as defined in section 16-17-420 committed as a part of criminal gang activity;
 - (12) pointing a firearm at any person as defined in section 16-23-410 committed as a part of criminal gang activity;
 - (13) discharging a firearm at or into dwellings, structures, enclosures, vehicles, or equipment as defined in section 16-23-440 committed as a part of criminal gang activity;
 - (14) the common-law offense of assault and battery of a high and aggravated nature committed as a part of criminal gang activity; or
 - (15) the common-law offense of obstruction of justice committed as a part of criminal gang activity.
- (E) "Gang-related incident" means an incident that, upon investigation, meets any of the following conditions:
- (1) the participants are identified as criminal gang members acting collectively for the purpose of benefiting, promoting, or furthering the interests of a criminal gang;

- (2) a reliable informant identifies an incident as criminal gang activity; or
 - (3) an informant of previously untested reliability identifies an incident as criminal gang activity and it is corroborated by independent information.
- (F) “Graffiti” means a mark, picture, drawing, writing, inscription, or graffiti made on a wall or another surface that is scratched, scribbled, painted, or inscribed with ink, paint, spray paint, crayon, charcoal, or the use of another object capable of making a scratch, dent, mark, or impression of any kind on a wall or other surface.

Section 4—Criminal Gang Recruitment.

- (A) A person who recruits, solicits, induces, coerces, or commands another person to actively participate in criminal gang activity, as defined in section 3 of this Act, or prevents the person from withdrawing or leaving a criminal gang, is guilty of criminal gang recruitment. A person convicted of criminal gang recruitment is guilty of a misdemeanor and, upon conviction for a first offense, must be fined not more than \$1,000 or imprisoned not more than two years, or both. A criminal gang member convicted for a second or subsequent offense pursuant to this subsection is guilty of a felony and, upon conviction, must be fined not more than \$5,000 or imprisoned for not more than five years, or both.
- (B) A person who uses or threatens to use physical violence against another person to recruit, solicit, induce, coerce, or command another person to actively participate in criminal gang activity, as defined in section 3 of this Act, or to prevent the person from withdrawing or leaving a criminal gang, must be punished in addition to the punishment prescribed in paragraph (A) by a fine of not more than \$5,000 or by imprisonment for an additional period of not more than five years, or both.
- (C) A person who uses or threatens to use a firearm or a deadly weapon against another person to recruit, solicit, induce, coerce, or command another person to actively participate in criminal gang activity, as defined in section 3 of this Act, or to prevent the person from withdrawing or leaving a criminal gang, must be punished in addition to the punishment prescribed in paragraph (A) by a fine of not more than \$10,000 or by imprisonment for an additional period of not more than ten years, or both.
- (D) A person convicted of criminal gang recruitment, as defined in paragraph (A), on two or more separate occasions within a ninety-day period must be punished in addition to the punishment prescribed in paragraph (A) by a fine of not more than \$5,000 or by imprisonment for an additional period of not more than five years, or both.
- (E) If the person recruited, solicited, induced, coerced, commanded, or threatened in violation of this section is under the age of eighteen and the violation did not occur within 1000 feet of school grounds during normal school hours, an additional term of three years may be imposed in addition to and consecutive to the penalty prescribed for a violation of this section.
- (F) If the person recruited, solicited, induced, coerced, commanded, or threatened in violation of this section is under the age of eighteen and the violation occurred within 1000 feet of school grounds during normal school hours, an additional term of five years may be imposed in addition to and consecutive to the penalty prescribed for a violation of this section.

- (G) A person who has been coerced, intimidated, threatened, or injured in violation of this section has a civil cause of action against a criminal gang or criminal gang member violating this section for treble the amount of the actual damages, for punitive damages, an injunction, and any other appropriate relief in law or equity. Upon prevailing in the civil action, the plaintiff may recover reasonable attorney fees and costs from the criminal gang or criminal gang member.
- (H) Nothing in this section limits prosecution under any other provision of law.

Section 5—Penalty Enhancements.

- (A) Upon a finding by the court at sentencing that the crime was committed as part of a pattern of criminal gang activity, as defined in section 3 of this Act and proven by a preponderance of the evidence, the penalty may be enhanced as follows:
 - (1) Misdemeanors
 - (a) A Class C misdemeanor may be punished as if it were a Class B misdemeanor.
 - (b) A Class B misdemeanor may be punished as if it were a Class A misdemeanor.
 - (c) A Class A misdemeanor may be punished as if it were a Class F felony.
 - (2) Felonies
 - (a) A Class F felony may be punished as if it were a Class E felony.
 - (b) A Class E felony may be punished as if it were a Class D felony.
 - (c) A Class D felony may be punished as if it were a Class C felony.
 - (d) A Class C felony may be punished as if it were a Class B felony.
 - (e) A Class B felony may be punished as if it were a Class A felony.
 - (f) A Class A felony may be punished by imprisonment for any number of years including a life sentence, with or without parole.
- (B) In addition to the penalty enhancement pursuant to paragraph (A), if the offense for which the person is convicted is a violent offense, as defined in section 16-1-60, the sentence must be extended by not more than ten years.
- (C) Except as provided in paragraphs (A) and (B), no sentence shall be enhanced based on the defendant's membership or participation in a criminal gang except upon aggravating circumstances submitted to a jury and proven beyond a reasonable doubt.
- (D) For sentencing purposes upon a conviction for murder, commission of a pattern of criminal gang activity shall be considered an aggravating factor pursuant to section 16-3-20.
- (E) Except as provided in paragraph (F), any person who violates the provisions of this Act in the commission of a felony punishable by imprisonment for life, shall not be paroled until a minimum of fifteen calendar years have been served.
- (F) A sentencing court may elect to suspend all or a part of the enhanced punishment provided for in this section only in an unusual case where the

interests of justice would best be served and if the court specifies on the record the circumstances and reasons that the interests of justice would best be served by a suspension of punishment.

Section 6—Expert Testimony.

- (A) With regard to a specific criminal act, expert testimony is admissible to show that the act was committed for the purpose of benefiting, promoting, or furthering the interest of a criminal gang.
- (B) Pursuant to paragraph (A), expert testimony is admissible to show, in regard to a specific criminal gang or criminal gangs whose conduct is relevant to the case,
 - (1) common characteristics of persons who are members of the criminal gang or criminal gangs;
 - (2) rivalries between specific criminal gangs;
 - (3) common practices and operations of the criminal gang or criminal gangs and the members of those gangs;
 - (4) social customs and behavior of members of the criminal gang or the criminal gangs;
 - (5) terminology used by members of the criminal gang or the criminal gangs;
 - (6) codes of conduct of the particular criminal gang or criminal gangs; and
 - (7) the types of crimes that are likely to be committed by the particular criminal gang.

Section 7—Arguments Insufficient as Defenses.

- (A) It is no defense to prosecution for a violation of the provisions of this Act that:
 - (1) One or more members of the gang are not criminally responsible for the offense;
 - (2) One or more members of the gang have been acquitted, have not been prosecuted or convicted, have been convicted of a different offense, or are under prosecution;
 - (3) A person has been charged with, acquitted, or convicted of any offense;
 - (4) The participants may not know each other's identity; or
 - (5) The membership in the criminal gang may change from time to time.
- (B) Once the initial combination of three or more persons is formed, the number or identity of persons remaining in the gang is immaterial as long as two or more persons remaining in the gang, excluding the defendant, are involved in a continuing course of conduct constituting a violation of this Act.

Section 8—Graffiti.

- (A) It is unlawful for a person to knowingly, intentionally, or maliciously deface the real or personal property of another with graffiti without the prior knowledge and consent of the owner of the property.
- (B) It is unlawful for a person to have in his possession or subject to his immediate control any object or instrument for the purpose or with the intent of defacing the real or personal property of another with graffiti without the prior knowledge and consent of the owner of the property. A person is guilty of possession of an object or instrument for the purpose or with the intent of defacing the real or personal property of another with graffiti when he has in his possession or subject to his immediate control a tool, instrument, article, substance, solution, or other compound designed or commonly used to etch, paint, cover, draw upon, or otherwise place a mark or graffiti upon a wall, surface, or item of real or personal property under circumstances evincing an intent to use the object or instrument to damage, deface, or destroy the real or personal property of another with graffiti.
- (C) A person who violates a provision of this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than \$5,000 or imprisoned for not more than two years, or both.

Section 9—Buildings or Places Used by Criminal Gangs; Nuisance; Additional Remedies.

- (A) Any private building or place used by members of a criminal gang to engage in a pattern of criminal gang activity or for the commission of a criminal act for the purpose of benefiting, promoting, or furthering the interests of a criminal gang is a nuisance and may be the subject of an injunction or cause of action for damages or for abatement of a nuisance as provided for in Chapter 43, Title 15 and in this Act.
- (B) A person may file a petition for injunctive relief with the appropriate court seeking eviction from or closure of any premises used for commission of a pattern of criminal gang activity by a criminal gang. Upon proof by the plaintiff that the premises are being used by members of a criminal gang for the commission of a pattern of criminal gang activity, the court may order the owner of record or the lessee of the premises to remove or evict criminal gang members from the premises and order the premises sealed, prohibit further use of the premises, or enter an order necessary to prohibit the premises from being used for the commission of a pattern of criminal gang activity and to abate the nuisance.
- (C) Nothing in this article shall preclude any aggrieved person from seeking any other remedy provided by law.

Section 10—Preventing Witnesses from Testifying.

- (A) It is unlawful for a criminal gang member by threat or force to:
 - (1) prevent a witness or victim from attending or giving testimony at a trial, proceeding, or inquiry authorized by law that concerns or relates to any criminal activity; or

- (2) attempt to prevent a witness or victim from attending or giving testimony at a trial, proceeding, or inquiry authorized by law that concerns or relates to any criminal activity.
- (B) A criminal gang member who violates a provision of this section is guilty of a felony and, upon conviction, must be punished by a fine of not more than \$10,000 or imprisoned for not more than ten years, or both.
- (C) A person who has been coerced, intimidated, threatened, or injured in violation of this section has a civil cause of action against a criminal gang or criminal gang member violating this section for treble the amount of his actual damages, for punitive damages, an injunction, and any other appropriate relief in law or equity. Upon prevailing in the civil action, the plaintiff may recover reasonable attorney fees and costs from the criminal gang or criminal gang member.
- (D) Nothing in this section limits prosecution under any other provision of law.

Section 11—Accomplice Liability.

- (A) A person who violates the provisions of this Act by conspiring with one or more persons with the intent of accomplishing an unlawful purpose or lawful purpose by unlawful means or who aids or abets the principal to commit a criminal offense but who is not present at its commission is guilty of a felony and, upon conviction, must be punished in the same manner as the principal.
- (B) A person who violates the provisions of this Act and who has knowledge that the principal has committed a completed felony and assists him with the intention of facilitating his escape from arrest, conviction, or punishment is guilty of the offense of accessory after the fact and, upon conviction, must be punished pursuant to the provisions of section 16-1-55.

Section 12—Exempt Organizations.

- (A) Mutual Aid Activities; Labor Organizations.

This Act does not apply to employees lawfully engaged in collective bargaining activities for their mutual aid and protection or the lawful activities of labor organizations or their members or agents.

- (B) Nonprofit or Charitable Organizations.

A government entity or a nonprofit or charitable organization which is conducting its affairs with ordinary care or skill must not be enjoined pursuant to the provisions of this article.

Section 15—Notice Upon Release from Custody.

When a criminal gang member is released from the custody of a jail, prison, or corrections facility, and the criminal gang member was in the custody of the jail, prison, or corrections facility for a violation of the provisions of this article, the jail, prison, or corrections facility must transmit notice of the release of the criminal gang member to the sheriff of the county in which the crime was committed. Notice also must be given to a sheriff that the criminal gang

member is being released and has provided an address within the jurisdiction of that sheriff for the county in which the criminal gang member intends to reside. If the crime was committed in a municipality, or if the criminal gang member will reside in a municipality upon release, that law enforcement agency must transmit the same notice to the chiefs of police of those municipalities.

Section 16—Law Enforcement Records.

The State Law Enforcement Division must include the Violent Gang and Terrorist Organization File of the Federal Bureau of Investigation's National Crime Information Center among those National Crime Information Center data available for direct access by authorized criminal justice agencies. State, county, and municipal law enforcement agencies must maintain a record of all persons who are found to be criminal gang members in the Violent Gang and Terrorist Organization File in accordance with the National Crime Information Center entry criteria. All gang-related incidents must be appropriately annotated in the South Carolina Incident Based Reporting System pursuant to the intent and purpose of this article.

Section 17—Civil Cause of Action.

- (A) A civil cause of action is created in favor of the State of South Carolina, a county, municipality, or another political subdivision, or an agency or instrumentality of them, that sustains any damage, impairment, or injury proximately caused by a pattern of criminal gang activity as defined in this article, or the commission of a criminal act for the purpose of benefiting, promoting, or furthering the interests of a criminal gang. The cause of action created by this section may be brought against a criminal gang, a criminal gang member, or any other person who intentionally directs, participates, conducts, furthers, or assists in the commission of a pattern of criminal gang activity, or any other person who commits a criminal act or delinquency for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.
- (B) Except as provided in this section, an action for injunction, damages, or other relief filed pursuant to this section must proceed according to the common law, statutory provisions relating to civil remedies and procedures, and the rules of civil procedure established for the circuit court.
- (C) For purposes of venue, an action under this section for the recovery of damages may be brought in the county where the wrongful conduct occurred or in the county where the damages were sustained. An action to enjoin the commission of an offense or an unlawful act may be brought in the county where the wrongful conduct occurred or may occur. For purposes of service of process, service of process upon a member of a criminal gang or a person representing a criminal gang member by appointment of court, operation of law, or mandate constitutes adequate service upon a criminal gang.

Section 18—Local Laws; Preemption.

Nothing in this Act shall prevent the governing body of a county, a municipality, or another political subdivision of the State from adopting and enforcing ordinances consistent with this Act relating to criminal gangs, criminal gang members, and gang violence. When local ordinances duplicate or supplement this Act, this Act shall be construed as providing alternative remedies and not as preempting the field.

Section 19—Severability.

If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, the holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.