Less Bark, More Bite:
Fixing the Criminal Street Gang Enhancement

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I. Introduction

Nearly a decade ago, Congress found that street gangs had become “increasingly prevalent and entrenched in our society... through the use of violence and drugs.”1 In response, lawmakers enacted in 1994 the Criminal Street Gangs statute (CSGS),2 which aimed to deter gang activity by enhancing sentences of gang members who commit violent crimes and narcotics offenses “by up to 10 years.” However, Congress unleashed a toothless hound instead of a ferocious guard dog.3 The scope of the statute is far too narrow, its requirements too rigorous (particularly post-Apprendi) and its inadequate penalty provision renders the game not worth the candle. As a result, prosecutors rarely employ the statute. Recognizing these problems, legislators have tried repeatedly to amend the statute to make it more effective. Meanwhile, criminal activity by gangs remains a “growing national menace.”4

This article, based in part on my experience investigating and prosecuting more than 125 gang members in the Eastern District of New York, explores the limitations of CSGS, examines the need for a more effective gang enhancement provision and suggests approaches to reform.

II. The Statute

While ostensibly just a sentencing enhancement applied to a conviction for a federal narcotics offense or crime of violence, CSGS requires proof of elements far more burdensome than many substantive crimes. The statute embodies compromises reached during the legislative process which fundamentally undercut its purpose and render CSGS ineffective.1 In order to obtain an enhancement under CSGS, prosecutors must first meet a four-element test to establish a “street gang,” and then prove three additional elements concerning the knowledge, intent and criminal record of the defendant.

A. Defining a “Street Gang”

Modeled on racketeering sections, CSGS sets forth four elements that define a “criminal street gang.” First, a gang must consist of five or more individuals.6 Second, the gang must have as one of its primary purposes the commission of one or more criminal offenses, which are further defined as conspiracies or substantive felonies involving violence or drugs in violation of federal law.7 Third, the members of a gang must have engaged in a “continuing series” (a term which, strangely, is not defined) of such offenses over a five year period.9 Finally, the activities of the gang must affect interstate commerce.9

While this elaborate definition of a criminal street gang is the least problematic of the statute’s requisites, it is far too restrictive to encompass effectively groups commonly considered street gangs. For example, while most street gangs would satisfy the “primary purpose” prong, the need to prove a “continuing series” of federal offenses readily excludes groups that fall within the common understanding of a street gang. Gang crimes are notoriously difficult to prove: internece violence—probably the most common gang crime—usually goes unreported. Witnesses to and victims of gang violence are often afraid to come forward, intimidated by the fearsome reputation cultivated by these groups. Moreover, the statute’s peculiar and unnecessary limitation of offenses to federal crimes further raises the bar.

More importantly, by defining a “criminal street gang” in terms of size, purpose and a pattern of criminal activity, CSGS imposes requisites which are largely redundant to the elements of the crimes to which the enhancement is most likely to apply. Consider, for example, the Violence in Aid of Racketeering10 (VICAR) provision—a statute commonly used against street gangs. VICAR provides penalties for violent crimes such as murder, assault, kidnapping, and threats made in connection with a racketeering enterprise. Before a defendant can be convicted under VICAR, however, the Government must establish that the violent act was done based on payment from, to gain entrance to, or maintain or increase the defendant’s position in a racketeering enterprise—defined as a group that engages in the crimes set forth in RICO. Similarly, RICO has carefully crafted elements, requiring the demonstration of, among other things, an enterprise engaged in a pattern racketeering activity, that limit its application to criminal groups.11 In light of the requisites of VICAR and RICO, the enterprise elements of CSGS appear superfluous.12
Finally, because CSGS purports to be a sentencing enhancement, the statute need not contain a requirement that the Government demonstrate an effect on interstate commerce. An interstate commerce element—such as the provisions contained in VICAR and RICO—provides one basis for the exercise of federal jurisdiction over a substantive crime. However, by definition, CSGS applies only to substantive conviction under another federal statute which already confers federal jurisdiction. Thus, CSGS should have been drafted without a jurisdictional element.

Section 924(c) of title 18, United States Code, which imposes enhanced penalties for defendants utilizing a firearm during certain federal crimes, provides a good example. While other federal firearms sections require the demonstration that the firearm traveled in interstate commerce, § 924(c) has no such element, as the jurisdictional requirements are satisfied by the underlying federal crime. Similarly, CSGS should have been drafted without an interstate commerce element, as federal jurisdiction is derived from the underlying substantive offense.

B. The Individual Elements

In addition to the elements establishing the existence of a criminal street gang, CSGS requires the demonstration of three additional elements which are even more problematic. First, it must be shown that the defendant knew that the gang participated in a “continuing series” of federal felonies involving violence or narcotics. Second, using concepts seemingly borrowed from VICAR and RICO, CSGS requires that the defendant committed the instant crime with intent to either promote the “felonious activity” of the gang or maintain or increase his position in the gang. Finally, the defendant must have been convicted of another crime of violence or narcotics offense arising to a felony under state or federal law within the past five years.

Clearly, the first two elements—requiring proof regarding a defendant’s state of mind—substantially hinder application of the statute. “Given these knowledge and intent requirements,” the Department of Justice has observed, “... § 521 has proven a difficult statute to apply successfully to defendants.” The Department of Justice reports that the statute was used only once in the 20 months following its enactment. Indeed, since its enactment, the statute appears in only one reported decision.

The criminal history element presents the most substantial limitations on the statute. CSGS requires a conviction for a violent or narcotics felony charge within five years of the instant offense. Yet, because of such prior convictions, many defendants will be imprisoned for more than five years, and thus disabled from committing another offense within that period. Even hardened recidivists may have a tough time qualifying. For example, in the prosecution of members and associates of the Pagans and Tyrants Outlaw Motorcycle gangs on Long Island, thirty-nine of forty defendants lacked a qualifying conviction needed to support a CSGS enhancement, even though many had prior convictions for violent crimes and narcotics offenses that were more than five years old. This is particularly telling, given that outlaw bikers tend to be substantially older than urban street gang members—such as the Blood, Crips and Latin Kings—and thus have longer adult rap sheets. CSGS applies to few urban street gang members, whose criminal records are often limited to youthful offender convictions. On the other hand, offenders with two prior convictions (even if one is outside the five year window), generally qualify for significantly enhanced punishment under the Career Offender section, eliminating the need for further enhancement for such offenders.

C. CSGS’s Penalty Provision and the Effect of Apprendi

For the extremely narrow class of offenders to which CSGS does apply, the statute provides that their sentence “shall be increased by up to ten years.” The Sentencing Guidelines Commission has codified this penalty in a non-binding policy statement that provides as follows:

If the defendant is subject to an enhanced sentence under § 521 ... an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations or associations that use violence to further their ends. If there may be cases in which ... § 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct, and, consequently, this departure provision would not apply.

Thus, for the prosecutor who successfully clears the demanding obstacles contained within the statute, the reward is a possibility of a discretionary upward departure, which is further limited to cases in which violence is clearly established.

The Supreme Court’s decision in Apprendi v. New Jersey further complicates matters. In United States v. Matthews, the only reported decision on CSGS, and one of the few cases in which the statute has been charged, the district court imposed a two-year sentencing increase for members of the Crips street gang who seriously injured a carjacking victim by shooting her five times. The Government established the facts justifying the enhancement using hearsay evidence—including testimony by a gang expert—during a post-trial Fatico hearing. On appeal, one defendant argued that CSGS was a substantive offense, requiring indictment by a grand jury and proof beyond a reasonable doubt before a trial jury. In upholding the district court’s decision, the Fifth Circuit held that CSGS “is a sentence enhancement statute rather than a separate offense.”
Appendi casts considerable doubt on the holding of Matthews. In striking down a bias enhancement contained in New Jersey’s assault statute, the Court held that “any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Since the elements of CSGS have this effect, it would appear that, after Apprendi, each of these elements must be proven to a jury beyond a reasonable doubt at trial, rather than determined by a judge under a preponderance standard. Thus, Apprendi makes it more difficult to satisfy the already demanding requisites of CSGS, and less likely that the statute will be employed by prosecutors.

III. Reforming the Gang Enhancement

A. Identifying the Need

For all of the reasons discussed above, CSGS fails to address the crime problems presented by street gangs. In 1997, the Senate Judiciary committee correctly concluded that CSGS “is too narrowly focused on drug offenses and provides inadequate penalties to be an effective tool for Federal prosecutors.”28 Meanwhile, street gangs have increased in size, expanded their geographic range, and engaged in growing numbers of violent crimes.29 As a result, during the past several years legislators have introduced several bills seeking to amend CSGS.30 Unfortunately, these attempts at reform – all of which were unsuccessful – failed to address the statute’s flaws, focusing instead on expanding the types of crime falling within CSGS’s purview.31 Expanding the scope of the crimes encompassed by CSGS would do nothing to deal with the statute’s needless complexity. More important, these proposals have failed to address a more basic problem: federal criminal law provides inadequate penalties for certain types of gang violence.

Under the Sentencing Guidelines and federal criminal statutes imposing mandatory minimums, offenders committing violent acts face highly disparate sentences. Aggravated assault, one of the most common offenses committed by gang members, provides an excellent example. Under the Sentencing Guidelines, gang members who beat a victim, inflicting permanent or life-threatening injury, face a sentence of as little as two years,32 while using a knife or a club to commit this offense increases the minimum to approximately three years.33 Meanwhile, the same offense committed with a firearm would result in a 13-year sentence.34 And if the victim dies – often a matter offortuity – the Guidelines mandate life in prison.35

Certainly, a gang beating that inflicts permanent injury warrants more than a two-year term and a life-threatening stabbing should require more than three years. Thus, an effective gang enhancement must address these deficits in the existing sentencing scheme.

On the other hand, although the drafters of CSGS struggled to increase the sentences of narcotics offenses committed by gang members, such enhancements are simply unnecessary. Federal sentences for illegal drug distribution are sufficiently harsh to deter such offenses, and further underscore the inadequacies of sentences for violent crimes. After all, under the Guidelines and narcotics statutes, an offender who sells 50 grams of crack with a street value of about $2,000 – an act which presents threats to human health and the potential for violence – faces a statutory minimum of ten years and a Guidelines range of 121-151 months,36 more than twice that faced by a gang member who stabs an innocent bystander in the throat.37 Thus, a properly drafted gang enhancement need not focus on narcotics trafficking.

B. Implementing the Enhancement

An effective gang enhancement could take one of two forms: a Sentencing Guidelines adjustment, or a statutorily-imposed consecutive penalty.

1. The Guidelines Approach

An amendment to the Sentencing Guidelines – in the form of a Chapter Three adjustment – would be an effective way to increase the penalties for gang related violence. Indeed, several of the initial drafts of CSGS envisioned a four-level Guidelines enhancement for gang-related crimes;38 one bill aiming to reform the section proposed a six-level Chapter Three increase,39 and another reform bill proposed an “appropriate enhancement.”40

How much of an increase is “appropriate”? The Guidelines currently provide for a four-level increase for use of a dangerous weapon in an assault;41 a street gang could be fairly analogized to a dangerous weapon. In the context of an extortion, the Commission has provided for a five-level increase for “an express or implied threat of . . . [serious] bodily injury” coupled with a “demonstrated . . . ability to carry out such threat,” which provides another fair analogy to gang membership. However, to address the sentencing disparities discussed above, a slightly higher increase may be warranted. A six-level enhancement would increase the penalty for a serious unarmed gang assault from two to six years, while in the case of a serious armed assault the penalty would rise from three to between five and seven years. Because of the Guidelines’ structure, this kind of enhancement offers a measured approach, increasing with the severity of the offense.

Moreover, the Guidelines approach offers the advantages of simplicity and flexibility. Rather than the unworkable strictures of CSGS, a Guidelines amendment could, borrowing language from § 5k2.18, provide for an adjustment for an offense involving, or intending to promote a gang, “group, club, organization or association that uses violence to further its ends.”
District judges are well situated to determine whether a particular crime is gang-related—the Guidelines entrust many similar determinations to district judges, such as hate crimes, abuse of trust, and leadership enhancements. A Guidelines enhancement would permit substantial flexibility in terms of proof, allowing prosecutors to employ expert testimony or hearsay evidence in a Fatico-type hearing, while avoiding the effects of Apprendi. Given that establishing gang membership can be difficult, particularly with groups that tend to be more secretive or lack tattoos, jackets or other physical evidence of membership, this kind of evidentiary latitude should be permitted.

Finally, to avoid application to offenses such as narcotics crimes—for which existing Guidelines provide adequate deterrence for offenders, a Chapter Three gang enhancement should provide a ceiling. For example, the adjustment could be structured to increase the offense level six levels, but in no event to a level exceeding 30. At that level, an offender with no criminal history faces a sentencing range of 97–121 months, giving the district court sufficient discretion to impose a significant sentence on gang members. While none of the existing Chapter Three adjustments contain such a ceiling, the terrorism adjustment contains a floor, and several Chapter Two sections provide for a ceiling.

2. The Statutory Minimum Approach

Another means implementing an enhancement would be to provide a statutory minimum consecutive penalty for gang-related violence. Congress has provided similar penalties for the use or possession of firearms, fire and explosives during the course of a federal crime, as well as significantly harsher penalties for a second or subsequent conviction under these sections. While such an enactment would provide prosecutors with a powerful tool to combat gang violence, it would require workable statutory definitions of a street gang and gang activity without the complications of CSGS. The firearms and explosives enhancements drew simple technical definitions from other statutory provisions, but given the amorphous nature of street gangs, finding a working definition may prove difficult. Like the drafters of CSGS, legislators would likely turn to a RI CO-type approach, which has proven unsuccessful. Thus, a Guidelines approach seems far preferable.

IV. Conclusion

Beyond any doubt, CSGS has proven itself unworkable. Yet the problems of gang violence remain unaddressed by the federal sentencing scheme. Further tinkering with the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will prove unavailing. The time has come to repeal the statute, proposed through various amendments, will provide more appropriate sentences for gang members.
See § 2A1.1.


This last example is not hypothetical. As part of the prosecution of the Pagans, the Government established that one of the appellants in United States v. Desena, 287 F.3d 170 (2d Cir. 2002) stabbed a bystander in the throat with a lock blade knife.

See, e.g., 139 Cong. Rec. S17095-03; Senate Record Vote Analysis, 103rd Congress, First Session, Vote No. 360.

1997 CONG US § 54.

2001 US CONG § 16.

U.S.S.G. § 2A2.2(b)(2)(B).


U.S.S.G. § 3B1.3.

U.S.S.G. § 3B1.1.

U.S.S.G. § 3A1.4.

See, e.g., U.S.S.G. § 2X3.1 (maximum level 30 for Accessory After the Fact) and U.S.S.G. § 2X4.1 (maximum offense level 19 for Misprison).

18 U.S.C. § 924(c) (imposing 5, 7 and 10 year consecutive sentences for possessing, brandishing or discharging a firearm during a crime of violence, and a mandatory consecutive sentence of 30 years for possession of a machine gun, destructive device or firearm equipped with a silencer.)

18 U.S.C. § 844(h)(1) (imposing 10 year consecutive sentences for use of fire in furtherance of federal offense)

U.S.C. § 844(h)(2) (imposing 10 year consecutive sentences for carrying explosives in furtherance of federal offense.)

For example, 924(c) imposes additional consecutive terms of 25 years for each successive firearms conviction, and a term of life for a successive conviction for possession of a machine gun, destructive device or firearm equipped with a silencer.