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Your Honor, I Seen Him with That Gang: The Constitutionality of the Federal Criminal Street Gang Statute in the Wake of *Apprendi v. New Jersey*

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YOUR HONOR, I SEEN HIM WITH THAT GANG: THE CONSTITUTIONALITY OF THE FEDERAL CRIMINAL STREET GANG STATUTE IN THE WAKE OF *APPENDI V. NEW JERSEY*

Jennifer E. Fleming*

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INTRODUCTION

One evening in Texas in 1995, Terrie Dittman had just bought a new van and was driving home. As she pulled into her driveway, two men pointed guns and demanded her new van. When Ms. Dittman attempted to back out of the driveway, away from the men, one of the men shot at her five times, hitting her at least three times. Both men fled, leaving the wounded Ms. Dittman in her driveway. They were eventually captured, charged, and convicted of carjacking, conspiracy to commit carjacking, and various firearms violations. When the defendants, Jeffrey Matthews and Michael Cook, were presented at sentencing several months later, a judge enhanced their sentences by ten years pursuant to the Criminal Street Gang Statute, finding that the men were members of the Crips, a criminal street gang, and their actions were committed with the goal of impressing their friends in the gang.¹

The only evidence presented at the sentencing hearing against defendant Matthews was the hearsay testimony of an F.B.I. agent summarizing the statements made by other members of Matthews's group of acquaintances.² Matthews's acquaintances told the F.B.I. agent that they had seen him around the Crips and Matthews had bragged about shooting Ms. Dittman.³ Matthews was not permitted to cross-examine the F.B.I. agent or the friends who had made those statements.⁴ The judge found by a preponderance of the evidence that Matthews belonged to the Crips and sentenced Matthews to jail for an additional ten years.⁵ Matthews had no notice of these charges at his trial and no ability to plead his case to the jury.⁶ This Note questions the constitutionality of the statute that sent Matthews to jail for an additional ten years: the Criminal Street Gang Statute.⁷

The word "gang" evokes various images—from the mob and Don Corleone in the Mario Puzo's *The Godfather* trilogy⁸ to a group of urban teens with colored bandanas hanging out on the street corner. Throughout history, people have formed groups to satisfy the need to be part of a community and experience a sense of unity with fellow citizens.⁹ The most common type of group is the ethnic group, which offers

¹ *United States v. Matthews*, 178 F.3d 295, 297–98 (5th Cir. 1999), *cert. denied*, 528 U.S. 944 (1999) (chronicling the events that led up to Matthews's trial and sentencing); *see* 18 U.S.C. § 521(b) (1994) (defining "criminal street gang").

² *Matthews*, 178 F.3d at 303.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 298.

⁶ *Id.* at 301.

⁷ *See* 18 U.S.C. § 521 (1994); *Matthews*, 178 F.3d at 298.

⁸ *See The Godfather Website*, <http://www.thegodfather.com> (last visited Aug. 11, 2009).

⁹ *See* TIM DELANEY, *AMERICAN STREET GANGS* 1 (2005) (explaining that "by joining together in groups, individuals become a part of a whole . . . and share a sense of 'we-ness' . . . that create[s] a community characterized by group loyalty"). *See generally* JANET FOSTER, *VILLAINS: CRIME AND COMMUNITY IN THE INNER CITY* (1990).

“communality in language, a series of customs and symbols, rituals, and appearance.”¹⁰ Gangs tend to have an ethnic element.¹¹ However, other gang associations have formed to fill the same role an ethnic group once filled; a sense of community, ability to belong, and an extended, or, in some cases, surrogate family.¹²

Gangs exist in many forms, shapes, sizes, and organizational structures. Sociologically, gang structures have been divided into two main categories: nonstreet and street gangs.¹³ Although the focus of this Note will be on street gangs, it is beneficial to briefly discuss nonstreet gangs to make a clear contrast. Motorcycle gangs, highly organized crime, and gangsters such as Crips and Bloods, the Ku Klux Klan, Skinheads, and prison gangs typically fall outside the traditional street gang definition.¹⁴ No matter the type, gangs generally create a sense of fear in the community resulting from their criminal activity. Prosecutors on both the state and federal levels have attempted many different approaches to battle the “gang problem.”¹⁵ Correspondingly, on the federal level, prosecutors have struggled to employ a useful tactic for those gangs that fall outside of a highly organized gang.¹⁶ The Federal Criminal Street Gang Statute (CSGS) has been successfully employed only once at the federal district court level,¹⁷ but can be reworked to tackle the gang problem, without becoming subject to the pitfalls of other attempts at gang legislation.

Currently, the CSGS functions as a sentencing enhancement to provide additional punishment to those found by the sentencing body to have “participate[d] in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses [including federal felonies of drug possession or violence]” and that the convicted felon “intend[ed] to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang,” and have been “convicted in the past 5 years [of various offenses listed in the statute].”¹⁸ Although not frequently used since its enactment in 1994, the statute still functions within the United States Code as an option for prosecutors in their fight against gang crime.¹⁹

¹⁰ See DELANEY, *supra* note 9, at 1 (quoting EUGENE E. ROOSENS, CREATING ETHNICITY (1989)).

¹¹ *Id.*

¹² *Id.*

¹³ See *id.* at 13.

¹⁴ See *id.* at 13–27.

¹⁵ See *infra* Part I.C for more background on the types of laws prosecutors have attempted to employ to end gang violence.

¹⁶ Racketeer Influenced and Corrupt Organization Act (RICO), discussed *infra* Part V, has been useful in fighting large, centrally organized syndicated gangs, but has been near useless in battling the smaller disjointed street gangs that are the topic of this Note.

¹⁷ See *United States v. Matthews*, 178 F.3d 295 (5th Cir. 1999), *cert. denied*, 528 U.S. 944 (1999); *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), *cert. denied*, 538 U.S. 938 (2003) (involving a successful charge of CSGS in the sentencing phase, leading to a sentence enhancement for Matthews which was upheld on appeal twice by the Fifth Circuit).

¹⁸ 18 U.S.C. § 521(d) (1994).

¹⁹ See *id.*

The CSGS is on a collision course, however, with the Supreme Court's current standards for sentencing enhancements. *Apprendi v. New Jersey* was decided in 2000 and directly impacted the landscape for all statutes currently operating as sentencing enhancements.²⁰ The facts of *Apprendi* revolve around a New Jersey hate crime statute which enhanced penalties for those believed to contain the necessary purpose to engage in a hate crime.²¹ The Supreme Court in *Apprendi* overturned the conviction, ruling that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.²² The New Jersey Hate Crime enhancement functioned in the same way that the CSGS functions, as a sentencing enhancement. The Court has yet to address the constitutionality of the CSGS. It has been acknowledged by at least one court that *Apprendi* may apply to the CSGS, and render it unconstitutional.²³

Although *Apprendi*'s application to the CSGS may render it unconstitutional, the CSGS can still be resurrected. Both law enforcement and potential defendants deserve a workable federal statute that will serve as a useful tool for prosecutors in the fight to curb the widespread, national surge of gangs and gang violence, while defendants are constitutionally entitled to a statute that provides them with fair notice of the charges against them,²⁴ and properly preserves due process.²⁵

The focus of the remainder of this Note will examine the law surrounding the CSGS. The CSGS currently operates as a sentencing enhancement that is in violation of the Due Process Clause in the wake of *Apprendi v. New Jersey*. Although attempts have been made to reform this statute, all have failed, and this statute stands as an operative but unused tool in the arsenal against gang violence. This Note advocates for the return of a competent, functional legislative option on the federal level that is both useful and properly protects citizen rights. Through amending and molding the CSGS into a substantive crime which must be pled in the indictment and proven to the jury, the CSGS will become a useful option for federal prosecutors while affording the proper Fifth and Sixth Amendment rights to those accused of gang violence.

To address this topic thoroughly, this Note will begin by providing background on criminal street gangs and examples of various jurisdictions' attempts at fighting the growing gang problem. In Part II, this Note will analyze the elements of the current CSGS. Part III will analyze the single jurisdiction which has attempted to employ the CSGS as a sentencing enhancement.²⁶ This part will also discuss more

²⁰ 530 U.S. 466 (2000).

²¹ N.J. STAT. ANN. § 2C:44-3(e) (West 2000) (repealed 2001).

²² *Apprendi*, 530 U.S. at 474-97.

²³ See *infra* Part III (discussing the constitutionality of the CSGS).

²⁴ U.S. CONST. amend. VI. (granting the right to a trial by jury and fair notice of the charges against the defendant).

²⁵ U.S. CONST. amend. V. (federally guaranteed due process); U.S. CONST. amend. XIV, § 1 (requiring due process be made applicable to state statutes through the Fourteenth Amendment).

²⁶ See *infra* Part III (discussing *Matthews I* and *II*).

thoroughly the holding in *Apprendi* and the effect on sentencing enhancements in the wake of *Apprendi*, focusing primarily on the CSGS and will conclude that the current CSGS is unconstitutional. Part IV will discuss recent attempts to address the ineffectiveness of the current CSGS through proposed legislation in both the House and Senate. Three large bills have been sent to committees in the House of the 110th Congress, but have died upon the commencement of the 111th Congress.²⁷ This Note will address briefly how each of these bills sought to alter the CSGS and why none of them would have fully addressed the constitutional issues. This discussion will lead into an original proposal, in Part V, for a bill to address the shortcomings of the CSGS. The current Racketeer Influenced and Corrupt Organizations (RICO) statute has been utilized successfully against many large scale nationally syndicated gangs and can provide valuable insight into effectively addressing gang-related problems.²⁸ Finally, Part VI will return to *Apprendi* and outline why this Note's proposal will be constitutional and effective against gang members whether they are first time offenders who pose a real threat to the community or repeat offenders with significant criminal histories.

I. SETTING THE STAGE: BACKGROUND

A. *The World of Gangs*

1. Motorcycle Gangs

Motorcycle gangs, such as the Hell's Angels and Pagan Outlaws, object strongly to being considered gangs and believe they should be exempt from all anti-gang legislation or restraints.²⁹ The founder of Hell's Angels, Ralph "Sonny" Barger, gave reasons for starting the gang which closely parallel those of other organized groupings: "We didn't stand for anything. It was just something to belong to . . . It was all about belonging to a group of people just like you."³⁰ Although Hell's Angels members dislike being associated with the term "gang," they do possess many characteristics of gangs, including a unifying name, symbol, and members who participate in group (often illegal) activities.³¹ As writer Hunter S. Thompson chronicled, Hell's Angels is not only involved in legal recreational activities and promoting brotherhood, but they "swap girls, drugs and motorcycles"³² and members have been frequently jailed

²⁷ See Anti-Gang Enforcement Act of 2007, H.R. 3150, 110th Cong. (2007); Fighting Gangs and Empowering Youth Act of 2007, H.R. 1692, 110th Cong. (2007); Gang Abatement and Prevention Act of 2007, S.456, 110th Cong. (2007) (as passed by Senate, Sept. 21, 2007).

²⁸ See Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961–68 (2006).

²⁹ See DELANEY, *supra* note 9, at 14.

³⁰ RALPH "SONNY" BARGER, HELL'S ANGELS: THE LIFE AND TIMES OF SONNY BARGER AND THE HELL'S ANGELS MOTORCYCLE CLUB 21 (2000).

³¹ See DELANEY, *supra* note 9, at 15.

³² HUNTER S. THOMPSON, HELL'S ANGELS: A STRANGE AND TERRIBLE SAGA 25 (1966).

for possession of "narcotics and marijuana, oftentimes with the intent to sell."³³ Although motorcycle gangs' criminal activity is similar to that of street gangs, the difference is seen in the structure of the group. Barger created a highly structured and well-organized gang.³⁴ This high level of organization leads to the durability and recognizability of Hell's Angels and other well-known biker gangs.³⁵ Barger, himself, created weekly meetings for each chartered group, established himself as the man who would handle any problems within the group, and acted as liaison between the group and any outside problems.³⁶ The typical street gang is not highly organized and usually does not have an easily identifiable leader such as Barger.

2. Organized Crime or Mafia

The Mafia is a recognizable symbol of this category of nonstreet gang. The Crips and Bloods are included in this category as "national super gangs" because of their highly organized and multilayered structure.³⁷ The similarity in criminal activity is the cohesive factor, which places these groups under the same category and differentiates them from street gangs. Organized crime is a distinct category of crime defined by the Federal Task Force on Organized Crime:

Organized crime includes any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities and, when appropriate, engaging in intricate financial manipulations. . . . Accordingly, the perpetrators of organized crime may include corrupt business executives, members of the professions, public officials, or any occupational group, in addition to the conventional, racketeer element.³⁸

This definition is broad and may encompass many gang types; however, the key concept is that the gangs falling under the definition of organized crime are engaged in

³³ DELANEY, *supra* note 9, at 15. Drug offenses are not the only crimes motorcycle gangs commit. Aggravated assaults, theft, and drug and alcohol related offenses are frequent charges on motorcycle gang members' records. *Id.* at 16.

³⁴ *Id.* at 16 ("The structure of the Hell's Angels is similar to that of a business or corporation.").

³⁵ *Id.* at 15.

³⁶ *Id.* at 16. See generally BARGER, *supra* note 30 (describing himself throughout the autobiography as the undisputed head of the Hell's Angels).

³⁷ DELANEY, *supra* note 9, at 17.

³⁸ DELANEY, *supra* note 9, at 17-18 (quoting NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, ORGANIZED CRIME, REPORT OF THE TASK FORCE ON ORGANIZED CRIME 213-15 (1976)) (discussing the importance of clearly differentiating organized crime from the kind of crime that criminal street gangs generally commit to draw a distinction between the types of gangs).

sophisticated activity.³⁹ The goal of much of this activity is financial gain, although the methods used to achieve this gain are corruption and the use or threat of violence.⁴⁰

3. Ku Klux Klan and Skinheads

The Ku Klux Klan (KKK) and the Skinheads are included among gangs that are less organized but are still dangerous, nationally well-known, and have common identifying characteristics.⁴¹ Both of these gangs derive their identities from their ethnicity and history.⁴² Each of these gangs is organized around the ideology of hate.⁴³ They differ from street gangs in that they do not occupy a common neighborhood, or “turf,” but are identifiable to one another and other community members by tattoos, symbols, and a rhetoric of hatred.⁴⁴ Both the KKK and various skinhead organizations can be found in many states, and the skinhead movement is present in Canada, Australia, New Zealand, and Germany.⁴⁵ Each of these groups operate as “cells” that have minimal contact with other cells, but these cells share similar belief structures and ideology in violence which makes each of these groups akin to smaller gangs throughout the United States.⁴⁶

³⁹ See DELANEY, *supra* note 9, at 18.

⁴⁰ See generally WILLIAM CHAMBLISS & ROBERT SEIDMAN, *LAW, ORDER, AND POWER* (2d ed. 1982).

⁴¹ See DELANEY, *supra* note 9, at 20 (discussing how different organizations relate to one another).

⁴² For a more in-depth examination of the history of the KKK, see ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992). The origin of the KKK can be traced to the first charter in Pulaski, Tennessee, where in May 1866 the KKK formed to resist post-Civil War Reconstruction and promote white supremacy. DELANEY, *supra* note 9, at 20. Also, for a more in-depth examination of the history of the Skinheads, see MARK HAMM, *AMERICAN SKINHEADS: THE CRIMINOLOGY & CONTROL OF HATE CRIME* (1993); JACK B. MOORE, *SKINHEADS SHAVED FOR BATTLE: A CULTURAL HISTORY OF AMERICAN SKINHEADS* (1993). Skinheads have their roots in post-World War II Britain and began as groups of teenage men who were rebelling against society. MOORE, *supra* at 19. It was not until the 1970s that the predecessor groups to the Skinheads formed an alliance with the British National Front, an organization that promoted racist beliefs. *Id.* at 46. In the early 1980s, the Skinheads began to form groups in the United States, complete with the swastika symbol and violence against any non-whites. *Id.* at 64–65.

⁴³ For the stated goals of the Ku Klux Klan, see The Knights Party, <http://www.kkk.bz/ourgoal.htm>.

⁴⁴ See DELANEY, *supra* note 9, at 21–22 (discussing the Klan’s current hatred rhetoric regarding its “ideal” society).

⁴⁵ *Id.* at 21 (describing the presence of the KKK in modern America); *id.* at 26–27 (describing the presence of skinhead subculture throughout the world).

⁴⁶ *Id.* at 25 (citing Jim Mulvaney, ‘Skinhead’ Founder Renounces His Ties, *LAS VEGAS REV. J.*, Aug. 1, 1993).

4. Prison Gangs

Prison gangs bear mention because they are commonly known gangs that include many members and have the capacity for great violence similar to the other gangs in this section.⁴⁷ Prison gangs were formed mostly by members of street gangs who were locked up and continued their illegal group activities behind bars.⁴⁸ Prison gangs are obviously nonstreet because they operate exclusively behind bars. With the occasional exception which is outside the scope of this Note, prison gangs typically do not cause problems for law enforcement outside of prison walls.⁴⁹

5. Street Gangs

Defining a street gang is a difficult problem due to various levels of organization each gang may possess, their types of activities (both legal and illegal), and where these gangs live and loiter. Malcolm Klein and Cheryl Maxson attempted to provide a working definition developed through their research on gangs: "A street gang is any durable, street-oriented youth group whose involvement in illegal activity is part of its group identity."⁵⁰ Although broad, this definition incorporates certain elements that both authors felt were present in all street gangs: (1) durability; (2) street-oriented; (3) youth; (4) illegal; and (5) identity.⁵¹

Durability is a bit vague, but "an existence of several months can be used as a guideline."⁵² Durability refers to groups that exist as a cohesive identifiable gang regardless of a turnover in membership.⁵³ Although street-oriented seems obvious, it implies "spending a lot of group time outside home, work, and school—often on streets, in malls, in parks, in cars," and around housing projects or neighborhood squares.⁵⁴ Street gangs are overwhelmingly youth-oriented. Some gangs include members into their late twenties or early thirties, but the majority of the membership is comprised of those in their mid-adolescence into their early twenties.⁵⁵ To be considered a street gang, Klein and Maxson's definition suggests that a group must be engaged in delinquent or criminal activities, not simply bothersome to the surrounding

⁴⁷ See DELANEY, *supra* note 9, at 27.

⁴⁸ See *id.* at 27–34 (discussing history of prison gangs beginning in 1950 with the Gypsy Jokers and growing to include dangerous gangs today such as La Eme (Mexican Mafia), Aryan Brotherhood, Neta, Black Guerrilla Family, and La Nuestra Familia).

⁴⁹ See DELANEY, *supra* note 9, at 27.

⁵⁰ MALCOLM W. KLEIN & CHERYL L. MAXSON, STREET GANG PATTERNS AND POLICIES 4 (2006).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

citizens.⁵⁶ Finally, identity is an important element common among all types of gangs, not simply street gangs. An identity must be formed for the group itself; it cannot simply adopt the identity of an individual or leader.⁵⁷ Usually groups use not only names but colors, symbols, tattoos, and hand signals to identify their particular gang.⁵⁸

The difficulty of defining “street gang” is that they come in many different organizational structures.⁵⁹ Many stereotypes abound when one considers what a gang member looks like, but not all of these are accurate and able to be included in the definition.⁶⁰ For the purposes of this Note, the general definition, including the element of illegality, will suffice as a starting point for conceptualizing a criminal street gang.

B. Gang Crime and Community Fear

Gangs exist in all fifty states, stretch throughout all socioeconomic classes and racial groups, and cause disruption and crime everyday in many communities.⁶¹ Because different cities and law enforcement agencies define a “gang” differently, statistics on exactly how many gangs exist are difficult to gather and it is difficult to assess the accuracy of these statistics.⁶² The 2006 National Youth Gang Survey (NYGS), published in 2008, reported that there are approximately 785,000 active gang members and about 26,500 active, identifiable gang operations in the United States.⁶³ The surveyed jurisdictions reported a rise across all major gang-related criminal activity

⁵⁶ KLEIN & MAXSON, *supra* note 50, at 4.

⁵⁷ *Id.*

⁵⁸ See DELANEY, *supra* note 9, at 8–10. Interestingly, some gangs have not only adopted the stereotypical tattoos or colored bandanas that come to mind when one thinks of gang members, but also gangs have adopted types or brands of clothing. *Id.* at 10. For instance, a Duke University sweatshirt is worn by many members of the Gangster Disciples of Chicago. They interpret DUKE to stand for *Disciples Utilizing Knowledge Everyday*. *Id.* Also, Calvin Klein jeans with the logo CK may be too dangerous to wear in some Los Angeles neighborhoods as it can be interpreted by gangs as standing for “Crip Killers” when worn by the rival gang, the Bloods. *Id.* (citing Melissa Roth, *Posse Paraphernalia*, GEORGE MAGAZINE, Mar. 1998).

⁵⁹ See *id.* at 7–8 (outlining states’ difficulties in crafting anti-gang statutes due to their inability to capture different organizational structures in the statutes’ definition section).

⁶⁰ See *id.* at 10–11 (describing the many gang stereotypes and the reality of gang members through the use of examples, including the contrast of the stereotype of gangs existing only in low income urban areas with gangs in small towns and Native American reservations).

⁶¹ *Id.* at 12.

⁶² *Id.* For instance, in Syracuse, New York, the Police Department denied that there were active gangs in the city because of the city’s narrow definition of a gang. See *id.* In 2002, the Police Chief finally acknowledged gang activity and created a task force within the department to address gang issues. *Id.*

⁶³ ARLEN EGLEY, JR., & CHRISTINA E. O’DONNELL, U.S. DEP’T OF JUSTICE, HIGHLIGHTS OF THE 2006 NATIONAL YOUTH GANG SURVEY 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200805.pdf>.

categories. Aggravated assault rose approximately fifty-five percent, while drug sales, robbery, theft, burglary, and auto theft all rose upwards of thirty percent.⁶⁴

Gangs have been a segment of the American social landscape since its inception, but the 1970s through the present mark what some have called “an epidemic” in gang proliferation and violence.⁶⁵ In this new era, gangs have become more diversified in size and structure, with both large street gangs and smaller, more localized street gangs.⁶⁶ Given the growth of street gangs, the number of new members, and the rise in violent crime that stems from these gang activities, it is understandable why police and communities have placed a high priority on fighting the spread of gangs.

C. Local Solutions: Task Forces, Check Points, and Injunctions

Communities have attempted to solve the gang problem in many different ways, from the typical procedures to the more creative. As discussed briefly above, many cities formed gang task forces to target and alleviate gang-related violence.⁶⁷ Federal agencies have also attempted to do their part. The Immigration and Naturalization Service (INS) formed a Violent Gang Task Force to “focus the INS’s attention not on general immigration enforcement, but on the use of immigration law as a means of assisting local anti-gang activity.”⁶⁸ Cities and towns have begun to utilize antiloitering laws and injunctions as both criminal and civil supplements to formal law enforcement.⁶⁹ Although California has long utilized antiloitering laws,⁷⁰ the question of

⁶⁴ *Id.* at 2, fig. 1.

⁶⁵ See DELANEY, *supra* note 9, at 59–60 (chronicling the change from primarily defense-oriented gangs concerned with protecting their members to offensive gangs who assertively, and often violently, seek larger territories, a bigger piece of illegal activity, and have spread to rural areas); see also 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, 101–05 (2002) (describing the rise of gangs in recent decades and the constitutionality of society’s attempts to control gang violence).

⁶⁶ See DELANEY, *supra* note 9, at 60 (calling attention to the large “brand name” gangs well-known to the public that have grown considerably in the wake of the Vietnam War creating “super gangs,” the preeminent being Los Angeles’s Bloods and Crips as well as Chicago’s Vice Lords, Latin Kings, Latin Disciples, and Black Gangster Disciples); see also Scott H. Decker & G. David Curry, *Gangs*, in 2 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 755, 756 (David Levinson, ed., 2002) (noting that both large and smaller gangs cause similar amounts of chaos due to the large availability of “automobiles and firearms” after the Vietnam War).

⁶⁷ See DELANEY, *supra* note 9, at 254.

⁶⁸ Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 325 (2007).

⁶⁹ Eva Rosen & Sudhir Venkatesh, *Legal Innovation and the Control of Gang Behavior*, 3 ANN. REV. L. & SOC. SCI. 255, 266–67 (2007).

⁷⁰ See ACLU FOUNDATION OF S. CAL., FALSE PREMISE/FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH I (1997), available at <http://www.streetgangs.com/injunctions/topics/blythereport.pdf> (last visited May 28, 2009). Officials claimed the injunction was “the nation’s first legal offensive against a street gang.” *Id.*

the constitutionality of antiloitering laws took center stage in *City of Chicago v. Morales*.⁷¹ The City of Chicago enacted an ordinance in 1992 prohibiting identifiable gang members from loitering in a public place.⁷² The ordinance had provisions to enforce this act through arrest, a fine, or imprisonment for not more than six months and a requirement of community service for the purpose of curbing an “escalation of violent and drug related crimes.”⁷³ The Supreme Court struck down this particular statute as unconstitutionally vague on the grounds that the statute denied due process guaranteed by the Fourteenth Amendment, partly on the grounds that the statute “fail[ed] to notify individuals what conduct is prohibited, and it encourage[d] arbitrary and capricious enforcement by police.”⁷⁴

Although the Court struck down the statute in *Morales*, Justice Stevens’s majority opinion is narrowly worded such that, while finding the statute a violation of due process, the statute does not violate the First Amendment guarantees of freedom of speech, expression, or freedom of association.⁷⁵ The majority found it unconstitutional on its face because it was vague and required no *mens rea* requirement despite potential criminal consequences.⁷⁶ The Court may have struck down the Chicago statute in *Morales*, but it remains unclear whether a city may constitutionally regulate, either criminally or civilly, gang activity through more concretely authored anti-loitering statutes.⁷⁷

Communities across the country have continued to pursue alternative legislation to achieve results in the fight against gang violence in the wake of *Morales*.⁷⁸ At the end of June 2008, Florida Governor Charlie Crist joined the ranks of other public officials when he signed a bill which permitted communities to enact civil injunctions against any of the approximately 1,500 gangs that claim residence in the state.⁷⁹ Other states to take such civil action against gangs include Massachusetts, Texas, Illinois (under a redesigned civil injunction remedy), and Minnesota.⁸⁰ Each injunction varies slightly from its counterparts, but all “seek a court order declaring the gang’s public behavior a nuisance in order to ask for limitations on their activity.”⁸¹ The limitations usually take the form of establishing curfews, prohibiting known gang apparel, and

⁷¹ 527 U.S. 41 (1999).

⁷² *Id.* at 45–46.

⁷³ *Id.* at 46.

⁷⁴ *Id.* at 45–46, 49–50.

⁷⁵ *Id.* at 53.

⁷⁶ *Id.* at 55.

⁷⁷ *Id.* (“There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine.”).

⁷⁸ See Rosen & Venkatesh, *supra* note 69, at 265.

⁷⁹ Stefanie Frith, *Cities Try Wrangling Gangs with Civil Suits*, U.S.A. TODAY, Sept. 8, 2008, at 2A, available at http://www.usatoday.com/news/nation/2008-09-07-ganginjunctions_N.htm.

⁸⁰ *Id.*

⁸¹ *Id.*

flashing gang signs.⁸² Law enforcement usually views these injunctions as a positive tool to keep gangs from meeting and creating fear in the surrounding community.⁸³

There is a strong risk, however, that these civil statutes may unconstitutionally limit rights. The American Civil Liberties Union, and others, fear that “the injunctions place prohibitions on lawful activity, including the right to gather publicly” and “[i]t criminalizes ordinary daily activity.”⁸⁴ Opponents to civil remedies criticize injunctions for their vagueness, and they attempt to stop normal non-criminal activity, such as two friends conversing on the street corner or two brothers having lunch together in the park.⁸⁵ Also widely criticized is the threshold issue of law enforcement’s ability to determine who is a gang member and who is not.⁸⁶ It, however, remains to be seen how the Supreme Court will ultimately view civil gang injunctions and other efforts at curbing gang activity.⁸⁷ Currently, the federal legislative focus has been the Criminal Street Gang Statute.

⁸² *Id.*

⁸³ See, e.g., Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69 (2002) (reporting the findings of a statistical study evaluating the effectiveness of civil gang injunctions in L.A. County). Dr. Grogger found that “8 years’ worth of data drawn from four law enforcement jurisdictions, suggest that civil gang injunctions lead the rate of violent crimes to decrease” roughly five to ten percent, most prevalently in assault crimes. *Id.* at 89.

⁸⁴ See Frith, *supra* note 79.

⁸⁵ *Id.*

⁸⁶ See Plácido G. Gómez, *It is Not So Simply Because an Expert Says It is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY’S L.J. 581, 583 (2003) (criticizing in detail the danger of allowing law enforcement officers to act as experts on gang membership and why the practice may lead to discriminatory and overbroad use of civil gang injunctions).

⁸⁷ Civil gang injunctions are only one of a few creative methods communities have found to supplement traditional law enforcement tactics. This author personally witnessed the events in June and July of 2008, when District of Columbia Police Chief Cathy L. Lanier instituted controversial checkpoints in D.C.’s violence-torn Trinidad neighborhood. All Things Considered, *D.C. Police Use Radical Tactic to Combat Homicides* (National Public Radio broadcast June 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91379525> (last visited Apr. 3, 2009). These checkpoints were designed to close off Trinidad streets after dark to limit access to the geographic area. Police stopped each car in the neighborhood and asked for identification. *Id.* Although the checkpoints created nine days of peace in a neighborhood that had seen an extreme escalation in violence, the District was sued by the Partnership for Civil Justice claiming that the checkpoints violated protected constitutional liberty. See DeNeen L. Brown, *Checkpoints: They Make You Stop and Think*, WASH. POST, July 28, 2008, at C1; Courtland Milloy, *A Street Corner Analysis of D.C. Crime*, WASH. POST, July 23, 2008, at B1. The District of Columbia Circuit overturned a municipal court decision declaring the checkpoints constitutional. *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1306 (D.C. Cir. 2009). In a unanimous ruling, the Court of Appeals held that “there is no . . . constitutionally sound bar in the NSZ checkpoint program. It is apparent that appellants’ constitutional rights are violated.” *Mills*, 571 F.3d at 1312.

II. THE FEDERAL LEVEL: WHAT IS THE CRIMINAL STREET GANG STATUTE?

At the federal level, legislation, either new or amended, is a tool lawmakers utilize prolifically to aid the fight against crime. Anti-gang legislation is no different. Injunctions discussed in Part I.C are a legislative creation on the state level, but federally, Congress has attempted to address the national gang problem on a larger scale. One of the legislative tools available to federal prosecutors is the Federal Criminal Street Gang Statute (CSGS).⁸⁸

The CSGS was passed in 1994 as a sentencing enhancement for criminal defendants found to be members of a criminal street gang.⁸⁹ Until the most recent decade, sentencing enhancements were treated differently by federal courts than substantive crimes.⁹⁰ The Federal Sentencing Guidelines were established in 1984 by the United States Sentencing Commission to provide sentencing recommendations for federal convictions.⁹¹ Recommendations may be a mischaracterization of the guidelines in the mid-1990s, as they were often criticized for being “overly rigid, complicated and unfair.”⁹² The Federal Sentencing Guidelines invested wide discretion in trial judges during the sentencing phase and permitted structured “departures” from the indicated sentencing guidelines.⁹³ The CSGS is a federally enacted “departure” from the original guidelines, permitting sentencing judges to enhance sentencing for another crime post-conviction if the judge finds by a preponderance of the evidence the defendant to be a member of a criminal street gang.⁹⁴

⁸⁸ 18 U.S.C. § 521(2006).

⁸⁹ *Id.*

⁹⁰ See David C. Holman, Note, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267 (2008) (discussing the current issues surrounding sentencing enhancements). Holman discusses the evolution of sentencing guidelines in the wider context of the Federal Sentencing Guidelines from their inception in 1984 through 2000, where they mechanically “stripped the sentencing judge of most of his discretion” and applied a formula for a sentence. *Id.* at 271–73.

⁹¹ See *id.* at 271; see also Lisa Stansky, *Breaking Up Prison Gridlock*, 82 A.B.A.J. 70 (reviewing the state of the federal sentencing guidelines pre-*Apprendi*).

⁹² Stansky, *supra* note 91, at 70–71 (noting that the increase of the prison population and the violence that stemmed from over crowding could trace its roots to the establishment of the sentencing guidelines).

⁹³ David O. Stewart, *One More Legacy of Rodney King: U.S. Supreme Court Ruling Affirms Trial Court Discretion in Sentencing*, 82 A.B.A.J. 44 (discussing the procedural aftermath of *Koon v. United States* and the affirmation of extreme deference to the trial court in sentencing matters); see also *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *rehearing en banc denied*, 45 F.3d 1303 (9th Cir. 1995) (Reinhardt, J., dissenting) (“The panel’s encroachment on district court discretion epitomizes the mechanical and inflexible approach to sentencing . . . the [Sentencing] Guidelines themselves represent.”), *aff’d in part & rev’d in part*, *Koon v. United States*, 518 U.S. 81 (1996).

⁹⁴ See Gary R. Brown, *Less Bark, More Bite: Fixing the Criminal Street Gang Enhancement*, 16 FED. SENT’G REP. 148 (2003).

The CSGS permits sentencing judges to employ an upward departure from federal guidelines for any “act of juvenile delinquency involving a violent or controlled substances felony.”⁹⁵ After conviction by a jury or bench trial of any violent or controlled substance felony, a sentencing judge may increase the substantive offense’s sentence by up to ten years under certain conditions.⁹⁶ It is left to the judge’s discretion to find that the defendant before him satisfies the requirements of § 521, namely that she participated in a street gang with knowledge of crimes committed by other members of the gang, intended to promote or further the crimes of the gang, or maintained or increased her position in the gang by committing the substantive crime, and had at least one prior conviction for a similar offense.⁹⁷ Because the CSGS is a sentencing enhancement and not a substantively charged crime, the prosecutor does not charge the gang crimes or need to prove beyond a reasonable doubt that the defendant participated for the benefit of the gang or with the intent to benefit the gang. The standard of proof for sentencing is currently preponderance of the evidence.⁹⁸ The CSGS is operable for prosecutors to employ during the sentencing phase. It is rarely used, however, perhaps due to its unconstitutionality when viewed in light of recent Supreme Court rulings.⁹⁹

III. THE CSGS’S DUBIOUS CONSTITUTIONALITY

Although the CSGS has not been challenged directly in the United States Supreme Court, recent decisions have shed light on the issue of sentencing enhancement statutes in general, and the CSGS specifically. The Fifth Circuit is the only federal circuit court to consider the constitutionality of the CSGS. The Fifth Circuit considered the CSGS in two separate appeals stemming from the same criminal action.¹⁰⁰ The Fifth Circuit considered the issue of the CSGS twice: once before *Apprendi v. New Jersey* was decided, and again after *Apprendi*.¹⁰¹

A. Round One: *United States v. Matthews I*

United States v. Matthews (Matthews I) stems from an appeal from a conviction of Matthews and his co-defendant, Cook, who attempted to carjack Terrie Dittman in

⁹⁵ 18 U.S.C. § 521(a),(c) (1994) (adding conspiracy charges to the applicable substantive crime).

⁹⁶ *Id.* at (b).

⁹⁷ *Id.* at (d).

⁹⁸ *United States v. Booker*, 543 U.S. 220, 232 (2005) (finding that sentencing enhancements based upon a preponderance of the evidence standard and never presented to a jury were unconstitutional).

⁹⁹ *Id.*

¹⁰⁰ See *United States v. Matthews*, 178 F.3d 295 (5th Cir. 1999), *cert. denied*, 528 U.S. 944 (1999); *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), *cert. denied*, 538 U.S. 938 (2003).

¹⁰¹ 530 U.S. 466 (2000).

her driveway.¹⁰² Matthews and Cook were convicted of carjacking, conspiracy to commit carjacking, and using a firearm during a crime of violence.¹⁰³ At the sentencing hearing, Matthews's carjacking sentence was enhanced due to the serious bodily injury inflicted on Ms. Dittman pursuant to a state statute. The court also enhanced his conspiracy to commit carjacking sentence because it found that he had committed the crime in furtherance of a criminal street gang under 18 U.S.C. § 521 (CSGS).¹⁰⁴ Matthews appealed on several grounds, but most pertinent to this Note is his appeal of the sentence enhancement handed down under the CSGS. The Fifth Circuit found that the CSGS is a sentencing enhancement, not a substantive crime, and it does not violate Matthews's Fifth and Sixth Amendment rights.¹⁰⁵ They also found no clear error in the court's findings during sentencing that Matthews was a member of the Crips street gang.¹⁰⁶

B. In the Interim: Apprendi v. New Jersey and A New Standard For Fifth and Sixth Amendment Rights in Sentencing Enhancements

The Supreme Court granted certiorari to hear an appeal from a petitioner who was found guilty of shooting into an African-American family's home while also carrying an "antipersonnel bomb."¹⁰⁷ The New Jersey court found by a preponderance of the evidence during a sentencing hearing that Petitioner acted as a result of racial hatred and enhanced his sentence under a New Jersey hate crime statute.¹⁰⁸ The Supreme Court ruled that the Due Process Clause required that a jury, on the basis of proof beyond a reasonable doubt, must find any fact, other than previous convictions, that increases the maximum prison sentence.¹⁰⁹ Put another way, the Court found

¹⁰² *Matthews*, 178 F.3d at 297.

¹⁰³ *Id.* at 298.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 301–02 (reviewing 18 U.S.C. § 521's language, structure, subject matter, context and history and finding it clear that the CSGS was a sentencing factor, not a substantive crime, and therefore did not violate either Matthews's Fifth Amendment due process rights or his Sixth Amendment right to a jury trial and notice of the charges against him).

¹⁰⁶ *Id.* at 302–03. During sentencing the government presented additional evidence in the form of testimony from an F.B.I. agent acting as an expert on gangs. The agent testified that Matthews was a member of the Crips, his co-defendant was also Crips-affiliated, Matthews received the gun used to commit the crime from a fellow gang member, and Matthews bragged about the carjacking to other gang members. *Id.*

¹⁰⁷ See *Apprendi v. New Jersey*, 530 U.S. 466, 469–70 (2000). During the defendant's interrogation he admitted that he did not know the occupants of the home, but "because they are black in color he [did] not want them in the neighborhood." *Id.* at 469.

¹⁰⁸ *Id.* at 471.

¹⁰⁹ *Id.* at 486, 490 ("Constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense and . . . a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment' may raise serious constitutional concern.") (internal citations omitted) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹¹⁰ The Court overruled New Jersey’s sentence for Petitioner and remanded.¹¹¹

At first these broad statements seemed to indicate a widespread change in sentencing procedures to conform sentencing to Fifth, Sixth and Fourteenth Amendment protections discussed in *Apprendi*. This has not come to pass.¹¹² In *Ring v. Arizona*,¹¹³ *United States v. Cotton*,¹¹⁴ and *Harris v. United States*,¹¹⁵ the Court demonstrated reluctance to extend *Apprendi* beyond its narrow holding. Particularly in *Harris*, in which a fact used in sentencing was not pled or proven to a jury beyond a reasonable doubt, the Court did not require Harris’s conviction to be overturned where a judge increased the defendant’s minimum, as opposed to maximum, sentence by finding the additional fact that Harris “brandish[ed]” his gun.¹¹⁶ Although the decision was 5-4 in *Harris*, only four Justices signed the section of the opinion that parsed the language of *Apprendi* to find a difference between increasing a statutory minimum sentence and a maximum sentence. Justice Breyer, the fifth member, admitted that he could not distinguish *Apprendi v. New Jersey* from *Harris* in terms of logic and could not agree with the majority’s opinion on the distinction.¹¹⁷ The close decision and the Court’s reluctance to extend *Apprendi* made *Apprendi*’s impact on judicial sentencing increases uncertain at best.¹¹⁸

¹¹⁰ *Id.* at 490; see also *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.”). This footnote in *Jones* seems to foreshadow the Court’s official holding a year later in *Apprendi*.

¹¹¹ *Apprendi*, 530 U.S. at 497.

¹¹² See Andrew M. Levine, *The Confounding Boundaries of “Apprendi-land”: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 380 (2002) (quoting *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting)) (stating that in the Spring 2002 Term, the Court agreed to hear three *Apprendi*-related cases and, in their wake, it appears that *Apprendi* is not the “watershed change” that the *Apprendi* dissenters feared)).

¹¹³ 536 U.S. 584 (2002) (determining *Apprendi*’s effect on Arizona’s capital sentencing system).

¹¹⁴ 535 U.S. 625 (2002) (discussing whether *Apprendi* requires an automatic reversal of certain criminal convictions on appeal).

¹¹⁵ 536 U.S. 545 (2002) (discussing whether *Apprendi* protections should apply to facts that increase a defendant’s statutory minimum sentence).

¹¹⁶ *Id.* at 568. The Court went on to conclude that the “judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments.” *Id.*

¹¹⁷ See Levine, *supra* note 112, at 381 (quoting *Harris*, 536 U.S. at 569 (Breyer, J., concurring)).

¹¹⁸ *Id.* at 382; see also Jess D. Mekeel, Note, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL RTS. J. 1583, 1593 (2006) (discussing the aftermath of

The uncertainty of sentencing is compounded by *United States v. Booker*.¹¹⁹ The holding in *Booker* closely mirrors *Apprendi* discussed above, but *Booker* takes the ruling one step further by slightly modifying the holding in *Apprendi* to fully address the constitutionality of the Guidelines, an issue the Court declined to answer in *Apprendi*.¹²⁰ In *Apprendi*, the specific holding referred to the necessity to plead charges and submit to a jury any findings that would enhance a sentence “beyond the prescribed statutory maximum.”¹²¹ The *Apprendi* Court declined to answer the question of whether the Guidelines themselves were constitutional.¹²² *Booker* revisited this question and concluded that the Guidelines must be advisory to conform to the Sixth Amendment.¹²³ In this aspect, the Supreme Court appeared to reaffirm its holding through *Booker* and declare that the Constitution will not tolerate sentencing enhancements that are not proven or submitted to a fact finder, such as would be the case in the CSGS.¹²⁴ The forcefulness of the *Booker* decision only contributed to the uncertainty of how sentencing enhancements are to be treated by courts when considered in conjunction with the reluctance of the Court in cases such as *Cotton*, *Ring*, and *Harris*.

To complete the picture of uncertainty, the Supreme Court most recently declined to extend *Apprendi* beyond its narrow holding in *Oregon v. Ice*.¹²⁵ The Court considered Ice’s appeal asserting his sentencing was unconstitutional under *Apprendi v. New Jersey*, because an Oregon statute allowed the sentencing judge to impose a consecutive sentence rather than a concurrent sentence when a “defendant is simultaneously sentenced for criminal offenses that do not arise from the same . . . course of conduct.”¹²⁶ In a five-to-four decision, the Court announced that in the present case, the erosion of the jury’s traditional role was not at stake, and therefore, the holding of *Apprendi* was inapplicable, as was the Sixth Amendment’s restriction on judge-found facts.¹²⁷ The majority again reaffirmed its desire to maintain *Apprendi* as a

Harris and noting that many commentators have concluded that the role of mandatory minimums have been augmented).

¹¹⁹ 543 U.S. 220 (2005). For a more complete discussion on constitutional controversy surrounding the Federal Sentencing Guidelines in the wake of *Booker*, see Holman, *supra* note 90.

¹²⁰ *Booker*, 543 U.S. at 238.

¹²¹ *Id.* at 238 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

¹²² *Apprendi v. New Jersey*, 530 U.S. 466, 497 n.21 (2000).

¹²³ *Booker*, 543 U.S. at 245.

¹²⁴ *Id.* at 230 (“It is equally clear that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.’” (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995))).

¹²⁵ 129 S. Ct. 711; 555 U.S. ____ (2009).

¹²⁶ OR. REV. STAT. § 137.123(2) (2007).

¹²⁷ *Ice*, 129 S. Ct. at 714–15; 555 U.S. at ____; see also *Blakely v. Washington*, 542 U.S. 296, 308–09 (2004) (discussing the traditional role reserved for the jury and the necessity that a judge not impose upon the jury’s role).

purely narrow holding, even over a strongly worded dissent.¹²⁸ In light of these most recent holdings, the CSGS will not have to be dramatically altered to conform to *Apprendi*. Primarily, the judge-found facts must not impede on the traditional jury role contemplated in the Sixth Amendment.¹²⁹ The changes will be discussed more substantively below in Part V.

C. *The Lost Opportunity*: United States v. Matthews II

Matthews renewed his appeal, again on several grounds, and appeared a second time before the Fifth Circuit.¹³⁰ The second appeal, however, was decided after *Apprendi*, but before any extensive insight from the Supreme Court on the scope of the holding.¹³¹ On Matthews's second appeal, he again raised the issue of the constitutionality of his sentencing enhancement for both the state carjacking enhancement and the CSGS enhancement.¹³² Matthews raised *Apprendi* as an intervening change of law that would reduce his sentence by nullifying the sentence enhancement.¹³³ Before reaching conclusions on the effect of *Apprendi* on the enhancements, the court addressed a procedural issue raised by Matthews, namely whether "doctrine of law of the case *permitted* the district court to reconsider and vacate its § 521 enhancement of his conspiracy sentence and *prohibited* the court from enhancing his carjacking sentence under § 521."¹³⁴ The court found that it was permitted to review the sentencing for the CSGS enhancement, but *Apprendi* did not mandate either sentencing enhancement review.¹³⁵ The court reviewed the CSGS enhancement and found that *Apprendi* did not categorically change the outcome.¹³⁶ The court read *Apprendi*'s holding to say "[i]f a fact increases the statutory maximum penalty, it must be pleaded in the indictment and found by a jury beyond a reasonable doubt, regardless of whether Congress intended the fact to be a 'sentencing factor' or an

¹²⁸ *Ice*, 129 S. Ct. at 722; 555 U.S. at _____ (Scalia, J., dissenting) ("Ultimately, the Court abandons its effort to provide analytic support for its decision The protection of the *Sixth Amendment* does not turn on this Court's opinion of whether an alternative scheme is good policy The right to trial by jury and proof beyond a reasonable doubt is a given, and all legislative policymaking . . . must work within the confines of that reality.").

¹²⁹ See *supra* note 127.

¹³⁰ *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), *cert. denied*, 538 U.S. 938 (2003).

¹³¹ *Apprendi v. New Jersey* was decided in late 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Matthews II* oral arguments were held in early 2002. *Matthews*, 312 F.3d 652 (5th Cir. 2002), *cert. denied*, 538 U.S. 938 (2003). The Supreme Court opinions clarifying *Apprendi* were not decided until late 2002.

¹³² See *Matthews*, 312 F.3d at 656.

¹³³ *Id.* (asking the court to rule on the "validity, after *Apprendi*, of a § 521 enhancement based on facts not pleaded in the indictment and not proven to a jury beyond a reasonable doubt").

¹³⁴ *Id.*

¹³⁵ *Id.* at 657–58.

¹³⁶ *Id.* at 661.

‘element.’”¹³⁷ Because the district court (1) found the facts of the CSGS by a preponderance of the evidence rather than beyond a reasonable doubt; and (2) did not plead the facts of CSGS in the indictment, the district court was in error.¹³⁸ The Fifth Circuit, however, did “not conclude that § 521 is unconstitutional, but only that *Apprendi* require[d] the facts” for the basis of the CSGS to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.¹³⁹ The court then applied a harmless error analysis and found that the error was harmless.¹⁴⁰

The short-shrift treatment that the Fifth Circuit gave to the discussion of the sentencing enhancement’s constitutionality is curious considering that *Apprendi* seemingly would have had a large impact on at least ten additional years to which Matthews was sentenced.¹⁴¹ Some scholars have suggested a few reasons for this, including the Fifth Circuit’s desire to apply a limited resentencing approach designed to limit the number of issues reviewed on appeal so as to further judicial economy and display reluctance to give the criminal defendant a “second bite at the apple.”¹⁴² The *Matthews II* court’s conclusion that a substantial violation of Matthews’s constitutional rights constituted only harmless error could be attributed to the law-of-the-case doctrine, or simply a desire to limit the impact of *Apprendi* on other pending cases.¹⁴³ Regardless of the Fifth Circuit’s reasoning, the question of the CSGS and its dubious constitutionality has yet to be directly addressed through a facial challenge.

Each of these developments causes one to doubt the constitutionality of § 521. Although *Matthews II* concluded that the sentencing enhancement’s applicability in his case was unconstitutional, the court stopped short of suggesting that § 521, on its face, was unconstitutional.¹⁴⁴ Currently, however, § 521 is not widely used to battle street gang violence, and rightfully so given its dubious constitutionality. In an attempt to provide workable tools in the war on crime, the following section reviews Congress’s three most recent attempts to amend or supplement § 521 and concludes that none of these bills would successfully address the street gang problem.

IV. A CONGRESSIONAL RECOGNITION OF A PROBLEM

During the 110th Congress, three bills were presented that would have directly affected § 521 if passed. Upon the commencement of the 111th Congress, however,

¹³⁷ *Id.* at 663.

¹³⁸ *Id.* at 664.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 665–67.

¹⁴¹ *Id.* at 656.

¹⁴² See Tracy Friddle & Jon M. Sands, “Don’t Think Twice, It’s All Right”: Remands, Federal Sentencing Guidelines & the Protect Act—A Radical “Departure”?, 36 ARIZ. ST. L.J. 527, 537 (2004) (quoting *United States v. Whren*, 111 F.3d 956, 959 (D.C. Cir. 1997)).

¹⁴³ See *id.* at 537–38 (The law-of-the-case doctrine refers to a “court’s reluctance to reopen a ruling it has already made or one court’s reluctance to revisit a ruling made by another.”).

¹⁴⁴ *Matthews*, 312 U.S. at 664.

these bills were presumed dead in committee. This section will examine why the bills, had they become law, would have unsuccessfully amended the CSGS.

*A. Fighting Gangs and Empowering Youth Act of 2007*¹⁴⁵

This large bill sought to prevent youth gang crime while providing economic stimulation and education funding to urban, specifically gang ridden, communities.¹⁴⁶ For the purposes of this Note, the amendment to § 521 is the most relevant section of this bill.¹⁴⁷ It was structured much like other legislation discussed below. H.R. 1692 included predicate crimes, enhanced punishment for two or more predicate crimes, and penalties for committing a predicate gang crime with intent and knowledge of furthering the gang through the commission of the crime, as well as making it a crime to recruit or encourage someone to join a criminal street gang.¹⁴⁸ The complexity of this bill is difficult to follow and would present a barrier to a prosecutor.

*B. Anti-Gang Enforcement Act of 2007*¹⁴⁹

This proposed legislation would have amended the current Criminal Street Gang Statute by adding to its breadth.¹⁵⁰ The proposed bill included prohibited acts (including interstate commerce activities),¹⁵¹ a new penalties section for violating section (a), defined predicate gang crimes, and made it a crime to participate in a criminal street gang by committing two or more of the predicate crimes with knowledge and purpose of aiding the gang.¹⁵² Penalties were added to punish committing a predicate crime as a member of a gang with knowledge and purpose that it was in furtherance of a gang,¹⁵³ a forfeiture provision,¹⁵⁴ and an additional section that increased penalties for violent crimes in furtherance of a criminal street gang.¹⁵⁵ This bill was introduced in the House on July 24, 2007, and referred to the Judiciary, Energy and Commerce, Health, Crime and Terrorism, and Homeland Security Committees where it died.

¹⁴⁵ H.R. 1692, 110th Cong. (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* § 301.

¹⁴⁸ *Id.* (making the commission of a large range of crimes, including any felony punishable by more than one year, coupled with the finding that a person is in gang an additional crime).

¹⁴⁹ H.R. 3150, 110th Cong. (2007).

¹⁵⁰ *Id.* § 2 (“Chapter 26 of title 18, United States Code, is amended by adding at the end [of § 521] the following: § 522 . . .”).

¹⁵¹ *Id.* § 2(a) (“It shall be unlawful for any person to use any facility in, or travel in, interstate or foreign commerce . . .”).

¹⁵² *Id.* § 3.

¹⁵³ *Id.* § 3(b).

¹⁵⁴ *Id.* § 3(d).

¹⁵⁵ *Id.* § 4(a) (“§ 523. Violent crimes in furtherance or in aid of a criminal street gang.”).

*C. Gang Abatement and Prevention Act of 2007*¹⁵⁶

Although not a proposed amendment to the CSGS,¹⁵⁷ this proposed bill would become operable upon a conviction utilizing § 521 and would have added a forfeiture provision to what is currently in § 521.¹⁵⁸ Section 215 of the proposed act would permit Congress to review sentencing guidelines and policies to conform to Title 18.¹⁵⁹ Senate Bill 456 was introduced to the Senate in January 2007, passed in the Senate on September 21, 2007, and was referred to the House on October 17, 2007. It has since been in the Committee on Healthy Families and Communities.

Each one of the above bills contained sections that would provide valuable tools to law enforcement. Not one of these bills, however, provided a simple, workable framework for law enforcement. The flaws of these bills are numerous and include a lack of simplicity, no defined elements, and no sociologically based definition of a street gang, each of which are core necessities in a CSGS. To provide a clear and usable constitutional tool for law enforcement and prosecutors, a new bill must meet these core objectives. Only a new model CSGS would accomplish both the constitutionality and simplicity needed to benefit both law enforcement and criminal defendants.

V. A PROPOSAL FOR CHANGE: RICO AND A MODEL CSGS

The large, convoluted bills discussed above have some virtues, but they are also riddled with problems that would render each bill unusable and not easily managed by prosecutors or easily understood by defendants. Primarily, the length and complexity of most of the above bills are imposing and present an initial hurdle to any time-squeezed prosecutor. Simplicity is crucial for the prosecutor's understanding, ability to convey the charges to a jury, and ability to ensure criminal defendants' comprehension. A model CSGS should contain clearly defined elements including a more precise definition section to determine who is considered "in the gang" and those who may have committed crimes, but may not have related to gang violence.¹⁶⁰

¹⁵⁶ S. 456, 110th Cong. (2007) (as passed by Senate, Sept. 21, 2007).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* § 525 ("A person who is convicted of a violation of this chapter shall forfeit to the United States . . .").

¹⁵⁹ *Id.* § 215 ("Amendment of Sentencing Guidelines" . . . "In carrying out this section, the United States Sentencing Commission shall—(1) establish new guidelines . . . in order to implement new or revised criminal offenses under this title and the amendments made by this title . . .").

¹⁶⁰ See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 83–91 (2005) (relating sociologist Sudhir Venkatesh's venture into the world of the Black Gangster Disciple Nation in Chicago, and stating that gangs hire "mercenary fighters" who are actually nonmembers of a gang, but are hired by the gang to aid the gang in turf wars).

Secondly, although the bills discussed above attempt to craft § 521 from a sentencing enhancement into a substantive crime, § 521 needs to be more clearly amended to rectify the constitutional challenge based on the Fifth and Sixth Amendment rights presented by *Apprendi*. Also, easily understood elements must be delineated to ensure the proper notice to the criminal defendant, and to aid the prosecutor in conveying their message to the jury.

Finally, additional sections must be added, including a forfeiture provision to target a gang's economic incentives and an interstate commerce jurisdictional hook to aid federal courts in invoking jurisdiction easily, as well as aid in law enforcement coordination. Additionally, a newly-crafted bill should attempt to understand why youth join criminal street gangs, and target those incentives.¹⁶¹ To refocus the discussion, this Note suggests that RICO,¹⁶² a highly successful tool used to combat organized crime, should be examined by legislators in crafting legislation that would target lesser organized criminal street gangs, while still conforming to *Apprendi* and its progeny. In the following section, this Note will explore the aspects of RICO which have been used successfully to combat crime in the United States and will build a model CSGS developed from these insights gained from RICO.

A. How RICO Can Guide a Model CSGS

Since its passage in 1970, RICO has been a highly successful tool in fighting highly organized gangs, including the Mob, and has succeeded in striking fear into many criminal organizations.¹⁶³ Although at one time the target of sharp criticism for overstepping its original purpose, RICO still provides a positive tool in the fight against crime.¹⁶⁴ Passed in 1970 as Title IX of the Organized Crime Control Act,

¹⁶¹ See, e.g., *id.* at 92–95. Mr. Levitt and Mr. Dubner compare dealing crack in Chicago to a small-town girl who wants to become the next Julia Roberts, or a high-school quarterback who trains to become the next Joe Montana. The chance of a very glamorous, very big payoff is a large incentive for a lot of people to compete for very few spots at the top. *Id.* J.T., the head drug dealer in Venkatesh's research, was paid much more than any of the undereducated urban youth could hope to earn in a legal profession, and the allure that they could be him one day drove many young gang members to sell crack despite it being the most dangerous job in America. See *id.*

¹⁶² 18 U.S.C. §§ 1961–68 (2006).

¹⁶³ Richard Valdemar, *How to Make a RICO Case Against Gangs*, POLICE MAGAZINE, Nov. 20, 2008, available at <http://www.policemag.com/Channels/Gangs/2008/11/20/How-to-Make-a-RICO-Case-Against-Gangs.aspx> (“Gang members know RICO can ruin their lives.”).

¹⁶⁴ See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 692–93 (1990) (stating that meaningful reform or repeal of RICO is necessary as it has outlived its usefulness and infringes on defendants' rights); see also Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the Reves “Operation or Management” Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1, 5 (2006) (stating that RICO is currently used in business fraud, securities violations, political corruption, and various white collar crimes).

the purpose of RICO was to attack the roots and enterprises of organized crime.¹⁶⁵ The addition of RICO allowed law enforcement to target not only traditional illegal activities carried out by crime families such as La Cosa Nostra but also the legitimate businesses that hid their corruption.¹⁶⁶ To successfully prosecute a RICO offense, prosecutors must demonstrate the presence of a defendant “person,” an “enterprise,” and a pattern of racketeering acts.¹⁶⁷ Each of these elements has been routinely interpreted broadly,¹⁶⁸ most notably that an enterprise could include other types of enterprises, such as gangs.¹⁶⁹ RICO has successfully been used to prosecute highly organized, widely syndicated criminal street gangs, such as the Mexican Mafia, although less organized and more localized street gangs usually fall outside its purview due to the lack of organization or “enterprise” activity present in street gangs.¹⁷⁰ Cities have, in the past, attempted to use RICO to inform civil statutes directed at curbing gang activity but have been heavily criticized.¹⁷¹ Further, civil remedies to gangs have attracted sharper attention, which will temper when applied in the context of criminal penalties.¹⁷² Despite this surrounding controversy, RICO can provide a workable framework against which to craft a model § 521 to target criminal gang activities.

1. Simplicity

RICO provides, “[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”¹⁷³ It defines “pattern

¹⁶⁵ See Baumgartel, *supra* note 164, at 3.

¹⁶⁶ See *id.* at 3–4.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ See *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) (stating that the “enterprise” concept is broad and encompasses any group of individuals associated-in-fact); *United States v. Fernandez*, 388 F.3d 1199, 1223–24 (9th Cir. 2004) (finding an enterprise where there is dispute as to leadership, goals, and factions within the super gang, La Eme); *United States v. Coonan*, 938 F.2d 1553, 1559 (2d Cir. 1991) (finding an enterprise by what the organization *does* rather than by analyzing its structure).

¹⁶⁹ See *United States v. Turkette*, 452 U.S. 576, 593 (1981).

¹⁷⁰ See Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 580 (1993) (“RICO has emerged as law enforcement’s most effective tool for combating organized criminal activity.”); Ethan B. Gerber, Note, “*A RICO You Can’t Refuse*”: *New York’s Organized Crime Control Act*, 53 BROOK. L. REV. 979, 981 (1988) (noting RICO is a “powerful armament” in prosecuting organized crime families); see also Valdemar, *supra* note 163.

¹⁷¹ See *Chicago, Ill.*, MUN. CODE 8-4-015(a) (using language similar to RICO to define criminal street gangs); see also Peter W. Poulos, Comment, *Chicago’s Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 410–12 & n.216(1995) (criticizing Chicago’s statute as unconstitutional).

¹⁷² See *supra* Part I.C (discussing the controversy surrounding *City of Chicago v. Morales*).

¹⁷³ 18 U.S.C. § 1962(c) (2006).

of racketeering activity” as at least two acts of predicate crimes which are enumerated in the statute.¹⁷⁴ The statute also defines “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹⁷⁵

Although this language is broad, courts have consistently applied the statute to achieve clear elements that the government must prove to meet its burden.¹⁷⁶ These elements are often formed as (1) “an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.”¹⁷⁷ The courts have further clarified that the enterprise can be a formal or informal group whose members function as a continuing unit.¹⁷⁸ These defined elements have clarified the duties of prosecutors in presenting evidence for each of these elements, as well as aid defendants in carefully preparing a defense. Delineated elements have also aided the fact finder in either finding for or against RICO liability.¹⁷⁹ Similarly, a corresponding CSGS will need defined elements for courts to apply consistently.

A model CSGS statute should meet constitutional and law enforcement challenges by crafting its current provisions into defined elements. A model CSGS should remove the predicate crime aspect currently worded as a “‘conviction’ . . . that a person has committed an act of juvenile delinquency involving a violent or controlled substances felony.”¹⁸⁰ In its place, a model CSGS should outline the prohibited criminal behavior, making it a crime to participate in a criminal street gang while participating in a violent or controlled substances crime. Through removing the predicate crime, a prosecutor would be able to charge § 521 as an independent criminal sanction charged in an indictment. In practice, a model § 521 charge should accompany another violent or controlled substance crime, but should also contain its own elements to be proven to a jury.

¹⁷⁴ *Id.* § 1961(5) (2006).

¹⁷⁵ *Id.* § 1961(4) (2006).

¹⁷⁶ See Brief of Respondent-Appellee at 9, *Boyle v. United States*, No. 07-1309 (Dec. 22, 2008).

¹⁷⁷ See *id.*

¹⁷⁸ *United States v. Turkette*, 452 U.S. 576, 583 (1981).

¹⁷⁹ Compare *Salinas v. United States*, 522 U.S. 52, 66 (1997) (finding it sufficient for the government to present evidence that the defendant committed two predicate acts to support a conviction under RICO), and *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 250 (1989) (reversing a motion to dismiss and finding it was sufficient to plead a combination of minor acts to show pattern of racketeering activity), with *Scheidler v. NOW, Inc.*, 547 U.S. 9, 15 (2007) (failing to find that the Respondents had properly pleaded the elements necessary to sustain a RICO violation), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460–61 (2006) (declining to uphold a conviction under RICO where the plaintiff did not plead the minimal elements of RICO including causation between acts and harm).

¹⁸⁰ 18 U.S.C. § 521(a) (1994).

Additionally, a more substantive definition of “criminal street gang” should be substituted for the current definition. Currently, a criminal street gang is defined as “an ongoing group, club, organization, or association of 5 or more persons.”¹⁸¹ This definition is limiting and requires a finding of five distinct members. Criminal street gangs typically consist of an amorphous number of members, making this line of five members arbitrary and meaningless.¹⁸² In its place, a model CSGS should include a definition of a gang similar to that discussed in Part I, including the following elements: (1) durability; (2) street-oriented; (3) illegal; and (4) identity.¹⁸³ These categories are seemingly vague, but court decisions interpreting RICO and civil gang injunctions will assist parties and courts in defining the concepts of durability and identity.¹⁸⁴ It will be crucial for courts to find the existence of all of the following, coupled with a finding of causation between the membership in a gang and the violent or substance control act to avoid constitutional issues, namely those of freedom of association and assembly.¹⁸⁵

Additional elements should be included in part (a) of a model CSGS which are now included under the heading of “circumstances” in part (d).¹⁸⁶ In order to remove further vagueness and overbreadth, a model CSGS should require the prosecution to prove the elements of: (1) knowledge that the participant’s actions are in furtherance of gang activity or to increase one’s standing in the gang; (2) the actions would in fact further a goal of the criminal street gang; (3) the actions are part of a pattern of felonious actions by one or more members of the same continuous gang; and (4) the participant was involved in a conspiracy to commit a felonious act on behalf of the criminal street gang, of which he or she is a voluntary member.¹⁸⁷ Overall, through

¹⁸¹ *Id.*

¹⁸² See KLEIN & MAXSON, *supra* note 50, at 193–94.

¹⁸³ See *id.* at 4.

¹⁸⁴ See *id.*

¹⁸⁵ See Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 33–34 (1998) (discussing the possibility of a vague statute aimed at street gangs being found void for vagueness by a court because of its “chilling” effect on speech and freedom of association); see also Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 776 (1990) (discussing overbreadth challenges to street gang loitering laws); Alexander A. Molina, Note, *California’s Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457, 457–58 (1993) (arguing that California’s Act is unconstitutional as it makes unlawful for an individual to join a gang).

¹⁸⁶ 18 U.S.C. § 521(d).

¹⁸⁷ “Voluntary member” may be hard to prove, but it is at least an attempt to distinguish between those who routinely participate in the gang, and may therefore be called members, from those who participate in a single instance of felonious conduct without regard to how the act may further the goals of the gang as a continuous group. See LEVITT & DUBNER, *supra* note 160. For a further discussion of the difficulties surrounding identifying members of a gang, see Burrell, *supra* note 185, at 748.

requiring the prosecution to prove beyond a reasonable doubt each element and causation, a model street gang statute will likely avoid challenges of constitutionality.

2. Substantive Crime

Unlike the current CSGS, RICO operates as a substantive crime, thereby preserving a defendant's Sixth Amendment rights to notice of the charges against her and the right to a trial by jury.¹⁸⁸ Under RICO, it is unlawful to participate in racketeering activities, commit two or more predicate crimes in furtherance of a continuing enterprise, or conspire to do so.¹⁸⁹ In order to find a defendant guilty under RICO, the violation must be charged as a racketeering offense in violation of the code.¹⁹⁰ The elements discussed above must be pleaded and proven to a fact finder, which is in accord with a defendant's Sixth Amendment rights. Because RICO is a substantive crime, it is constitutional in so far as it does not conflict with *Apprendi v. New Jersey* or its progeny.¹⁹¹ The CSGS must be transformed into a substantive crime to serve the same law enforcement and constitutional ends.

Transforming the current CSGS into a substantive crime is a relatively easy fix to this particular problem. Currently, the penalty section states that a person convicted of an offense in subsection (c) shall be increased by up to ten years.¹⁹² A model CSGS would simply transform the sentencing enhancement into a substantive penalty of up to ten years in prison if convicted under this section. The remodeling of the penalties provision would bring a model CSGS into conformity with *Apprendi* by providing Fifth Amendment due process rights and requiring a jury to find beyond a reasonable doubt the above elements.¹⁹³ Additionally, a defendant will have notice of all the charges against him, conforming the CSGS to the Sixth Amendment; by carefully modeling the penalty so as it remains advisory, the model CSGS will not run afoul of *Booker*.¹⁹⁴

3. Federal Jurisdiction and Forfeiture

RICO contains a jurisdictional requirement and a forfeiture clause that, if included, would also assist a model CSGS in tracking gang-related crimes and targeting gang incentives.

¹⁸⁸ U.S. CONST. amend. VI.

¹⁸⁹ 18 U.S.C. § 1962 (2006).

¹⁹⁰ See Ann K. Wooster, Annotation, *Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C.A. §§ 1961 et seq.—*Supreme Court Cases*, 171 A.L.R. FED. 1, 15 (2001).

¹⁹¹ See *id.* at 14–15.

¹⁹² 18 U.S.C. § 521(b) (1994).

¹⁹³ U.S. CONST. amend. V; *Apprendi v. New Jersey*, 530 U.S. 466, 485–92 (2000).

¹⁹⁴ See *supra* Part III.B for a discussion of *United States v. Booker*, 543 U.S. 220 (2005).

The interstate commerce provision grants federal courts jurisdiction over any racketeering activity or conspiracy to commit a racketeering activity which affects interstate commerce.¹⁹⁵ A similar provision is currently included in the CSGS and should remain prominent in the model act.¹⁹⁶ This powerful jurisdictional hook has helped law enforcement tie criminal acts together into a pattern of racketeering at the federal level, encapsulating all the acts of criminal organizations that fall under the purview of RICO. Courts have interpreted “affects interstate commerce” broadly to include almost any use of the United States mail system, phone lines, and any transportation across state lines as affecting interstate commerce.¹⁹⁷ Originally, courts interpreted the clause to mean that the total enterprise itself had to affect interstate commerce.¹⁹⁸ Recently, however, courts have exercised this jurisdictional requirement by allowing the government to demonstrate that the predicate acts have a *de minimis* impact on interstate commerce.¹⁹⁹ Courts have additionally held that, where a statute makes it a crime to commit acts for the purpose of maintaining or increasing one’s position in a racketeering enterprise, it is not required that the acts themselves affect interstate commerce.²⁰⁰ This particular aspect of RICO will aid in supplementing the CSGS by coordinating law enforcement at the federal level to create a larger interstate enterprise, as well as aiding prosecutors by creating a definable jurisdictional element to plead without creating an insurmountable barrier to charging gang acts, committed in discrete states, at the federal level. Additionally, it is worth mentioning that courts have found that “affecting interstate commerce” does not demand an economic motive to the crime to qualify under RICO.²⁰¹ Should courts continue

¹⁹⁵ 18 U.S.C. § 1962 (a)–(c) (2006) (“any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce”).

¹⁹⁶ 18 U.S.C. § 521(a)(C) (1994) (“the activities of which affect interstate or foreign commerce”).

¹⁹⁷ See, e.g., *Scheidler v. NOW, Inc.*, 547 U.S. 9 (2006) (charging a pro-life protest group under RICO and finding it satisfied the interstate commerce requirement because the petitioners used mail and phone lines); see also Fay Clayton & Sara N. Love, *NOW v. Scheidler: Protecting Women’s Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 977 (1999) (discussing the use of the phone lines and wiretaps that were necessary to plead a RICO violation).

¹⁹⁸ See *United States v. Nerone*, 563 F.2d 836, 854 (7th Cir. 1977) (requiring the government to demonstrate that the enterprise itself affects interstate commerce in order to prosecute a RICO claim); see also Amy Franklin et al., *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871, 888 (2008).

¹⁹⁹ See *United States v. Juvenile Male*, 118 F.3d 1344, 1349 (9th Cir. 1997) (holding that the acts of gang members “had a probable or potential impact on interstate commerce”); see also Franklin, *supra* note 198, at 888–89 (“This element may be satisfied if the enterprise’s activities have an impact on interstate commerce.”).

²⁰⁰ See Franklin, *supra* note 198, at 889.

²⁰¹ See *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir. 1986) (upholding convictions under RICO, even though the charged arsons had no financial benefit to the enterprise); see also Jennifer Bullock, Note, *National Organization for Women v. Scheidler: RICO and the*

to interpret interstate jurisdictional clauses broadly, CSGS would benefit from this element to clarify and coordinate prosecutorial efforts.

RICO also contains a forfeiture clause that, if used in a revised CSGS statute, would provide an element that specifically tackles gang motivations—primarily, money and power.²⁰² RICO contains both criminal and civil forfeiture provisions, but most pertinent to this Note is the criminal forfeiture provision.²⁰³ Although jail time is undesirable for most citizens, the forfeiture targets a set of economic values that may strike a harder blow to gang members than jail time.²⁰⁴ A key aspect of the forfeiture provision as applied in RICO, is the relation back doctrine that provides the “government’s title to forfeitable property vests at the time of the commission of the predicate acts.”²⁰⁵ The forfeiture provision has been utilized in RICO charges to divest those convicted of real property crimes, including the defendant’s joint interest in real property,²⁰⁶ business interests and assets,²⁰⁷ and any proceeds or personal property purchased with proceeds flowing from racketeering activity.²⁰⁸ In complex RICO cases, the assets seized were usually large and able to be tied to the individuals implicated in the RICO charges through a paper trail.²⁰⁹

In the case of smaller, criminal street gangs, the ability of law enforcement to tie the personal property of a gang member to a pattern of acts will be more difficult due to the disorganization of street gangs, as well as the expansive black market in which street gangs operate.²¹⁰ Despite these difficulties, a forfeiture provision would more adequately target the desires of the young people who join gangs. Statistics

Economic Motive Requirement, 26 CONN. L. REV. 1533, 1540–42 (1994) (reviewing RICO’s legislative history and Supreme Court ruling which have determined that Congress intended no economic motive requirement in RICO).

²⁰² See LEVITT & DUBNER, *supra* note 160 (discussing gang motivations); see also S. REP. NO. 91-617, at 79 (1969) (“What is needed here . . . are new approaches [to] deal . . . with the economic base through which [these] individuals constitute such a serious threat to the economic well-being of the Nation.”).

²⁰³ 18 U.S.C. § 1963 (a)(3) (2006) (“Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity. . .”).

²⁰⁴ See Elizabeth A. Skorcz, Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. REV. 1199, 1207 (1990) (noting that criminal activities could still be delegated to a colleague while in prison).

²⁰⁵ See *id.* at 1202.

²⁰⁶ See, e.g., *Pacheco v. Serendensky*, 393 F.3d 348, 354 (2d Cir. 2004).

²⁰⁷ See, e.g., *Alexander v. United States*, 509 U.S. 544 (1993).

²⁰⁸ See, e.g., *Russello v. United States*, 464 U.S. 16 (1983).

²⁰⁹ See, e.g., *Libretti v. United States*, 516 U.S. 29, 45 (1995) (discussing forfeiture of home and parcel of land in Wyoming).

²¹⁰ See SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* xii–xv (2006) (chronicling a sociologist’s first experiences with the large underground black market in Chicago).

show that although gangs can easily recruit new members to replace those who have been arrested, acquiring new weapons, ammunition, and drugs creates problems for street gangs without an influx of legitimate income.²¹¹ Forfeiture is more difficult to trace because of lack of an ownership paper trail present in more organized crime enterprises. It is still possible, however, to focus on the personal property provision of RICO, by confiscating all personal property, clothing, jewelry, cell phones, and other personal property tied to a convicted felon under the model § 521. This would be easily accomplished through confiscating all personal property found on the gang member when arrested after he is convicted. Also, cars, cell phones, and jewelry can be traced to an individual through documentation.

In addition to a traditional forfeiture provision, a regulation used in connection with § 521 aimed at targeting federal public housing assistance would further the goals of deterrence and further attack gang life in a meaningful way. Although much public housing is subsidized on the state level, the Anti-Drug Abuse Act of 1998 was passed with the goal of giving local housing agencies and others who supervise federally assisted housing discretion to deny “housing when any household member uses alcohol in a way that interferes with the health, safety, or right to peaceful enjoyment” of the other tenants.²¹² The bill also includes the right to exclude based on illegal drug use and other drug-related criminal activity.²¹³ Although this particular act is controversial for its ban on public housing for life,²¹⁴ a model § 521 would include a provision preempting the Anti-Drug Abuse Act of 1998 and replacing it with a provision that a defendant convicted under § 521 would be banned from public assistance housing for a stated period of time. This would reinforce the seriousness of the punishment as well as serve to deter individuals from participating willingly in gang related crimes.

A model CSGS that achieves the goals of (1) simplicity, (2) creating a substantive crime, (3) maintaining broad federal jurisdiction, and (4) targeting traditional incentives of criminal street gangs would be the most precise way to charge those involved in violent street gang activity powerfully, while also protecting the constitutional rights of those accused of membership in a street gang. The following section will provide an explanation of how this Note’s model § 521 will withstand a facial

²¹¹ See *supra* Part I.A (discussing gangs generally).

²¹² *Feature: The Conviction that Keeps On Hurting—Drug Offenders and Federal Benefits*, DRUG WAR CHRONICLE, Feb. 5, 2007, http://stopthedrugwar.org/chronicle/471/drug_offenders_lose_federal_benefits.

²¹³ Anti-Drug Abuse Act of 1998, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (amended 1998).

²¹⁴ See *Feature: The Conviction that Keeps on Hurting*, *supra* note 212 (discussing the controversy surrounding the continued penalization of drug offenders); see also U.S. GOV’T ACCOUNTABILITY OFFICE, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS (2005), *available at* http://www.stopthedrugwar.org/chronicle/471/drug_offenders_lose_federal_benefits (discussing the limits of broad sweeping federal legislation on the ability to police drug-related offenses).

constitutional challenge and why this model statute will be better suited to achieve the goals of law enforcement.

VI. A RETURN TO *APPENDI*: THE CONSTITUTIONALITY OF THE MODEL CSGS

In Part III above, a number of constitutional concerns were discussed that would primarily impact the constitutionality of the current CSGS if § 521 is challenged on its face.²¹⁵ Although that challenge has not yet occurred, the dubious constitutionality of the CSGS has essentially rendered the statute inoperable for law enforcement. The model CSGS proposed in this Note addresses these concerns and attempts to create an operable and effective statute to battle the war on criminal street gangs. It does so through preserving the defendant's Fifth and Sixth Amendment rights, while removing the complex predicate crimes structure which bars tough prosecution of one-time offenders.

In *Matthews II*, discussed in Part III.C, the Fifth Circuit correctly addressed the issue of CSGS's affect on Matthews's sentence, but eventually came to an unconstitutional outcome.²¹⁶ The court stated that, in light of *Apprendi v. New Jersey*, the district court must require the jury to find the facts of the CSGS beyond a reasonable doubt where they have been pled in the indictment to grant Matthews's Fifth Amendment right to due process,²¹⁷ his Sixth Amendment rights to notice of the charges against him,²¹⁸ and his right to a jury.²¹⁹ In spite of this ruling, the court in *Matthews II* declined to either overturn Matthews's sentencing enhancement, or to find § 521 unconstitutional.²²⁰ The Fifth Circuit's logic was flawed. Their decision to record conclusions of law that point to declaring the CSGS unconstitutional, but to refuse to actually do so, does not result in logical case law. Regardless of the Supreme Court's reluctance to extend *Apprendi*,²²¹ the Fifth Circuit's formulation of the violation of Matthews's rights warrants a finding of the CSGS as unconstitutional.

The model CSGS would solve the constitutional problems and render CSGS usable to federal law enforcement in the battle against gangs. The model CSGS also

²¹⁵ See *supra* Part III (discussing the current constitutionality issues of the CSGS).

²¹⁶ *United States v. Mathews*, 312 F.3d 652, 652, 662–63 (5th Cir. 2002), *cert. denied* 538 U.S. 938 (2003).

²¹⁷ U.S. CONST. amend. V; see also *Jones v. United States*, 526 U.S. 227, 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).

²¹⁸ U.S. CONST. amend. VI.

²¹⁹ *Id.*; *Matthews*, 312 F.3d at 662–63.

²²⁰ *Matthews*, 312 F.3d at 664.

²²¹ See *supra* Part III.B (discussing *Harris v. United States*, 536 U.S. 545, 545 (2002) and the Court's refusal to apply the holding of *Apprendi* to facts which increase a sentencing minimum).

would have resulted in a more just result for Jeffrey Matthews. *Apprendi* charges a court dealing with a federal statute to ensure that the statute entitles a criminal defendant to “a jury determination that [he] is guilty of every element of the crime he is charged beyond a reasonable doubt.”²²² The model CSGS provides for a substantive crime that must be charged in the indictment and proven to a jury beyond a reasonable doubt. The inclusion of a clear elemental definition of what constitutes a criminal street gang, and narrowly tailored elements will ensure the criminal defendant has notice of the charges against him, and can properly prepare a defense. By requiring the government to prove an alleged member’s knowledge that his actions would further the goals of the criminal street gang, the actions would further the street gang, the actions constitute felonious activity by one or more members of the same continuous gang, or there was a conspiracy to engage in the charged activity, the prosecutors will also have a clearly defined task. This is a higher burden on the prosecutor’s office, but will ensure that criminal convictions under the model CSGS would be unassailable on appeal. The model CSGS would adequately “guard against a spirit of oppression and tyranny” that forms the backbone of the Constitution, and the model CSGS would conform the current CSGS to that goal.²²³

Although the criminal defendant’s rights are the paramount concern in *Apprendi*, the model CSGS would serve an added benefit over current attempts to change § 521 by creating a substantive crime that would be chargeable upon the first instance of a criminal street gang member’s illegal conduct. An element in the model CSGS would require the establishment of a pattern of felonious actions by one or more members of the same gang, a requirement similar to RICO. However, the individual on trial does not necessarily have to be the member who previously committed a crime.²²⁴ Once a prosecutor establishes that the individual is a member of the criminal street gang and had knowledge that her actions would further the gang’s activities, the prosecutor may establish the existence of other felonious actions by introducing the prior convictions of members of the same gang.²²⁵ Through this structure, the model CSGS

²²² *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2001) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

²²³ *Apprendi*, 530 U.S. at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

²²⁴ See *Pinkerton v. United States*, 328 U.S. 640 (1946) (finding that commission of separate crimes and conspiracy for those crimes were distinct charges, and thus defendants could be charged with both crime and conspiracy).

²²⁵ Introduction of this type of evidence will be granted with the court’s discretion after the judge balances the probative value over the prejudicial effect. FED. R. EVID. 403. Introduction through a lay witness of community reputation of the gang members and activity may provide the proper forum for introduction of some of this evidence, as would police records and prior convictions under the business records exception to the hearsay rule. FED. R. EVID. 701 and 803. The evidentiary aspects of the model CSGS would be best suited for another article, however.

avoids the traps of the earlier attempts to alter the current CSGS.²²⁶ Also, the predicate crimes structures of the other statutes require a criminal to commit more than one crime to be eligible for the punishments of the CSGS.²²⁷ The model CSGS would put dangerous gang members behind bars the first time a defendant is convicted, as well as render them susceptible to the additional punishments of forfeiture and the loss of public assistance housing.²²⁸ The structure of the model CSGS would provide the alleged criminal street gang members with protections of their Fifth and Sixth Amendment rights.²²⁹ Finally, if a prosecutor can meet his or her burden of proof, the member of the gang will be punished the first time charged and be eligible for additional punishment in a way that targets the gang member's economic incentives.

CONCLUSION

Criminal street gangs are a growing problem, nearing epidemic proportions throughout the United States. The amorphous size and disorganization of criminal street gangs have presented numerous difficulties to law enforcement attempting to make a meaningful dent in the violence. Although localities, and even Congress, have attempted various solutions to curb gang violence, there is currently no constitutional federal law to increase penalties for dangerous gangs. The model CSGS, advocated for here, would provide constitutional guarantees to criminal defendants, like Jeffrey Matthews, while aiding in law enforcement's ability to charge gang members severely on their first conviction. The model CSGS would provide a valuable tool in the federal arsenal against gang violence.

²²⁶ See *supra* Part IV (outlining earlier congressional attempts to alter the CSGS).

²²⁷ See *supra* note 148 & accompanying text (discussing the predicate crimes of the Fighting Gangs and Empowering Youth Act of 2007); see also *supra* note 152 & accompanying text (discussing the "two or more" required predicate crimes of the Anti-Gang Enforcement Act of 2007).

²²⁸ Cf. 18 U.S.C. § 1963(a)–(c) (2006).

²²⁹ See *supra* note 217 & accompanying text.