Analyzing 18 U.S.C. § 2113(A) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment

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I. INTRODUCTION

A young man lies on the couch in his run-down apartment. Empty beer bottles from the night before scatter the floor. He was recently fired from his job for his repeated tardiness and surly attitude.

As the man lies on the couch, a television show chronicling a bank robbery begins. Fascinated with the program, he decides that he wants access to large amounts of cash immediately, and he resolves to rob a federal bank. His criminal past has been limited to a few thefts from retail stores, for which he was never caught.

Knowing little about bank robbery beyond what he learned from the television program, the man recruits two of his friends to help plan and execute the robbery. The three men decide they first need to choose the bank to rob. They drive to the center of town and observe a federal bank in a shopping center. The men survey side streets around the shopping center that could serve as part of their getaway route. They walk up to the doors of the bank and observe the physique and number of bank employees, as well as the location of security cameras. Finally, they resolve that this is the bank that they will rob the following day. In preparation for the robbery, the three men acquire stockings to hide their faces from any potential witnesses, gloves to prevent fingerprints, a duffel bag to store the money, and a hand-gun for each of them.

On the day of the robbery, the men drive toward the bank and park the car on a side street. As the potential robbers reach for the door handles of the car, they pause, noticing several police cars a few blocks away. Unsure of the reason for the police presence, the men remain in the car, hoping that the police will leave soon. After the police watch the men waiting in the car for about an hour, an officer comes over to their car and inquires about their reasons for sitting idly in the parked car. Upon noticing the guns, the duffel bag, and the stockings in the vehicle, and the gloves worn by each of the men, the officer asks the men to step out of the vehicle and arrests them. The men, all visibly nervous, are taken to the police station. After hours of interrogation, each of the men eventually admits the plan to rob the bank.

Whether or not this story ends with the conviction of these men for attempted bank robbery depends on their geographic location. A split has arisen among the federal circuits regarding whether actual force and violence or actual intimidation is necessary for conviction of *attempted* bank robbery under the Federal Bank Robbery Act ("the Act").[1] If the alleged attempted robbery took place in either the Second, Fourth, Sixth, or Ninth Circuits, the men would most likely be convicted of attempted bank robbery under § 2113(a) of the Act.[2] If the men, however, were tried in the Fifth or Seventh Circuits, the charge would likely fail.[3]

Under the first paragraph of § 2113(a),

> [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

shall be fined or imprisoned.[4] The circuit courts disagree as to whether the word "attempts" applies only to the taking of "any property or money or any other thing of value," or if it applies to the clause "by force and violence, or by intimidation" as well.[5] Under the former interpretation, the government is required to prove that a defendant used actual force and violence or intimidation during an attempted bank robbery.[6] The latter interpretation requires only that the government

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[1] 18 U.S.C. § 2113(a) (2006).

[2] *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).

[3] *See* United States v. Thornton, 539 F.3d 741 (7th Cir. 2008); United States v. Bellew, 369 F.3d 450 (5th Cir. 2004). The issue of whether attempted bank robbery requires that the defendant use actual force and violence or intimidation has continued to divide courts over the past several years as well. *See* United States v. Corbin, 709 F. Supp. 2d 156, 160 (D.R.I. 2010) (holding that actual force and violence, or intimidation is a necessary element of attempted bank robbery); United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *26 (E.D. Pa. Aug. 31, 2009) (holding that actual use of force and violence or intimidation is needed for attempted bank robbery under the first paragraph of § 2113(a) of the Act, thus mirroring the view held by the minority in the circuit split). *But see* United States v. Duffey, No. 3:08-CR-0167-B, 2010 U.S. Dist. LEXIS 4069, at *5–8 (N.D. Tex. Jan. 20, 2010) (holding that only attempted force and violence or intimidation is needed when the defendant cannot be properly charged under the second paragraph of § 2113(a)).

[4] 18 U.S.C. § 2113(a).

[5] *See Thornton*, 539 F.3d at 746; *Wesley*, 417 F.3d at 618; *Belle*w, 369 F.3d at 454; *Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 152; *Jackson*, 560 F.2d at 116–17; *Smith*, 2009 U.S. Dist. LEXIS 77588, at *6–13.

[6] *See Thornton*, 539 F.3d at 748; *Bellew*, 369 F.3d at 453– 56.

establish that a defendant attempted to use actual force and violence or intimidation in attempting to commit the bank robbery.[7]

Ultimately, the split has resulted from circuit courts' application of conflicting methods of statutory interpretation.[8] Part II of this Comment first discusses the legislative history and policies behind the Act, and then addresses the current circuit split on the issue of statutory interpretation of the first paragraph of § 2113(a). The Second, Fourth, Sixth, and Ninth Circuits, utilizing an inquiry very similar to the substantial step test proffered by the American Law Institute's Model Penal Code (MPC)[9] and focusing on the policy goals of the MPC, held that actual force and violence or actual intimidation is not required for attempted bank robbery.[10] In contrast, the Fifth and Seventh Circuits, basing their holdings on textual interpretation and legislative history, held that actual use of force and violence or intimidation is necessary under the first paragraph of § 2113(a).[11]

Part III of this Comment examines the opposing methods of statutory interpretation that have divided the federal circuits on this issue. This section first explores the courts' past use of statutory interpretation methods that focus on the language and legislative history of a statute. This section then scrutinizes the test for attempt utilized by the circuit majority and the MPC's policy reasons behind punishing attempted crimes.

Part IV of this Comment offers a prediction as to the Supreme Court's approach if the Court were to grant certiorari on this split. By

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[7] *See* cases cited *supra* note 5.

[8] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *6–13.

[9] MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1962) ("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.").

[10] *Wesley*, 417 F.3d at 618–20; *Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 151–52; *Jackson*, 560 F.2d at 118–21; United States v. Stallworth, 543 F.2d 1038, 1040–41 (2d Cir. 1976); *see also Smith*, 2009 U.S. Dist. LEXIS 77588, at *6–11; *cf.* United States v. Crawford, 837 F.2d 339, 339–40 (8th Cir. 1988) (applying the substantial step test to an attempted bank robbery, even though the Eighth Circuit has not addressed specifically whether actual force and violence or intimidation is necessary for attempted bank robbery under § 2113(a), and finding that Crawford had taken a substantial step when he obtained ski masks and gloves for the robbery, investigated the area of the bank to identify a getaway route, and planted a getaway car near the bank).

[11] *Thornton*, 539 F.3d at 746– 51; *Bellew*, 369 F.3d at 454–56; *see also Smith*, 2009 U.S. Dist. LEXIS 77588, at *11–13.

examining a recent case heard by the Supreme Court involving statutory interpretation of a federal criminal statute,[12] this part reasons that the Court would likely apply an approach centering on an examination of the text and legislative history of the statute. Accordingly, the Court would probably side with the minority in the circuit split and hold that actual force and violence or intimidation is necessary for a conviction under the first paragraph of § 2113(a). Finally, Part V argues that amending the first paragraph of § 2113(a) to clearly require only *attempted* force and violence or intimidation for attempted bank robbery is the most comprehensive solution. In amending the statute, Congress would promote the goals delineated by the MPC while serving traditional methods of statutory interpretation.

II. THE HISTORY OF THE ACT AND THE CIRCUIT SPLIT

A. The Federal Bank Robbery Act

In 1934, Congress passed the Federal Bank Robbery Act in response to an increase in serious interstate crimes.[13] The original Act covered only robbery, robbery accompanied by an aggravated assault, and homicide committed during a robbery or when escaping afterward.[14] In 1937, however, the Attorney General requested an amendment to the Act due to his concern over "incongruous results" that had emerged under the law.[15] The Attorney General discussed a case where although law enforcement officials apprehended a man as he was walking out of a bank with $11,000 of the bank's funds, the man could not be prosecuted under the statute for robbery.[16] A conviction would not stand because he had obtained the money while the bank employee was absent, without using force and violence or intimidation,[17] and he was stopped by authorities before leaving the bank.[18] Congress consequently amended the statute, resulting in its application to a broader range of crimes less

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[12] Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890–94 (2009).

[13] James F. Ponsoldt, *Criminal Law: A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. CRIM. L. & CRIMINOLOGY 363, 364–65 (1983) ; *see also* H.R. REP. NO. 1461, 73d Cong., 2d Sess. (1934); Jerome v. United States, 318 U.S. 101, 102 (1934).

[14] Prince v. United States, 352 U.S. 322, 325 (1957).

[15] *Id.* at 325–26.

[16] *Id.* at 326.

[17] The Attorney General noted that force and violence or intimidation is a necessary element of robbery. *Id.*

[18] *Id*.

serious than that of robbery.[19] Following the 1937 amendments, Congress placed the crime of robbery in the same paragraph with the lesser crimes of larceny and entering a bank with the intent to commit a felony.[20] In 1948, Congress separated the larceny provision into § 2113(b).[21] The first paragraph of § 2113(a) still contained the robbery provision, and the second paragraph of § 2113(a) delineated the crime of unlawful entry.[22] In 1986, the legislature amended the text of the statute to add the phrase "obtains or attempts to obtain by extortion" to the first paragraph of § 2113(a).[23]

B. The Circuit Majority

There is currently a split among the federal circuits on the issue of whether actual force and violence or intimidation is needed for an attempted bank robbery charge under the Act. This split, which developed after the Fifth and Seventh Circuits diverged from the majority, arose after years without any significant statutory amendments and a uniform interpretation of the statutory language among the circuit courts that had encountered the matter.[24] The Second Circuit, in *United States v. Stallworth*,[25] was the first to examine whether actual force and violence or intimidation is needed for attempt.[26] The Second Circuit considered the issue in the context of the second paragraph rather than the first paragraph of § 2113(a).[27] In that case, the court affirmed the defendants' convictions for attempted bank robbery.[28] After first circling

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[19] *Prince*, 352 U.S. at 326; *see also* United States v. Loniello, 610 F.3d 488, 490 (7th Cir. 2010).

[20] *Prince*, 352 U.S. at 326.

[21] 18 U.S.C. § 2113(b) (2006); *see also Prince*, 352 U.S. at 326 n.5; United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *22 (E.D. Pa. Aug. 31, 2009).

[22] 18 U.S.C. § 2113(a); *see also Prince*, 352 U.S. at 326 n.5; *Smith*, 2009 U.S. Dist. LEXIS 77588, at *22.

[23] 18 U.S.C. § 2113.

[24] *See Prince*, 352 U.S. at 326 n.5.

[25] 543 F.2d 1038 (2d Cir. 1976).

[26] *See id.* at 1040–41. While the Second Circuit was the first circuit court to examine the issue at the center of the circuit split, a California district court was the first court to analyze whether the word "attempts" relates only to the taking, or to the "by force and violence, or by intimidation" as well. United States v. Baker, 129 F. Supp. 684, 685–86 (S.D. Cal. 1955) (quoting 18 U.S.C. § 2113(a)). The court found that the "attempt" relates to the actual taking and not to the intimidation. *Baker*, 129 F.Supp at 686. The district court noted that where intimidation is relied upon by the prosecution to establish a crime, it must be shown by proof of conduct or words. *Id.* at 686. The court did not, however, make reference to the plain meaning of the text in its analysis. *Id.* at 685–86.

[27] United States v. Bellew, 369 F.3d 450, 456 (5th Cir. 2004) (stating that the Second Circuit's rejection in *Stallworth* of the reasoning of the court in *Baker* was with respect to the second paragraph of § 2113(a)); *see also Stallworth*, 543 F.2d at 1040.

[28] *Stallworth*, 543 F.2d at 1039.

the shopping center in which the target bank was located, Sellers, one of the defendants, started to approach the bank.[29] The other defendants, who were still in the car, stopped in front of the bank.[30] As they exited the vehicle, they were arrested.[31] Prior to their arrest and in preparation for the robbery, the defendants obtained ski masks, surgical gloves, supplies to "fix" a shotgun, and a revolver.[32] They had also examined the bank to determine its internal physical structure and security.[33]

The court applied a two-tier inquiry in determining if the conduct of the defendants constituted attempted robbery.[34] First, the court considered whether the defendants were acting with the kind of culpability necessary for the commission of the crime.[35] Second, the court examined whether the defendants engaged in conduct that signified a substantial step toward the commission of the crime and was strongly indicative of a firm criminal intent.[36] In applying the inquiry and affirming the defendants' conviction for attempted bank robbery, the court stated that the defendants' actions were beyond preparation, and substantial steps were taken that strongly corroborated their criminal intent.[37] The court found that these substantial steps included reconnoitering the bank, discussing attack plans, arming themselves, and wearing ski masks and surgical gloves.[38] The court further held that their movement toward the bank indicated that they would proceed with the robbery, and their efforts were only thwarted by the intervention of law enforcement.[39] The Second Circuit found this analysis to be the proper approach to determine whether conduct constituted attempted robbery as it noted that this two-step inquiry closely coincides with the "sensible" definition of attempt and the substantial step test found in the MPC.[40] Although the defendants argued that they could not be convicted of attempted bank robbery because they failed to enter the bank or brandish weapons, the Second Circuit disagreed with this "wooden logic."[41] The

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[29] *Id.* at 1039–40.
[30] *Id.* at 1039.
[31] *Id.* at 1040.
[32] *Id.* at 1039.
[33] *Id.*
[34] *Stallworth*, 543 F.2d at 1040–41.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 1041.
[38] *Id.*
[39] *Id.*
[40] *Stallworth*, 543 F.2d. at 1040 (citing United States v. Mandujano, 499 F.2d 370–77 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, (1975)); *see also* MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1962).
[41] *Stallworth*, 543 F.2d at 1040.

court reasoned that the rationale behind punishing attempt crimes is that wrongdoers who set out on a criminal path should be properly arrested and charged when intent to commit a crime and a substantial step are established, rather than after they proceed further into their criminal activities and place innocent people in danger.[42]

Shortly after the *Stallworth* decision, in *United States v. Jackson*,[43] the Second Circuit addressed the issue of whether actual force and violence or intimidation is needed for an attempted bank robbery directly within the context of the first paragraph of § 2113(a).[44] The Second Circuit extended the holding of *Stallworth* to the first paragraph, holding that actual force, violence, or intimidation is not needed for attempted robbery.[45] Prior to the robbery, the defendants purchased gloves and face disguises, and entered the bank to evaluate the surveillance equipment and the employees.[46] On the day of the attempted robbery, agents from the Federal Bureau of Investigation (FBI) observed the defendants' car circling the area near the targeted bank with a fake cardboard license plate.[47] At one point, Scott, one of the defendants, got out of the car, loitered outside the bank, and then returned to the car.[48] After circling, pulling into a side street, and suspecting surveillance by the agents, the defendants tried to speed off.[49] FBI agents stopped and arrested the defendants.[50] The agents confiscated shotguns, a revolver, handcuffs, and masks from a suitcase in the rear of the vehicle.[51]

Following the holding in *Stallworth*, the Second Circuit reasoned that the drafters of the MPC wanted to create a standard "more inclusive than one requiring the last proximate act before attempt liability would attach, but less inclusive than one which would make every act done with intent to commit a crime criminal."[52] In this case, the court applied the MPC's substantial step test and affirmed the defendants' convictions.[53] The test looks at whether an action is a substantial step in a course of

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[42] *Id.*
[43] 560 F.2d 112 (2d Cir. 1977).
[44] *Id.* at 116.
[45] *Id.* at 116–17.
[46] *Id.* at 114.
[47] *Id.* at 115.
[48] *Id.*
[49] *Jackson*, 560 F.2d at 115.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 118–19; *see also* MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1962).
[53] *Jackson*, 560 F.2d at 120. The two-step inquiry from *Mandujano* that the court applied in *Stallworth* derived largely from the MPC's substantial step test. *Id.* at 116–18; *see also Stallworth*, 543 F.2d at 1040.

action aimed at achieving a criminal result, and whether that step is strongly corroborative of criminal intent.[54] The MPC lists conduct that is indicative of, but may not be sufficient, to establish a substantial step if it corroborates the actor's criminal intent.[55] This conduct includes, but is not limited to, lying in wait or following the potential victim, investigating or unlawfully entering the location of the potential crime, and possessing objects to be used in the crime.[56] In applying the test, the Second Circuit reasoned that the defendants (1) had agreed upon a robbery plan and had driven to the bank with loaded weapons; (2) were very dedicated to the commission of a crime; (3) had passed beyond the point of mere preparation; and (4) would have carried out the robbery had they not been deterred by external factors, namely, detection by the FBI.[57] The Second Circuit further noted that defendants' possession of robbery paraphernalia and their surveillance of the bank sufficiently constituted a substantial step, and these actions strongly corroborated the firmness of their criminal intent.[58]

In 1984, the Fourth Circuit, following the example of the *Jackson* court and applying the substantial step test, weighed in on the issue of the circuit split in *United States v. McFadden*.[59] The defendants purchased shotguns and disguises, which they hid in the bushes near the bank.[60] After driving around the bank and determining that no police vehicles were in the vicinity, they walked toward the bank.[61] They spotted an FBI agent with a gun, but FBI agents arrested them before they could reach their weapons.[62]

The Fourth Circuit found that the defendants "acted with the kind of culpability otherwise required for the commission of the crime."[63] Additionally, the court found that the conduct of the defendants, which included discussing strategy for the robbery, reconnoitering banks, obtaining weapons and disguises, and traveling to the bank, supported their firm criminal intent and constituted a substantial step toward the crime's commission.[64] In rejecting the defendants' argument that actual force and violence or intimidation is required for an attempted bank

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54 *Jackson*, 560 F.2d at 119.
55 MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1962).
56 *Id.*
57 *Jackson*, 560 F.2d at 120.
58 *Id.*
59 739 F.2d 149, 152 (4th Cir. 1984).
60 *Id.* at 151.
61 *Id.*
62 *Id.*
63 *Id.* at 152.
64 *Id.*

robbery, the Fourth Circuit stated that this conclusion would mean that the agents must wait until the defendants entered or attempted to enter the bank with the shotguns in order for the defendants to be liable under the first paragraph of § 2113(a).[65] The court further stated that by being forced to wait until the potential robbers reached this stage in the robbery, the lives of the bank employees, police, and any innocent bystanders would be endangered before an arrest could be made for attempted bank robbery.[66]

Six years later, the Ninth Circuit addressed the issue of whether attempted robbery requires actual force and violence or intimidation in *United States v. Moore*,[67] and like the circuit courts before it, the court applied the substantial step test.[68] In *Moore*, FBI agents, working off a detailed tip from an informant, arrested Moore and another man as they approached the targeted bank.[69] When agents apprehended Moore, he was walking in the direction of the bank, wearing a ski mask, and carrying gloves, pillowcases, and a concealed, loaded gun.[70]

The Ninth Circuit held that conviction for attempted bank robbery under § 2113(a) requires only that the defendant intended to use force and violence or intimidation and made a substantial step toward completing the robbery.[71] The court stated that the elements of first finding culpable intent and then finding conduct constituting a substantial step toward the commission of the crime were both satisfied.[72] In that case, Moore possessed robbery paraphernalia.[73] Additionally, although Moore never discharged the gun, the Ninth Circuit found that one could reasonably conclude that he carried it to increase the probability that the robbery would be successful and thus, he intended to use force and violence or intimidation to complete the bank robbery.[74] The court bolstered its reasoning by echoing the logic of its sister courts, stating that law enforcement officials are not required to wait until innocent people are placed in danger before making arrests.[75] Thus, the circuit courts in the string of cases from 1976 to 1990 that dealt with the first paragraph of § 2113(a) all held that actual force and

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65 *McFadden*, 739 F.2d at 151.
66 *Id.*
67 921 F.2d 207 (9th Cir. 1990).
68 *Id.* at 209.
69 *Id.* at 208.
70 *Id.*
71 *Id.* at 209.
72 *Id.*
73 *Moore*, 921 F.2d at 209.
74 *Id.*
75 *Id.*

violence or intimidation is not a necessary element of attempted bank robbery.

The circuit majority gained more support as the Sixth Circuit addressed the issue at the center of the circuit split in dicta in *United States v. Wesley*.[76] Reid, a police informant, drove to the bank with Wesley.[77] Reid and Wesley examined the bank from inside the car before leaving the vicinity.[78] Wesley had previously spoken with Reid regarding bank security and had requested that Reid act as the getaway driver following a bank robbery.[79] Subsequently, law enforcement arrested Wesley at his home.[80]

The Sixth Circuit, in accordance with the holdings expressed by the Second, Fourth and Ninth Circuits, stated that actual force and violence or intimidation is not needed for attempted bank robbery under the Act.[81] The court explained that to read the statute as requiring actual force and violence or intimidation would be inconsistent with the Sixth Circuit's definition of attempt crimes and would require that before a defendant could be convicted of attempted robbery, there would need to be proof that a defendant actually confronted someone in the bank.[82] Instead, the court applied the substantial step test analysis.[83] The court concluded that a reasonable jury could find that Wesley's visit to Reid's home to recruit her as a getaway driver, his discussion of robbery strategy, and the fact that he had Reid transport him to the bank constituted a substantial step that supported his unwavering intention to rob the bank.[84]

The issue at the center of the circuit split has also recently been addressed by district courts. In *United States v. Duffey*,[85] the court upheld the defendants' convictions under the first paragraph of § 2113(a), finding that although the defendants had not entered the bank or used actual force and violence or intimidation, they took substantial steps towards the completion of the bank robberies.[86] While the court recognized that the pre-existing Fifth Circuit case of *United States v.*

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[76] 417 F.3d 612, 618 (6th Cir. 2005). At the time of this decision, a circuit split had already been created by the Fifth Circuit's decision in *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004).

[77] *Wesley*, 417 F.3d at 616.

[78] *Id.*

[79] *Id.* at 615.

[80] *Id.* at 616.

[81] *Id.* at 618.

[82] *Id.*

[83] *Wesley*, 417 F.3d at 620.

[84] *Id.* at 616–20.

[85] No. 3:08-CR-0167-B, 2010 U.S. Dist. LEXIS 4069 (N.D. Tex. Jan. 20, 2010).

[86] *Id.* at *4–8.

Bellew[87] held that actual force and violence or intimidation is needed for attempted bank robbery,[88] the court found that the holding in *Bellew* was not controlling since the facts of *Duffey* are distinguishable from those in *Bellew*.[89] Furthermore, in dicta, the district court noted that extending the holding of *Bellew* to the facts of *Duffey* would imply that a defendant needs to either enter the bank or use actual force and violence or intimidation to be properly convicted of attempted bank robbery under § 2113(a).[90] The court stated that this would contradict public policy interests and the goal of prosecuting attempted crimes.[91]

C. The Circuit Minority

The Fifth Circuit in *United States v. Bellew* bucked the trend and held that actual force and violence or intimidation is necessary for a conviction of attempted bank robbery under the first paragraph of § 2113(a).[92] Bellew entered a bank, wearing what bank employees described as an "obvious" wig, and carrying a briefcase that police later found to contain a firearm, instructions on how to rob the bank, and a demand note.[93] When he entered the bank, he asked to speak to the manager, but a bank employee told him that the manager was busy.[94] Bellew left the bank.[95] When he returned, the manager was still unavailable.[96] The bank manager called the police upon viewing Bellew's suspicious behavior.[97] When Bellew saw the police, he fled to his vehicle.[98] The police confronted Bellew near his car, and after a standoff lasting nearly three hours, Bellew admitted his intentions to rob the bank.[99]

In deciding whether actual force, violence, or intimidation is needed for attempted bank robbery, the court examined the text of the statute as

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[87] 369 F.3d 450 (5th Cir. 2004).

[88] *United States v. Bellew* is part of the circuit minority and is discussed later in this part of the Comment.

[89] *Duffey*, 2010 U.S. Dist. LEXIS 4069, at *7. Unlike Bellew, the defendants in *Duffey* never entered the bank and therefore could not be charged under the second paragraph of § 2113(a). *Id.* at *7–8.

[90] *Id.* at *8 n.4.

[91] *Id.*

[92] *Bellew*, 369 F.3d at 453; *see also* United States v. Dentler, 492 F.3d 306, 309 (5th Cir. 2007).

[93] *Bellew*, 369 F.3d at 451.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 452.

[98] *Id.*

[99] *Bellew*, 369 F.3d at 452.

well as the legislative history.[100] The Fifth Circuit first established a lateral issue, holding that the requirement of taking or attempted taking by "force and violence, or by intimidation" is disjunctive, and the use of force and violence was not alleged to have been involved in this case.[101] Therefore, the court found that only intimidation, and not force and violence, needs to be shown.[102] The Fifth Circuit further noted that the requirement of a taking by intimidation under § 2113(a) is satisfied when a regular person in the victim's position reasonably could infer a threat of bodily harm from the acts of the alleged bank robber.[103]

More significantly, in examining the statute's text, the Fifth Circuit found that a reading that requires an actual act of intimidation as opposed to attempted intimidation is the most natural reading of the text.[104] The court looked to the way in which it has previously outlined the elements of a violation under § 2113(a) to bolster the notion that an actual act of intimidation is needed for conviction.[105] The Fifth Circuit next examined the legislative history of the statute.[106] The court stated that previous courts have made a determination that Congress added the second paragraph of § 2113(a) in order to punish a person who enters or attempts to enter a bank intending to commit a crime, but is thwarted for some reason before the crime's completion,[107] and probably before the

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[100] *Id.* at 453–55.

[101] *Id.* at 453.

[102] *Id.*

[103] *Id.* at 451 (citing United States v. Higdon, 832 F.2d 312, 315 (5th Cir. 1987)); *see also* United States v. Ketchum, 550 F.3d 363, 367 (4th Cir. 2008) (citing United States v. Woodrup, 86 F.3d 359, 364 (4th Cir. 1996)) (stating that the intimidation element is met if an ordinary person in the position of the bank teller or other victim could reasonably conclude that there was a threat of bodily harm from the actions of the defendant, even if the defendant did not aim to intimidate the teller); United States v. Baker, 129 F. Supp. 684, 685 (S.D. Ca. 1955) (noting that intimidation means to put the victim in fear, but this fear cannot arise merely from the unpredictable or irrational apprehension of a particular victim). The subjective fear of the teller is irrelevant in finding whether the intimidation element is met. *Ketchum*, 550 F.3d at 367 (citing United States v. Wagstaff, 865 F.2d 626, 627-28 (4th Cir. 1989)). Intimidation can be found from nothing more than the written or verbal demands communicated by a defendant to a teller because these types of demands convey an implicit threat. *Id.* (citing United States v. Gilmore, 282 F.3d 398, 402 (6th Cir. 2002)).

[104] *Bellew*, 369 F.3d at 454.

[105] *Id.* The elements had previously been outlined in a way that required "the Government [to] prove: (1) an individual or individuals (2) used force and violence or intimidation (3) to take or attempt to take (4) from the person or 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." *Id.* (citing United States v. McCarty, 36 F.3d 1349, 1357 (5th Cir. 1994)).

[106] *Id.* at 455.

[107] *Id.* (citing Prince v. United States, 352 U.S. 322, 328 (1957)). The language of the second paragraph of § 2113(a) states that, "[w]hoever enters or attempts to enter any

person has used force and violence, or intimidation. The court reasoned that the fact that Congress applied the same punishment for conviction under either paragraph supports this determination.[108] Therefore, the court stated that if the substantial step test was meant to be applied to attempted bank robberies, and defendants who only attempted to use force and violence or intimidation could be charged under the first paragraph, there would be no reason for Congress to have added the second paragraph.[109] Because the court found that Bellew did not use actual intimidation, it held that the government did not meet the elements to convict him under the first paragraph of § 2113(a).[110] The Fifth Circuit noted, however, that Bellew probably should have been charged under the second paragraph of § 2113(a) since he entered the bank and intended to commit a robbery.[111]

In 2008, the view of the Fifth Circuit received support from the Seventh Circuit in *United States v. Thornton*.[112] Thornton and his accomplice discussed robbing a bank, and Thornton obtained supplies, including disguises and guns, for the robbery.[113] The accomplice drove Thornton to the bank and remained in the car as Thornton approached the bank.[114] Near the bank's entrance, a bystander spotted Thornton in the parking lot.[115] The bystander asked Thornton what he was doing, but the bystander fled and called 911 when he thought he saw Thornton reaching

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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 or such savings and loan association and in violation of any statute of the United States, or any larceny . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both."

[108] *Id.*

[109] *Id.; see also* United States v. Goudy, 792 F.2d 664, 671 (7th Cir. 1986) (reciting the legislative history of § 2113 and finding that Congress added language to § 2113(a) in 1937 to cover situations in which people wished to steal banks' assets but did not use any force in doing so).

[110] *Bellew*, 369 F.3d at 454.

[111] *Id.* at 452–55; *see also* United States v. Loniello, 610 F.3d 488, 494 (7th Cir. 2010) (holding that the two paragraphs of § 2113(a) create two separate offenses even if the different subsections of § 2113 do not allow cumulative sentences, and therefore the double jeopardy clause does not preclude a defendant from being charged with both offenses).

[112] 539 F.3d 741, 745 (7th Cir. 2008). After the decision in *Thornton*, in *United States v. Acox*, the District Court for the Northern District of Illinois followed the precedent set by the Seventh Circuit, and found that actual force and violence or intimidation is needed to convict a defendant of attempted bank robbery. No. 07-CR-145, 2008 U.S. Dist. LEXIS 84685, at *9–10 (N.D. Ill. Sep. 10, 2008).

[113] *Thornton*, 539 F.3d at 743.

[114] *Id.*

[115] *Id.*

for a gun.[116] Another person witnessed the peculiar encounter and called the police.[117] Thornton and his accomplice left the scene, but the police arrived at Thornton's workplace, searched his belongings, and arrested him.[118]

The court held that actual force and violence or intimidation is necessary under the statute since the statute's "'attempt' language relates only to the taking and not to the intimidation."[119] The court reasoned that if only attempted force and violence or intimidation was needed, the statute would have been written to say "whoever attempts by force and violence or intimidation . . . ."[120] The court explicitly pointed out that similar to Bellew, Thornton could have been prosecuted under the second paragraph of § 2113(a).[121]

Since force and violence were not alleged, the court applied an objective test to determine if Thornton had used actual intimidation that would cause an ordinary person to reasonably feel that resistance or defiance would be met with force.[122] The court found there was no actual intimidation as Thornton did not enter the bank or demand money, had no direct contact with anyone in the bank, and made no implicit or explicit threats.[123] The court reasoned that no one, including the bystander who questioned Thornton, could reasonably infer that Thornton had a weapon.[124]

Recently, the issue of whether actual force and violence or intimidation is an element of attempted bank robbery was addressed by the Eastern District of Pennsylvania in *United States v. Smith*[125] and the District of Rhode Island in *United States v. Corbin*.[126] In *Smith*, a police officer observed a parked car with darkly tinted windows.[127] After running the plate numbers and finding that the tag did not match the

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[116] *Id.* at 743–44.
[117] *Id.* at 744.
[118] *Id* at 745.
[119] *Thornton*, 539 F.3d at 747.
[120] *Id.*
[121] *Id.; see also* United States v. Loniello, 610 F.3d 488, 490 (7th Cir. 2010). Thornton was originally charged under the second paragraph of § 2113(a), but the charge was changed to a charge under the first paragraph in order to add the firearm count. *Thornton*, 539 F.3d at 747 n.2.
[122] *Thornton*, 539 F.3d at 748 (citing United States v. Burnley, 533 F.3d 901, 903 (7th Cir. 2008)).
[123] *Id.* at 750.
[124] *Id.* at 751.
[125] No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *4 (E.D. Pa. Aug. 31, 2009).
[126] No. 3:08-CR-0167-B, 2010 U.S. Dist. LEXIS 4069, at *5–8 (N.D. Tex. Jan. 20, 2010).
[127] *Smith*, 2010 U.S. Dist. LEXIS 4069, at *2.

vehicle's registration, the police officer approached the car.[128] The two occupants were fully reclined in their seats, wearing multiple layers of clothing, and had a large black bag, black ski masks, four cell phones, a screwdriver, and two BB guns resembling semiautomatic weapons.[129]

The court in *Smith* held that actual force and violence or intimidation is necessary for conviction under § 2113(a).[130] The court concentrated on the text of the statute and employed a test that it claimed provided guidance as to congressional intent.[131] The test has the court place itself in the position of assistant counsel to a congressional committee, whose duties include drafting a bill that will protect banks and similar financial institutions from illegal takings.[132] The court found that in drafting a statute that could potentially apply in *Smith*, the assistant counsel could have written language for the first paragraph of § 2113(a) that would more clearly convey that only *attempted* force and violence or intimidation would be necessary for conviction of *attempted* bank robbery.[133] Since this indication was not unambiguously made, the court held that the version that the legislature ultimately adopted requires actual force and violence or intimidation for an attempted bank robbery.[134]

The *Smith* court further reasoned that it is not clear from the legislative history that the statutory amendments were intended to include under the first paragraph of § 2113(a) robbery attempts that do not involve the use of actual force and violence or intimidation.[135] Finally, the court responded to the argument that requiring actual force and violence or intimidation will weaken the ability of the police to restrain violent crimes.[136] The court stated that the fear that the statute is underinclusive should not control the interpretation of the statute in accordance with its plain language.[137] Ultimately, the *Smith* court found that since the defendants merely stayed seated in a parked car with masks and BB guns, no reasonable jury could conclude that the defendants used actual force and violence or intimidation.[138]

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[128] *Id.*
[129] *Id.* at *2–3.
[130] *Id.* at *26.
[131] *Id.* at *15–18.
[132] *Id.* at *16.
[133] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *16–18.
[134] *Id.* at *18.
[135] *Id.* at *20–24.
[136] *Id.* at *24.
[137] *Id.* at *24–25.
[138] *Id.* at *26.

Similarly, in *United States v. Corbin*, the court held that actual force and violence or intimidation is necessary for attempted bank robbery.[139] In *Corbin*, the police received a tip from the defendant's mother that he was planning on robbing a bank.[140] The police observed the defendant walking up a ramp towards the bank, but the police arrested the defendant before he could reach the bank.[141] The defendant told police that while he initially planned to commit a robbery, he changed his mind on his way to the bank, and he was actually going to a restaurant across the street from the bank when police arrested him.[142] The police discovered a bandana and a robbery note upon searching the defendant and his belongings, both of which the defendant admitted he had planned to use in the now- abandoned robbery plan.[143]

The court in *Corbin* held that in order for a defendant to be convicted of attempted bank robbery, the government must show that a defendant took substantial steps towards the robbery involving actual force and violence or intimidation.[144] The court noted that the First Circuit had not, up until this point, decided whether actual force and violence or intimidation is necessary for attempted bank robbery.[145] The court stated that its holding would not endanger the public or hinder law enforcement, since there were other statutes under which the defendant could be charged.[146]

III. METHODS OF STATUTORY INTERPRETATION AS APPLIED TO THE CIRCUIT SPLIT

In examining whether actual force and violence or intimidation is necessary for conviction of attempted bank robbery under the first paragraph of § 2113(a), a circuit split has developed that centers around

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[139] United States v. Corbin, 709 F. Supp. 2d 156, 160 (D.R.I. 2010).

[140] *Id.* at 157.

[141] *Id.* at 158.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 160. Furthermore, the court denounced the reasoning of the *Jackson* court, stating that while the objectives of crime prevention and protection of members of the public are reputable goals, they do not give courts unlimited freedom to rewrite a statute. *Id.*

[145] *Corbin*, 709 F. Supp. 2d at 160. In the only factually similar case that the First Circuit dealt with, the court found that the defendant took substantial steps towards the commission of the robbery, but also used actual intimidation. *Id.* (citing United States v. Chapdelaine, 989 F.2d 28 (1st Cir. 1993). Since actual intimidation was used, it was not necessary for the First Circuit to decide whether the statute required actual or merely attempted intimidation. *See id.*

[146] *Id.* at 159.

the appropriate methods of statutory interpretation.[147] The circuit majority has applied a two-step inquiry to the facts of the respective cases, bolstering holdings with the policies surrounding attempt that are delineated in the MPC.[148] In sharp contrast, the minority has utilized a method which looks at the text of the statute, and sometimes extends the analysis to include the legislative history.[149]

In the past, when addressing an issue involving statutory interpretation, courts have generally employed one or more key methods, such as textualism or intentionalism, the former method focusing its interpretation on the text, and the latter taking into account the intent of the legislative body.[150] Specifically in cases involving criminal statutes, an analysis of the text of the statute is the preliminary inquiry of the examining court.[151] While some courts end the statutory examination at that point, others extend beyond the words of the statute and delve into the legislative history.[152]

A. The Text of the Statute in Statutory Interpretation

The plain language of the statute is the greatest indicator of legislative intent.[153] Courts have repeatedly upheld the notion that when the language of the statute is unambiguous, there should be no further inquiry from the judiciary, except in exceptional situations.[154] Only the "most extraordinary showing of contrary intentions" from the legislative history would validate deviation from the ordinary meaning of the language of the statute.[155] Notably, in *Carter v. United States*,[156] the

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[147] United States v. Thornton, 539 F.3d 741 (7th Cir. 2008); United States v. Bellew, 369 F.3d 450, 455–56 (5th Cir. 2004).

[148] United States v. Wesley, 417 F.3d 612, 618–20 (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); United States v. Jackson, 560 F.2d 112, 118–21 (2d Cir. 1977); United States v. Stallworth, 543 F.2d 1038, 1040–41 (2d Cir. 1976); *see also* United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *6–11 (E.D. Pa. Aug. 31, 2009).

[149] *Thornton*, 539 F.3d at 746– 51*; Bellew*, 369 F.3d at 454–56; *see also* Smith, 2009 U.S. Dist. LEXIS 77588, at *11–13.

[150] Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1294 (2004); *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005).

[151] McMunigal, *supra* note 150, at 1294. In determining how to interpret a statute, courts often look to precedent for direction and guidance. *See Bellew*, 369 F.3d at 454–56.

[152] *See* McMunigal*, supra* note 150, at 1294.

[153] United States v. Van Winrow, 951 F.2d 1069**,** 1072 (9th Cir. 1991).

[154] Garcia v. United States, 469 U.S. 70, 75 (1984) (citing Crooks v. Harrelson, 282 U.S. 55, 60 (1930)).

[155] *Garcia*, 469 U.S. at 75.

[156] 530 U.S. 255 (2000).

Supreme Court faced the task of interpreting § 2113(b).[157] In that case, the Court stated that statutory interpretation begins by looking at the text of the statute, and not by psychoanalyzing the mental processes of those who enacted the statute.[158]

B. Textual Statutory Analysis Applied to § 2113(a)

The courts in the circuit split that have applied a textual analysis to the statute have all come to the same, uniform conclusion that *actual* force and violence or intimidation is necessary to convict a defendant under the first paragraph of § 2113(a).[159] A natural reading of the text would indicate that there can be no conviction for attempted bank robbery with only attempted force and violence or intimidation.[160] The statute can be broken down into the elements that the government must prove:

> 1) an individual or individuals 2) used force and violence or intimidation 3) to take or attempt to take 4) from the person or 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.[161]

From this parsing of the statutory text, it can be concluded that there is no distinction between the elements needed for robbery and attempted robbery.[162] If all that is necessary for attempted robbery is attempted force and violence or attempted intimidation, the statute could have been written in several different ways to ensure that the syntax supports this interpretation.[163] Furthermore, the second offense delineated in the first paragraph of § 2113(a), which criminalizes the actions of whoever "obtains or attempts to obtain by extortion," utilizes different syntax than the language that criminalizes the actions of "whoever, by force and violence, or by intimidation, takes, or attempts to take" anything of value

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[157] *Id.* at 258–59.

[158] *Id.* at 271 (citing Bank One Chicago, N.A. v. Midwest Bank and Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring)).

[159] United States v. Thornton, 539 F.3d 741, 746– 51 (7th Cir. 2008); United States v. Bellew, 369 F.3d 450, 454–56 (5th Cir. 2004).

[160] *Thornton*, 539 F.3d at 747; *Bellew*, 369 F.3d at 454.

[161] United States v. McCarty, 36 F.3d 1349, 1357 (5th Cir. 1994); *see also* 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. Van, 814 F.2d 1004, 1005–06 (5th Cir. 1987).

[162] *Bellew*, 369 F.3d at 454.

[163] *Thornton*, 539 F.3d at 747; United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *17–18 (E.D. Pa. Aug. 31, 2009).

belonging to a bank.[164] The phrase "by extortion" does not precede, but rather follows the language that references obtaining or attempted obtaining, thus indicating that the drafters were at least somewhat aware of the significance and grammatical implications of the word placement.[165]

C. Legislative History as an Additional Interpretive Tool in Statutory Analysis

By solely scrutinizing the unambiguous text of the statute, it is clear that actual force and violence or intimidation is needed for conviction under § 2113(a). But some courts choose to go beyond a textual examination and consider the legislative history of statutes.[166] In *Holloway v. United States*,[167] the Supreme Court found it appropriate to look not only at the plain text of the statute but also at the purpose of the statute within the legislative scheme.[168] Similarly, the Court in *United States v. American Trucking Associations*[169] stated, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[170] Additionally, courts have noted that if application of the plain meaning of the statute would be inconsistent with the legislative intent or purpose of the statute, the court should look beyond the text of the statute to gather the congressional intent.[171]

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[164] 18 U.S.C. § 2113(a) (2006); *Smith*, 2009 U.S. Dist. LEXIS 77588, at *20.

[165] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *20.

[166] *See* Alexander v. Sandoval, 532 U.S. 275, 297 (2001); Holloway v. United States, 526 U.S. 1, 6 (1999); Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 34 (1983).

[167] 526 U.S. 1 (1999).

[168] *Id.* at 6 (citing Bailey v. United States, 516 U.S. 137, 145 (1995)). In *Holloway*, the court looked at the federal carjacking statute, and held that the statute only required proof of the intent to kill or harm a victim if necessary to complete the carjacking, rather than proof of unconditional intent to cause harm or death to the victim. *Id.* at 12.

[169] 310 U.S. 534 (1940).

[170] *Id.* at 543–44 (1940) (citing Helvering v. N.Y. Trust Co., 292 U.S. 455, 465 (1934) (internal citations omitted)); s*ee also* Michelle Schuld, *Statutory Misrepresentation:* Small v. United States *Darkens the Already Murky Waters of Statutory Interpretation*, 40 AKRON L. REV. 751, 769–70 (2007). *American Trucking Associations* dealt with the interpretation of the Motor Carrier Act to determine the authority of the Interstate Commerce Commission to institute motor carrier employee qualification requirements when those employees' duties do not influence the safety of operation. *Id.* at 538.

[171] Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

D. Legislative History as Applied to the Statutory Interpretation of § 2113(a)

In viewing the statute within the context of the scant amount of legislative history that exists, there is no indication that the text does not carry out the intent of the legislature.[172] The 1937 Amendment, which added to the statute crimes less serious than robbery at the request of the Attorney General, is helpful in determining legislative intent, as is the placement of the crime of unlawful entry in the second paragraph of § 2113(a).[173] Congress added the acts of entering or attempting to enter a bank with intent to commit a felony or larceny in the second paragraph of § 2113(a),[174] which are crimes that do not require a person to use force and violence or intimidation.[175] Congress kept robbery and attempted robbery in the first paragraph of § 2113(a).[176] The court in *Bellew* found that the addition of the second paragraph of § 2113(a) partially remedies the problem of not being able to convict under the first paragraph of § 2113(a) when there is no force and violence or intimidation.[177] The court in *Smith* also found it significant that the penalties under either the first or second paragraphs of § 2113(a) are equal, at twenty years for each.[178] Therefore, even after extending the statutory analysis to include both the legislative history and a textual examination, the more substantially supported conclusion is that actual force and violence or intimidation is necessary for conviction under the first paragraph of § 2113(a).

E. MPC Policies of Attempt and the Attempt Inquiry

The circuit majority has based its holdings on two principles. First, these circuits apply to the facts of each case the substantial step test or a two-part inquiry largely derived from the "sensible" definition of attempt found in the MPC.[179] Second, they also use the MPC's policies underlying attempted crimes to support their holdings.[180] As stated

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[172] Jerome v. United States, 318 U.S. 101, 105 (1943) (noting that the legislative information regarding the statute is meager).

[173] Prince v. United States, 352 U.S. 322, 325–26 (1957); *see also* United States v. Bellew, 369 F.3d 450, 455 (5th Cir. 2004); United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *22–24 (E.D. Pa. Aug. 31, 2009).

[174] *Prince*, 352 U.S. at 326.

[175] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *23.

[176] *Prince*, 352 U.S. at 326.

[177] *Bellew*, 369 F.3d at 455; *see also* 18 U.S.C. § 2113(a) (2006).

[178] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *23–24; *see also Prince*, 352 U.S. at 329.

[179] United States v. Jackson, 560 F.2d 112, 120 (2d Cir. 1977); United States v. Stallworth, 543 F.2d 1038, 1040 (2d Cir. 1976).

[180] United States v. Wesley, 417 F.3d 612, 618–20 (6th Cir. 2005); United States v. Moore, 921 F.2d 207, 209 (9th Cir. 1990); United States v. McFadden, 739 F.2d 149,

supra, in applying the substantial step test to the cases, the circuits in the majority of the split found that the potential bank robbers took actions to prepare for carrying out their prospective robberies.[181] The policies adopted by the MPC that support the application of the substantial step test to and the punishment of attempted crimes are the desire to punish those with clear criminal intent, to deter future crimes, and to protect witnesses.[182] These policies certainly have relevance in the factual scenarios of the cases in the circuit split, and provide strong motives for allowing attempted bank robbers to be charged and convicted after they have used only attempted force and violence or intimidation. One of the fundamental arguments in support of the MPC's definition of attempt centers on the concept that criminal law aims to punish those who exhibit their dangerous intent or moral depravity through their actions.[183] Consequently, disciplining those who intend to perform a criminal act and fail is fully justified, regardless of the reason for the failure.[184] Additionally, the aim of deterring future crimes would be accomplished by applying the substantial step test to the facts of these cases.[185] Not only does punishment at least temporarily prevent the defendant from trying to complete the crime again, but it also promotes general deterrence.[186] In the cases here, the defendants that were not convicted of attempted robbery might be inspired to try to complete the robbery successfully at another time. This notion is further evidenced by the fact that prior to their arrests, some of the defendants had originally planned a robbery for a certain day, but ultimately changed the date of the planned robbery because they felt that circumstances might have been more favorable on another date.[187] Therefore, they were willing to make several attempts to complete a robbery.

Finally, the circuit majority considered the safety of bystanders in its reasoning. The substantial step test precludes attempt liability for

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151–52 (4th Cir. 1984); *Jackson*, 560 F.2d at 118–21; *Stallworth*, 543 F.2d at 1040–41; *see also Smith*, 2009 U.S. Dist. LEXIS 77588, at *6.

[181] *Wesley*, 417 F.3d at 615–19; *Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 151–52; *Jackson*, 560 F.2d at 114–20; *Stallworth*, 543 F.2d at 1039–41; *see also Smith*, 2009 U.S. Dist. LEXIS 77588, at *5–11.

[182] MODEL PENAL CODE § 5.01 (Tent. Draft No. 10 1960).

[183] United States v. Smauley, 39 M.J. 853, 856–60 (1994); John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 45 (2002).

[184] Hasnas, *supra* note 183, at 45–46.

[185] *Id.* at 46.

[186] *Id.*

[187] *Wesley*, 417 F.3d at 616; *Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 151; *Jackson*, 560 F.2d at 114.

remote acts in preparation of a crime.[188] Yet it allows attempt liability following a substantial step, without requiring the police to wait until the commission of the "last proximate act" before intervening.[189] Consequently, the substantial step test diminishes the danger to innocent bystanders.[190] In the cases involved in the circuit split, most of the defendants were carrying guns.[191] It is conceivable that those guns might have been used to harm innocent onlookers if the defendants had not been thwarted by law enforcement. Therefore, while an analysis of statutory language and history leads to the conclusion that actual force and violence or intimidation is needed for attempted bank robbery under the first paragraph of § 2113(a), reasoning centered around the policy goals and the substantial step test of the MPC supplies valid grounds to support the conclusion that one can commit attempted bank robbery through the use of attempted rather than actual force and violence or intimidation.

IV. THE SUPREME COURT'S LIKELY DECISION ON THE SPLIT

If the Supreme Court were to grant certiorari to end this circuit split, the Court would likely come to the conclusion that actual force and violence or intimidation is needed for a defendant to be convicted under the first paragraph of § 2113(a), based on the use of traditional statutory construction principles. In 2009, the Supreme Court, facing an issue of statutory interpretation of a federal criminal statute in *Flores-Figueroa v. United States*,[192] examined primarily the text of the statute and only briefly considered the statute's legislative history in its reasoning.[193] At issue in that case was the liability of a defendant under 18 U.S.C. § 1028A(a)(1), a federal statute that criminalizes the actions of an offender who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person[,]" where the defendant provided his employer with social security and alien registration cards bearing his name but the numbers of other individuals.[194] Specifically, the Court addressed whether the government is required to show that the defendant knew that the means

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[188] MODEL PENAL CODE § 5.01 cmt. 47 (Tent. Draft No. 10, 1960).

[189] *Id.*

[190] *Wesley*, 417 F.3d at 618–19; *McFadden*, 739 F.2d at 151; United States v. Stallworth, 543 F.2d 1038, 1040 (2d Cir. 1976).

[191] *Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 151; *Jackson*, 560 F.2d at 115; *Stallworth*, 543 F.2d at 1039.

[192] 129 S. Ct. 1886, 1890–94 (2009).

[193] *Flores-Figueroa*, 129 S. Ct. at 1890–94; *see also* United States v. Betancourt, 586 F.3d 303, 309 (5th Cir. 2009).

[194] 18 U.S.C. § 1028A(a)(1) (2006); *Flores-Figueroa*, 129 S. Ct. at 1888.

of identification that he or she transferred, possessed or used unlawfully, belonged to another person or, in other words, whether the element of "knowingly" applied to all of the succeeding elements.[195]

The Court began its analysis by using "ordinary English grammar," to determine what the statute entails.[196] The Court, in a unanimous opinion, held that "knowingly" applies to all of the subsequent elements.[197] The Court rejected the government's argument that requiring the prosecution to show the defendant had actual knowledge that the identification belonged to another person would stifle law enforcement efforts to control the use of false documents.[198] In briefly reviewing the legislative history, the Court noted that neither the concerns about practical enforceability nor indications of contrary congressional purpose adequately outweigh the unambiguousness of the text.[199]

This statutory interpretation by the Supreme Court indicates that an examination of the statute's text and possibly the legislative history would most likely govern the interpretation of federal criminal statutes. Additionally, governmental concerns regarding the difficulty of enforcing the statute would probably not persuade the Court to stray from a natural reading of the unambiguous text. Thus, if the Supreme Court addressed the issue at the center of the circuit split, the Court would likely find that actual force and violence or intimidation is necessary for attempted bank robbery under the first paragraph of § 2113(a).

V. FUTURE REPERCUSSIONS OF AND POSSIBLE SOLUTIONS TO THE CIRCUIT SPLIT

A. The Need for Consistency of Statutory Interpretation Methods

It is imperative that courts continue to apply similar and long-established methods of statutory interpretation in order to maintain consistency and predictability within the court system and to avoid undermining past interpretations of statutes. As discussed in Part II, courts have primarily utilized a few core methods to interpret laws.[200] Although more than one customary manner of interpreting a statute exists, it can reasonably be assumed that the small group of typical

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195 *Flores-Figueroa*, 129 S. Ct. at 1888.
196 *Id.* at 1890–91.
197 *Id*. at 1894.
198 *Id*. at 1893.
199 *Id.* at 1893–94.
200 McMunigal, *supra* note 150, at 1294; Nelson, *supra* note 150, at 347–48.

methods has contributed to a sense of consistency in the way courts read and decipher statutes. This is especially true since the statutory analysis almost always takes into account the text of the particular statute.[201]

In this circuit split, the Second, Fourth, Sixth, and Ninth Circuits failed to incorporate any sort of textual analysis into their decisions.[202] Instead, these courts focused on the MPC's substantial step test and reinforced their holdings with the policies underlying attempt liability as delineated in the MPC.[203] This departure from the use of conventional statutory interpretation methods affects not only the interpretation of this statute but the interpretation of all statutes; it calls into question the future predictability of statutory interpretation and promotes uncertainty within the lawmaking process, as congressional efforts that have produced consistent results in the past may no longer be interpreted in a uniform manner. Courts must adhere to consistent methods of statutory interpretation because allowing courts to extend beyond the techniques typically used and to pick and choose the sources and methods that will be utilized to interpret laws would lead to ambiguity among statutes.[204]

B. Escaping Liability under § 2113(a)

Although the established and traditional methods of statutory interpretation should not be abandoned, applying these methods to the issue at the center of the circuit split has at times led to dire consequences. Such interpretation has placed innocent people in danger, while committed and dangerous bank robbers can avoid liability under the Act, and make repeated criminal attempts. The facts of the cases in the circuit minority all present scenarios where it appears that a bank robbery would have occurred but-for the intervention of law enforcement officials.[205] While the courts in each of those cases determined that the defendants could not be convicted of attempted bank robbery under the

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[201] McMunigal, *supra* note 150, at 1294.

[202] United States v. Wesley, 417 F.3d 612, 617–20 (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); United States v. Jackson, 560 F.2d 112, 116–21 (2d Cir. 1977); United States v. Stallworth, 543 F.2d 1038, 1040–41 (2d Cir. 1976);) *see also* United States v. Thornton, 539 F.3d 741, 747 (7th Cir. 2008); United States v. Bellew, 369 F.3d 450, 456 (5th Cir. 2004); United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *7–11 (E.D. Pa. Aug. 31, 2009).

[203] *Wesley*, 417 F.3d at 617–20*; Moore*, 921 F.2d at 209; *McFadden*, 739 F.2d at 151–52; *Jackson*, 560 F.2d at 116–21; *Stallworth*, 543 F.2d at 1040–41; *see also Thornton*, 539 F.3d at 747; *Bellew*, 369 F.3d at 456; *Smith*, 2009 U.S. Dist. LEXIS 77588, at *7–11.

[204] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002).

[205] *Thornton*, 539 F.3d at 744; *Bellew*, 369 F.3d at 452; *Smith*, 2009 U.S. Dist. LEXIS 77588, at *2–3.

first paragraph of § 2113(a) because the defendants did not use actual intimidation,[206] the defendants still presented a danger to innocent bystanders. Even though Bellew entered the bank and did not harm or threaten anyone, he armed himself with a gun with which he could have easily harmed a bank employee or customer.[207] Similarly, Thornton carried a machine gun before he was spotted by witnesses and eventually arrested.[208] Even though Smith did not have an automatic weapon, he possessed a BB gun that resembled a semiautomatic firearm.[209] These defendants did not use force or intimidation against others, but it can reasonably be concluded that they had clear and unwavering intent to complete the robberies, and had the ability to harm others. Additionally, if the courts in the majority had applied the statutory analysis that the courts in *Bellew*, *Thornton*, and *Smith* applied, none of the defendants in those cases would have faced conviction under the first paragraph of § 2113(a). All of the defendants in the cases decided by the circuit majority failed to enter the bank during the attempted robbery and, like the defendants in the cases in the circuit minority, did not use actual intimidation.[210] They did, however, have access to weapons with which innocent people might have been hurt or killed.[211]

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[206] *Thornton*, 539 F.3d at 750; *Bellew*, 369 F.3d at 453; *Smith*, 2009 U.S. Dist. LEXIS 77588, at *26.

[207] *Bellew*, 369 F.3d at 451.

[208] *Thornton*, 539 F.3d at 744.

[209] *Smith*, 2009 U.S. Dist. LEXIS 77588, at *3. A BB gun has been classified as a dangerous weapon for purposes of sentencing. *See* United States v. Dunigan, 555 F.3d 501, 506 (5th Cir. 2009) (holding that under the Commentary to the United States Sentencing Guidelines, the BB gun qualifies as a dangerous weapon); United States v. Woods, 556 F.3d 616, 623 (7th Cir. 2009) (stating that whether or not the BB gun was inoperable, the guns qualify as dangerous weapons under the Commentary to the United States Sentencing Guidelines, and further noting that a gun is a dangerous weapon if it bears a strong resemblance to a dangerous weapon or is used in a manner that conveys that it is dangerous); *Developments in State Constitutional Law: 2001: IV. Due Process*, 33 RUTGERS L. J. 1299, 1322 (2002) ((citing State v. Johnson, 766 A.2d 1126, 1129 (N.J. 2001) (finding that the defendant had committed a violent crime and sentencing the defendant was therefore appropriate because the defendant had used a BB gun)).

[210] United States v. Wesley, 417 F.3d 612, 616 (6th Cir. 2005); United States v. Moore, 921 F.2d 207, 208 (9th Cir. 1990); United States v. McFadden, 739 F.2d 149, 151 (4th Cir. 1984); United States v. Jackson, 560 F.2d 112, 115 (2d Cir. 1977); United States v. Stallworth, 543 F.2d 1038, 1039 (2d Cir. 1976).

[211] *Moore*, 921 F.2d at 208; *McFadden*, 739 F.2d at 151; *Jackson*, 560 F.2d at 115; *Stallworth*, 543 F.2d at 1039. While no weapons were found on Wesley when he was arrested, he was also arrested at his home rather than during the course of an attempted robbery, in the vicinity of the bank. *Wesley*, 417 F.3d at 616. Additionally, Wesley had told a police informant a day earlier that he planned to commit the robbery with guns and disguises. *Id.* at 615. Therefore, it can reasonably be assumed that had Wesley and his accomplices attempted the bank robbery, they would have had weapons in their possession at the time.

While the defendant bank robbers might have been liable under the second paragraph of § 2113(a), in some circumstances, they might have escaped conviction completely under the Act. In most of the cases in which federal circuits have dealt with the issue of whether actual force and violence or intimidation is needed for attempted robbery, the defendants did enter or attempt to enter the bank, and thus could face liability under the second paragraph.[212] Additionally, since the second paragraph addresses not only situations where the defendant enters the bank, but also where there is attempted entry,[213] police intervention would be warranted at an earlier point. The Sixth Circuit in *Wesley*, however, stated that defendants who do not enter or attempt to enter the bank would escape conviction under the second paragraph.[214] The FBI apprehended the defendants in *Jackson* while they sat in a car.[215] The police arrested Smith while he was sitting in a car as well, and the district court found that he had not used actual intimidation, thus granting Smith his desired acquittal.[216] Police arrested Wesley at his home, and he made no attempt to enter the bank.[217]

Finally, the hypothetical young man and his friends from this Comment's introduction who decided to rob a bank but were arrested while in their car, did not attempt to enter the bank. Accordingly, neither this young man, nor the defendants in *Smith*, *Jackson*, and *Wesley* could have been convicted under either paragraph of § 2113(a) if the view of the minority is followed. More significantly, if these defendants escaped charges completely, they would be able to revise their plans for future robbery efforts. Thus, while courts should continue to utilize the customary methods of statutory interpretation, the policies of the MPC have relevant application in the context of potential bank robbers who might otherwise be able to escape liability under the Act, and consequently would not be deterred from committing dangerous crimes in the future.

C. Statutory Amendment as a Potential Solution

While the policies of the MPC are certainly relevant to the factual situations presented by the robbery of federal banks, it is the legislature,

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[212] The Fifth and Seventh Circuits in *Bellew* and *Thornton*, respectively, explicitly pointed out that the defendants in those cases could have properly been charged under the second paragraph of § 2113(a). *Thornton*, 539 F.3d at 747; *Bellew*, 369 F.3d at 455.

[213] 18 U.S.C. § 2113(a) (2006).

[214] *Wesley*, 417 F.3d at 618 n.1.

[215] *Jackson*, 560 F.2d at 115.

[216] United States v. Smith, No. 07-743-02, 2009 U.S. Dist. LEXIS 77588, at *2, 27 (E.D. Pa. Aug. 31, 2009).

[217] *Wesley*, 417 F.3d at 616.

rather than the judiciary, that should take these policies into account. The safety of innocent bystanders and the desire to halt and punish those with clear intent to commit the dangerous crime of robbery are significant social priorities. Yet, in order to maintain consistency in statutory interpretation, the courts should not allow policy issues to completely invert a conclusion that a court would have reached using traditional methods of statutory interpretation. In a recent comment analyzing this circuit split, the author suggests that the solution to the dilemma would be for the Supreme Court to grant certiorari, and hold that the circuit minority is correct in holding that actual force and violence, or intimidation is needed for attempted bank robbery under the Act.[218] This route, however, would merely achieve the single goal of supporting and reinforcing the use of textual and legislative history analysis as a method of statutory interpretation. By upholding the circuit minority's view, the Supreme Court would not be addressing the dilemma that would occur in situations where a potential bank robber would escape liability completely under the Act because he did not use actual force and violence or intimidation and did not enter or attempt to enter the bank.

Therefore, the most complete solution would be for the legislature to amend the first paragraph of § 2113(a), so that it can be unambiguously interpreted by courts as requiring only attempted force and violence or intimidation for the crime of attempted bank robbery. This amendment would most likely allow not only for the convictions of the defendants in *Jackson*, *Wesley*, and *Smith*, but also the hypothetical young man, since these defendants had access to either actual guns or weapons closely resembling firearms, both of which most people would probably find intimidating.[219] The Ninth Circuit in *Moore* found that a jury could reasonably conclude that Moore's carrying of a gun showed that he intended to use force and violence or intimidation.[220] If other courts were to make the same finding, it could be determined that a defendant had attempted to use force and violence or intimidation, and

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[218] Michael Rizzo, 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, 249–53 (2009). This Comment does not take into account the recent district court cases that have weighed in on whether actual force and violence or intimidation is needed for attempted bank robbery. *Id.*

[219] *Wesley*, 417 F.3d at 615; *Jackson*, 560 F.2d at 114.

[220] United States v. Moore, 921 F.2d 207, 209 (9th Cir. 1990). The Ninth Circuit found Moore to have "used" the gun during the attempted robbery because even though he never brandished or discharged it, he carried the concealed gun in order to increase the likelihood that he would complete the robbery successfully. *Id.*

therefore the elements of attempted bank robbery would be satisfied. Thus, an amendment of the statute by the legislature would meet the dual goals of 1) allowing the courts to utilize similar and consistent methods of statutory interpretation, and 2) permitting police to intervene at an earlier stage in an alleged bank robbery in order to protect innocent bystanders and arrest potential bank robbers.

It may be argued that amendment of the statute would have minimal effect on preventing bank robberies as the potential bank robbers can be charged under either the second paragraph of § 2113(a) or under another statute. The importance, however, of amending the statute in order to promote the goals of the MPC in the situations where a potential bank robber would slip through the cracks of being charged with a serious crime, or with any crime at all for that matter, is incontestable. It is true that although the prosecution could not have convicted the defendants in the circuit majority under the first paragraph of § 2113(a) if those courts required actual force and violence or intimidation, defendants can often be convicted under the second paragraph, which carries the same punishment as the first paragraph.[221] Additionally, since prosecutors often charge defendants under multiple statutes, it is likely that while the defendant may be able to avoid liability under § 2113(a), the defendant will face a charge and potential conviction for another action related to the robbery, under either federal or state law.[222]

Yet charging a potential bank robber under an alternate statute may often result in a punishment less severe than for a conviction under § 2113(a). By letting the potential bank robber off with a lesser sentence, or possibly no punishment at all, the robber is permitted to revise his plan and attempt the robbery again. An increase in robberies and attempted robberies could have serious effects due to the danger that robbery presents. Courts have viewed robbery as an extremely dangerous crime, and the MPC has listed robbery among the predicate

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[221] *See* 18 U.S.C § 2113(a) (2006); *see also* United States v. Loniello, 610 F.3d 488, 491 (7th Cir. 2010) (noting that it is possible to violate the first paragraph of § 2113(a) without entering the vicinity of the bank, such as where a potential bank robber attempts to kidnap a bank employee for ransom).

[222] *See* United States v. Corbin, 709 F. Supp. 2d 156, 160 (D.R.I. 2010); Ob'Saint v. Warden, Toledo Corr. Inst., 675 F. Supp. 2d 827 (S.D. Ohio Dec. 21, 2009). *Ob'Saint* involved a bank robbery where the defendant did not use actual force and violence or intimidation and therefore was not charged under the first paragraph of § 2113(a), but had his sentence enhanced under the Ohio firearm specification statute, which is satisfied if the offender displays, brandishes, indicates that he possessed a weapon, or uses the weapon to facilitate the offense. 675 F. Supp. at 829.

crimes for felony murder.[223] Notably, in a recent case in which a defendant committed armed robbery in violation of § 2113(a), the Eleventh Circuit upheld the district court's refusal to lessen a sentence despite the fact that the defendant had no criminal record and was an active member of his community and church.[224] The court emphasized that someone could have been killed during the robbery and the defendant's absence of past convictions does not outweigh the severity of the crime.[225]

Therefore, amendment of the statute would, at least in some scenarios, allow for potential bank robbers to be charged under the first paragraph of § 2113(a) instead of being charged under a statute carrying a lesser punishment or not being charged at all. The amendment of the statute would thereby deter future crimes through the conviction of those with clear criminal intent and protect innocent bystanders by allowing the police to intervene at an earlier stage in a crime.

VI. CONCLUSION

A circuit split currently exists regarding whether actual force and violence or intimidation is needed for conviction of attempted bank robbery under the first paragraph of § 2113(a). The minority of the circuits is correct in applying the statutory interpretation methods of examining the text and legislative history of the statute, and in holding that actual force and violence or intimidation is needed. The policies of the MPC that support application of the substantial step test to attempted crimes, however, have much credibility and relevance in the factual situations that accompany bank robberies. These policies, if applied to statutory interpretation in the way that the majority in the circuit split has done, allow for earlier police intervention and the arrest of a committed potential bank robber before he or she is able to harm innocent victims.

Yet the traditional methods of statutory interpretation used by the minority of the circuits should certainly not be abandoned, as this would lead to great inconsistency and uncertainty regarding past and future statutory interpretation and congressional intent. Thus, the solution to furthering the policies of the MPC while continuing to use established methods of statutory interpretation lies in the discretion of the

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[223] MODEL PENAL CODE § 210.2(1)(b) (Official Draft and Revised Comments 1962); *see also* State v. Tribble, 790 N.W. 2d 121, 124 (Iowa 2010); Stephen J. Morse, *Reasons, Results and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 403 (2004) (stating that armed robbery is one of the felonies that is most intrinsically dangerous to life).

[224] United States v. Creason, No: 09-15638, 2010 U.S. App. LEXIS 13108, at *3 (11th Cir. June 25, 2010).

[225] *Id.* at *4.

Legislature. Congress has the ability and the responsibility to amend the wording of the statute so that it is clear, under an analysis of the text, that only attempted force and violence or intimidation is necessary for a defendant to be convicted of attempted bank robbery under the first paragraph of § 2113(a).