

2009]

227

THE NEED TO APPLY THE “PLAIN MEANING” RULE TO  
THE FIRST PARAGRAPH OF 18 U.S.C. § 2113(A) IS  
“PLAIN”: A BANK ROBBER MUST HAVE USED ACTUAL  
FORCE AND VIOLENCE OR INTIMIDATION

*Michael Rizzo\**

INTRODUCTION

A young father has fallen hopelessly into debt and is struggling to provide for his wife and three kids, so he begins to contemplate robbing a local bank. He already fears being laid off from his day job, so requesting a raise is not an option, and the needs of his young children foreclose the possibility of moonlighting. He has never attempted robbery before (nor any other felony), but creditors have been mercilessly harassing him all month and he realizes that robbing a bank could finally resolve his family’s longstanding problem.

After work on Monday he purchases a fake gun and a Joker mask to help intimidate the bank teller. He devotes his Tuesday lunch hour to researching which bank would make the easiest target. In true amateur fashion, he also writes a step-by-step procedural plan for the day of the robbery. At this early stage, the young father is still blinded by the exhilarating prospect of alleviating the debt that has plagued his family for years.

He takes a personal day from work on Wednesday in order to stash a duffel bag containing his toy gun, mask, and robbery plan near the target bank. However, as he walks down the block searching for a suitable spot, he witnesses a pickpocket and mentally condemns the thief. As he considers the loss the victim will suffer, reality sets in and he feels great remorse for starting down the path of crime. Fortunately, it is not too late for the young father to abort his criminal plot, or so he thinks. Disgusted, he quickly discards his duffel bag on the sidewalk and returns home in time for dinner with his family.

The young father’s jubilation from his pickpocket epiphany is abruptly interrupted the following day when he is blindsided by a police investigation at his office. Apparently, he had foolishly written his robbery plan on company letterhead, and because he was the only employee not present at the office on the day the police discovered the duffel bag, he becomes an

---

\* George Mason University School of Law, Juris Doctor Candidate, May 2010; Notes Editor, *GEORGE MASON LAW REVIEW*, 2009-2010; Geneseo College, B.A., Psychology, *summa cum laude*, May 2006. I would like to thank Edward H. Grove and Thomas Craven for their input, as well as my friends and family for their support.

obvious suspect. The young father naively confesses, thinking that his preparatory actions had not crossed the line into punishable, criminal conduct. Nevertheless, the Department of Justice disagrees and charges him under 18 U.S.C. § 2113(a), which states:

Whoever, by force and violence, or by intimidation, takes, or *attempts* to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.<sup>1</sup>

Ultimately, this young family man's guilt or innocence will depend on how the court interprets the first paragraph of the statute. Under one interpretation, the court would require that he has actually used force and violence or intimidation in the course of the attempted robbery. The prosecution would almost certainly fail under this reading and the young father would be acquitted. However, under another interpretation, the court would require merely that he attempted to use force and violence or intimidation in the course of the attempted robbery. Under this reading, the government would have a stronger case for conviction because the young man's actions arguably constituted a substantial step toward committing the robbery.<sup>2</sup> Clearly, the court's choice of interpretation can have real consequences for a bank robbery defendant.

In fact, the circuit courts of the United States are split in choosing between these two conflicting interpretations of the first paragraph of 18 U.S.C. § 2113(a). Very simply, the split deals with whether the word "attempts" applies only to the phrase "to take" or whether it also applies to the phrase "by force and violence, or by intimidation."<sup>3</sup> In the former case, the

---

<sup>1</sup> 18 U.S.C. § 2113(a) (2002) (emphasis added). This Comment will focus on the current language and structure of the statute, but it is worth noting that the original enacting legislation contained similar language and structure vis-à-vis the attempt provision in the first paragraph. *See* Bank Robbery Act, ch. 304, § 2(a), 48 Stat. 783 (1934) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously *attempts* to take, from the person or presence of another . . . ." (emphasis added)). This attempt provision would remain unchanged until 1948 when Congress amended it to look identical to its present form. *See* ch. 645, § 2113(a), 62 Stat. 796 (1948).

<sup>2</sup> *See infra* Part I.A.

<sup>3</sup> *Compare* United States v. Wesley, 417 F.3d 612, 618 (6th Cir. 2005), United States v. Moore, 921 F.2d 207, 209 (9th Cir. 1990), United States v. McFadden, 739 F.2d 149, 151-52 (4th Cir. 1984),

government must prove that a defendant actually used force and violence or intimidation in attempting to take money from the bank; in the latter case, the government need only prove that a defendant *attempted* to use force and violence or intimidation in attempting to take money from the bank.<sup>4</sup> The reason for the circuit court split lies in the contrasting approaches to statutory interpretation taken by the two sides of the divide. Whereas the minority of circuits immediately looks to the plain language of the statute,<sup>5</sup> the majority bypasses this crucial step, instead skipping ahead to applying the “substantial step” test for attempt.<sup>6</sup>

Indeed, the hypothetical young father’s fate depends on—perhaps as much as any other single factor—where the alleged crime occurred and thus which judicial circuit will have jurisdiction over his prosecution. Notwithstanding his sympathetic turnaround, based on the present stances of those circuit courts which have addressed the interpretative issue, the young father is likely to spend years in prison away from his needy family.

Part I of this Comment presents the diametrically opposed majority and minority views regarding interpretation of the first paragraph of 18 U.S.C. § 2113(a). Part II then argues that the minority view is correct. First, only the minority properly approaches the statutory interpretation issue by applying the well-established “plain meaning” rule. Second, the majority approach produces a result that is inconsistent with another accepted aspect of the statute. Part III discusses the ramifications of the majority’s flawed interpretation in terms of erroneously defining criminal conduct and producing troublesome precedent. Finally, Part IV closes with a brief discussion of the need for Supreme Court intervention to resolve the divisive issue.

## I. BACKGROUND: MAJORITY VIEW VS. MINORITY VIEW

In *United States v. Baker*,<sup>7</sup> a California district court became the first court to interpret the “attempts” language in the first paragraph of 18 U.S.C.

---

and *United States v. Jackson*, 560 F.2d 112, 116-17 (2d Cir. 1977) (all requiring only attempted force and violence or intimidation), with *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008), and *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004) (both requiring actual force and violence or intimidation).

<sup>4</sup> See, e.g., *Bellew*, 369 F.3d at 454 (“One reading of the first paragraph of Section 2113(a) is that a defendant must actually commit an act of intimidation while wrongfully taking or attempting to take money from the presence of a person at a bank. That is, the attempt only relates to the taking, not the intimidation. Another reading, urged by the government, is that all that is required to violate the statute is for a defendant to attempt to intimidate while attempting to rob a bank.”).

<sup>5</sup> See, e.g., *id.* (“We . . . focus on the relevant text itself, the first paragraph of Section 2113(a).”).

<sup>6</sup> See, e.g., *Jackson*, 560 F.2d at 120.

<sup>7</sup> 129 F. Supp. 684 (S.D. Cal. 1955).

§ 2113(a).<sup>8</sup> Although it did not explicitly refer to the “plain meaning” rule, the court found it “apparent” that the attempt provision related to the taking, but not to the “force and violence or intimidation” phrase.<sup>9</sup> However, the Second Circuit in *United States v. Stallworth*<sup>10</sup> later rejected a defendant’s argument which resembled *Baker*’s interpretation<sup>11</sup> en route to applying the “substantial step” test.<sup>12</sup> Despite the fact that *Stallworth* was argued and decided in the context of the second paragraph of 18 U.S.C. § 2113(a) rather than the first,<sup>13</sup> *Stallworth* has dubiously spawned the majority’s interpretation of the first paragraph.

A. *Majority View: Conviction Requires only an Attempt to Use Force and Violence or Intimidation*

The earliest circuit court to squarely address the interpretation of “attempts” in relation to the first paragraph of 18 U.S.C. § 2113(a) was the Second Circuit in *United States v. Jackson*.<sup>14</sup> The Second Circuit declined to follow *Baker*’s interpretation, instead relying on *Stallworth*, which had criticized *Baker*’s logic.<sup>15</sup> The court gave no explanation for extending *Stallworth*’s second paragraph holding to the first paragraph of 18 U.S.C. § 2113(a), even though the language of the two paragraphs is dramatically different. Nevertheless, following *Stallworth*, the court in *Jackson* applied the “substantial step” test.<sup>16</sup> Proposed by the American Law Institute’s

---

<sup>8</sup> See *id.* at 685-86.

<sup>9</sup> *Id.* at 686 (“It is apparent that in the statute under consideration the ‘attempt’ relates to the taking and not to the intimidation. Thus, what is involved in this indictment is an attempted taking by intimidation, the means being intimidation . . . .” (footnote omitted)). The district court nonetheless convicted the defendant upon finding actual intimidation. *Id.* at 687. Apparently the defendant did not appeal, so the Ninth Circuit did not have the chance to approve or reject the district court’s interpretation at that time.

<sup>10</sup> 543 F.2d 1038 (2d Cir. 1976).

<sup>11</sup> *Id.* at 1040 (“[A]ppellants assert they cannot be convicted of attempted bank robbery because they neither entered the bank nor brandished weapons. We reject this wooden logic.”); see also *Jackson*, 560 F.2d at 116 (“The *Stallworth* court faced a . . . statutory construction argument which . . . relied heavily on *United States v. Baker* . . .”).

<sup>12</sup> *Stallworth*, 543 F.2d at 1040-41.

<sup>13</sup> See *United States v. Bellew*, 369 F.3d 450, 456 (5th Cir. 2004) (noting that *Stallworth*’s criticism of *Baker*’s logic was “apparently in the context of the second paragraph of Section 2113(a)”).

<sup>14</sup> 560 F.2d 112 (2d Cir. 1977).

<sup>15</sup> *Id.* at 116-17 (“We reject this wooden logic. Attempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.” (quoting *Stallworth*, 543 F.2d at 1040)).

<sup>16</sup> *Id.* at 120-21.

2009] APPLYING THE “PLAIN MEANING” RULE TO 18 U.S.C. § 2113(A) 231

Model Penal Code and substantially adopted by the federal courts,<sup>17</sup> the “substantial step” test provides that:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.<sup>18</sup>

The next subsection of the Model Penal Code goes on to provide the following non-exhaustive list of conduct which:

[I]f strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.<sup>19</sup>

In *Jackson*, the defendant, inter alia, decided on a plan for the robbery, drove to the bank with loaded weapons, recruited an accomplice, covered the car’s license plate, and entered the bank for the purpose of reconnoiter-

---

<sup>17</sup> See, e.g., *United States v. Mandujano*, 499 F.2d 370, 377 n.6 (5th Cir. 1974) (“Our definition [of attempt] is generally consistent with and our language is in fact close to the definition[] proposed by the . . . American Law Institute’s Model Penal Code.”).

<sup>18</sup> MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1962).

<sup>19</sup> *Id.* § 5.01(2).

ing.<sup>20</sup> Because the defendant's conduct matched two of the enumerated substantial steps,<sup>21</sup> both of which were strongly corroborative of his criminal purpose, the Second Circuit affirmed the district court's conviction.<sup>22</sup>

The next circuit court to address the issue was the Fourth Circuit in *United States v. McFadden*.<sup>23</sup> In *McFadden*, the defendants hid two guns and a disguise in the bushes outside of the bank they planned to rob, drove around the bank until they determined that no police vehicles were in the area, and then got out of their car and approached the bank.<sup>24</sup> However, when the defendants spotted an armed FBI agent they reached for their weapons and were arrested before ever entering the bank.<sup>25</sup> At trial, the defendants argued that 18 U.S.C. § 2113(a) requires that actual force and violence or intimidation accompany the attempted taking from the bank, but the court followed *Jackson* and *Stallworth* instead.<sup>26</sup> The court was concerned with the public policy implication of the defendants' suggestion that FBI agents would have to wait until a robber actually enters the bank, thereby endangering innocent people's lives.<sup>27</sup> Consequently, the Fourth Circuit applied the "substantial step" test and, based on the defendants' discussing their robbery plans, reconnoitering the bank, assembling the weapons and disguises near the bank, and proceeding to the area with a vehicle and getaway driver, affirmed the conviction of the defendants under the first paragraph of 18 U.S.C. § 2113(a).<sup>28</sup>

The Ninth Circuit first interpreted the meaning of "attempts" in *United States v. Moore*.<sup>29</sup> In *Moore*, the defendant was arrested for walking toward a bank while wearing a ski mask and carrying gloves, two pillowcases, and a loaded gun in his waistband.<sup>30</sup> In affirming the defendant's conviction, the Ninth Circuit disagreed with his argument that actual use of force and violence or intimidation was required.<sup>31</sup> Rather, the court held that the first paragraph of 18 U.S.C. § 2113(a) only requires that a defendant "intended"

---

<sup>20</sup> *Jackson*, 560 F.2d at 120.

<sup>21</sup> The defendant committed the substantial steps (c) and (e) of the Model Penal Code formulation. *Id.*

<sup>22</sup> *Id.* at 120-21.

<sup>23</sup> 739 F.2d 149 (4th Cir. 1984).

<sup>24</sup> *Id.* at 151.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 151-52.

<sup>27</sup> *Id.* at 151 ("In the present case this would mean that the agents must wait until the defendants entered the bank or the vicinity of the bank with the sawed-off shotguns at the ready. This would require that the lives of the bank employees, the police, any innocent bystanders and the defendants themselves be endangered before an arrest could be made for an attempted robbery of the bank by use of force and violence or intimidation.").

<sup>28</sup> *Id.* at 152-53.

<sup>29</sup> 921 F.2d 207 (9th Cir. 1990).

<sup>30</sup> *Id.* at 208-09.

<sup>31</sup> *Id.* at 209.

to use force and violence or intimidation and that, in this case, the defendant took a substantial step toward consummating the robbery.<sup>32</sup>

Although by this time the Fifth Circuit had already created a split in authority,<sup>33</sup> the Sixth Circuit in *United States v. Wesley*<sup>34</sup> sided with the Second, Fourth, and Ninth Circuits in holding that actual use of force and violence or intimidation was not required.<sup>35</sup> Like each of the other circuit courts in the majority, the Sixth Circuit disposed of the defendant’s claim that the government had to prove actual force and violence or intimidation simply by reciting the “wooden logic” criticism from *Stallworth* and *Jackson*.<sup>36</sup> As a result, the Sixth Circuit found sufficient evidence to support a conviction against the defendant based on the defendant taking the substantial steps of assessing whether the bank was a good target, recruiting a convicted robber to participate, discussing specific plans, scouting the bank vault, and choosing a getaway route.<sup>37</sup> To be sure, the defendant had not yet fully committed to the robbery, as he had recently told his accomplice that he was “at a standstill” and claimed that “he was too afraid to actually do it,”<sup>38</sup> but the Sixth Circuit would have affirmed the conviction nonetheless.<sup>39</sup>

It should be noted that the Eighth Circuit in *United States v. Crawford*<sup>40</sup> also applied the “substantial step” test to a prosecution under 18 U.S.C. § 2113(a).<sup>41</sup> However, the defendant in that case never raised the issue whether the statute requires actual or attempted use of force and violence or intimidation.<sup>42</sup> Thus, the Eighth Circuit did not have occasion to truly address the interpretation issue.<sup>43</sup>

---

<sup>32</sup> *Id.*

<sup>33</sup> *See infra* Part I.B.

<sup>34</sup> 417 F.3d 612 (6th Cir. 2005).

<sup>35</sup> *Id.* at 618.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 620.

<sup>38</sup> *Id.* at 616.

<sup>39</sup> *Id.* at 620. The Sixth Circuit ultimately reversed the defendant’s conviction and remanded the case for a new trial based on an unrelated evidentiary error in the district court. *Id.* at 622.

<sup>40</sup> 837 F.2d 339 (8th Cir. 1988) (per curiam).

<sup>41</sup> *Id.* at 340.

<sup>42</sup> *See United States v. Bellew*, 369 F.3d 450, 456 n.6 (5th Cir. 2004). In fact, the defendant may have implicitly conceded the point by focusing his appellate argument on the correctness of the district court’s “substantial step” analysis rather than on whether it was the appropriate test in the first place. *Crawford*, 837 F.2d at 340 (“Crawford asserts the Government failed to prove that his actions constituted a substantial step, rather than mere preparation, toward the commission of bank robbery.”).

<sup>43</sup> *See Bellew*, 369 F.3d at 456 n.6 (“[W]hile the Eighth Circuit did rely on the substantial step analysis used in *McFadden*, the Eighth Circuit did not follow the holding that only attempted intimidation needs to be proved for conviction of attempted bank robbery.”).

B. *Minority View: Conviction Requires Actual Use of Force and Violence or Intimidation*

The Fifth Circuit in *United States v. Bellew*<sup>44</sup> acknowledged that it was creating a division when it applied the “plain meaning” rule to the first paragraph of 18 U.S.C. § 2113(a) and resuscitated *Baker*’s original interpretation.<sup>45</sup> Though it was reluctant to break with the only reported circuit court cases to address the issue,<sup>46</sup> it recognized those courts’ interpretative error of immediately looking beyond the text of the statute.<sup>47</sup>

In *Bellew*, the defendant entered a bank wearing an “obvious wig” and carrying a briefcase containing a firearm, self-written instructions describing how to rob the bank, and a demand note.<sup>48</sup> The defendant twice asked to speak to the bank’s manager, but both times was told to wait.<sup>49</sup> After being informed that he could not meet with the bank manager until later that afternoon, the defendant temporarily left, at which point the bank manager alerted the police to the defendant’s suspicious behavior.<sup>50</sup> As the defendant walked back toward the bank, he noticed the manager talking with the police, so he ran back to his car where the police confronted him.<sup>51</sup> Following a three-hour standoff, the defendant finally dropped his weapon and was taken into custody.<sup>52</sup> The defendant admitted that he intended to rob the bank,<sup>53</sup> but contested the issue of whether the first paragraph of 18 U.S.C. § 2113(a) requires an actual act of intimidation or merely attempted intimidation.<sup>54</sup> At the time the case was decided, the circuit courts were unanimously applying the “substantial step” test without actually examining the statute’s language,<sup>55</sup> but the Fifth Circuit broke the trend.<sup>56</sup>

Focusing on the relevant language itself, the Fifth Circuit found “the ‘actual act of intimidation’ reading to be the most natural reading of the text.”<sup>57</sup> In addition to the “plain meaning” of the statute, the court also

---

<sup>44</sup> 369 F.3d 450.

<sup>45</sup> *Id.* at 454, 456.

<sup>46</sup> *Id.* at 456 (“[W]e acknowledge creating a circuit split, and do so hesitatingly . . .”).

<sup>47</sup> *Id.* at 453-54 (“In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it.” (quoting *Carter v. United States*, 530 U.S. 255, 271 (2000)) (internal quotation marks omitted)).

<sup>48</sup> *Id.* at 451.

<sup>49</sup> *Id.*

<sup>50</sup> *Bellew*, 369 F.3d at 451-52.

<sup>51</sup> *Id.* at 452.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See supra* Part I.A.

<sup>56</sup> *See Bellew*, 369 F.3d at 454.

<sup>57</sup> *Id.*

found other support for its holding.<sup>58</sup> First, it noted that the Fifth Circuit had traditionally parsed the elements of the first paragraph of 18 U.S.C. § 2113(a) such that the “use of force and violence or intimidation” element was treated separately from the “takes or attempts to take” element.<sup>59</sup> Next, the second paragraph of 18 U.S.C. § 2113(a)—dealing with the situation in which a robber enters a bank but is thwarted prior to attempting to take any money<sup>60</sup>—was specifically designed to cover fact scenarios like *Bellew*.<sup>61</sup> Thus, if the first paragraph called for the far-reaching “substantial step” test and could capture the defendant in *Bellew*, then the first paragraph would completely swallow up the second paragraph, rendering the latter redundant and worthless.<sup>62</sup> In other words, Congress would have had no reason to enact the second paragraph if the first paragraph was capable of achieving the exact same effect. The final point made by the Fifth Circuit in *Bellew* was that the Eighth Circuit in *United States v. Brown*<sup>63</sup> had previously approved of a jury instruction requiring that the government prove actual intimidation:

A taking, or an attempted taking, by intimidation must be established by proof of one or more acts or statements of the accused which were done or made, in such a way or manner, and under such circumstances, as would produce in the ordinary person fear of bodily harm.<sup>64</sup>

The Fifth Circuit in *Bellew* understood that the particular facts of the case at bar made the distinction between interpretations seem rather trivial in practice.<sup>65</sup> That is, due to the existence of the second paragraph of 18 U.S.C. § 2113(a) and the fact that the defendant unquestionably entered the bank with the intent to take the bank’s property, the only consequence would be requiring the government to charge under the second paragraph instead of the first.<sup>66</sup> Nonetheless, the minority view can have a more meaningful impact in cases with different fact patterns.<sup>67</sup>

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 455 (“It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted [as the second paragraph of Section 2113(a)] to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.” (quoting *Prince v. United States*, 352 U.S. 322, 328 (1957)) (internal quotation marks omitted)).

<sup>61</sup> *Id.* (“The second paragraph of Section 2113(a) was added by Congress in an effort to cover precisely the sort of events that occurred in this case.”).

<sup>62</sup> *Bellew*, 369 F.3d at 455.

<sup>63</sup> 412 F.2d 381 (8th Cir. 1969).

<sup>64</sup> *Bellew*, 369 F.3d at 454 (quoting *Brown*, 412 F.2d at 384 n.4) (internal quotation marks omitted).

<sup>65</sup> *See id.* at 456.

<sup>66</sup> *Id.* (“[W]e trust that the prospective impact of the split will be minimal to non-existent because the availability of the second paragraph of Section 2113(a) would allow for a conviction under the facts

In the 2008 case of *United States v. Thornton*,<sup>68</sup> the Seventh Circuit became the second and most recent circuit court to endorse the minority view.<sup>69</sup> The Seventh Circuit appreciated the primary importance of the statute's own language and simply applied the "plain meaning" rule.<sup>70</sup> In rejecting the majority view, the Seventh Circuit criticized its four adherents<sup>71</sup> for overlooking analysis of the statutory text.<sup>72</sup> Furthermore, the court pointed out that, if the majority view was correct, "the statute would have begun with, '[w]hoever *attempts* by force and violence or intimidation to take.'" <sup>73</sup> Instead, the court held that the "'by force and violence or intimidation' language relates to both 'takes' and the phrase 'attempts to take,'" <sup>74</sup> and concluded that actual force and violence or intimidation is required regardless of whether the defendant successfully took, or attempted and failed to take, the bank's property.<sup>75</sup> Because the government failed to prove the essential "by force and violence or intimidation" element, the Seventh Circuit reversed the defendant's conviction with instructions for acquittal.<sup>76</sup>

The facts of *Thornton* provide for an intriguing analysis under 18 U.S.C. § 2113(a). In *Thornton*, the defendant took various steps toward robbing Bank One including drawing sketches of the bank, recruiting a getaway driver, switching the license plate on his car, and gathering a disguise consisting of a bald cap, makeup, and a pillow to make him look heavier.<sup>77</sup> More importantly, while wearing dark clothing and a bandana over his face and carrying a duffel bag that appeared to have "stuff" in it,<sup>78</sup>

---

presented here. Unfortunately for the government, the indictment did not charge an offense under the second paragraph.").

<sup>67</sup> See *infra* Part III.A.

<sup>68</sup> 539 F.3d 741 (7th Cir. 2008).

<sup>69</sup> *Id.* at 747.

<sup>70</sup> *Id.* at 746 ("[The defendant] also asserts that the structure of § 2113(a) as a whole, legislative history, case law, and policy considerations all support the conclusion that actual force and violence or intimidation are required. We need go no further than the statutory language itself.").

<sup>71</sup> The majority view's adherents were the Second, Fourth, Sixth, and Ninth Circuits. See *id.* at 747.

<sup>72</sup> *Id.* ("We do not find these cases persuasive because they omit an appropriate statutory analysis.").

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Thornton*, 539 F.3d at 747.

<sup>75</sup> *Id.* ("[A]ctual force and violence or intimidation is required for a conviction under the first paragraph of § 2113(a), whether the defendant succeeds (takes) or fails (attempts to take) in his robbery attempt.").

<sup>76</sup> *Id.* at 751 ("No reasonable jury could find beyond a reasonable doubt that Thornton said or did something that amounts to intimidation under § 2113(a). Thus, the government failed to prove an essential element of the crime of attempted bank robbery").

<sup>77</sup> *Id.* at 743.

<sup>78</sup> The police later discovered a duffel bag at the defendant's workplace which contained more disguise items and a machine gun. *Id.* at 744.

the defendant actually arrived at the door of the bank.<sup>79</sup> However, just as the defendant placed his hand on the handle of the bank door, a bank customer made eye contact with the defendant, causing the defendant to walk away without opening the door.<sup>80</sup> The bank customer then confronted the defendant and asked him what he was doing.<sup>81</sup> This further interaction caused the defendant to panic and run back to his getaway car.<sup>82</sup> The police later arrested the defendant shortly after he returned to his job.<sup>83</sup>

Unlike *Bellew*, the government would not have had an open-and-shut case against the defendant in *Thornton* under the second paragraph of 18 U.S.C. § 2113(a) because he was interrupted prior to entering the bank.<sup>84</sup> However, had the Seventh Circuit followed the majority in administering the “substantial step” test, the government would have had a very strong case for conviction under the first paragraph, as the defendant probably committed numerous strongly corroborative substantial steps.<sup>85</sup> Thus, the Seventh Circuit’s minority interpretation in *Thornton* had a real, as opposed to merely theoretical, impact for the defendant.

## II. THE MAJORITY TAKES THE WRONG APPROACH AND REACHES THE WRONG RESULT

### A. *Traditional Rules of Statutory Interpretation Dictate that the First Step to Interpreting a Statute is to Examine the Text Itself*

“A classic authority has stated that interpretation is ‘the art of finding out the true sense of any form of words; that is, the sense which the author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey . . . .’”<sup>86</sup> When the subject matter of interpretation is a federal statute like 18 U.S.C. § 2113(a), the “author” is Congress. Despite courts having an abundance of tools available to help

---

<sup>79</sup> *Id.* at 743.

<sup>80</sup> *Thornton*, 539 F.3d at 743.

<sup>81</sup> *Id.* at 743-44 (“[The bank customer] pulled up next to the [defendant] and asked, ‘What the f\_\_\_ are you doing?’ At trial [the customer] explained that he said this because . . . the [defendant] was masked and wearing pretty big clothing.”).

<sup>82</sup> *Id.* at 744.

<sup>83</sup> *Id.*

<sup>84</sup> Compare *id.* at 743-44 (stating that the defendant did not enter the bank), with *United States v. Bellew*, 369 F.3d 450, 451 (5th Cir. 2004) (stating that the defendant did enter the bank).

<sup>85</sup> *Thornton*, 539 F.3d at 751 n.3 (“We do not quarrel with the government’s view of the evidence as sufficient to prove substantial step and culpable intent, but that is not enough to support Thornton’s conviction.”).

<sup>86</sup> 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:4 (7th ed. 2007) (quoting FRANCIS LIEBER, HERMENEUTICS 11 (1839)).

construe a statute,<sup>87</sup> the common law has established a definite sequence by which judges are to utilize them.

Notwithstanding the typical association of “art” with creativity, the Supreme Court unmistakably directs courts to first approach statutory interpretation rather mechanically by simply examining the text of the statute.<sup>88</sup> This mandate is commonly referred to as the “plain meaning” rule and can be described as follows: “[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.”<sup>89</sup> Certain basic linguistic canons of statutory interpretation can facilitate this initial process,<sup>90</sup> but further construction or “artistry” is prohibited unless this initial reading reveals ambiguity or produces an absurd or unreasonable result.<sup>91</sup>

*Bellew*, and later *Thornton*, took the correct approach by adhering to precedent and applying the “plain meaning” rule.<sup>92</sup> Finding only one natural

---

<sup>87</sup> See *id.* § 45:14 (“The resource materials for statutory construction are commonly classified into two fundamentally different categories, called ‘intrinsic’ and ‘extrinsic’ aids. These characterizations refer to the text of the statute. Intrinsic aids are those which derive meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it. Extrinsic aids, on the other hand, consist of information which comprises the background of the text, such as legislative history and related statutes.”).

<sup>88</sup> See *id.* § 46:1; see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 229 (1975) (“[The plain meaning rule] reaffirms the preeminence of the statute over materials extrinsic to it.”).

<sup>89</sup> *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *Lake County v. Rollins*, 130 U.S. 662, 670 (1889) (“If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.”).

<sup>90</sup> See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 86 (2009) (“[C]ourts assume that legislative language conforms, at least roughly, to the rules of English grammar. . . . Similarly, courts rely on rules of punctuation, so that a period ends a sentence and a stand-alone provision.”); see also *id.* at 87 (“The basic linguistic canon is now used . . . and provides that statutes should be interpreted in accord with the rules of grammar in mind. An example would be the rule of the last antecedent. If a statute contains some qualifying language, a question is to what other words the qualifiers apply. The general grammatical rule dictates that they refer only to the immediately prior reference.”).

<sup>91</sup> See, e.g., *Nat’l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994); *Hannah v. WCI Cmty., Inc.*, 348 F. Supp. 2d 1322, 1328-29 (S.D. Fla. 2004); 2A SINGER & SINGER, *supra* note 86, § 46:1; see also *id.* § 45:9 (“Knowing the purpose behind the statute could help the court decode ambiguous text, but first there must be some ambiguity.”); DICKERSON, *supra* note 88, at 232 (“The important interpretative problem is to determine, in the light of the text and its proper context, whether the facts suggesting that a normal reading of the language would produce an absurdity, an inequity, or unreasonableness create a presumption strong enough . . . to conclude that the legislature did not mean what it expressly said.”).

<sup>92</sup> See *United States v. Thornton*, 539 F.3d 741, 746 (7th Cir. 2008); *United States v. Bellew*, 369 F.3d 450, 453-54 (5th Cir. 2004).

reading,<sup>93</sup> their duty of interpretation was at an end.<sup>94</sup> *Bellew*'s and *Thornton*'s alternative rationales for renouncing the majority view were superfluous to their resolution of the issue.<sup>95</sup>

The majority's interpretative approach is flawed because, rather than acknowledging the “plain meaning” rule and declaring it to be inconclusive in the case at bar,<sup>96</sup> each circuit court in the majority apparently ignored the rule altogether. At a minimum—before considering potential policies to be furthered by the statute<sup>97</sup>—the courts in the majority were obligated to identify an ambiguity in the text of the first paragraph of 18 U.S.C. § 2113(a) or some absurdity or unreasonableness which the plain meaning interpretation would generate.<sup>98</sup>

*Stallworth* neatly illustrates the majority's neglect of the “plain meaning” rule.<sup>99</sup> Immediately upon rejecting the defendant's *Baker* interpretation based exclusively on policy grounds,<sup>100</sup> the court in *Stallworth* proceeded to “substantial step” analysis in the very next paragraph.<sup>101</sup> A proper approach would have entailed openly assessing the asserted unequivocalness of the text or, alternatively, explaining that the proposed result would operate so absurdly or unreasonably so as to negate the presumptively valid plain

---

<sup>93</sup> *Thornton*, 539 F.3d at 747; *Bellew*, 369 F.3d at 454; see also *Hutton v. Phillips*, 70 A.2d 15, 17 (Del. Super. Ct. 1949) (“In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it . . . would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.”).

<sup>94</sup> See *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) (starting the process of statutory interpretation “where courts should always begin . . . and where they often should end it as well, which is with the words of the statutory provision” (emphasis added)).

<sup>95</sup> *Thornton*, 539 F.3d at 746 (“[The defendant] also asserts that the structure of § 2113(a) as a whole, legislative history, case law, and policy considerations all support the conclusion that actual force and violence or intimidation are required. We need go no further than the statutory language itself.”).

<sup>96</sup> The courts in the majority could have made a plausible argument for ultimately going beyond the text. Their “wooden logic” critique is probably not tantamount to a claim of absurdity, but does seem to suggest unreasonableness, albeit impliedly. *But see* DICKERSON, *supra* note 88, at 232 (“Although the presumption against absurdity is strong, the presumptions against unfairness and unreasonableness, depending on degree, are usually weak.”). In any event, the troubling aspect of the majority approach is that the courts did not make explicit their justification for circumventing the “plain meaning” rule.

<sup>97</sup> See *supra* notes 15 and 27 and accompanying text.

<sup>98</sup> See *supra* note 91 and accompanying text.

<sup>99</sup> See *United States v. Stallworth*, 543 F.2d 1038, 1040-41 (2d Cir. 1976). *Stallworth* is not technically considered a member of the majority because it dealt with the second paragraph of 18 U.S.C. § 2113(a) rather than the first, but its approach was adopted by the Second Circuit in *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977), and by the other circuit courts of the majority. See, e.g., *id.* at 116-20.

<sup>100</sup> *Stallworth*, 543 F.2d at 1041 (“Application of the foregoing to the instant case emphasizes the importance of a rule encouraging early police intervention where a suspect is clearly bent on the commission of crime.”).

<sup>101</sup> *Id.* at 1040.

meaning interpretation.<sup>102</sup> An adequately supported finding of ambiguity, absurdity, or unreasonableness would have entirely legitimized subsequent resort to policy considerations.<sup>103</sup>

B. *The Majority View Produces an Anomaly*

The majority's interpretation of the first paragraph of 18 U.S.C. § 2113(a) means that the government need only prove that a robber attempted to use intimidation,<sup>104</sup> and the majority applies the Model Penal Code's "substantial step" test to determine whether such attempted intimidation occurred.<sup>105</sup> However, the "substantial step" test requires proof of the robber's mens rea,<sup>106</sup> whereas the circuits agree that, in cases of *actual* intimidation, there is no mens rea component.<sup>107</sup>

Under prevailing law, the intimidation element in the first paragraph of 18 U.S.C. § 2113(a) is satisfied so long as "an ordinary person in the [victim]'s position reasonably could infer a threat of bodily harm from the defendant's acts."<sup>108</sup> Whether or not the defendant actually intended to intimidate that person does not factor into the determination.<sup>109</sup> Obviously, the defendant is therefore more likely to be convicted than if the courts required that the defendant possess a particular culpable state of mind. *United States v. Yockel*<sup>110</sup> provides a colorful illustration of how courts treat the intimidation element.

In *Yockel*, the defendant entered UMB Bank and asked the teller to withdraw \$5,000 from his account.<sup>111</sup> The defendant provided several different names under which the account might be found, but even with the manager's help, the bank teller was unable to locate the defendant's account.<sup>112</sup> When the teller apologized and returned his identification, the de-

---

<sup>102</sup> See *supra* notes 88-91 and accompanying text.

<sup>103</sup> See *supra* note 91 and accompanying text.

<sup>104</sup> See, e.g., *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005).

<sup>105</sup> See, e.g., *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984).

<sup>106</sup> See *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974) ("A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.").

<sup>107</sup> *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) ("[W]hether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt."); accord *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996).

<sup>108</sup> *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987).

<sup>109</sup> *Woodrup*, 86 F.3d at 364 ("The statute merely requires that a theft of money from a bank be 'by force or violence, or by intimidation' in order to constitute robbery; nothing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . We therefore reaffirm that the intimidation element of § 2113(a) is satisfied . . . whether or not the defendant actually intended the intimidation.").

<sup>110</sup> 320 F.3d 818.

<sup>111</sup> *Id.* at 820.

<sup>112</sup> *Id.* at 820-21.

2009] APPLYING THE “PLAIN MEANING” RULE TO 18 U.S.C. § 2113(A) 241

defendant asked her, “Does it matter to you if you go to heaven or hell?”<sup>113</sup> When the teller responded that she would like to go to heaven, the defendant asked again and then told her, “If you want to go to heaven, you’ll give me the money.”<sup>114</sup> This statement by the defendant caused the bank teller to fear for her life, to think about her son and the afterlife, and to urinate.<sup>115</sup> In an effort to appease the defendant, she gave him \$6,000, and he left the bank without being apprehended.<sup>116</sup>

The following day, the defendant approached a teller at another UMB Bank in the same city, again providing his identification and requesting to withdraw funds.<sup>117</sup> When informed that he needed his account number, “[the defendant] replied that he had been able to obtain ‘money down the street yesterday’ without an account number.”<sup>118</sup> This time, the defendant was arrested when another teller recognized him from the incident at the first bank and called the police.<sup>119</sup> The government charged the defendant under the first paragraph of 18 U.S.C. § 2113(a), though at no point during the alleged robbery did he make a physical move toward the teller, hand her a demand note, or display or claim to possess any weapon.<sup>120</sup>

At trial, the defendant planned to utilize medical records and testimony to establish that his mental health demonstrated a lack of intent to intimidate.<sup>121</sup> However, in response to the government’s motion in limine, the district court judge excluded the mental health evidence “in its entirety as not relevant to any issue in the case.”<sup>122</sup> On appeal, the defendant argued that the government had to prove that he knowingly intimidated the teller,<sup>123</sup> but the Eighth Circuit affirmed, ruling that intimidation is judged under an objective standard, and that under that standard, intent to intimidate is irrelevant in determining a defendant’s guilt.<sup>124</sup>

Whereas the rule for actual intimidation resembles strict liability in that there is no inquiry into the purpose of the defendant’s actions, the majority’s “substantial step” test for attempted intimidation only allows conviction where the defendant was “acting with the kind of *culpability* otherwise required for the commission of the crime” he is charged with attempting.<sup>125</sup> An explanatory note following the Model Penal Code’s attempt pro-

---

<sup>113</sup> *Id.* at 821.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Yockel*, 320 F.3d at 821.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* at 820-21.

<sup>121</sup> *Id.* at 822.

<sup>122</sup> *Yockel*, 320 F.3d at 822.

<sup>123</sup> *Id.* at 823.

<sup>124</sup> *Id.* at 824.

<sup>125</sup> MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1962) (emphasis added).

vision makes clear that “the mens rea is purpose.”<sup>126</sup> That is, a defendant must not only have taken a substantial step toward intimidating the teller, but he also must have acted with a purpose to intimidate. Anomalously, this means that the government would have to prove the defendant’s mens rea when the defendant attempts to intimidate but not when the defendant actually intimidates. None of the circuit courts in the majority have submitted any justification for the disparate treatment.<sup>127</sup>

### III. THE MAJORITY’S MISINTERPRETATION PRODUCES ADVERSE CONSEQUENCES

#### A. *Criminal Punishment Will Extend Beyond What Congress Contemplated*

The oft-cited public policy rationale for far-reaching criminal attempt laws like the “substantial step” test is to permit early intervention by law enforcement agents.<sup>128</sup> Indeed, this policy plays a crucial role within 18 U.S.C. § 2113(a), as it gave rise to the second paragraph of the statute.<sup>129</sup> The widely accepted purpose of the second paragraph is to allow early intervention in a “situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.”<sup>130</sup> Thus, Congress has implemented the policy, but only to a certain extent, and exclusively through the second paragraph. Specifically, Con-

---

<sup>126</sup> *Id.* § 5.01(1) explanatory note.

<sup>127</sup> The reason that the anomaly has not been acknowledged is probably that it is too subtle to survive the majority’s muddled analysis. In theory, under the majority view the government would still have to prove an attempt to intimidate apart from proving an attempt to take property. Though certain acts (e.g., purchasing a gun) bear on both elements, other evidence will only satisfy the “taking” element. In practice, the courts in the majority merge the analysis, neglecting to specify which particular acts tend to prove the intimidation element. *See, e.g.*, *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984). This trend becomes especially problematic in cases like *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005), where none of the substantial steps relied upon by the Sixth Circuit clearly has any bearing on the element of “force and violence or intimidation.” *See id.* at 620. Regardless of individual injustice, the end result is that the majority effectively eliminates any independent analysis of the “force and violence or intimidation” element, and so the anomaly goes unnoticed.

<sup>128</sup> *See, e.g.*, *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977) (citing *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976)).

<sup>129</sup> *See United States v. Bellew*, 369 F.3d 450, 455 (5th Cir. 2004) (“It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted [as the second paragraph of Section 2113(a)] to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.” (quoting *Prince v. United States*, 352 U.S. 322, 328 (1957)) (internal quotation marks omitted)).

<sup>130</sup> *United States v. Thornton*, 539 F.3d 741, 746-47 (7th Cir. 2008) (quoting *Bellew*, 369 F.3d at 455).

gress’s envisioned scheme would permit early intervention once a robber enters the bank, but not before. Given this clearly-expressed will, the majority betrays Congress’s intent when it manipulates the first paragraph to further stretch the policy.

As previously mentioned, the second paragraph of 18 U.S.C. § 2113(a) will occasionally offer the government an alternative prosecutorial option in the event that a charge under the first paragraph is not viable.<sup>131</sup> In such cases, a misinterpretation that produces a conviction under the inappropriate first paragraph rather than the appropriate second paragraph would not be so repugnant.<sup>132</sup> This is because Congress intended for the statute, through either one of the paragraphs, to capture the defendant’s actions notwithstanding the mistaken charge in the indictment. However, in cases in which the government cannot avail itself of the second paragraph, whether a court misinterprets the first paragraph will have a dramatic effect on the defendant. Specifically, in the case of the hypothetical father,<sup>133</sup> the choice of interpretation will decide whether he returns home to his family and job or goes to prison.

In fact, one need not refer to a hypothetical case to demonstrate how judicial misinterpretation of the first paragraph of 18 U.S.C. § 2113(a) can land an otherwise innocent person behind bars. For example, in *Thornton*, conviction under the second paragraph would be unlikely because the defendant went no further than putting his hand on the door handle.<sup>134</sup> Thus, the defendant would be altogether acquitted of the § 2113(a) charge unless the court followed the majority and improperly extended the reach of the first paragraph.<sup>135</sup>

The Fourth Circuit’s decision in *United States v. McFadden*<sup>136</sup> and the Sixth Circuit’s decision in *United States v. Wesley*<sup>137</sup> are even more poignant examples. *Wesley* is perhaps the most significant, as the defendant in that case appeared to be less immediately dangerous than the defendant in *McFadden*. Whereas the defendant in *McFadden* never abandoned his plan

---

<sup>131</sup> In *Thornton*, the government actually filed a superseding indictment charging the defendant under the second paragraph just two days after the Seventh Circuit dismissed the charge under the first paragraph. *United States v. Thornton*, No. 05 CR 813, 2009 WL 377979, slip op. at 1 (N.D. Ill. Feb. 12, 2009) (unpublished opinion). However, the court dismissed the indictment for violating the double jeopardy clause of the Fifth Amendment. *Id.* Thus, there is some authority that the government must choose the appropriate paragraph in the first instance or risk forfeiting a suitable charge.

<sup>132</sup> See *infra* Part III.B.

<sup>133</sup> See *supra* Introduction.

<sup>134</sup> *Thornton*, 539 F.3d at 743. The government did unsuccessfully try to convict Thornton under the second paragraph, but its failure had nothing to do with the merits of the charge. See *supra* note 131.

<sup>135</sup> Of course, the government may still be able to prosecute certain defendants for violating other criminal statutes. See, e.g., *Thornton*, 2009 WL 377979, slip op. at 1 (denying the defendant’s motion to dismiss a superseding indictment conspiracy charge under 18 U.S.C. § 371).

<sup>136</sup> *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984).

<sup>137</sup> *United States v. Wesley*, 417 F.3d 612, 616 (6th Cir. 2005).

to rob the bank prior to the moment he was apprehended, the defendant in *Wesley* told his accomplice that he was “at a standstill” and was arrested outside his home without any accomplices, weapons, or disguises present. Through the second paragraph of 18 U.S.C. § 2113(a), Congress clearly drew the line for criminalization at a defendant entering the bank, and the defendant in *Wesley* did not cross that line. If it is true that the defendant was too afraid to go through with his plan to rob the bank as he claimed, then Congress’s desire not to punish him seems all the more justified. That is, he posed little threat of endangering innocent bystanders at the time.

The first and second paragraphs of 18 U.S.C. § 2113(a) have other crucial differences that affect the likelihood of conviction. For instance, the first paragraph is deemed to be a general intent crime, whereas the second paragraph is a specific intent crime.<sup>138</sup> As a result, if the government prosecutes a defendant under the second paragraph rather than the first, the government must prove specifically that the defendant possessed “intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny.”<sup>139</sup> In contrast, the first paragraph only mandates that the government establish the defendant’s generally culpable state of mind.<sup>140</sup> Thus, the second paragraph’s additional specific intent requirement creates a heavier burden for the government and could prevent a conviction that would be routine under the first paragraph in which mere general intent is required.

In addition to the varying burdens for proving intent, the availability of the defense of diminished capacity also depends on which paragraph of 18 U.S.C. § 2113(a) the government pursues. The general rule is that a diminished capacity defense is only available to a defendant charged with a specific intent crime.<sup>141</sup> To illustrate the significance of this limitation, suppose the hypothetical father from the Introduction,<sup>142</sup> rather than devising a plan

---

<sup>138</sup> *United States v. Gonyea*, 140 F.3d 649, 653-54 (6th Cir. 1998) (“The second paragraph of § 2113(a), providing that a defendant must act ‘with intent to commit . . . any felony,’ explicitly requires the government to prove that the defendant harbored a specific intent. By contrast, the first paragraph is silent insofar as requiring that a defendant act with any intent at all. Because we agree . . . that Congress showed ‘careful draftsmanship’ by including an intent requirement in the second paragraph, but not the first paragraph, of § 2113(a), we hold that the first paragraph of § 2113(a) describes a general intent crime.” (citations omitted)); *see also* *United States v. Johnston*, 543 F.2d 55, 58 (8th Cir. 1976) (“In those cases where courts have distinguished the first and second paragraphs of § 2113(a) in terms of intent, it has been held that specific intent is not an element of an offense under the first paragraph . . .”).

<sup>139</sup> 18 U.S.C. § 2113(a) (2006).

<sup>140</sup> *See United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (“[T]he government need only prove that the defendant acted knowingly and voluntarily in order to convict under [the first paragraph of] § 2113(a).”).

<sup>141</sup> *See Johnston*, 543 F.2d at 57 (“It is the general and undisputed rule that evidence of voluntary intoxication may not be used to negate general criminal intent, but that where specific intent is an element of the offense charged, voluntary intoxication may be used to prove lack of intent.”).

<sup>142</sup> *See supra* Introduction.

over the course of the week, simply got drunk one Saturday afternoon following a morning of particularly severe creditor harassment. On a whim, he haphazardly plans a robbery attempt and strolls into the nearest bank wearing an old Halloween mask he found in the attic. None of the bank employees are at all intimidated in light of the man’s obviously drunken state, and he gets arrested before reaching the teller. He has clearly violated the second paragraph’s actus reus element, but could assert his intoxication as a defense to the specific intent element. On the other hand, he would not be able to utilize this defense if he had been charged under the first paragraph. Therefore, if the court followed the majority view and interpreted the first paragraph to encompass attempted intimidation, the government could charge under the first paragraph and the hypothetical defendant would be stripped of an otherwise available defense.

Apart from the conviction itself, the duration of a convict’s sentence can depend on whether the government charges under the first or second paragraph of 18 U.S.C. § 2113(a). It is true that the first and second paragraphs are parts of the same offense and so carry the same sentence,<sup>143</sup> but only the first paragraph can be a predicate for an additional firearm charge.<sup>144</sup> That is, a firearm charge under 18 U.S.C. § 924(c)<sup>145</sup> could not attach to a charge under the second paragraph of 18 U.S.C. § 2113(a) because mere entrance to a bank does not qualify as a “crime of violence”<sup>146</sup> as defined by § 924(c).

In *United States v. Jones*,<sup>147</sup> the defendant Jones attempted to rob a bank with knowledge that his accomplice and co-defendant possessed a .38 caliber revolver.<sup>148</sup> Upon noticing the defendants approaching the bank wearing ski masks, a bank employee alerted her supervisor in time for the supervisor to lock the bank’s doors.<sup>149</sup> Nevertheless, the defendants returned and tried to forcefully shake the doors open, but their effort was unsuccess-

---

<sup>143</sup> Violators of either paragraph are equally fined and/or given a maximum prison sentence of twenty years. *See* 18 U.S.C. § 2113(a) (2006).

<sup>144</sup> *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (“The government notes that the second paragraph of § 2113(a) cannot serve as a predicate crime of violence to support a § 924(c)(3) charge. That is correct.”).

<sup>145</sup> 18 U.S.C. § 924(c)(1)(A) (2006) (“[A]ny person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence [receive a mandatory consecutive penalty].”).

<sup>146</sup> 18 U.S.C. § 924(c)(3) (“For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”).

<sup>147</sup> 993 F.2d 58 (5th Cir. 1993).

<sup>148</sup> *Id.* at 59.

<sup>149</sup> *Id.*

ful and they were arrested a few minutes later.<sup>150</sup> The trial court convicted the defendant Jones of violating the second paragraph of 18 U.S.C. § 2113(a) as well as 18 U.S.C. § 924(c)(1).<sup>151</sup> However, the Fifth Circuit vacated the firearm charge, holding that the second paragraph of 18 U.S.C. § 2113(a) does not constitute the prerequisite crime of violence.<sup>152</sup>

When courts follow the majority's misinterpretation and comingle the first and second paragraphs of 18 U.S.C. § 2113(a), they promote prosecutorial manipulation to achieve excessive sentences.<sup>153</sup> Importantly, the potential for subjecting an armed defendant to unwarranted additional punishment is real, as it appears that the government charged the defendant in *Thornton* under the first paragraph, rather than the second, precisely for that reason.<sup>154</sup>

B. *The Majority's Misinterpretation Creates Dangerous Precedent Which Could Mislead Courts Interpreting Similar Statutes*

Because the majority takes the wrong approach and reaches a flawed result,<sup>155</sup> its interpretation of the first paragraph of 18 U.S.C. § 2113(a) creates undesirable precedent. First, a court looking to interpret a completely different statute might view the majority's approach as a license to ignore the "plain meaning" rule. Second, a court interpreting a similarly-worded statute might resolve its interpretative question simply by borrowing the relevant interpretation of 18 U.S.C. § 2113(a).

It is routine practice for courts to refer to precedent for guidance in choosing the proper method of statutory interpretation.<sup>156</sup> Such an exercise helped the Seventh Circuit reach its decision in *Thornton*,<sup>157</sup> noting that it had previously adhered to the "plain meaning" rule in *United States v. Salgado*<sup>158</sup> when faced with a similarly clear and unambiguous statute.<sup>159</sup>

---

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 59-60.

<sup>152</sup> *See id.* at 62 ("[T]he jury could convict Jones of count two only if it found he committed a crime of violence, but count one never included the essential element of violence . . .").

<sup>153</sup> *See, e.g.,* *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) ("As the government did in *Salgado*, it again attempts to stretch federal law to cover an act that is not criminalized by the statute at issue.").

<sup>154</sup> *Id.* at 747 n.2 ("[The defendant] was initially charged with a violation of the second paragraph of § 2113(a) in the complaint when he was arrested. It appears that this suitable charge was abandoned in favor of the first paragraph count in the indictment so that the firearm count (with a mandatory consecutive penalty) could be added."); *see also id.* at 747 ("[W]e cannot bend the statute simply to accommodate the government's zeal to obtain stiffer penalties.").

<sup>155</sup> *See supra* Part II.A-B.

<sup>156</sup> *See, e.g.,* *United States v. Bellew*, 369 F.3d 450, 454-55 (5th Cir. 2004) (looking to the Supreme Court for the "plain meaning" rule).

<sup>157</sup> *Thornton*, 539 F.3d at 747.

<sup>158</sup> 519 F.3d 411 (7th Cir. 2008).

2009] APPLYING THE “PLAIN MEANING” RULE TO 18 U.S.C. § 2113(A) 247

Though the court in *Salgado* interpreted 18 U.S.C. § 2114(a), dealing with assault on a person in possession of United States property,<sup>160</sup> the court in *Thornton* adopted *Salgado*'s method in interpreting 18 U.S.C. § 2113(a).<sup>161</sup> Unfortunately, some court in the future could just as easily cite the majority's flawed method of interpreting the first paragraph of 18 U.S.C. § 2113(a) as support for misinterpreting another statute.

In addition to adopting the approach itself, a court in need of assistance interpreting a similarly-worded statute to 18 U.S.C. § 2113(a) might be tempted to borrow the majority's erroneous conclusion. There is no doubt that courts often engage in this common practice.<sup>162</sup> For example, in *Ex parte Hunte*,<sup>163</sup> the Alabama Supreme Court had to interpret a section of the Alabama Code<sup>164</sup> in order to determine the requisite elements of Medicaid fraud.<sup>165</sup> Specifically, the issue was whether the crime required an element of reliance by the Medicaid agency.<sup>166</sup> The Alabama Supreme Court concluded that it did not.<sup>167</sup> In reaching its conclusion, the court analogized to certain portions of the statutory crime of forgery<sup>168</sup> and how that statute

---

<sup>159</sup> *Thornton*, 539 F.3d at 747.

<sup>160</sup> 18 U.S.C. § 2114(a) (2006) (“A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.”).

<sup>161</sup> *Thornton*, 539 F.3d at 747.

<sup>162</sup> See *Woodford v. Ngo*, 548 U.S. 81, 107 (2006) (“[I]f we have already provided a definitive interpretation of the language in one statute, and Congress then uses nearly identical language in another statute, we will give the language in the latter statute an identical interpretation unless there is a clear indication in the text or legislative history that we should not do so.”); see generally 2A SINGER & SINGER, *supra* note 86, § 53:4.

<sup>163</sup> 436 So. 2d 806 (Ala. 1983).

<sup>164</sup> Ala. Code § 22-1-11(a) (1975) (“Any person who, with intent to defraud or deceive, makes, or causes to be made or assists in the preparation of any false statement, representation, or omission of a material fact in any claim or application for any payment, regardless of amount, from the Medicaid agency, knowing the same to be false; or with intent to defraud or deceive, makes, or causes to be made, or assists in the preparation of any false statement, representation, or omission of a material fact in any claim or application for medical benefits from the Medicaid Agency, knowing the same to be false; shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars (\$10,000) or imprisoned for not less than one nor more than five years, or both.”).

<sup>165</sup> *Hunte*, 436 So. 2d at 806.

<sup>166</sup> *Id.* at 807-08.

<sup>167</sup> *Id.* at 808 (“Here the crime is complete, once one, with intent to defraud, makes or causes to be made or assists in the preparation of any false statement, representation or omission of a material fact in any claim or application for any payment.” (emphasis omitted)).

<sup>168</sup> Ala. Code § 13A-9-3(a) (1975) (“A person commits the crime of forgery in the second degree if, with intent to defraud, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed: (1) a deed, will, codicil, contract,

had been interpreted.<sup>169</sup> It found the following interpretation from *Wyatt v. State*<sup>170</sup> to be on point:

[F]orgery of an endorsement is complete as a crime when the endorsement having the capacity to defraud, is placed on the instrument without authority and with the intent to injure or defraud. *It is not necessary that any prejudice should in fact have happened by reason of the fraud.* The capacity of the false and fraudulent writing to work injury, is the material question. If the writing has that capacity, the offense is committed.<sup>171</sup>

*Overstreet v. North Shore Corp.*<sup>172</sup> provides another example in which a court relied upon the interpretation of a similarly-worded statute, this time dealing with a federal statute like 18 U.S.C. § 2113(a). In *Overstreet*, the plaintiffs sued under the Fair Labor Standards Act<sup>173</sup> for damages resulting from the denial of minimum wage and overtime compensation guaranteed by the Act.<sup>174</sup> The issue before the court was whether the plaintiffs “engaged in commerce”<sup>175</sup> so as to be covered by the Act.<sup>176</sup> The plaintiffs’ employment involved operating a toll road which connected Florida’s mainland to a nearby island.<sup>177</sup> This road served as the primary means for transporting persons, vehicles, mail, and products between the mainland and the island.<sup>178</sup> In addition, the road doubled as a drawbridge allowing boats engaged in interstate commerce to pass underneath.<sup>179</sup>

---

assignment or a check, draft, note or other commercial instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or (2) A public record, or an instrument filed or required or authorized by law to be filed in a public office or with a public employee; or (3) A written instrument officially issued or created by a public office, public employees or government agency.”); *id.* § 13A-9-4(a) (“A person commits the crime of forgery in the third degree if, with intent to defraud, he falsely makes, completes or alters a written instrument.”).

<sup>169</sup> *Hunte*, 436 So. 2d at 809.

<sup>170</sup> 57 So. 2d 366 (Ala. 1952).

<sup>171</sup> *Hunte*, 436 So. 2d at 809 (quoting *Wyatt*, 57 So. 2d at 371) (emphasis added and internal quotation marks omitted).

<sup>172</sup> 318 U.S. 125 (1943).

<sup>173</sup> 29 U.S.C. §§ 201-219 (1938).

<sup>174</sup> *Overstreet*, 318 U.S. at 127-28.

<sup>175</sup> Fair Labor Standards Act, ch. 676, § 6(a), 52 Stat. 1062-63 (1938) (“Every employer shall pay to each of his employees who in any workweek is *engaged in commerce* or in the production of goods for commerce wages at [certain minimum rates] . . . .” (emphasis added)) (current version at 29 U.S.C. § 206(a) (2006)); Fair Labor Standards Act, ch. 676, § 7(a), 52 Stat. 1063 (1938) (“No employer shall . . . employ any of his employees who in any workweek is *engaged in commerce* or in the production of goods for commerce [for more than a specified number of hours per workweek] . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” (emphasis added)) (current version at 29 U.S.C. § 207(a)(1) (2006)).

<sup>176</sup> *Overstreet*, 318 U.S. at 126.

<sup>177</sup> *Id.* at 127.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

The defendant employer claimed that its business did no more than “affect” commerce,<sup>180</sup> but the court rejected this argument, focusing instead on practical considerations.<sup>181</sup> In fact, the court’s emphasis on a practical interpretation was borrowed directly from the interpretation of similar language<sup>182</sup> in the Federal Employer’s Liability Act (“FELA”).<sup>183</sup> In *Pedersen v. Delaware, Lackawanna & Western Railroad*,<sup>184</sup> the Supreme Court had held that the jobs of maintaining and repairing railroad tracks were so indispensable to interstate commerce that they were “in practice and in legal contemplation a part of it.”<sup>185</sup> Allowing *Pedersen*’s practical interpretation of the analogous statute to govern,<sup>186</sup> the court in *Overstreet* found that vehicular roads and bridges are likewise indispensable to commerce.<sup>187</sup> Thus, the court declared that the plaintiffs were “engaged in commerce,” and so reversed the lower court’s dismissal of their complaint.<sup>188</sup>

Stare decisis is one of the oldest and most sacred doctrines in American jurisprudence, but it tends to perpetuate and exacerbate initial mistakes. In light of the propensity of courts to borrow prior interpretive approaches and conclusions, the danger of a “ripple effect” is clear.

#### IV. THE SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT

The Justices of the Supreme Court exercise wide discretion in granting or denying writs of certiorari.<sup>189</sup> Nevertheless, certain categorical factors have consistently provided persuasive reasons for the Supreme Court to

---

<sup>180</sup> *Id.* at 128.

<sup>181</sup> *Id.*

<sup>182</sup> *Overstreet*, 318 U.S. at 128-29.

<sup>183</sup> Federal Employers’ Liability Act, ch. 149, § 1, 35 Stat. 65 (1908) (“[E]very common carrier by railroad while *engaging in commerce* between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . .” (emphasis added)) (current version at 45 U.S.C. § 51 (2006)).

<sup>184</sup> 229 U.S. 146 (1913).

<sup>185</sup> *Id.* at 151.

<sup>186</sup> *Overstreet*, 318 U.S. at 131-32 (“The Federal Employers’ Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged ‘in commerce’ laid down in the *Pedersen* and related cases . . . should not be applied to the similar language in the Fair Labor Standards Act . . .”).

<sup>187</sup> *Id.* at 130.

<sup>188</sup> *Id.* at 130-33.

<sup>189</sup> 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4004.1 (2d ed. 1996) (“Review on a writ of certiorari is not a matter of right, but of judicial discretion.”).

intervene.<sup>190</sup> One of the most persuasive of these reasons is to settle a conflict between the circuit courts concerning an issue of federal law.<sup>191</sup>

In *McMonagle v. Northeast Women's Center, Inc.*,<sup>192</sup> Justice White argued that the Supreme Court should have granted certiorari to resolve the circuit court conflict.<sup>193</sup> The issue in the lower court concerned interpretation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>194</sup> Specifically, the Third Circuit had upheld the imposition of liability under RICO despite the defendants' lack of economic motivation.<sup>195</sup> This holding directly conflicted with decisions in the Second and Eighth Circuits, which had refused to allow a conviction in the absence of any profit-making element.<sup>196</sup> Though the Supreme Court ultimately denied certiorari in that case without explanation,<sup>197</sup> the argument for granting certiorari to resolve the conflicting interpretations of 18 U.S.C. § 2113(a) is even more compelling.<sup>198</sup>

In *Evans v. United States*,<sup>199</sup> the Supreme Court granted certiorari to settle the circuit courts' contrasting interpretations of the Hobbs Act.<sup>200</sup> The Hobbs Act is a federal statute,<sup>201</sup> and the controversial issue was whether the public official who knowingly received the bribe also had to induce it.<sup>202</sup> At the circuit court level, the Eleventh Circuit had followed the majority in

---

<sup>190</sup> *Id.*

<sup>191</sup> *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law."); *see also* 2A FEDERAL PROCEDURE § 3:402 (2003) ("[T]he fact that lower courts had reached conflicting results on an issue was a substantial reason for granting certiorari . . . . Thus, it was a ground for granting certiorari that a federal court of appeals had rendered a decision in conflict with the decision of another federal court of appeals on the same matter.").

<sup>192</sup> 493 U.S. 901 (1989) (mem.).

<sup>193</sup> *Id.* at 901 (White, J., dissenting from denial of certiorari).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See infra* Part IV.

<sup>199</sup> 504 U.S. 255 (1992).

<sup>200</sup> *Id.* at 256.

<sup>201</sup> 18 U.S.C. § 1951(a), (b)(2) (2006) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. . . . The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.").

<sup>202</sup> *Evans*, 504 U.S. at 256 ("We granted certiorari . . . to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act." (citation omitted)).

holding that no act of inducement by the public official was necessary,<sup>203</sup> but this conclusion conflicted with that reached by the Second and Ninth Circuits.<sup>204</sup> The Supreme Court ultimately endorsed the Eleventh Circuit and majority view.<sup>205</sup>

Because 18 U.S.C. § 2113(a) is a federal statute and the circuits have taken two clearly conflicting positions on a well-defined issue, the Supreme Court should step in and harmonize the circuits. Though *Bellew* initially created the split, a writ of certiorari to review the interpretative issue might not have been appropriate at that particular time and under those particular facts.<sup>206</sup> First of all, the Supreme Court typically prefers to wait until several lower courts have had an opportunity to try the issue.<sup>207</sup> For example, in *McCray v. New York*,<sup>208</sup> the Supreme Court recognized the dire importance of determining whether to allow race-based peremptory challenges,<sup>209</sup> but nonetheless chose to wait for the lower courts to first address the issue.<sup>210</sup> Because the Fifth Circuit was only the fourth circuit court to interpret the first paragraph of 18 U.S.C. § 2113(a)<sup>211</sup>—and the first to require actual force and violence or intimidation—the Supreme Court would have been prudent to abstain until more of the circuit courts had provided opinions.

---

<sup>203</sup> *United States v. Evans*, 910 F.2d 790, 796-97 (11th Cir. 1990), *aff'd*, 504 U.S. 255 (1992) (“[T]he requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. ‘The coercive nature of the official office provides all the inducement necessary.’” (quoting *United States v. O’Malley*, 707 F.2d 1240, 1248 (11th Cir. 1983)) (footnote omitted)).

<sup>204</sup> *Id.* at 796 n.3; *see also Evans*, 504 U.S. at 259 (“Two Circuits . . . have held that an affirmative act of inducement by the public official is required to support a conviction of extortion under color of official right.”).

<sup>205</sup> *Evans*, 504 U.S. at 271.

<sup>206</sup> It should be noted that no petition for certiorari was filed in *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004). The foregoing discussion of *Bellew* is meant to illustrate some of the Supreme Court’s typical reservations when petitioned for certiorari.

<sup>207</sup> 16B WRIGHT, COOPER & MILLER, *supra* note 189, § 4004.1.

<sup>208</sup> 461 U.S. 961 (1983).

<sup>209</sup> *Id.* at 961-62.

<sup>210</sup> *Id.* at 962-63 (“I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.”); *see also Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (mem.) (Marshall, J., dissenting from denial of certiorari) (“[T]his Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem.”).

<sup>211</sup> The Fifth Circuit decided *Bellew* after *United States v. Jackson*, 560 F.2d 112 (2d Cir 1977), *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984), and *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990), but prior to *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005), and *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008).

Relatedly, the Supreme Court might also have wished to abstain in hopes that the issue would disappear.<sup>212</sup> This convenient resolution once appeared realistic when the Sixth Circuit refused to join the Fifth Circuit's minority approach, instead tipping the scale even more overwhelmingly in favor of the majority view. Finally, the Supreme Court sometimes denies certiorari if there is a risk that the parties will not adequately advocate the issue.<sup>213</sup> Given that the defendant in *Bellew* undoubtedly entered the bank, and as a result could probably be convicted under the second paragraph of 18 U.S.C. § 2113(a) if not the first, there would be relatively little incentive for the defendant's counsel to zealously argue the issue.<sup>214</sup>

All of the aforementioned factors weighing against granting certiorari in *Bellew* vanish with regard to the Seventh Circuit's recent decision in *Thornton*. By 2008, six of the circuit courts had squarely tackled the issue, with at least two circuits settling on each side of the divide. This fact distinguishes *McMonagle*, in which there was a mere two-to-one alignment. Second, if there was ever any real chance of *Bellew*'s minority view disappearing on its own, *Thornton*'s reinforcement probably precludes any such wishful thinking. Furthermore, Congress does not seem inclined to clarify the first paragraph of 18 U.S.C. § 2113(a) by amendment.<sup>215</sup> For instance, in recently proposed legislation, Congress addressed 18 U.S.C. § 2113 generally, but only plans to amend an unrelated subsection.<sup>216</sup> Perhaps most importantly, the defendant in *Thornton* has a legitimate chance to be acquitted of the crime altogether if he prevails on the first paragraph interpretative issue.<sup>217</sup> Thus, unlike in *Bellew*, the defense counsel in *Thornton* would be sufficiently motivated to vigorously advocate the issue before the Supreme Court.

## CONCLUSION

The circuit court majority neglected to examine the actual text of the first paragraph of 18 U.S.C. § 2113(a). In doing so, the majority rebuffed the most elementary rule of statutory interpretation—the “plain meaning” rule. The minority view is correct that the wording of the statute plainly

---

<sup>212</sup> 16B WRIGHT, COOPER & MILLER, *supra* note 189, § 4004.1.

<sup>213</sup> *Id.*

<sup>214</sup> Aside from the fact that *Bellew* was decided before *Thornton*'s district court remand, it is not clear that a district court within the Fifth Circuit would also have barred a subsequent prosecution under the second paragraph. *See supra* note 131.

<sup>215</sup> *See Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (“With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute . . .”).

<sup>216</sup> H.R. 6875, 110th Cong. (2008); S. 447, 110th Cong. (2007).

<sup>217</sup> *See supra* note 84 and accompanying text.

2009] APPLYING THE “PLAIN MEANING” RULE TO 18 U.S.C. § 2113(A) 253

does not extend the word “attempts” to the “force and violence or intimidation” element, but the majority nevertheless applies the Model Penal Code’s “substantial step” test as if it does, and generates an unexplained anomaly in the process.

As the Fifth Circuit pointed out, the existence of the second paragraph of 18 U.S.C. § 2113(a) tends to reduce the gravity of the first paragraph’s interpretation by catching some of those defendants fortunate enough to be acquitted under the minority view. For many other defendants, however, the minority view means avoiding conviction altogether, and perhaps even returning to one’s family as in the case of the hypothetical father from the Introduction. Still, even when the second paragraph offers the government a viable charge, an examination of the differences between the two paragraphs in terms of proof, availability of defenses, and the possibility of additional charges reveals the inappropriateness of allowing the government to substitute the first paragraph for the second. Finally, the majority view threatens to misguide other courts in search of statutory interpretative assistance. For all of these reasons, it is time for the Supreme Court to grant certiorari in the next suitable case in order to unite the circuits courts under *Bellew* and *Thornton*’s minority view.