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Take the Money and Split: The Current Circuit Split and Why Actual Force and Violence or Intimidation Should Not Be Required Under Section 2113(a) of the Bank Robbery Act

Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2007, Johns Hopkins University. Thank you to the members of the Catholic University Law Review for their time, energy, and hard work given to this Comment. I would like to thank Kerry and Nick for their love, patience, and encouragement. A special thank you to my parents who inspire me with their tireless support and love, for which I am eternally grateful.

TAKE THE MONEY AND SPLIT: THE CURRENT CIRCUIT SPLIT AND WHY ACTUAL FORCE AND VIOLENCE OR INTIMIDATION SHOULD NOT BE REQUIRED UNDER SECTION 2113(A) OF THE BANK ROBBERY ACT

Kaitlin N. Flynn⁺

“Why do you rob banks?”¹ Thief answers: “Because that’s where the money is.”² As one of the FBI’s “most wanted”³ and commonly known as “Public Enemy Number One,”⁴ John Dillinger once stated, “I guess my only bad habit is robbing banks. I smoke very little and don’t drink much.”⁵ Between the fall of 1933 and the summer of 1934, stories of the numerous and violent bank robberies John Dillinger and his gang committed filled headlines.⁶ The outbreak of the Depression Era bank robberies prompted Congress to pass the Bank Robbery Act of 1934,⁷ which specifically focused on “gangsters who operate habitually from one State to another in robbing banks.”⁸

The Bank Robbery Act of 1934 punished “certain offenses committed against banks.”⁹ As originally enacted, however, the statute led to “some incongruous results” because its scope was limited to robbery and did not include larceny or burglary.¹⁰ Today, other inconsistencies exist, causing U.S. courts of appeals to disagree on whether the Bank Robbery Act requires

⁺ J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2007, Johns Hopkins University. Thank you to the members of the *Catholic University Law Review* for their time, energy, and hard work given to this Comment. I would like to thank Kerry and Nick for their love, patience, and encouragement. A special thank you to my parents who inspire me with their tireless support and love, for which I am eternally grateful.

1. ELLIOT J. GORN, *DILLINGER’S WILD RIDE: THE YEAR THAT MADE AMERICA’S PUBLIC ENEMY NUMBER ONE* 129 (2009).

2. *Id.*

3. *Famous Cases and Criminals*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/john-dillinger> (last visited Nov. 3, 2012).

4. G. RUSSELL GIRARDIN & WILLIAM J. HELMER, *DILLINGER: THE UNTOLD STORY* 52 (1994); GORN, *supra* note 1, at 123.

5. GORN, *supra* note 1, at 63; *see* GIRARDIN, *supra* note 4, at 109.

6. *See Famous Cases and Criminals*, *supra* note 3.

7. Bank Robbery Act of 1934, ch. 304, § 2, 48 Stat. 783 (codified as amended at 18 U.S.C. § 2113); *Carter v. United States*, 530 U.S. 255, 280 (2000) (Ginsburg, J., dissenting) (noting that the original 1934 Bank Robbery Act was created because of “bank robberies committed by John Dillinger and others” (citing *Jerome v. United States*, 318 U.S. 101, 102 (1943))).

8. S. REP. NO. 73-537, at 1 (1934) (quoting memorandum from the Department of Justice).

9. Bank Robbery Act of 1934, ch. 304, § 2.

10. H.R. REP. NO. 75-732, at 1–2 (1937).

“actual” or “attempted” force and violence or intimidation to prosecute an individual for attempted bank robbery.¹¹

The first paragraph of the Bank Robbery Act, codified at 18 U.S.C. § 2113(a), imposes liability upon,

[w]hoever, 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.¹²

The U.S. circuit courts disagree as to whether the word “attempts” applies to “force and violence or . . . intimidation” or whether “attempts” only applies to the taking of “property or money . . . belong[ing] to, or in the care of, . . . any bank.” The U.S. Courts of Appeals for the Fifth and Seventh Circuits agree with the latter, holding that a conviction under § 2113(a) requires actual force and violence or intimidation; attempted force is not enough to sustain a conviction for attempted bank robbery under the statute.¹³ The U.S. Courts of Appeals for the Second, Fourth, Sixth, and Ninth Circuits disagree, holding that attempted force and violence or intimidation meets § 2113(a)’s statutory requirements.¹⁴

This Comment examines the split among the circuits regarding the application of 18 U.S.C. § 2113(a). Part I of this Comment examines the evolution of the crime of bank robbery. Part II discusses the current split among the circuits on the issue of whether attempted force and violence, or intimidation satisfies § 2113(a) for a conviction of attempted bank robbery and addresses the reasons for the conflicting statutory interpretations. Part III explains why § 2113(a) should be interpreted to require attempted force and violence or intimidation. This analysis includes an examination of the plain language of the statute, Congress’s intent when enacting the statute, and the theory of deterrence. These principles demonstrate the need for the statute to be construed so as to sustain convictions when attempted, not actual, force and violence or intimidation is used.

11. See *infra* notes 13–14 and accompanying text; see also *infra* Part I.D.

12. 18 U.S.C. § 2113(a) (2006).

13. *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (holding that “actual 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”); *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004) (coming to the same conclusion).

14. See *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984); *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977); *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

I. THE EVOLUTION OF THE BANK ROBBERY ACT

A. *The History and Adoption of Larceny in American Criminal Law*

In England, the prohibition against larceny, or the wrongful taking of another's property, was developed out of a need to maintain social order, to punish those who committed the offense, and to acknowledge the right of the owner to use the item.¹⁵ Larceny consists of the following elements: (1) taking or carrying away of property, (2) from another's possession, and (3) with the intent to permanently deprive the owner of the property.¹⁶ Larceny was first enforced in England in the thirteenth century, but at that time, a person could only be convicted for taking property from another's *actual* possession.¹⁷ Larceny prohibited such takings because "violence was more likely when property was taken from the owner's actual possession."¹⁸ The law continued to expand, however, in recognition that the prohibition should not only reflect a desire to prevent social harms, but should also hold paramount the protection of personal property from permanent deprivation of ownership.¹⁹ As a result, the law began to recognize additional types of larceny offenses, including offenses when taking of property merely owned by another occurred or when taking of property occurred by trickery.²⁰ Many American jurisdictions have taken these various types of theft offenses and combined them into one crime.²¹

Robbery, a common law larceny-type offense, includes the required elements of larceny in addition to assault on a person.²² Force or threat of

15. See Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1448 (1984); see also George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 474 (1976) (stating that the crime of larceny was viewed as a socially undesirable event because it disrupted social norms).

16. *Mitchell v. United States*, 394 F.2d 767, 770 (D.C. Cir. 1968).

17. *Bell v. United States*, 462 U.S. 356, 358 (1983) (noting that the primary purpose of early larceny laws was not to stop wrongful takings, but to prevent violence and breaches of the peace).

18. *Id.*

19. *Id.* at 359 (explaining that the history of larceny at common law was expanded to include cases in which the owner merely possessed, as opposed to owned, the item).

20. *Id.*; see also Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 967 (1953) (stating that the three types of "gentle theft" in American law are larceny, embezzlement, and false pretenses).

21. CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 633 (2005); see also Model Penal Code § 223.1 (1980) (consolidating "conduct denominated theft" like "unlawful taking, deception, extortion, theft of property lost, receiving stolen property, theft of services and unauthorized use of automobiles" into a single offense).

22. *United States v. W.T.T.*, 800 F.2d 780, 782–83 (8th Cir. 1986) (Oliver, J., concurring in part and dissenting in part) (citing *Norris v. United States*, 152 F.2d 808, 809 (5th Cir. 1946)) (defining robbery in the federal statute as the elements of larceny plus violence or "putting in fear . . . at the time of the act or immediately preceding it" (emphasis omitted)).

force elevates a larceny to a robbery.²³ The Bank Robbery Act, codified at 18 U.S.C. § 2113, is the federal statute that applies to robberies and larcenies of banks.²⁴

B. *The Enactment of the Federal Bank Robbery Act*

Congress passed the original Bank Robbery Act in 1934²⁵ with the purpose of putting an end to the violence and harm caused by the outbreak of bank robberies during the Depression Era.²⁶ The original Act only prosecuted robbery, homicide during the commission of a robbery, and aggravated assault that accompanied a robbery. In an attempt to prosecute crimes of a lesser degree, Congress amended the statute in 1937 and again in 1948.²⁷ The 1948 amendments created two paragraphs within § 2113(a): the first paragraph restates the original Act, and the second paragraph incorporates the crime of larceny by prohibiting unlawful entry.²⁸ The statute penalizes an individual for unlawfully taking, or attempting to take, property from the bank by force and violence or intimidation.²⁹

23. *Carter v. United States*, 530 U.S. 255, 275 (2000) (Ginsberg, J., dissenting) (noting the added requirements of robbery—that it was an “aggravated form of larceny” whereas “larceny was a lesser included offense of robbery”); Danielle R. Newton, Comment, *What’s Right with a Claim-of-Right*, 33 U.S.F. L. REV. 673, 676 (1999) (stating that the only difference between robbery and larceny is the use of force in the former).

24. 18 U.S.C. § 2113 (2006). Although some jurisdictions apply common law, all federal crimes are statutorily based. See *Jerome v. United States*, 318 U.S. 101, 104–05 (1943) (explaining that there are no common law criminal offenses against the United States); see also Patricia E. Lee, *Bank Robber Act: Fraud or Larceny*, 50 GEO. WASH. L. REV. 656, 656 (1982).

25. Bank Robbery Act of 1934, ch. 304, § 2, 48 Stat 783 (codified as amended at 18 U.S.C. § 2113).

26. 78 CONG. REC. 8148 (1934) (statement of Sen. David Glover) (“The robbing of banks and killing of people for the purpose of taking away money deposited by citizens and those engaged in banking is a crime that should be severely punished, and this bill provides a punishment that will deter anyone from attempting bank robbery of this kind.”).

27. Act of June 25, 1948, ch. 645, 62 Stat. 796 (1948) (codified as amended at 18 U.S.C. § 2113).

28. 18 U.S.C. § 2113(a) (2006). The statute provides,

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.

Id.

29. *Id.*

C. The Attempt Doctrine

Under § 2113(a), an individual can be prosecuted not only for actual bank robbery, but attempted bank robbery.³⁰ At common law, an attempted crime requires (1) the specific intent to commit the crime, and (2) an “overt act” or “substantial step” towards the commission of the crime.³¹ This definition does not allow “mere preparation” to satisfy the requirements of attempt crimes.³² Moreover, this definition of attempt leads to the common law standard that attempt crimes require specific intent.³³ This common law notion has carried over into statutory law and into judicial interpretation of federal criminal statutes.³⁴

The heightened requirement of a culpable mental state in attempt crimes exists to ensure that a person involved in purely innocent conduct cannot be convicted of attempting to commit a crime.³⁵ While protecting innocent conduct is valuable, it is also important to prevent a “substantial step” or “overt act” towards the commission of a crime from occurring.³⁶

30. *Id.*

31. *United States v. Sarbia*, 367 F.3d 1079, 1085 (9th Cir. 2004); *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987) (listing the two elements of attempt as “(1) intent to engage in the criminal conduct and (2) an overt act which is a substantial step towards commission of the crime”).

32. *Sarbia*, 367 F.3d at 1087 (quoting *State v. Lung*, 28 P. 235, 236–37 (Nev. 1891)) (explaining that a conviction for attempt cannot be sustained if the activity is mere preparation; rather, there must be “direct movement” toward the commission of a crime after the preparations are made).

33. *See United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990) (stating that specific intent is a necessary element in attempt crimes); *see also United States v. Bailey*, 444 U.S. 394, 405 (1980) (stating that crimes, such as an attempt crime, require a “higher level” of culpability in order to distinguish innocent behavior from wrongful behavior); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 748–49 (1983).

34. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (holding that Congress’s use of the word “attempt” requires that a defendant have the “specific intent to commit the attempted crime, even when the statute [does] not contain an explicit intent requirement”); *United States v. Darby*, 857 F.2d 623, 626 (9th Cir. 1988) (noting that attempted bank robbery requires specific intent and to prove attempted bank robbery, prosecutors must “prove that the defendant intended to take the property by force, violence or intimidation”). *But see United States v. Johnston*, 543 F.2d 55, 57–58 (8th Cir. 1976) (holding that specific intent is not an element of attempted bank robbery under the first paragraph of § 2113(a)).

35. *Gracidas-Ulibarry*, 231 F.3d at 1193 (explaining that the purpose of a more stringent mental state requirement in attempt crimes is to ensure that the conduct being punished is “truly culpable”); *see also Omri Ben-Shahar & Alon Harel, The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 318 (1996) (discussing how the criminal justice system punishes completed crimes more harshly than attempted crimes, and that certain preparation to commit a crime is not to be punished).

36. *United States v. Stallworth*, 543 F.2d 1038, 1040 (1976) (providing that “[a]ttempt 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”); *see also Robert E.*

The Model Penal Code's policy underlying attempt crimes focuses on the "desire to punish those with clear criminal intent, to deter future crimes, and to protect witnesses."³⁷ Conversely, federal attempt crimes are largely non-existent, and Congress has only explicitly allowed for their prosecution in certain federal statutes.³⁸ Therefore, despite the wide use of attempt crimes in state law, many federal criminal statutes fail to provide sanctions for attempting to commit a crime.³⁹ The Bank Robbery Act is one such exception.

D. The Discordant Analyses of Attempted Bank Robbery Under the Bank Robbery Act

The U.S. Courts of Appeals disagree on whether *actual* force and violence or intimidation *is necessary* or whether *attempted* force and violence or intimidation suffices to sustain a conviction for attempted bank robbery under the first paragraph of § 2113(a). The minority view, held by only the Fifth and Seventh Circuits, requires actual force and violence or intimidation to sustain a conviction.⁴⁰ In contrast, the majority of circuits hold that a defendant's attempt to use force and violence or intimidation is enough to sustain a conviction for attempted bank robbery.⁴¹

1. The Minority View: Requiring Actual Force and Violence or Intimidation

There are two main cases that demonstrate the essence of the minority view: *United States v. Bellew* and *United States v. Thornton*.⁴²

Wagner, *A Few Good Laws: Why Federal Criminal Law Needs a General Attempt Provision and How Military Law Can Provide One*, 78 U. CIN. L. REV. 1043, 1051–52 (2010); Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571, 575 (1961) (explaining that attempt, as defined under the Model Penal Code, requires that "[t]he actor . . . have for his purpose to engage in the criminal conduct or accomplish the criminal result that is an element of the substantive crime").

37. Jennifer M. Lota, Comment, *Analyzing 18 U.S.C. § 2113(a) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment*, 7 SETON HALL CIRCUIT REV. 445, 466 (2011) (citing Model Penal Code § 5.01 (Tent. Draft No. 10 1960)).

38. Wagner, *supra* note 36, 1052–53 (2010) (explaining that the inconsistencies in federal law regarding the definition of attempt have led to confusion, and in some cases, to the inability to convict certain wrongful actions).

39. *Id.*

40. See *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008); *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004).

41. See *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984); *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977); *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

42. *Thornton*, 539 F.3d at 746; *Bellew*, 369 F.3d at 454 (explaining that the attempt language in § 2113(a) only relates to the taking).

In *United States v. Bellew*, the U.S. Court of Appeals for the Fifth Circuit explicitly re-affirmed its position that the first paragraph of § 2113(a) requires actual force and violence or intimidation.⁴³ In *Bellew*, the defendant went into a bank wearing a wig and carrying a briefcase containing a weapon and a demand note.⁴⁴ When the defendant requested to meet with the manager of the bank, the bank staff asked him to wait.⁴⁵ While waiting, the defendant started acting strangely: he left the bank, returned, and again asked for the manager.⁴⁶ This suspicious behavior caused the bank staff to report the defendant to the police.⁴⁷ The court firmly held that the defendant could not be convicted of attempted bank robbery under the first paragraph of § 2113(a) because the defendant did not use actual force and violence or intimidation, even if he had attempted to use such force.⁴⁸ In so doing, the court explicitly rejected the approach taken by other circuits, stating, “[w]e, therefore, reject the opposing interpretation given this text by our sister circuits.”⁴⁹ Instead, the Fifth Circuit relied on many previous decisions from within the circuit to support its decision⁵⁰ that actual force and violence or intimidation is necessary to sustain a conviction under § 2113(a).⁵¹ In reaching its holding, the court specifically noted that the “‘actual act of intimidation’ reading [is] . . . the most natural reading of the text.”⁵²

Similarly, in *United States v. Thornton*, the U.S. Court of Appeals for the Seventh Circuit found that actual force and violence or intimidation was

43. *Bellew*, 369 F.3d at 453–54 (finding that the most accurate reading of 18 U.S.C. § 2113(a) requires an “actual act of intimidation”); *see also infra* note 50.

44. *Bellew*, 369 F.3d at 451.

45. *Id.*

46. *Id.*

47. *Id.* at 451–52 (explaining that upon noticing the police, the defendant ran to his car and put a gun to his own head, but was taken into custody after a three-hour stand-off).

48. *Id.* at 455. The court remanded the case for acquittal because the strange behavior and apparent disguise was not enough, in the court’s view, to be intimidating. *Id.*

49. *Id.* at 454 (disagreeing with other circuits that hold that attempted force and violence or intimidation satisfies § 2113(a) by interpreting the first paragraph of § 2113(a) to require only actual force and violence or intimidation).

50. *Id.* (citing *United States v. Burton*, 126 F.3d 666, 670 (5th Cir. 1997); *United States v. Baker*, 17 F.3d 94, 96 (5th Cir. 1994); *United States v. McCarty*, 36 F.3d 1349, 1357 (5th Cir. 1994); *United States v. Van*, 814 F.2d 1004, 1005–06 (5th Cir. 1987)).

51. *Id.*; *see Burton*, 126 F.3d at 670 (enumerating “[use of] force and violence or intimidation” as one of the requirements for a conviction under § 2113(a)); *Baker*, 17 F.3d at 95–97 (finding that the intimidation element of § 2113(a) was met when the defendant, a small, unarmed 11-year-old, gave the teller a note that threatened “to make [the bank] . . . red with blood”); *McCarty*, 36 F.3d at 1357 (5th Cir. 1994) (finding that a reasonable jury could have concluded that actual intimidation existed when the defendant walked into a bank wearing abnormal clothing and presented a note explaining it was a bank robbery).

52. *Bellew*, 369 F.3d at 454 (focusing on a literal reading of the first paragraph of § 2113(a)).

required to convict an individual of attempted bank robbery.⁵³ In *Thornton*, the defendant made extensive preparations for a bank robbery, including drawing sketches of the bank's layout, and obtaining a gun as well as an old license plate, and a disguise.⁵⁴ On the day of the robbery, the defendant reached the door of the bank, wearing dark clothes with a bandana covering the lower portion of his face.⁵⁵ However, a patron noticed him, causing the defendant to panic and leave the scene without opening the door of the bank.⁵⁶ On appeal, the Seventh Circuit addressed whether the district court erred in instructing the jury that actual force and violence or intimidation was not required to violate the statute.⁵⁷ The court, examining only the statutory language of § 2113(a),⁵⁸ held that attempt under § 2113(a) "relates only to the taking and not to the intimidation."⁵⁹ Thus, the Seventh Circuit held that actual force and violence or intimidation is required in order to sustain a conviction under § 2113(a).⁶⁰ Because the defendant's actions were insufficient to show *actual* intimidation in violation of § 2113(a), the court reversed the conviction.⁶¹

In reaching their holdings, both the Fifth and Seventh Circuits cited to *United States v. Baker*, a "widely-cited"⁶² 1955 case from the U.S. District

53. *United States v. Thornton*, 539 F.3d 741, 746–47 (7th Cir. 2008) (noting the split in circuits regarding whether actual intimidation is required and following the Fifth Circuit's holding in *Bellew*).

54. *Id.* at 743 (describing the defendant's disguises, which included a bald cap, makeup to change the defendant's complexion, a full beard, and a pillow to make him appear heavier).

55. *Id.* When the patron first saw the defendant, they made eye contact, which scared the defendant. *Id.* The patron then walked up to the defendant and asked him what he was doing. *Id.* The defendant immediately panicked, cursed the patron, and ran from the bank. *Id.*

56. *Id.* (describing the defendant's panic as he began to curse at the patron, the patron's fear in response, and the patron's subsequent denial that he saw anything suspicious).

57. *Id.* at 745 (noting that the district court's jury instruction stated, among other things, "[t]o sustain the charge of attempted bank robbery . . . the government must prove . . . that the defendant attempted to take from the person or presence of another money belonging to and in the care, custody, control, management, or possession of Bank One . . . [and that] *the defendant acted to attempt to take such money by force and violence or by intimidation*" (emphasis added)).

58. *Id.* at 747 (finding that the court must adhere to the statute's plain language because it is clear and unambiguous).

59. *Id.* (noting that this conclusion is derived from a "straightforward reading of § 2113(a)").

60. *Id.* The court explicitly disagreed with the Second, Fourth, Sixth, and Ninth Circuits, which have held that attempted force and violence or intimidation is enough. *Id.* (citing *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984); *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977)).

61. *Id.* at 749–51 (holding that although the patron may have been scared of the defendant, there was not enough evidence to prove actual intimidation—the defendant never entered the bank and never demanded the money; therefore, there was no actual intimidation).

62. *United States v. Bellew*, 369 F.3d 540, 455 (5th Cir. 2004) (citing *United States v. Baker*, 129 F. Supp. 684 (S.D. Cal. 1955), *abrogated by Moore*, 921 F.2d 207).

Court for the Southern District of California.⁶³ In *Baker*, the defendant robbed the bank by writing a note to the teller of the bank, which said, “Please check all, into this sack. Thank you, ECB.”⁶⁴ The court stated, without any citation, that “[i]t is apparent that in the statute . . . the word ‘attempt’ related to the *taking* and not to the intimidation.”⁶⁵ Following this analysis, the court found the defendant guilty because there was actual intimidation in the attempted taking.⁶⁶

Recently, two federal district courts in Rhode Island and Pennsylvania have also held that actual force and violence or intimidation is required to satisfy the first paragraph of § 2113(a).⁶⁷ The Courts of Appeals for the First and Third Circuits, which have jurisdiction over the Rhode Island and Pennsylvania district courts respectively, have never explicitly addressed whether actual or attempted force and violence or intimidation meets the statutory requirements in § 2113(a).⁶⁸ Both district courts acquitted the defendant of attempted bank robbery because they found that the evidence was insufficient to demonstrate the use of actual force and violence or intimidation.⁶⁹

2. *The Majority View: Attempted Force and Violence or Intimidation Satisfies § 2113(a)*

Unlike the Fifth and Seventh Circuits, the U.S. Courts of Appeals for the Second, Fourth, Sixth, and Ninth Circuits have concluded that an attempt to use force and violence or intimidation is sufficient to sustain a conviction under § 2113(a).⁷⁰

63. 129 F. Supp. 684; *see Thornton*, 539 F.3d at 746 (citing *Baker*, 129 F. Supp. at 686).

64. *Baker*, 129 F. Supp. at 687 (describing that when the teller questioned the defendant about the note’s meaning, he responded, “[r]ead it again; do as I say and there won’t be any trouble”).

65. *Id.* at 686 (holding that attempted bank robbery is an “*attempted taking* by intimidation, the means being intimidated”).

66. *Id.* at 687 (observing that the defendant “intended to get the money from the teller by intimidation . . . [and] [t]hat the teller called for help shows an awareness on her part of the defendant’s intention”).

67. *United States v. Corbin*, 709 F. Supp. 2d 156 (D.R.I. 2010); *United States v. Smith*, 2009 U.S. Dist. LEXIS 77588 (E.D. Pa. Aug. 28, 2009).

68. *Corbin*, 709 F. Supp. 2d at 159 (noting that the First Circuit has not directly addressed whether § 2113(a) required actual force and violence or intimidation); *Smith*, 2009 U.S. Dist. LEXIS 77588, at *4 (“The Third Circuit has yet to have occasion to comment on this issue . . .”).

69. *Corbin*, 709 F. Supp. 2d at 160 (ruling that § 2113(a) requires actual force and violence or intimidation and concluding that the government failed to prove beyond a reasonable doubt that force and violence or intimidation existed); *Smith*, 2009 U.S. Dist. LEXIS 77588, at *26 (finding that no reasonable juror could find that the defendant’s actions of sitting in a parked car in front of a bank with masks and BB guns could meet the requirement of actual force and violence or intimidation).

70. *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, 152 (4th Cir. 1984);

The U.S. Court of Appeals for the Second Circuit was the first federal circuit court to hold that attempted force and violence or intimidation met the requirements of 18 U.S.C. § 2113(a).⁷¹ In *United States v. Stallworth*, the Second Circuit was not persuaded by the defendants' defense that they could not be convicted of attempted bank robbery because they did not enter the bank or carry any weapons.⁷² The defendants were apprehended before entering the bank because one of the co-conspirators allowed law enforcement to install a recording device in the car in exchange for immunity on prosecutions for four other bank robberies.⁷³ The court analyzed the attempted bank robbery in a two-step analysis.⁷⁴ First, the court determined whether the defendants had the specific intent to commit bank robbery.⁷⁵ Second, the court considered whether the defendants had taken substantial steps toward the commission of the crime.⁷⁶ Under this two-step analysis, the court upheld the conviction of attempted bank robbery.⁷⁷

The following year, in *United States v. Jackson*, the Second Circuit reaffirmed its holding in *Stallworth* and found that the defendants satisfied the first paragraph of § 2113(a) by attempting force and violence or intimidation during the commission of an attempted bank robbery.⁷⁸ In *Jackson*, the defendants planned to rob a bank early on Monday morning to steal the weekend deposits.⁷⁹ The original plan failed because the group arrived too late to enter with the manager; however, the defendants were persistent and obtained a fourth accomplice and re-planned the bank robbery for the following week.⁸⁰ During the course of the week, one member of the group was arrested on a separate bank robbery charge and began to cooperate with

United States v. Jackson, 560 F.2d 112, 116–17 (2d Cir. 1977); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976).

71. *Stallworth*, 543 F.2d at 1040–41.

72. *Id.* at 1040 (denouncing the defendants' argument that they had not acted in a way that violated 18 U.S.C. § 2113(a) because they had never entered the bank or brandished any weapons).

73. *Id.* at 1039 (noting that the arrested individual agreed to cooperate with the FBI in order to avoid prosecution for four armed bank robberies that occurred between June and September 1975).

74. *Id.* at 1040 (analyzing the elements of attempted bank robbery based on the "classic elements of an attempt").

75. *Id.*

76. *Id.* at 1041 (highlighting the defendants' "substantial steps that strongly corroborate[] their criminal intent," including inspecting the bank, obtaining ski masks, roofing nails, and weapons, and stuffing gasoline-soaked newspaper into the car to burn it after the robbery).

77. *Id.* (explaining that the only things standing between the defendants and the bank robbery were the law enforcement officers who stopped the crime and holding that any reasonable jury could find that the preparation was complete).

78. 560 F.2d 112, 120 (2d Cir. 1977) (noting that the district court "anticipated the precise analysis which this Court adopted in the strikingly similar *Stallworth* case").

79. *Id.* at 114.

80. *Id.*

law enforcement.⁸¹ The group, without the recently arrested co-conspirator, proceeded to the bank and tried to execute their plan.⁸² When they realized that they were being watched by law enforcement, the defendants decided not to approach the bank.⁸³ The court, nevertheless, found them guilty under the first paragraph of § 2113(a) because there was evidence that they had the requisite intent to commit the bank robbery, and they took the required substantial step to fall within the scope of § 2113(a).⁸⁴

Similarly, in *United States v. Wesley*, the Sixth Circuit held that “[a]ctual intimidation is not required to prove attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a).”⁸⁵ In *Wesley*, the defendant worked with an accomplice who was responsible for the getaway car, but unbeknownst to the defendant, his accomplice was working with the police.⁸⁶ The accomplice allowed the police to install listening devices in the car to record the conversations between the accomplice and the defendant.⁸⁷ The conversations included information about wearing nylons over their faces, carrying guns, and the role of the accomplice as the getaway driver.⁸⁸ As part of their scheme, the defendant and the accomplice drove around the bank to plan the exact method of attack, but did not commit the robbery that day.⁸⁹ The police, fearing that the bank robbery was imminent and that the defendant had become suspicious of the accomplice, arrested the defendant at his home.⁹⁰ The defendant argued that his conviction under the first paragraph of § 2113(a) should be reversed because he did not use actual force and violence or intimidation—he never approached or tried to enter the bank.⁹¹ The court disagreed with the

81. *Id.* at 115 (observing that the recently arrested co-conspirator told the federal agents that she suspected that the bank robbery would take place without her because the other conspirators feared that agents would be watching her).

82. *Id.* at 114–15 (discussing how the defendants realized that they were being watched by law enforcement officers while they were driving around the bank and describing their failed attempt to speed away).

83. *Id.*

84. *Id.* at 120–21 (finding that the defendants’ criminal intent was “beyond dispute” and that their substantial steps towards the commission of the crime were evidenced by reconnoitering at the bank and possessing paraphernalia to commit the crime, such as weapons and disguises).

85. 417 F.3d 612, 618–19 (6th Cir. 2005).

86. *Id.* at 615 (describing the cooperation between the accomplice, Deborah Reid, and the police).

87. *Id.* (explaining the need for three people to accompany the robber in the bank: one to watch the bank floor, a second to deal with the tellers, and a third to handle the vault).

88. *Id.* (outlining the defendant’s plan for the bank robbery that never actually occurred).

89. *Id.* at 616 (describing the taped discussion in the car in which the defendant and the accomplice noted that they could see that the vault was open from the street, but that they did not have the other accomplices with them to actually commit the robbery that day).

90. *Id.*

91. *Id.* at 617. In fact, the court held that this argument was waived because it was heard for the first time on appeal. *Id.* However, the court still analyzed the defendant’s argument, “even if the issue had not been waived.” *Id.* at 618.

defendant, noting that “actual intimidation is not required to prove attempted bank robbery.”⁹²

In a factually similar case to *Wesley*, the U.S. Court of Appeals for the Ninth Circuit also held that attempted force and violence or intimidation satisfied § 2113(a).⁹³ In *United States v. Moore*, an informant told law enforcement that the defendant planned to rob a bank.⁹⁴ Law enforcement officers observed the defendant and others, including the informant, walk toward the bank wearing ski masks and carrying gloves, two pillowcases, and a concealed weapon.⁹⁵ On appeal, the defendant argued that there was inadequate evidence to convict him of attempted bank robbery under 18 U.S.C. § 2113(a) because he was arrested before he even entered the bank and, thus, did not exhibit actual force, violence or intimidation.⁹⁶ The Ninth Circuit disagreed, holding that “[c]onviction under section 2113 requires only that the defendant intended to use force, violence or intimidation and made a substantial step toward consummating the robbery.”⁹⁷ The court reaffirmed the conviction, holding that a reasonable juror could have found that the defendant committed a substantial step towards the commission of the bank robbery and had a culpable intent to rob the bank.⁹⁸

In reaching their holding, all of the majority circuits focus on the requirements of an attempt crime.⁹⁹ These courts apply the two-tiered analysis

92. *Id.* at 616, 618 (citing *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976)).

93. *Moore*, 921 F.2d at 209.

94. *Id.* at 208.

95. *Id.*

96. *Id.* at 209 (noting the defendant’s argument that “the government cannot prove a necessary element of the charge”).

97. *Id.* (citing *United States v. Snell*, 627 F.2d 186, 187–88 (9th Cir. 1980); *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977)).

98. *Id.* (explaining that the informant’s information about the planned bank robbery, coupled with the defendant’s walk toward the bank with a loaded weapon, ski mask, and gloves, demonstrated culpable intent and a substantial step). The Fourth Circuit came to the same conclusion in *United States v. McFadden*, stating “[i]t holds that the attempt relates to the taking and not the intimidation.” 739 F.2d 149, 151 (4th Cir. 1984). In *McFadden*, the defendant alleged that his conviction could not stand under 18 U.S.C. § 2113(a) because he did not use force, violence or intimidation, as required under the statute. *Id.* at 150 (describing how the defendants hid disguises and weapons in the shrubbery around the bank, but they were caught before they could use them). The court, using the *Stallworth* two-step analysis, found that there was sufficient evidence to convict both defendants under the Bank Robbery Act because the evidence showed the culpability required for the crime of attempted bank robbery and a substantial step towards the crime. *Id.* at 152 (stating that the defendants planned the robberies, met and surveyed the specific location, brought weapons, and had a getaway driver and vehicle ready to go).

99. See *United States v. Stallworth*, 543 F.2d 1038, 1040–41 (2d Cir. 1976).

first discussed in *Stallworth* to find defendants that fail to enter the bank,¹⁰⁰ or even approach the bank, guilty of attempted bank robbery because of their requisite intent and because they took a substantial step toward the commission of a bank robbery.¹⁰¹

II. ATTEMPTED FORCE AND VIOLENCE OR INTIMIDATION SHOULD SATISFY 18 U.S.C. § 2113(A)

A. *The Overarching Purpose of the Statute or a Strict Reading?*

The circuit split evidences the two different approaches courts have taken when analyzing an attempt under the Bank Robbery Act. The Fifth and Seventh Circuits narrowly read the first paragraph of § 2113(a),¹⁰² while the majority circuits take a much broader approach that focuses on legislative intent.¹⁰³

Specifically, the majority circuits analyze the overarching purpose of attempt crimes when criminalizing attempted use of force and violence or intimidation. For example, in *Jackson*, the Second Circuit rejected the minority approach as “wooden logic,” observing that “[t]hey argue that their activities did not transcend a hypothetical fixed point on a spectrum of conduct culminating in the substantive offense of bank robbery.”¹⁰⁴ Instead, the majority circuits examine attempted bank robberies under the two-tiered *Stallworth* analysis that focuses on the purpose of attempt crimes in general.¹⁰⁵ For example, in reaching its holding in *Stallworth*, the Second Circuit emphasized: “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.”¹⁰⁶ Further, the majority circuits also emphasize that by failing to convict defendants for attempted force and violence or intimidation as part of an attempted bank robbery, inconsistencies in the purpose and rationale for

100. See, e.g., *McFadden*, 739 F.2d at 150 (defendant arrested while walking toward the bank); *Stallworth*, 543 F.2d at 1040 (defendants arrested as they stepped out of their car, which was parked near the bank).

101. See, e.g., *United States v. Wesley*, 417 F.3d 612, 619 (6th Cir. 2005) (defendants arrested days in advance of bank robbery).

102. See *United States v. Thornton*, 539 F.3d 741, 746–47 (7th Cir. 2008); *United States v. Bellew*, 369 F.3d 450, 453–54 (5th Cir. 2004).

103. See, e.g., *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977) (noting that “18 U.S.C. § 2113(a) specifically makes attempted bank robbery an offense” (footnote omitted)).

104. *Stallworth*, 543 F.2d at 1040.

105. See *supra* Part I.D.2; see also *United States v. Corbin*, 709 F. Supp. 2d 156, 160 (D.R.I. 2010) (explaining that the Second Circuit’s analysis of § 2113(a) “did not examine the language of the statute at all, but rather appeared to read ‘force and violence or by intimidation’ right out of it to further the legitimate and laudable goals of crime prevention and protecting the public”).

106. *Corbin*, 707 F. Supp. 2d at 160 (quoting *Stallworth*, 543 F.2d at 1040).

criminalizing bank robberies will result.¹⁰⁷ Additionally, these courts stress that waiting for the actual force and violence or intimidation to occur may put innocent employees and bystanders in a precarious position with the potential for injury or death.¹⁰⁸

On the other hand, the Fifth and Seventh Circuits disagreed with the majority circuits' use of the general purpose of an attempt crime, noting, "we do not find these cases persuasive because they omit an appropriate statutory analysis."¹⁰⁹ Instead, these minority circuits follow a strict constructionist approach that focuses on the placement of the word "attempt" within the statute.¹¹⁰ Both circuits found support for their textual reading of the statute from the Supreme Court case, *Prince v. United States*.¹¹¹ According to these circuits "[t]he attempt language only relates to the taking and not the intimidation."¹¹² When analyzing the statutory text, the Seventh Circuit noted that if Congress had intended for "attempt" to apply to force and violence or intimidation, it would have written the statute to read: "Whoever attempts by force and violence and intimidation to take" ¹¹³ Reaching the same conclusion, the Fifth Circuit parsed out the elements of § 2113(a) under "the most natural reading of the text":

- (1) an individual or individuals (2) *used force and violence or intimidation* (3) to take or attempt to take (4) from the person or

107. *Stallworth*, 543 F.2d at 1041 ("Application of the foregoing [two-step attempt analysis] 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.").

108. See *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984) (noting that waiting for actual force and violence or intimidation "would require that the lives of the bank employees, the police, any innocent bystanders and the defendants themselves be endangered before the arrest could be made"); *Stallworth*, 543 F.2d at 1041 ("[Law enforcement's] timely intervention probably prevented not only a robbery, but possible bloodshed in an area crowded with noontime shoppers."); see also *infra* notes 145–48 and accompanying text (discussing the importance of preventing bank robberies by apprehending defendants before they actually use violence or intimidation).

109. *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008).

110. *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004) (focusing on "the relevant text itself"); *Thornton*, 539 F.3d at 747 (examining the statutory text of § 2113(a) and noting that courts need to "simply read the text").

111. *Prince v. United States*, 352 U.S. 322, 328 (1957).

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 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. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal.

Id.

112. *Thornton*, 539 F.3d at 747.

113. *Id.* The actual language of the first paragraph of § 2113(a) states, "Whoever, by force and violence, or by intimidation, takes, or attempts to take" 18 U.S.C. § 2113(a).

presence of another (5) money, property, or anything of value (6) belonging to or in the care, custody, control, management, or possession (7) of a bank, credit union, or savings and loan association.¹¹⁴

B. Applying the Canons of Statutory Interpretation to § 2113(a)

The disagreement between the minority and majority circuits depends on how broadly or narrowly one reads the statute. The difference, which in reality boils down to one word,¹¹⁵ requires an in-depth analysis of the statute. Statutory analysis begins with the textual reading of the statute.¹¹⁶ If that language is not clear, then Congressional intent is examined.¹¹⁷

1. Construing the Statutory Text of § 2113(a)

Statutory analysis starts with the language of the statute itself.¹¹⁸ The relevant language of 18 U.S.C. § 2113(a) states, “[w]hoever, by force and violence, or by intimidation, takes, or attempts to take”¹¹⁹ When the words in the statute are plain, they are given their ordinary and normal meaning.¹²⁰ Additionally, under the canon of *noscitur a sociis*, the words are understood by the surrounding words.¹²¹ Because the statute distinguishes completed taking from attempted taking,¹²² the statute prohibits attempts, and there is room for interpretation as to whether the attempts apply to both the taking of the money and in the force and violence or intimidation.¹²³ The ambiguity in the first sentence of § 2113(a), as to whether “attempt” modifies the taking of the money, or if it also applies to the force and violence or intimidation, is resolved once Congressional intent is examined.¹²⁴

114. *Bellew*, 369 F.3d at 454 (emphasis added).

115. *Thornton*, 539 F.3d at 747 (7th Cir. 2008) (disagreeing about whether attempt relates to the taking, or to both the taking and the force and violence or intimidation).

116. *Bellew*, 369 F.3d at 453 (citing *Carter v. United States*, 530 U.S. 255, 271 (2000)).

117. 82 C.J.S. *Statutes* § 364 (2009 & Supp. 2012) (explaining that the canons of construction are used to examine legislative intent and to reasonably interpret the statute to meet the legislative purpose for its enactment).

118. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the 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.”).

119. 18 U.S.C. § 2113(a) (2006).

120. *See Caminetti*, 242 U.S. at 485–86.

121. *See* EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM: READING AND CASES 168 (3d ed. 2001) (“[N]oscitur a sociis translates as ‘a thing is knowing by its associates.’”).

122. 18 U.S.C. § 2113(a) (2006) (providing, “takes, or attempts to take . . .”).

123. *See United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984) (finding the argument that attempt only relates to the taking portion of § 2113(a) unconvincing, and instead applying the two-tiered analysis of attempt crimes found in *Stallworth*).

124. *See infra* Part II.B.2 and III.A.–B.

2. Congress's Intent with the Bank Robbery Act

After the language of the statute is considered ambiguous, the next factor to examine in statutory interpretation is congressional intent.¹²⁵ The 1937 amendments to the Bank Robbery Act show that Congress intended to enact a broad statute that would cover attempted force and violence or intimidation.¹²⁶ The Bank Robbery Act was amended in 1937 due to the concern that individuals successfully avoided prosecution, despite having stolen large sums of money, because they did not fall under the narrow language of the statute.¹²⁷ To correct this problem, the 1937 amendment broadened the statutory language to ensure that all wrongful conduct of attempted or completed bank robbery could be punishable.¹²⁸ By narrowly interpreting the statute to require actual force and violence or intimidation in order to convict an individual of attempted bank robbery, the Fifth and Seventh Circuits' holdings are contrary to Congress's intent of ensuring that all criminal activity related to bank robberies would be punished.¹²⁹

The passage of the Bank Robbery Act reflects Congress's attempt to explicitly define universally perceived wrongful conduct and to make it a statutory offense.¹³⁰ In its enactment of the Bank Robbery Act, Congress

125. See *Chickasaw Nation v. United States*, 543 U.S. 84, 93–94 (2001) (asserting that canons of interpretation help judges to determine congressional intent from the statutory language); see also 82 C.J.S. *Statutes* § 364 (2009 & Supp. 2012) (“The purpose of rules of statutory construction is to discover the true intent of the statute.”).

126. See H.R. REP. NO. 75-732, at 1–2 (1937) (broadening the scope of punishable behaviors that qualified as illegal under the Bank Robbery Act).

127. See *id.*

128. *Id.* (“The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute . . . to include larceny and burglary of the banks protected by this statute.”).

129. Interestingly, in reaching their conclusions, both the Fifth and Seventh Circuits explicitly note that the defendants could have been charged under the second paragraph of § 2113(a), which criminalizes actual or attempted larceny during a bank robbery. See *supra* note 28 and accompanying text; see also *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (“Thornton could have been prosecuted under the second paragraph of § 2113(a) so the government is not without a law under which to seek conviction of defendants under similar factual circumstances” (footnote omitted)); *United States v. Bellew*, 369 F.3d 450, 452–53 (5th Cir. 2004) (“Bellew was not indicted under the second paragraph of Section 2113(a), though it appears that the facts would have supported such a charge.”). However, this recourse is not beneficial for two important reasons. First, a conviction under the second paragraph of § 2113(a) carries a lighter sentence and cannot be a predicate for a firearm charge. See *Thornton*, 539 F.3d at 747. Second, an individual who is caught after taking a substantial step, but before he has actually attempted to enter a bank, will not fit within the second paragraph's purview. See, e.g., *United States v. Wesley*, 417 F.3d 612, 618 n.1 (6th Cir. 2005) (noting that, unlike the factual scenario with which the Fifth Circuit was faced, the defendant in *Wesley* could not be convicted under the second paragraph because the police apprehended the defendant before he actually attempted to enter a bank).

130. See *United States v. Donahue*, 948 F.2d 438, 441 (8th Cir. 1991).

intended to codify a *malum in se*, or inherently evil, activity.¹³¹ However, courts, by prohibiting the conviction of an individual who only uses attempted force and violence or intimidation, dilute this statutory prohibition.¹³² Because the conduct is inherently wrong and signifies an attempt to rob a bank, the statute should apply whether the perpetrator attempts or successfully uses force and violence or intimidation.¹³³ Once the defendant demonstrates a substantial step towards committing bank robbery, the defendant should be punished for the natural and probable consequences of the action.¹³⁴ The interpretation given by the majority of the circuits follows Congress's intent when passing the Bank Robbery Act, and the narrow reading of the minority circuits fails to unite the statutory language with its congressional purpose.

III. UNDERSTANDING THE IMPORTANCE OF CRIMINALIZING ATTEMPTED FORCE AND VIOLENCE OR INTIMIDATION

A. The Purpose of Criminal Law Is Served when Attempted Force and Violence or Intimidation Satisfies § 2113(a)

One of the main theories of punishment in American criminal law is deterrence.¹³⁵ Deterrence is a utilitarian principle centered on the basis that punishment can be beneficial by dissuading individuals from committing

131. See H.R. REP. NO. 75-732, at 1–2 (1937) (describing the act of armed bank robbery as “inherently and essentially evil”).

132. See *Thornton*, 539 F.3d at 747 (acknowledging the circuit split and deciding that the plain language of § 2113(a) requires actual force and violence or intimidation to sustain a conviction). Compare *Bellew*, 369 F.3d at 454 (requiring actual force and violence or intimidation), with *United States v. Baker*, 129 F. Supp. 684, 686 (S.D. Cal. 1955) (stating that “attempt” in the statute only relates to the taking and not to the intimidation), *abrogated by* *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990).

133. See *United States v. McFadden*, 739 F.2d 149, 151–52 (4th Cir. 1984) (explaining that actions such as discussing plans for the robbery, reconnoitering at the bank, and gathering the disguises and weapons may be grounds for a conviction of attempted bank robbery); *United States v. Jackson*, 560 F.2d 112, 116–17 (2d Cir. 1977) (concluding that the holding in *United States v. Stallworth* precludes the defendant from successfully arguing that § 2113(a) requires actual force and violence or intimidation); *United States v. Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976) (recognizing other courts that have convicted individuals for attempted bank robbery, even when the robbers had not committed assault and had not entered the bank, and voicing the importance of the “rational policies underlying the attempt doctrine”).

134. See, e.g., *United States v. Crawford*, 837 F.2d 339, 340 (8th Cir. 1988).

135. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950 (2003); see also, MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 104–05, 151 (1997) (explaining retributivism, another principle of criminal law, which is focused on punishing the criminal because he deserves punishment).

crimes.¹³⁶ There are two types of deterrence: general and specific.¹³⁷ The purpose of general deterrence is to prevent individuals from acting in a wrongful way by making society aware of the punishment for wrongful conduct.¹³⁸ The purpose of specific deterrence is to punish the wrongdoer, so he or she suffers, and, as a result, will not repeat the criminal act.¹³⁹ If the person repeats the act, he or she will be punished again—and usually, more severely.¹⁴⁰ Section 2113(a) accomplishes both goals of general and specific deterrence when attempted bank robberies satisfy the requirements of the statute. It sends a clear message that bank robbery, through attempted or actual violence or intimidation, is criminal and will be punished. This strong stance will help deter future attempted bank robberies. In addition, the purpose of punishing the wrongful conduct is satisfied.

Criminal liability should be determined by what the bank robber tried to accomplish, and not by the success of his actions.¹⁴¹ If an individual tries to rob a bank, with the intent to use actual force and violence or intimidation, but fails, his or her criminal liability should not be negated.¹⁴² Reading the statute in a way that precludes convicting such activity does not serve the principle of

136. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 482 (1999) (“Deterrence theory is utilitarian . . . in nature.”); see also Hon. Robert T. Altman, Letter to the Editor, *Hate Crime Legislation*, L.A. TIMES, Oct. 21, 1998, at B6 (“We punish wrongdoers in order to protect innocent people and to deter potential criminals.”).

137. See Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1492 (1997) (explaining the difference between general and specific deterrence, and noting that general deterrence focuses on preventing anyone from committing the crime and specific deterrence seeks to prevent ex-offenders from re-committing crimes).

138. See Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL’Y REV. 105, 159–61 (2003).

139. See Kahan, *supra* note 136, at 415 (1999) (referring to “deterrence” as “a policy aimed at creating efficient behavioral incentives”); Robinson & Darley, *supra* note 135, at 954 (“[A]ny system that can impose punishment can produce a credible deterrent ‘bite.’”).

140. See Kahan, *supra* note 136, at 425 (describing how the “deterrence theory focuses on consequences” and, as such, will punish recidivists).

141. See Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code and in the Common Law*, 19 RUTGERS L.J. 725, 727 (1988) (explaining that the rationale for protection and allowing law enforcement to stop the crime before it is complete).

142. See *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (distinguishing mere preparation from attempt by noting that “the requirement that the objective acts of the defendant evidence commitment to the criminal venture and corroborate the *mens rea*”); *United States v. Roundtree*, 527 F.2d 16, 19–20 (8th Cir. 1975) (explaining that the Federal Bank Robbery Act is comprehensive and intended to cover “aggressions” that occur in a bank robbery).

deterrence.¹⁴³ Instead, it may encourage the same bank robber to try again.¹⁴⁴

Further, one fundamental purpose of criminal law is to allow the community to condemn inappropriate actions.¹⁴⁵ As early as 1784, English courts recognized the attempt doctrine.¹⁴⁶ The primary reason that the criminal justice system criminalizes attempted criminal activity is to prevent the contemplated act from occurring.¹⁴⁷ Punishing an attempted bank robbery is important, in particular, because innocent bank employees and bystanders could be injured easily, even with an unsuccessful robbery.¹⁴⁸ The purpose of the attempt doctrine is to avoid this type of scenario.¹⁴⁹ As such, an individual's attempt to use force and violence or intimidation should be criminalized and should satisfy the first paragraph of § 2113(a).¹⁵⁰ Requiring law enforcement to wait until the force and violence or intimidation was complete in order to ensure that the defendant can be convicted under the first paragraph of

143. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 27–28 (2005) (stating implicitly that deterrence requires guilt of the defendant in order for deterrence to have its appropriate effect; if the defendant knows and understands the wrongful conduct, the punishment will dissuade similar behavior from occurring again).

144. See *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976) (noting that one benefit of the attempt doctrine is to ensure that public safety and welfare are not disturbed). This problem was most poignantly exemplified in *United States v. Bellew*, 369 F.3d 450, 451–53 (5th Cir. 2004). In *Bellew*, the defendant returned to the bank numerous times to try to speak with the bank manager in an attempt to rob the bank. *Id.* at 451. Nonetheless, the court held that the defendant could not be charged with attempted bank robbery because he did not actually intimidate anyone. *Id.* at 453.

145. See *United States v. Bass*, 404 U.S. 336, 348 (1971) (highlighting the importance of legislatures defining criminal activity because the punishment represents the community's moral condemnation of wrongful conduct); Kahan, *supra* note 136, at 421.

146. *Rex v. Scofield*, *Cald. Mag. Rep.* 397, 402–03 (1784); see also Francis Bones Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 833–36 (1928) (reviewing the English development of attempt).

147. See Ashworth, *supra* note 141, at 727 (noting the importance of prevention in minimizing the injury).

148. See *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984) (discussing the danger of waiting to arrest the defendant until he or she has used actual force and violence or intimidation); *Stallworth*, 543 F.2d at 1041 (noting the potential danger to bank patrons).

149. Jerome Hall, *Criminal Attempt – A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 817 (1940) (explaining that the function of the attempt doctrine is to prevent criminal activity from occurring by putting a halt to it in the early stages before the crime is in fact committed).

150. See *United States v. Roundtree*, 527 F.2d 16, 19–20 (8th Cir. 1975) (“18 U.S.C. § 2113, is a comprehensive statute containing special provisions for increased punishment for aggravated offenses. It is intended to cover most of the aggressions that may arise from a bank robbery”); *contra* Michael Rizzo, Casenote & Comment, *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*, 17 GEO. MASON L. REV. 227, 228–29 (2009) (arguing that an attempt should not be punished under § 2113(a) based on the language of the statute).

§ 2113(a) would contradict the purpose of attempt crimes and the role of law enforcement to protect society.¹⁵¹

B. Criminalizing Attempted Force and Violence or Intimidation Accomplishes Congress's Purpose for Enacting § 2113

Additionally, holding that attempted force and violence or intimidation satisfies § 2113(a) matches the public policy goals of § 2113(a).¹⁵² The congressional record clearly indicates that the purpose for enacting the Bank Robbery Act was to prevent attempted and completed bank robberies.¹⁵³ The crime of attempted bank robbery requires that the defendant be convicted only if there was sufficient evidence that he or she had the intent to rob the bank.¹⁵⁴ For a successful bank robbery, it is immaterial for the law's purpose to deter this type of crime, regardless of whether there was actual or attempted force and violence or intimidation, but for an attempted, but unsuccessful bank robbery, the statutory interpretation is critical.¹⁵⁵ A conviction should be upheld if the defendant is prohibited from completing the bank robbery while attempting to use force and violence or intimidation. By only criminalizing those defendants who use actual force and violence or intimidation during an attempted bank robbery, courts are severely limiting the number of defendants who can be convicted. Such a stringent reading provides no recourse to convict an individual who was caught before he ever walked inside the bank.¹⁵⁶

C. Judicial Conformity Is Necessary to Ensure Consistent Prosecution

In order to create consistent federal law, the U.S. Supreme Court should grant certiorari to address the issue of whether actual or attempted force and violence or intimidation is required under the Bank Robbery Act.¹⁵⁷

151. See *Stallworth*, 543 F.2d at 1040 (noting that the purpose of the attempt doctrine is to stop a criminal before harm actually occurs).

152. See 78 CONG. REC. 8148 (1934) (statement of Sen. David Glover) (discussing that the purpose of the federal Bank Robbery Act was to protect the employees of the bank as well as the money the citizens' put into the bank and noting that those who act in violation of the statute should be severely punished).

153. *Id.* (describing all the dangerous weapons that could be used in a bank robbery and deciding on the word "device," which covers a wider range of ways in which a robber could inflict harm on the bank).

154. See *United States v. Jackson*, 560 F.2d 112, 118–19 (2d Cir. 1977) (discussing the purpose of attempt crimes and the importance of criminalizing an intent to commit bank robbery when it is coupled with substantial steps); *Stallworth*, 543 F.2d at 1040 (noting the importance of the defendant having the criminal intent to commit bank robbery).

155. 78 CONG. REC. 8148 (1934).

156. See *supra* note 129.

157. Generally, the U.S. Supreme Court resolves a circuit split by granting certiorari. See *Braxton v. United States*, 500 U.S. 344, 347 (1991) (noting that certiorari is often granted when there is a split among the courts of appeals regarding the interpretation of a federal law); see also Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008) ("The emphasis on uniformity is most visible in the Supreme Court's self-selected docket, which is dominated by

Inconsistent applications of a federal statute can lead to a lack of predictability and unequal application of the law, and undermine the legitimacy of the statute itself.¹⁵⁸ The need for uniformity in federal laws is highlighted through the contradictory outcomes in the cases addressing § 2113(a).¹⁵⁹ An explicit ruling on this issue would eliminate an area of long-standing disagreement among the circuits and ensure that all defendants will be prosecuted uniformly, regardless of which jurisdiction they attempt to commit their crime.

IV. CONCLUSION

Currently, the circuit courts disagree on whether 18 U.S.C. § 2113(a) requires actual or attempted force and violence or intimidation. This unsettled statutory interpretation and rift between the circuits has developed over the course of more than half a century. However, as of yet, courts have not come to a meaningful resolution. Nonetheless, a careful evaluation of Congress's intent when it enacted the Bank Robbery Act, coupled with an analysis of the attempt doctrine, demonstrates the need to prosecute an individual for attempted bank robbery when he attempted to, but did not actually, use force and violence or intimidation.

cases raising issues over which the lower courts disagree.”). The importance of consistent interpretation of federal statutes is part of the reason why the Supreme Court often grants certiorari on circuit splits. See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 16B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 4004.1 (1996) (arguing that the “[g]eneral public importance of the issues, and the need to secure infirmity of federal law, must be the basic touchstones” for certiorari decisions). It is, however, wholly within the Supreme Court’s discretion to grant certiorari. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judge’s Bill*, 100 COLUM. L. REV. 1643, 1643 (2002) (“We tend to take for granted that the United States Supreme Court has the discretionary power, through its use of the writ of certiorari, to select the cases it wishes to decide.”).

158. See Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264–65 (2011) (explaining that one purpose for the creation of the Supreme Court was to ensure uniformity in laws).

159. Compare *United States v. Wesley*, 417 F.3d 612, 619 (6th Cir. 2005) (affirming defendant’s conviction for attempted bank robbery despite being arrested an hour away from the bank without a weapon or disguise), with *United States v. Thornton*, 539 F.3d 741, 744–45, 749 (7th Cir. 2008) (dismissing defendant’s conviction for attempted bank robbery in which the defendant, disguised and carrying a weapon, reached the front steps of the bank, but left panicked after an encounter with a patron).

