

1982

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Recommended Citation

Jeanne F. Phillips, *Determining the Proper Scope of Section 2113(b) of the Federal Bank Robbery Act*, 51 Fordham L. Rev. 536 (1982).

Available at: <https://ir.lawnet.fordham.edu/flr/vol51/iss3/7>

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DETERMINING THE PROPER SCOPE OF SECTION 2113(b) OF THE FEDERAL BANK ROBBERY ACT

INTRODUCTION

In 1937 Congress expanded the coverage of the Federal Bank Robbery Act¹ (Act), making it a federal offense to "take and carry away, with intent to steal or purloin, any property or money" from a bank that is a member of the Federal Reserve System, or that is organized or operating under the laws of the United States.² As originally enacted in 1934,³ the Act, pursuant to a congressional desire to combat interstate gangsterism, only made bank robbery,⁴ a crime traditionally within the jurisdiction of the states, a federal offense.⁵

Courts have disagreed as to what types of thefts are encompassed by the 1937 amendment.⁶ Read narrowly, it applies only to trespassory

1. Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934) (codified as amended at 18 U.S.C. § 2113 (1976)).

2. Act of Aug. 24, 1937, ch. 747, § 2(a), 50 Stat. 749. Section 2113(b) provides in full:

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 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 not more than \$5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 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 not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 2113(b) (1976).

3. Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934) (codified as amended at 18 U.S.C. § 2113 (1976)).

4. *Id.* "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both." *Id.* § 2(a).

5. S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934).

6. The majority of courts of appeals supports a broad construction of § 2113(b) to include non-trespassory thefts other than common-law larceny. *See United States v. Shoels*, 685 F.2d 379, 382-83 (10th Cir. 1982) (taking by false pretenses), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Bell*, 678 F.2d 547, 548-49 (5th Cir. 1982) (*en banc*) (same), *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 82-5119); *United States v. Simmons*, 679 F.2d 1042, 1049 (3d Cir. 1982) (check-forging scheme), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *United States v. Khamis*, 674 F.2d 390, 394 (5th Cir. 1982) (worthless check); *United States v. Guiffre*, 576 F.2d 126, 128 (7th Cir.) (use of stolen and forged checks), *cert. denied*, 439 U.S. 833 (1978); *United States v. Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972) (embezzlement); *United States v. Ferraro*, 414 F.2d 802, 804 (5th Cir. 1969) (receipt of embezzled money); *Williams*

takings that were considered larceny at common law,⁷ whereby the owner is deprived of possession of but not title to property.⁸ A broad

v. United States, 402 F.2d 258, 259 (5th Cir. 1968) (taking by false pretenses), *cert. denied*, 396 U.S. 1017 (1970); Thaggard v. United States, 354 F.2d 735, 736-38 (5th Cir. 1965) (same), *cert. denied*, 383 U.S. 958 (1966); cf. United States v. Tavoularis, 515 F.2d 1070, 1074 n.7 (2d Cir. 1975) (violation of § 2113(c) does not require that taking under § 2113(b) be larcenous); United States v. Barnes, 213 F. Supp. 510, 514 (E.D. Pa. 1963) (indictment under § 2113(c) upheld even though separate indictment alleged money embezzled in violation of 18 U.S.C. § 656 and not § 2113(b)).

A minority of jurisdictions have construed the section narrowly, limiting it to the trespassory takings of common-law larceny. See United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); United States v. Feroni, 655 F.2d 707, 711 (6th Cir. 1981); United States v. Pinto, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); Bennett v. United States, 399 F.2d 740, 744 (9th Cir. 1968); LeMasters v. United States, 378 F.2d 262, 266 (9th Cir. 1967); United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961); United States v. Patton, 120 F.2d 73, 75-76 (3d Cir. 1941) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); United States v. Posner, 408 F. Supp. 1145, 1150 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); United States v. Rollins, 383 F. Supp. 494, 496-97 (S.D.N.Y. 1974), *aff'd on other grounds*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); United States v. Starr, 48 F. Supp. 910, 911 (S.D. Fla. 1943) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); United States v. Mangus, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (same). In *Patton* and *Pinto*, the Third Circuit adopted a narrow construction of § 2113(b). More recently, however, the court in *Simmons* held that the section was to be given a broad construction. 679 F.2d at 1048-49. The Third Circuit did not refer to its prior decision in *Patton*, although it distinguished *Pinto* as limited to its particular facts. *Id.* at 1049. A concurring opinion vigorously called for an express statement that the majority had in fact overruled *Pinto*. *Id.* at 1051 (Adams, J., concurring). Notwithstanding the majority's refusal to expressly overrule *Pinto*, *Simmons* places the continued viability of *Patton* and *Pinto* in question.

In *Rollins*, the defendant was charged with violations of § 2113(a) and the federal mail fraud statutes. The government relied on the Second Circuit's broad interpretation of § 2113(b) in *Fistel* as a predicate for its charge under § 2113(a). 383 F. Supp. at 495. The district court, however, dismissed the § 2113(a) charge, finding that the legislative history of the 1937 amendment created a clear exception to the broad construction of § 2113(b) in *Fistel*, when the intended taking is fraudulent, "whether by the use of the mails or otherwise." *Id.* at 496. Although the district court rejected the analysis of the Second Circuit, the broad interpretation in *Fistel* was followed by the Second Circuit, after the *Rollins* decision, in *Tavoularis*.

It should be noted that both the 1943 district court decision in *Starr* and the 1940 district court decision in *Mangus* may no longer be good law, at least in their respective circuits, in light of the more recent broad interpretations of § 2113(b) by the Fifth Circuit in *Bell*, *Khamis*, *Ferraro*, *Williams* and *Thaggard*, and the Seventh Circuit in *Guiffre*. See generally Memorandum for the United States, United States v. Bell, *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 82-5119) [hereinafter cited as Memorandum]. This Memorandum, filed in November 1982 by the Solicitor General in response to petitioner Bell's petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit, does not oppose the grant of the petition because of the multi-circuit conflict on the issue. Rather, it presents both sides of the issue of whether § 2113(b) should be limited to common-law larceny.

7. See *supra* note 6.

8. The elements of larceny at common-law included 1) a trespassory taking and carrying away of the personal property of another, see United States v. Rogers, 289

F.2d 433, 438 (4th Cir. 1961); *United States v. Posner*, 408 F. Supp. 1145, 1150-51 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); 4 W. Blackstone, Commentaries *229, 2) with intent to permanently deprive the owner of his rights. *United States v. Posner*, 408 F. Supp. 1145, 1150-51 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); *see* 4 W. Blackstone, Commentaries *232. The trespassory nature of the taking is preserved only if the thief, without the owner's consent, obtains possession of the goods but not title. *See Topolewski v. State*, 130 Wis. 244, 254-55, 109 N.W. 1037, 1041 (1906) (no trespass because owner partially induced defendant's taking); W. LaFave & A. Scott, *Handbook on Criminal Law* § 84, at 618; *id.* § 85, at 622 (1972); J. Miller, *Handbook of Criminal Law* § 111, at 348-51 (1934).

Several other situations were considered larceny at common law even though the owner voluntarily relinquished possession. The theory was that the person in actual possession who misappropriated the property committed a trespass against the owner's "constructive possession." Two such situations are larceny by bailee, *People v. McDonald*, 43 N.Y. 61 (1870), and the delivery of property by the owner for a special purpose or as part of a transaction, in which the receiver of the property absconds with it. *Hildebrand v. People*, 56 N.Y. 394 (1874). A third situation is larceny by trick, whereby the thief, with intent to fraudulently convert property, induces the owner by lies to give up possession but not title. *See J. Miller, supra*, § 112, at 357-61. A classic example is *The King v. Pear*, 168 Eng. Rep. 208 (1779), in which the defendant hired a horse by telling the owner that he was going to Sutton, while in fact he intended to go elsewhere and sell the horse. *Id.* at 208-09. The defendant obtained possession but not title; the owner, however, was deemed to have retained "possession" until the defendant sold the horse, thereby preserving the "trespass" necessary to convict the defendant of larceny. *See id.* at 209; W. LaFave & A. Scott, *supra*, § 85, at 627. The lies sufficient for larceny by trick may be written or spoken, and they may be misrepresentations of present or past facts or false promises. *Id.* A fourth situation is larceny by unilateral mistake of the owner/possessor. The property of A may be delivered to B by a mistake as to a) the nature of the property, *id.* at 629; *see Sapp v. State*, 157 Fla. 605, 26 So. 2d 646 (1946) (en banc) (bank cashier confused amount of check with paid-to-date total); *Cooper v. Commonwealth*, 110 Ky. 123, 60 S.W. 938 (1901) (delivery by bank teller of gold pieces in the belief that they were nickels), or b) the identity of the recipient. *Rex v. Mucklow*, 168 Eng. Rep. 1225 (1827) (postman delivered letter to the wrong "James Mucklow"); W. LaFave & A. Scott, *supra*, § 85, at 629. If the recipient of the property transferred by mistake appropriated the property knowing of the mistake at the time of delivery, he commits a trespass in the taking and is guilty of larceny. *Id.* § 85, at 629; *see United States v. Rogers*, 289 F.2d 433, 438 (4th Cir. 1961) (delivery of goods by transferor acting under unilateral mistake of fact may be ineffective to transfer right to possession or title); *Rex v. Mucklow*, 168 Eng. Rep. 1225, 1226 (1827) (larceny conviction reversed because defendant Mucklow had no *animus furandi* when he first received misdelivered letter and check, which he subsequently cashed). A second view regarding larceny by mistake distinguishes mistake in the *factum* from mistake in the inducement, and reasons that only when the mistake is as to the identity of the object given to another does a misappropriation constitute common-law larceny. For example, when A gives B a ten dollar bill, believing both that he owes B five dollars and that the bill is in fact a five dollar bill, B is guilty of larceny if he knowingly accepts it. *See United States v. Posner*, 408 F. Supp. 1145, 1151-53 (D. Md. 1976) (explaining the two viewpoints but concluding that because the distinction has been rejected by most courts, either type of larceny by mistake is common-law larceny), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977). *See generally Beatty, The Federal Bank Robbery Act: Has Fraud Become Larceny?*, 86 *Banking L.J.* 195 (1969), which criticizes the reasoning of decisions construing § 2113(b) that were based on theories of larceny by mistake and concludes that Congress intended to adopt the technicalities of common-law distinctions in § 2113(b).

interpretation of the amendment, however, includes other types of theft⁹ that are not technically trespassory in nature. Such non-trespassory thefts include taking by false pretenses, whereby the owner, influenced by fraud, intends to part with both title and possession,¹⁰ and embezzlement, whereby the wrongdoer already has lawful possession of the property.¹¹ This disagreement has stemmed from the

9. See *supra* note 6.

10. Taking by false pretenses is a statutory crime, defined in slightly different ways in various jurisdictions. W. LaFave & A. Scott, *supra* note 8, § 90, at 655. It consists generally of the following elements: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer [or some third person at the wrongdoer's direction or request], (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim." *Id.*; accord *United States v. Shoels*, 685 F.2d 379, 382 (10th Cir. 1982) *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *People v. Jones*, 36 Cal. 2d 373, 377, 381, 224 P.2d 353, 355, 358 (1950); *Black's Law Dictionary* 541 (5th ed. 1979). "The representation may be implied from conduct, or may consist of concealment or non-disclosure where there is a duty to speak [and] may consist of any act, word, symbol or token calculated and intended to deceive." *Bright v. Sheriff*, 90 Nev. 168, 170, 521 P.2d 371, 373 (1974) (*per curiam*) (*emphasis deleted*); *Black's Law Dictionary* 541 (5th ed. 1979); accord W. LaFave & A. Scott, *supra* note 8, § 90, at 656.

The owner's retention of title distinguishes larceny from taking by false pretenses. See *J. Miller, supra* note 8, § 121, at 390. For example, in *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967), the defendant fraudulently represented himself to a federally insured bank as one of its depositors, Mr. Tournour, by presenting stolen identification papers. He was issued a new passbook in Tournour's name and withdrew a total of \$6700 from the account, without any authority from Tournour. *Id.* at 263. The defendant's conduct was taking by false pretenses because the bank, relying on defendant's false representations, had willingly given over title and possession of the money. See *id.* at 263-64. The court reversed the defendant's conviction, holding that § 2113(b) covered only common-law larceny. See *id.* at 266-68.

11. Embezzlement is a statutory crime generally consisting of the following elements: "(1) the fraudulent (2) conversion of (3) the property (4) of another (5) by one who is already in lawful possession of it," W. LaFave & A. Scott, *supra* note 8, § 89, at 644, or who has been entrusted with the property. Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 469 n.1 (1976). Most statutes list the various types of persons who commit embezzlement when they fraudulently convert, such as corporate directors and officers, attorneys, trustees, brokers and agents. W. LaFave & A. Scott, *supra* note 8, § 84, at 621 n.10; *id.* § 89, at 644-45. A few jurisdictions apply the statute to anyone who falls within its terms. *Id.* § 89, at 645. When the wrongdoer converts the property lawfully in his possession to his own use, he does not commit larceny because no trespass against the owner's right to possession has occurred. *Id.* § 89, at 644; *J. Miller, supra* note 8, § 116, at 374. A common example of embezzlement occurs in an employer/employee situation. In *Commonwealth v. Ryan*, 155 Mass. 523, 30 N.E. 364 (1892), a store clerk momentarily placed cash received from a customer into a cash drawer, and then converted the money to his own use. *Id.* at 524, 30 N.E. at 364. The conviction for embezzlement was affirmed because the court ruled that the employee had lawful possession of the money, which he had not transferred to the employer at the time of conversion. *Id.* at 526, 30 N.E. at 365. This situation is to be distinguished from a case in which the employer, and not a third party, gives property to his employee. Because the employer retains

unclear scope of the language of the 1937 amendment (section 2113(b)), which, in addition to section 2113(b), included a proscription of burglary.¹² Further, the legislative histories of the 1934 Act and the 1937 amendment have sparked controversy¹³ because they are sparse¹⁴ and provide little evidence of congressional intent.

Given this ambiguity, some courts have reasoned that both the rule of lenity, which requires strict construction of ambiguous penal statutes,¹⁵ and the policy of judicial restraint in construing federal crimes traditionally covered by state law,¹⁶ together dictate that section

"constructive possession" while the employee has mere custody, conversion by the employee is still a trespass, and therefore larceny. *Id.* at 526, 30 N.E. at 364-65; *W. LaFave & A. Scott, supra* note 8, § 84, at 619 & n.4.

12. Act of Aug. 24, 1937, ch. 747, § 2(a), 50 Stat. 749 (codified as amended at 18 U.S.C. § 2113(a) (1976)) ("whoever shall enter or attempt to enter any bank, . . . with intent to commit . . . any felony or larceny, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both"); see *Jerome v. United States*, 318 U.S. 101, 106 (1943).

13. Compare *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967) (Congress had no intention to include obtaining by false pretenses) with *United States v. Simmons*, 679 F.2d 1042, 1046-48 (3d Cir. 1982) (review of the legislative history led to conclusion that Congress broadened the Act to include taking by false pretenses), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

14. *Jerome v. United States*, 318 U.S. 101, 105 (1942); *United States v. Shoels*, 685 F.2d 379, 382, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1047 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

15. *Williams v. United States*, 102 S. Ct. 3088, 3095 (1982); 3 C. Sands, *Sutherland's Statutes and Statutory Construction*, § 59.03, at 6-8 (4th ed. 1974) (citing *McBoyle v. United States*, 283 U.S. 25 (1931)); see *Bell v. United States*, 349 U.S. 81, 83-84 (1955). Cases of "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

16. Some of the courts that narrowly construe § 2113(b) are concerned not with the unquestioned jurisdiction of federal courts over federal offenses, 13 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3575, at 509 (1975) (citing 18 U.S.C. § 3231 (1976)), but rather with whether taking by false pretenses is a federal offense under § 2113(b). *E.g.*, *LeMasters v. United States*, 378 F.2d 262, 263-64 (9th Cir. 1967); *United States v. Rollins*, 383 F. Supp. 494, 496 (S.D.N.Y. 1974), *aff'd on other grounds*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). Because there is no federal criminal common law, federal criminal prosecutions must rest on an Act of Congress specifically defining the crime. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812). If a crime is not a federal offense, it is necessarily left to the states' jurisdiction. See *id.* at 33. Courts supporting a narrow interpretation of the section are reluctant to include taking by false pretenses because Congress did not explicitly use the term in the statute, and it is already covered by state law. *E.g.*, *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967); *United States v. Rollins*, 383 F. Supp. 494, 496-97 (S.D.N.Y. 1974), *aff'd on other grounds*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

2113(b) be narrowly applied.¹⁷ Other courts reject this reasoning. They hold that the section should be read broadly to include both trespassory and non-trespassory offenses because of the strong federal interest in protecting the federally insured funds of the numerous banks and other financial institutions covered by the Act.¹⁸

This Note analyzes the statute within the framework of traditional principles of statutory construction. It examines the language and the legislative history of the statute and determines that neither requires that application of section 2113(b) be limited to common-law larceny.¹⁹ The rule of lenity and the policy of judicial restraint regarding federal criminal jurisdiction are then weighed against the general purpose of the amendment and the federal interest in protecting the assets of federally insured banks.²⁰ This Note concludes that the purposes behind the amendment and this strong federal interest require that common-law distinctions be rejected, and therefore, that section 2113(b) be broadly construed to encompass both trespassory and non-trespassory offenses.

I. TEXTUAL ANALYSIS OF SECTION 2113(b)

Analysis of the language of the 1937 amendment is the first step in determining its meaning.²¹ The pertinent words describing the conduct punishable under section 2113(b) are: "[w]hoever takes and car-

17. *E.g.*, *United States v. Feroni*, 655 F.2d 707, 711 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *LeMasters v. United States*, 378 F.2d 262, 267-68 (9th Cir. 1967).

18. *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); see *United States v. Shoels*, 685 F.2d 379 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982).

19. See *infra* pts. I-II.

20. See *infra* pts. III-IV.

21. See 2A Sutherland's, *supra* note 15, § 46.01, at 48 (4th ed. 1973). Statutory construction can be approached from two points of view. Some courts are concerned with interpreting the statute according to the intent of the legislature; others attempt to determine the meaning of the statute as the public would understand it. *Id.* §§ 45.05, 45.07-08. The plain meaning rule examines the language of the statute, and if the intent of the legislature is clear and unambiguous from that language, there will be no room for construction. *Id.* §§ 46.02, 46.04. "[T]he plain meaning rule seems most consistent with . . . an interpretation according to what the statute means, or may be supposed to mean, to persons affected by it." *Id.* § 46.01, at 49. This inquiry into the plain meaning of the statute, however, also takes into account the will of the legislature because the text of the statute is seen as the best evidence of legislative intent. *Id.* § 46.03, at 53. Penal laws, such as § 2113(b), are "given their common and ordinary meaning so that they may be understood by all." 3 *id.* § 59.08, at 26; *People v. Shakun*, 251 N.Y. 107, 114, 167 N.E. 187, 189-90 (1929) ("tools" does not include printing equipment). As part of an amendatory act, the amendment must be read as a whole, with words of common use construed in their "natural, plain and ordinary meaning. If possible, effect must be given to every word." 1A Sutherland's, *supra* note 15, § 22.29, at 177.

ries away, with intent to steal or purloin.”²² Courts that interpret this language as tantamount to a description of common-law larceny do so because it closely resembles the various definitions given common-law larceny.²³ Under this interpretation the statute does not apply to non-trespassory thefts, such as taking by false pretenses or embezzlement, because these offenses did not constitute larceny at common law.²⁴ Common-law larceny, however, cannot be simply or uniformly defined, although its elements have traditionally been considered: 1) the “felonious taking and carrying away of the personal goods of another,”²⁵ with 2) an intent to permanently deprive the owner of his property.²⁶ To fall within the ambit of common-law larceny, a taking must be trespassory in nature,²⁷ that is, without the owner’s consent.²⁸

22. 18 U.S.C. § 2113(b) (1976).

23. *E.g.*, *Bennett v. United States*, 399 F.2d 740, 743-44 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 264, 267 (9th Cir. 1967); *United States v. Posner*, 408 F. Supp. 1145, 1150, 1153 (D. Md. 1976), *aff’d mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); *see United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *United States v. Feroni*, 655 F.2d 707, 710-11 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *United States v. Rogers*, 289 F.2d 433, 437 (4th Cir. 1961); *United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941) (construing predecessor to § 2113(b), 12 U.S.C. § 588b). In contrast to the words of common-law larceny—“takes and carries away”—the crime of false pretenses is often described in terms of “obtaining money by false pretenses.” *See, e.g.*, 18 U.S.C. § 1025 (1976); *W. LaFave & A. Scott, supra* note 8, § 90, at 655; *J. Miller, supra* note 8, § 118, at 382.

24. *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *United States v. Feroni*, 655 F.2d 707, 709, 710 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836-37 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *Bennett v. United States*, 399 F.2d 740, 744 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 267-68 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437 (4th Cir. 1961); *see United States v. Patton*, 120 F.2d 73, 75-76 (3d Cir. 1941) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); *United States v. Starr*, 48 F. Supp. 910, 910-11 (S.D. Fla. 1943) (same); *United States v. Mangus*, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (same).

25. *LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967) (quoting 4 W. Blackstone, *Commentaries* *230); *United States v. Rogers*, 289 F.2d 433, 438 (4th Cir. 1961) (same); *accord United States v. Shoels*, 685 F.2d 379, 382 (10th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. (U.S. Oct. 8, 1982) (No. 82-5550); *United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941); *United States v. Posner*, 408 F. Supp. 1145, 1150 (D. Md. 1976), *aff’d mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977). *See generally W. LaFave & A. Scott, supra* note 8, §§ 85-87.

26. *United States v. Shoels*, 685 F.2d 379, 382-83 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *accord United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941); *United States v. Posner*, 408 F. Supp. 1145, 1150 (D. Md. 1976), *aff’d mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); *see LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967). This intent element can be reconciled in the cases as an intent of the taker to appropriate the stolen property to a use inconsistent with the property rights of the owner. *United States v. Maloney*, 607 F.2d 222, 227 (9th Cir. 1979) (citing *Pennsylvania Indem. Fire Corp. v. Aldridge*, 117 F.2d 774, 776 (D.C. Cir. 1941)).

The words "take and carry away" in section 2113(b) are clearly associated with common-law larceny, though they are also compatible with non-trespassory theft offenses.²⁹ Section 2113(b) fails to use the term "trespassory" and adds the word "purloin," which was not used in common-law definitions of larceny.³⁰ The absence of the word "trespassory" is significant because the element of trespass distinguishes common-law larceny from other theft offenses.³¹ Moreover, the phrase "with intent to steal or purloin" is not included in most definitions of common-law larceny. This suggests that section 2113(b) has a broad application.³² The precise meaning of this phrase, however, requires further analysis.³³

When a federal criminal statute uses a common-law term without otherwise defining it, the term is generally given its common-law meaning.³⁴ The words "steal" or "stolen," however, have no accepted common-law meaning.³⁵ In *United States v. Turley*,³⁶ relied upon by

27. *United States v. Shoels*, 685 F.2d 379, 382 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Bell*, 678 F.2d 547, 548 (5th Cir. 1982) (en banc), *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 82-5201); *Bennett v. United States*, 399 F.2d 740, 743 (9th Cir. 1968); *United States v. Rogers*, 289 F.2d 433, 438 (4th Cir. 1961); *United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941); *United States v. Posner*, 408 F. Supp. 1145, 1150 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); see *United States v. Feroni*, 655 F.2d 707, 707 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *United States v. Mangus*, 33 F. Supp. 596, 597 (N.D. Ind. 1940).

28. *United States v. Shoels*, 685 F.2d 379, 382 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *Bennett v. United States*, 399 F.2d 740, 743 (9th Cir. 1968); *United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941) (citing *Regina v. Ashwell*, 16 Q.B.D. 190, 195 (1885)); *United States v. Posner*, 408 F. Supp. 1145, 1150-51 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977).

29. See *supra* note 6 for cases espousing a broad construction.

30. *LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967).

31. See *United States v. Posner*, 408 F. Supp. 1145, 1150-51 (D. Md. 1976) (in false pretenses, the owner intends to part with possession and title; once he consents to the taking there can be no larceny), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); *W. LaFave & A. Scott, supra* note 8, § 85, at 622 & n.2 (in embezzlement, "the wrongdoer fraudulently converts property already properly in his possession, he does not take it from anyone's possession and so cannot be guilty of larceny"). See *supra* notes 10-11.

32. See *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

33. 2A *Sutherland's, supra* note 15, § 45.02; see *LeMasters v. United States*, 378 F.2d 262, 267 (9th Cir. 1967).

34. *United States v. Turley*, 352 U.S. 407, 411 (1957); *Thaggard v. United States*, 354 F.2d 735, 737 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

35. *United States v. Turley*, 352 U.S. 407, 411 (1957).

36. 352 U.S. 407 (1957).

many courts espousing a broad construction of section 2113(b),³⁷ the Supreme Court construed the meaning of "stolen" in an analagous statutory context. The statute in question prohibited the transportation of a motor vehicle in interstate commerce "knowing [it] to have been stolen."³⁸ In examining the history of "steal" or "stolen,"³⁹ the Court noted that the original connotation of the word implied stealth, and that it later became a generic designation for dishonest acquisition.⁴⁰ It also relied in part on a definition of "steal" as "the criminal taking of personal property either by larceny, embezzlement, or false pretenses."⁴¹ The Court concluded that "steal" or "stolen," as they have been used in common usage and in federal statutes, "do not have a necessary common-law meaning coterminous with larceny and exclusive of other theft crimes."⁴² In addition, many courts have construed other federal statutes containing words such as "steal," "stolen" or "intent to steal or purloin" as not limited to a technical, common-law definition.⁴³

37. *United States v. Simmons*, 679 F.2d 1042, 1045 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *see, e.g., United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *Thaggard v. United States*, 354 F.2d 735, 737 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

38. 352 U.S. at 408. The issue in *Turley* was "whether the meaning of the word 'stolen,' as used in this provision, [National Motor Vehicle Theft Act, 18 U.S.C. § 2312 (1976)] is limited to a taking which amounts to common-law larceny, or whether it includes an embezzlement or other felonious taking with intent to deprive the owner of the rights and benefits of ownership." 352 U.S. at 408. A similar split among the circuits regarding § 2312 had developed concerning the use of "stolen" before it was resolved in *Turley*. *Id.* at 410-11.

39. 352 U.S. at 411-12.

40. *Id.* at 412 (quoting *Boone v. United States*, 235 F.2d 939, 940 (4th Cir. 1956)).

41. 352 U.S. at 412 (quoting *Black's Law Dictionary* 1583 (4th ed. 1951)); *accord United States v. Simmons*, 679 F.2d 1042, 1045 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982). The *Turley* Court looked to the definition of "stolen" in Webster's New International Dictionary (2d ed. 1953), "[o]btained or accomplished by theft, stealth or craft." 352 U.S. at 412. It also noted that, "Blackstone does not mention 'steal' in defining larceny . . . or in expounding its several elements." *Id.* (quoting *Boone v. United States*, 235 F.2d 939, 940 (4th Cir. 1956)).

42. 352 U.S. at 412. The Court held that "stolen" included "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417.

43. *See, e.g., United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979) (construing "steal" in 18 U.S.C. § 659 (1976), which proscribes embezzlement, stealing, unlawful taking and carrying away of goods from interstate shipments); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d Cir. 1978) (construing

"stolen" in the National Stolen Property Act, 18 U.S.C. § 2314 (1976), as "sufficiently broad to abolish archaic distinctions between larceny, . . . larceny by trick, embezzlement and obtaining property by false pretenses"); *United States v. Handler*, 142 F.2d 351, 353 (2d Cir.) (construing 18 U.S.C. § 415 (1940)) (current version at 18 U.S.C. § 2314 (1976)), which prohibited interstate transportation of goods "stolen, . . . taken feloniously . . . or with intent to steal or purloin"), *cert. denied*, 323 U.S. 741 (1944); *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938) (construing 18 U.S.C. § 99 (1940)) (current version at 18 U.S.C. § 641 (1976)), "steal or purloin" added to cover cases which "may shade into larceny, as well as any new situation . . . not envisioned under the common law"); *United States v. Trosper*, 127 F. 476, 477 (S.D. Cal. 1904) (construing Act of June 8, 1872, ch. 336, § 281, Rev. Stat. § 5469, 43d Cong., 1st Sess., pt. 2 1066 (1873-1874) (currently codified as amended at 18 U.S.C. § 1341 (1976)) ("steal" from the mails not restricted to common-law larceny).

In *United States v. Maloney*, 607 F.2d 222 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980), the Ninth Circuit broadly interpreted the offense defined in 18 U.S.C. § 661 (1976)—"whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin,"—as defining and punishing the crime of larceny within the meaning of 18 U.S.C. § 1153 (1976). 607 F.2d at 226. It defined a *federal* crime of larceny, however, as not limited to its common-law definition. *Id.* at 229. Previously, the Third Circuit in *United States v. Henry*, 447 F.2d 283 (3d Cir. 1971), had broadly construed 18 U.S.C. § 661 (1976), tracing the history of this language as a federal crime to the Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 112, 116, which was often referred to as punishing "larceny." 447 F.2d at 284-85. The court held, however, that the words "with intent to steal or purloin" . . . were intended to broaden the offense of larceny to include such related offenses as would tend to complicate prosecutions under strict pleading and practice." *Id.* at 285.

In an early case supporting the narrow construction of § 2113(b), *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961), the Fourth Circuit also stated that the words were "borrowed from the Act of April 30, 1790, which had been construed as a larceny statute." *Id.* at 437. As demonstrated by the courts in *Maloney* and *Henry*, however, the Act of April 30, 1790 and its subsequent enactments, retained the exact same language, which is broader in scope than common-law larceny. *United States v. Maloney*, 607 F.2d 222, 226-29 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); *United States v. Henry*, 447 F.2d 283, 285-86 (3d Cir. 1971).

That these same words, as used in § 2113(b), embrace only common-law offenses of larceny is a difficult argument to support. *But see* *LeMasters v. United States*, 378 F.2d 262, 264, 267 (9th Cir. 1967) (§ 2113(b) does not cover false pretenses but is language of common-law larceny). The *Maloney* court attempts to distinguish the seemingly anomalous result in the *LeMasters* decision on the basis of a "distinctly different" legislative history and purpose, but it affirms that the mere use of the phrase "take and carry away," "classic larceny" to the court in *LeMasters*, does not indicate a per se limitation to common-law larceny. *United States v. Maloney*, 607 F.2d 222, 229-30 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). This distinction is not well founded because the legislative history does not mandate a limited reading, and the purpose of § 2113(b) supports a more liberal reading of the statute. *See* *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1046, 1048 (3d Cir. 1982), *petition for cert. filed sub nom.* *Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982). *Contra* *LeMasters v. United States*, 378 F.2d 262, 266-67 (9th Cir. 1967); *but see* *United States v. Bryan*, 483 F.2d 88, 91 & n.1 (3d Cir. 1973) (en banc) (construing "steals" in 18 U.S.C. § 659 (1976) broadly but distinguishing it from 18 U.S.C. § 2113(b), which described common-law larceny); *Loman v. United States*, 243 F.2d 327, 329 (8th Cir. 1957) (construing "stolen" in 18 U.S.C. § 2314 (1976) narrowly as common-law larceny).

The word "purloin" implies acts performed by stealth or trick⁴⁴ and is defined as "to steal; to commit larceny or theft."⁴⁵ "Theft," in turn, is considered a "wider term than larceny," encompassing swindle and embezzlement.⁴⁶ A broad interpretation of "steal or purloin" as used in section 2113(b) is strongly supported by these definitions of "steal" and "purloin,"⁴⁷ their use in other federal statutes⁴⁸ and the conclusion reached by the Supreme Court in *Turley*.⁴⁹

Courts favoring a narrow interpretation of section 2113(b), however, find that reliance on the *Turley* definition of "stolen" is inappropriate because the legislative purpose of the statute construed in *Turley* was different from that of section 2113(b).⁵⁰ Moreover, they

44. *United States v. Johnson*, 575 F.2d 678, 679 (8th Cir. 1978) (" 'purloin' . . . is nearly synonymous with 'steal,' especially under circumstances that invoke a breach of trust. ").

45. *Black's Law Dictionary* 1400 (4th ed. 1957).

46. *Id.* at 1647-48.

47. *United States v. Simmons*, 679 F.2d 1042, 1045-46 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *Thaggard v. United States*, 354 F.2d 735, 737-38 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

48. *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982) *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *see United States v. Turley*, 352 U.S. 407, 412 & n.9 (1957); *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

49. *United States v. Shoels*, 685 F.2d 379, 382-83 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1045, 1046 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *United States v. Guiffre*, 576 F.2d 126, 127 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978); *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *Thaggard v. United States*, 354 F.2d 735, 736-37 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); *see United States v. Khamis*, 674 F.2d 390, 394 (5th Cir. 1982). *See supra* note 42.

50. *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981); *LeMasters v. United States*, 378 F.2d 262, 267 (9th Cir. 1967). The court in *LeMasters* noted that if the National Motor Vehicle Theft Act at issue in *Turley* had not been interpreted to include obtaining a car by false pretenses, no jurisdiction would have had effective control over the crime in situations in which the vehicle was taken across state borders. *Id.* at 267. *LeMasters* argues that this provided a "powerful urge toward the broad interpretation," which does not exist in the case of § 2113(b) because "state law . . . was adequate and effectively enforced." *Id.* at 267-68. In fact, this same argument does exist in the situation of § 2113(b) because money obtained by false pretenses or embezzlement is just as easily carried across state borders, rendering state law enforcement inadequate.

Although the legislative history of the National Motor Vehicle Theft Act is different, reliance on *Turley* for the proposition that "steal" or "stolen" do not necessarily have a meaning restricted to common-law larceny in § 2113(b), *e.g.*, *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *Thaggard v. United States*, 354 F.2d 735, 737 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), is proper because it is not dependent upon *Turley's* subsequent analysis of the legislative history.

criticize the failure of some other courts to follow the precept in *Turley*⁵¹ that language be interpreted "consistent[ly] with the context in which it appears."⁵² Thus, in order to resolve the ambiguity of "take and carry away with intent to steal or purloin," the phrase must be examined in the context of the legislative history and the purpose behind the Act.⁵³

II. THE LEGISLATIVE HISTORY

A. The 1934 Act

In 1934, the Senate passed a bill punishing certain offenses committed against federally insured banks.⁵⁴ The bill prohibited robbery,⁵⁵ burglary⁵⁶ and the taking and carrying away, or the attempt to take and carry away, property or money or any thing of value "(1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money . . . to the use of any individual, association . . . other than such bank."⁵⁷ Clearly, this bill, had it remained in this form, would have prohibited both common-law larceny and non-trespassory fraudulent takings.⁵⁸ Yet without any discussion⁵⁹ the House amended the bill, limiting it to

It should also be noted that the word "steal" as used in § 2113(b) is not part of the criminal act itself, "takes and carries away," but part of the mental element, "with intent to steal or purloin." In *Turley*, the broad construction of "stolen" and the offense of "stealing" a motor vehicle to which it referred, related basically to the criminal act, not the criminal intent. See *United States v. Turley*, 352 U.S. 407, 414-17 (1956). It might be argued that this distinguishes the analysis in *Turley* from an analysis of "steal" in § 2113(b). Memorandum, *supra* note 6, at 13.

51. *United States v. Feroni*, 655 F.2d 707, 709-10 (6th Cir. 1981); see *LeMasters v. United States*, 378 F.2d 262, 266-67 (9th Cir. 1967).

52. *United States v. Turley*, 352 U.S. 407, 412-13 (1957).

53. See *United States v. Shoels*, 685 F.2d 379, 382-83 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1046-48 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); 2A Sutherland's, *supra* note 15, §§ 45.02, 46.05, 47.03, 48.06, 48.08 (when words alone are ambiguous other sources such as the legislative history, the social problem sought to be corrected, titles and headings, and committee reports must be consulted in a search for a conclusive meaning or intent of the statute as a whole).

54. S. 2841, 73d Cong., 2d Sess., 78 Cong. Rec. 5738 (1934) (the banks included were members of the Federal Reserve System or any bank "organized or operating under the laws of the United States").

55. *Jerome v. United States*, 318 U.S. 101, 103 (1943); see S. 2841, 73d Cong., 2d Sess., § 4(a), 78 Cong. Rec. 5738, 5738 (1934).

56. *Jerome v. United States*, 318 U.S. 101, 103 (1943); see S. 2841, 73d Cong., 2d Sess., § 3, 78 Cong. Rec. 5738, 5738 (1934).

57. S. 2841, 73d Cong., 2d Sess., § 2, 78 Cong. Rec. 5738, 5738 (1934).

58. *LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967); see *United States v. Simmons*, 679 F.2d 1042, 1046 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

robbery alone.⁶⁰ The amended bill was enacted⁶¹ after consideration of several others⁶² collectively known as the "crime" bills⁶³ or "anti-gangster" bills.⁶⁴

Congress' aim in enacting the 1934 Act was to aid state officials who were hindered in apprehending "gangsters who operate[d] habitually from one State to another in robbing banks" and escaped punishment by traveling across state lines.⁶⁵ The elimination of the burglary, larceny and fraudulent takings provisions was understandable⁶⁶ because at that time Congress was reluctant to intrude in matters thought to be only of local significance.⁶⁷

B. *The 1937 Amendment*

The limitation of the 1934 Act to robbery permitted individuals who stole money from federally insured banks, other than by the use of force or violence, to escape federal prosecution.⁶⁸ The bank, the

59. 78 Cong. Rec. 8767, 8776 (1934); 78 Cong. Rec. 8132 (1934) (following the Conference Committee approval of the amended version of the bill passed by the House). The Act also provided a higher penalty for any kidnapping or murder committed in the course of a robbery. Federal Bank Robbery Act, ch. 304, § 3, 48 Stat. 783, 783 (1934).

60. *Jerome v. United States*, 318 U.S. 101, 103 (1943).

61. Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934) (codified as amended at 18 U.S.C. § 2113 (1976)).

62. 78 Cong. Rec. 8044, 8044 (1934); (bills included: S. 2252 (Act to amend prohibition against the transportation of kidnapped persons in interstate commerce); S. 2253 (Act making it unlawful for any person to flee from one state to another for purpose of avoiding prosecution or the giving of testimony in certain cases); S. 2575 (Act to define certain crimes against the United States in connection with the administration of federal penal and correctional institutions); S. 2845 (Act to extend the provisions of the National Motor Vehicle Theft Act to other stolen property)).

63. 78 Cong. Rec. 8322, 8775 (1934).

64. *Id.* at 8768.

65. S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934); see *Jerome v. United States*, 318 U.S. 101, 102 (1943); *United States v. Simmons*, 679 F.2d 1042, 1046 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *LeMasters v. United States*, 378 F.2d 262, 264-65 & n.3 (9th Cir. 1967).

66. *LeMasters v. United States*, 378 F.2d 262, 265 (9th Cir. 1967).

67. See *id.* at 266; 78 Cong. Rec. 8133, 8133 (1934). When asked whether the bill should also apply to other government institutions, Representative Sumners replied, "We are going rather far in this bill, since all the property is owned, as a rule, by the . . . community The committee was not willing to go further, and the Attorney General did not ask it to" *Id.* (statement of Rep. Sumners). Representative Sumners, Chairman of the House Judiciary Committee, may have been responsible for the deletion of these provisions because he "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." Note, *A Note On The Racketeering, Bank Robbery and "Kick-Back" Laws*, 1 Law & Contemp. Probs. 445, 448-49 (1934); Memorandum, *supra* note 6, at 15 n.11.

68. See S. Rep. No. 1259, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937).

ultimate beneficiary of the Act, was nonetheless injured as if it had been robbed.⁶⁹ The 1937 amendment was designed to avoid such "incongruous results."⁷⁰

Although little legislative history relating to this amendment exists,⁷¹ courts that narrowly define section 2113(b) argue that Congress' deletion of the language regarding non-trespassory fraudulent takings from the final version of the 1934 Act, and its failure to reinsert such language in the 1937 amendment, are evidence that Congress continued to refuse to classify such thefts as federal crimes.⁷² According to the Third Circuit in *United States v. Simmons*,⁷³ however, "it is just as reasonable to conjecture that at that time Congress may have decided that language expressly referring to fraud, artifice and false pretenses in § 2113 might presage a narrow interpretation of other criminal statutes using the words 'steal or purloin.'"⁷⁴

No firm conclusions can be drawn from this omission. Interestingly, however, while the language deleted in 1934 of taking with consent

69. See S. Rep. No. 1259, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937).

70. See S. Rep. No. 1259, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937). A letter of the Attorney General, which was made a part of the House and Senate Reports, "explains the desirability of the proposed amendment." S. Rep. No. 1259, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1 (1937). As an example of the "incongruous results," the Attorney General noted that a man had been recently arrested in a national bank while trying to walk out with \$11,000, which he had taken during an employee's momentary absence. The thief had not committed a robbery and as a result could not be prosecuted under any federal statute. S. Rep. No. 1259, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937); see *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1047-48 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

71. See *supra* note 14.

72. See *Jerome v. United States*, 318 U.S. 101, 105-06 (1943); *United States v. Feroni*, 655 F.2d 707, 710-11 (6th Cir. 1981); *Bennett v. United States*, 399 F.2d 740, 742 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437 & n.14 (4th Cir. 1961); *United States v. Rollins*, 383 F. Supp. 494, 496 (S.D.N.Y. 1974), *aff'd on other grounds*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Mangus*, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (construing predecessor of § 2113(b), 12 U.S.C. § 588b).

73. 679 F.2d 1042 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

74. *Id.* at 1048. The court gave as an example 18 U.S.C. § 661, which contains similar language and has been construed in *United States v. Maloney*, 607 F.2d 222, 231 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980), as not limited to offenses amounting to common-law larceny. After a thorough analysis of the legislative history of § 2113(b), 679 F.2d at 1046, the court rejected a narrow reading of the legislative intent and interpreted the section to "encompass a scheme . . . whereby forged checks were utilized to remove funds from insured banks." *Id.* at 1049.

obtained "by any trick, artifice, fraud, or false or fraudulent representation"⁷⁵ was not used in the 1937 amendment, neither was the language from the 1934 Act repeated which clearly expressed common-law larceny: "tak[ing] . . . without the consent of [the] bank . . . with intent to convert . . . to the use of any individual . . . other than [the] bank."⁷⁶ Nor did Congress use the exact wording of the burglary provision deleted in 1934 when it added that offense in 1937.⁷⁷ The mere inclusion in the 1937 amendment of the phrase "take and carry away," words of "classic larceny,"⁷⁸ does not necessarily indicate that Congress understood this phrase to be incompatible with non-trespassory offenses.⁷⁹

Additionally, some courts give several other reasons to demonstrate that Congress understood section 2113(b) to define common-law larceny, including: 1) the amendment was entitled, "An Act to amend the bank-robbery statute to include burglary and larceny";⁸⁰ 2) the

75. S. 2841, 73d Cong., 2d Sess., 78 Cong. Rec. 8132 (1934).

76. *Id.*

77. Compare *id.* ("breaks into, or attempts to break into . . . with intent to commit . . . any offense defined by this act or any felony") with H.R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 5376 (1937) ("whoever shall enter or attempt to enter any bank . . . with intent to commit . . . any larceny or other depredation") and Act of Aug. 24, 1937, ch. 747, § 2(a), 50 Stat. 749 (1937) (codified as amended at 18 U.S.C. § 2113(a) (1976)) (same as H.R. 5900 except "with intent to commit . . . any felony or larceny").

78. *LeMasters v. United States*, 378 F.2d 262, 267 (9th Cir. 1967).

79. For example, in 1934 Congress employed the words "take and carry away" to proscribe two types of theft offenses, "takings" both *without* consent of the bank or *with* consent obtained by fraud. See *supra* note 57. The repetition of this phrase "take and carry away" in the 1937 amendment similarly could indicate that Congress understood this phrase not as limited to common-law larceny, but as compatible with both consensual and non-consensual takings committed "with intent to steal or purloin." Memorandum, *supra* note 6, at 16-17. In 1939, however, Congress passed a statute that prohibited the obtaining of money by false pretenses on the high seas. Act of Aug. 5, 1939, ch. 434, 53 Stat. 1205 (currently codified as 18 U.S.C. § 1025 (1976)). The false pretense statute was passed to include "card sharpening" offenses on the high seas which were not covered by the statute prohibiting "larceny," presently at 18 U.S.C. § 661 (1976). See S. Rep. No. 446, 76th Cong., 1st Sess. 1 (1939). This "larceny" statute, § 661, contains exactly the same language as § 2113(b), "take and carry away with intent to steal or purloin." This might suggest that in 1937 Congress did not understand the words of § 2113(b) to include obtaining by false pretenses. Memorandum, *supra* note 6, at 17-19 & n.14. A contrary conclusion may be drawn, however, from decisions in the Ninth and Third Circuits that analyzed the history of § 661 and determined that "18 U.S.C. § 661 and its predecessor statutes were not mere codifications of the common-law crime of larceny but were intended to broaden that offense." *United States v. Maloney*, 607 F.2d 222, 229 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); *United States v. Henry*, 447 F.2d 283, 285-86 (3d Cir. 1971). For a further discussion of *Maloney* and *Henry*, see *supra* note 43.

80. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (1937); see *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *LeMasters v. United States*, 378 F.2d

committee reports describe it in the same way;⁸¹ and 3) a short floor discussion of the House bill referred to it as "larceny."⁸² In *Jerome v. United States*,⁸³ the Supreme Court, construing the word "felony" in the burglary section of section 2113 also referred to section 2113(b) as defining "larceny."⁸⁴

262, 267-68 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437 & n.13 (4th Cir. 1961).

81. S. Rep. No. 1259, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1 (1937).

82. 81 Cong. Rec. 4656 (1937) (statement of Rep. Wolcott). This discussion does not necessarily indicate that the language of § 2113(b) is limited to common-law larceny because the meaning of "larceny" as used in the discussion is not clarified. *Id.*; see *United States v. Turley*, 352 U.S. 407, 414-17 (1957). In *Turley*, the Court, construing the National Motor Vehicle Theft Act noted that although the Congressional floor discussion referred to "larceny," this did not imply that Congress meant common-law larceny because nothing was said about excluding other forms of theft. The Court stated that "[n]o mention [was] made of a purpose to distinguish between different forms of theft, as would be expected if the distinction had been intended." *Id.* at 414-15. Congress modified § 2113(b) by dividing it into two offenses, a felony and a misdemeanor, based solely on the value of the property or money stolen, 81 Cong. Rec. 5376-77 (1937), because it did not wish to impose the same penalties for robbery, breaking and entering, and any other taking and carrying away. See *id.* at 4656 (statements of Reps. Rankin and Wolcott). The Court of Appeals for the Ninth Circuit in *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967), the leading case espousing a narrow construction, noted that this division is precisely the distinction between grand and petit larceny. *Id.* at 265; see *Jerome v. United States*, 318 U.S. 101, 103-04 (1943) (dictum). This division of the offense into a felony or misdemeanor bears no relevance to the determination of the scope of § 2113(b). Many federal criminal statutes, which punish not only larceny but also embezzlement and possession offenses, impose penalties according to the division between a felony and a misdemeanor offense. *E.g.*, 18 U.S.C. § 371 (conspiracy) (1976); *id.* § 655 (embezzlement); *id.* § 656 (embezzlement); *id.* § 659 (possession); *id.* § 662 (same); *id.* § 1025 (false pretenses).

83. 318 U.S. 101 (1943).

84. *Id.* at 103-04, 106. The Court's statement that the 1937 amendment added "two new clauses—one defining larceny," *id.* at 103, and that "Congress defined in § 2(a) robbery, burglary, and larceny but not felony," *id.* at 106, was dictum because the actual holding concerned the scope of "felony" as used in the burglary section. *Id.* at 108. In addition, the Court referred to the provision in the 1934 Act, which prohibited takings both without consent of the bank and with consent obtained by fraud, as "dealing with larceny," *id.* at 103, although it clearly included both common-law larceny and false pretenses. See *supra* note 58 and accompanying text. Arguably, this indicates that the Court's reference to the 1937 amendment as defining "larceny" does not refer exclusively to common-law larceny. See Memorandum, *supra* note 6, at 17.

It must be noted that in *Prince v. United States*, 352 U.S. 322 (1957), the Supreme Court again had occasion to construe § 2113 in deciding "whether unlawful entry [§ 2113(a)] and robbery [§ 2113(a)] [were] two offenses consecutively punishable in a typical bank robbery situation." *Id.* at 324. The legislative history of the 1934 Act and the 1937 amendment were again examined and § 2113(b) was referred to as "larceny." *Id.* at 325-26. The Court stated, however, that "larceny," as used in the opinion, "refer[red] not to the common-law crimes, but rather to the analogous offenses in the Bank Robbery Act." *Id.* at 324 n.2.

Even if section 2113(b) does define "larceny," it does not necessarily follow that this definition is limited to common-law larceny.⁸⁵ The technical distinctions between common-law larceny and the non-trespassory offenses of false pretenses and embezzlement were criticized in the 1930's,⁸⁶ and a number of states had amended their theft statutes to include all of these offenses under the label of "larceny."⁸⁷ Congress did not mention the word "larceny" in section 2113(b)⁸⁸ but chose the broader phrase, "takes and carries away with intent to steal or purloin."⁸⁹ In light of these factors, Congress arguably used the label "larceny" without intending to limit section 2113(b) to common-law larceny.⁹⁰

In assessing Congress' intent in the 1937 amendment, the Ninth Circuit in *LeMasters v. United States* discerned no "background of evil" that Congress sought to correct other than "the evil of interstate

85. When Congress uses a common-law term that it does define, its meaning must be evaluated from the words used, 2A Sutherland's, *supra* note 15, § 46.01, other federal statutes, *see* *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943), and the legislative history, *see id.* at 102-06, without assuming it is limited to its common-law definition. *See* *United States v. Turley*, 352 U.S. 407, 411 (1957) (a common-law term not defined by Congress will be assumed to carry its common-law meaning); *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (same); 3 Sutherland's, *supra* note 15, § 59.08 (penal statutes subject to all rules of statutory construction).

86. Memorandum, *supra* note 6, at 9-10; *see, e.g.,* J. Miller, *supra* note 8, § 115(b), at 373-74 & n.81 (quoting Comment, *Larceny by Trick: False Pretenses*, 2 Calif. L. Rev. 334, 335 (1914) ("The boundary line separating [trespassory and non-trespassory theft offenses] is often too difficult to ascertain in advance," resulting in technical pleadings which produce unnecessary acquittals. "[T]he subtle distinctions in these crimes [are not] inherent in the nature of things, but . . . their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace.")).

87. *See, e.g.,* Mass. Gen. Laws, ch. 266, § 30 (1932); Mason's Minn. Rev. Stat., ch. 101, § 10358 (1927); Birdseye, Cumming & Gilbert's Consol. Laws of N.Y. Ann., vol. 5, ch. 88, § 1290 (1909); R.I. Gen. Laws tit. 39, ch. 397, §§ 15-16 (1923); Code of Va. Ann. tit. 40, ch. 179, §§ 4451, 4459 (1919); Remington's Rev. Stat. of Wash. tit. 14, ch. 9, § 2601 (1932); W. Va. Code, ch. 61, art. 3, §§ 21, 24 (1931); *see* Memorandum, *supra* note 6, at 10.

88. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (1937) (codified as amended in 18 U.S.C. § 2113(b) (1976)).

89. *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); Act of Aug. 24, 1937, ch. 747, § 2(a), 50 Stat. 749, 749 (1937) (codified as amended in 18 U.S.C. § 2113(b) (1976)); *see* *United States v. Henry*, 447 F.2d 283, 285-86 (3d Cir. 1971) (words "steal" and "purloin" used in § 661 intended to broaden the offense beyond common-law larceny).

90. *See* *United States v. Simmons*, 679 F.2d 1042, 1047-48 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); Memorandum, *supra* note 6, at 9-10, 16. *But see* Beatty, *supra* note 8, at 221 (Congress intended to adopt the technicalities distinguishing common-law larceny from non-trespassory offenses in § 2113(b)); Note, *Obtaining Money by False Pretenses from a Bank Is Not a Violation of The Federal Bank Robbery Statute*, 5 Houston L. Rev. 531, 535 (1968) (analyzing *LeMasters* and concluding that the strict common-law definitions it adhered to best comported with Congressional policy).

operation of gangster bank robbers.”⁹¹ Thus, the court concluded that Congress could not have intended to include non-trespassory thefts because they “have no aspects of interstate gangster activities.”⁹² This conclusion is inexplicable. Although taking by false pretenses, for example, does not embody the forceful or violent nature of gangster bank robberies, neither do the trespassory offenses of burglary or common-law larceny, which indisputably were included in the 1937 amendment. The *LeMasters* court failed to recognize that the amendment of the Act, “to include burglary and larceny,”⁹³ “demonstrates that Congress’ concern had expanded beyond the ‘gangsterism’ referred to in the legislative history of the original 1934 Act.”⁹⁴

Moreover, the inability to assert federal jurisdiction over those who commit non-trespassory takings would produce the incongruous results Congress intended to avoid.⁹⁵ Absent further proof of legislative intent in 1937 or any limiting language on the face of the statute, and in light of the purpose of the amendment, it must be concluded that the expansion of the scope of the Act beyond robbery was not solely intended to include burglary and those offenses that were larceny at common law.⁹⁶

III. THE RULE OF LENITY

Courts supporting a narrow construction of section 2113(b) state that such an interpretation is mandated by the rule of lenity,⁹⁷ which

91. 378 F.2d at 267.

92. *Id.* at 266.

93. See *supra* note 80.

94. United States v. Simmons, 679 F.2d 1042, 1048 (3d Cir. 1982), *petition for cert. filed sub nom.* Brown v. United States, No. 82-5201 (U.S. Aug. 7, 1982). A broad construction of § 2113(b) in *Simmons* was further supported by the subsequent amendments to § 2113, which “manifest[ed] a consistent attempt by Congress to expand rather than restrict the scope of that provision.” *Id.* at 1048; *e.g.*, Act of June 29, 1940, ch. 455, 54 Stat. 695 (1940) (added offense of receiving, possessing or concealing property or money knowing it to have been taken in violation of § 2113(b)); Act of Aug. 3, 1950, ch. 516, 64 Stat. 394 (1950) (amended to include federally insured savings & loan associations); Act of Sept. 22, 1959, Pub. L. No. 86-354, § 2, 73 Stat. 628, 639 (1959) (amended to include federal credit unions as defined in the Federal Credit Union Act); Act of Oct. 19, 1970, Pub. L. No. 91-468, § 8, 84 Stat. 994, 1017 (1970) (to include any federally insured credit union).

95. See United States v. Shoels, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982).

96. *Id.*; United States v. Simmons, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom.* Brown v. United States, No. 82-5201 (U.S. Aug. 7, 1982).

97. United States v. Pinto, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); see United States v. Feroni, 655 F.2d 707, 710-11 (6th Cir. 1981); *LeMasters v. United States*, 378 F. 2d 262, 268 (9th Cir. 1967); United States v. Starr, 48 F. Supp. 910, 911 (S.D. Fla. 1943) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); United States v. Mangus, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (same).

requires that ambiguities in penal statutes be strictly construed against the government.⁹⁸ A harsher alternative will be chosen only when "Congress [has] spoken in language that is clear and definite."⁹⁹ Thus, if the words of the statute "leave no reasonable doubt as to [their] meaning or the intention of the legislature,"¹⁰⁰ resort to the rule of lenity is inappropriate.¹⁰¹

Arguably, section 2113(b) is unambiguous because non-trespassory offenses such as taking by false pretenses and embezzlement also fall within the literal terms of the section,¹⁰² and the broad language employed indicates that Congress intended to proscribe more than common-law larceny. If the words of the statute are deemed ambiguous, however, the rule of lenity would still be inapplicable. One reason for applying the rule is to ensure fairness by providing adequate warning "in language that people generally would understand, as to what actions would expose them to . . . penalties and what the penalties would be."¹⁰³ It would take a tortured reading of section 2113(b) to find that one who takes by false pretenses or embezzlement had not been apprised of the wrongfulness of his act or that such an act is punishable. When the function of fair "warning is assisted by common knowledge and understanding of conventional values," as in *malum in se* offenses like taking "with intent to steal or purloin," a strict construction of the statute is less necessary.¹⁰⁴ Furthermore, given that all types of theft are proscribed by state statutes, "it may be unreal to argue that there are notice problems under the federal law."¹⁰⁵

Another rationale underlying the rule's application is the prevention of "judicial usurpation of the legislative function [by enforcement of] a penalty where the legislature had not clearly and unequivocally proscribed it."¹⁰⁶ Thus, some courts urge a narrow reading of this

98. 3 Sutherland's, *supra* note 15, § 5903, at 6-8.

99. United States v. Bass, 404 U.S. 336, 347 (1971) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)); see Prince v. United States, 352 U.S. 322, 329 (1957).

100. 3 Sutherland's, *supra* note 15, § 59.04, at 13; see United States v. Anderez, 661 F.2d 404, 406 (5th Cir. 1981).

101. United States v. Anderez, 661 F.2d 404, 408 (5th Cir. 1981); see Williams v. United States, 102 S. Ct. 3088, 3095-96, 3101-02 (1982) (White and Marshall, JJ., dissenting).

102. Memorandum, *supra* note 6, at 5.

103. 3 Sutherland's, *supra* note 15, § 59.03, at 7; accord *McElroy v. United States*, 102 S. Ct. 1332, 1341 (1982); *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982).

104. 3 Sutherland's, *supra* note 15, § 59.03, at 8; see *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964); *People v. Shakun*, 251 N.Y. 107, 114, 167 N.E. 187, 189 (1929); *People v. Phye*, 136 N.Y. 554, 559, 32 N.E. 978, 979 (1893).

105. United States v. Bass, 404 U.S. 336, 348 n.15 (1971).

106. 3 Sutherland's, *supra* note 15, § 59.03 at 8; accord *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Corbett*, 215 U.S. 233, 242-43 (1909).

section reasoning that Congress did not "clearly and unequivocally proscribe" takings other than common-law larceny.¹⁰⁷

Limitations to the rule of lenity,¹⁰⁸ however, prevent a narrow construction of section 2113(b).¹⁰⁹ The rule is "merely one among various aids which may be useful in determining the meaning of penal laws,"¹¹⁰ and it "should not be permitted to defeat the policy and purposes of the statute."¹¹¹ Even though the offense must be confined to the words of the statute,¹¹² the rule does not require "that every criminal statute must be given [its] narrowest possible meaning";¹¹³ nor "should [the language] be read with[out] the saving grace of common sense."¹¹⁴ The rule "is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."¹¹⁵

Applying the rule of lenity to section 2113(b) thwarts the purpose of the 1937 amendment, which was to protect federally insured banks by expanding the category of proscribed takings beyond robbery to include those committed without the use of force or violence.¹¹⁶ A narrow interpretation of section 2113(b) encompasses the common-law offenses of larceny by trick¹¹⁷ and larceny by unilateral mistake of

107. See *United States v. Feroni*, 655 F.2d 707, 710-11 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 & n.7 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *LeMasters v. United States*, 378 F.2d 262, 266, 268 (9th Cir. 1967); *United States v. Starr*, 48 F. Supp. 910, 911 (S.D. Fla. 1943) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); *United States v. Mangus*, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (same).

108. See 3 Sutherland's, *supra* note 15, § 59.06 (for example, intent of the legislature, purpose and policy of the Act, evils which Congress sought to overcome).

109. See *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

110. 3 Sutherland's, *supra* note 15, § 59.06, at 18 (footnote omitted).

111. *Id.* (footnote omitted); see *McElroy v. United States*, 102 S. Ct. 1332, 1339, 1341 (1982); *United States v. Anderz*, 661 F.2d 404, 406-07 (5th Cir. 1981).

112. 3 Sutherland's, *supra* note 15, § 59.04, at 14; *id.* § 59.06, at 18.

113. *McElroy v. United States*, 102 S. Ct. 1332, 1341 (1982) (quoting *United States v. Bramblett*, 348 U.S. 503, 510 (1955)); see 3 Sutherland's, *supra* note 15, § 59.06, at 18.

114. *Bell v. United States*, 349 U.S. 81, 83 (1955); see 3 Sutherland's, *supra* note 15, § 59.06, at 19.

115. *United States v. Brown*, 333 U.S. 18, 26 (1948), *quoted in Williams v. United States*, 102 S. Ct. 3088, 3101 (1982) (Marshall, J., dissenting).

116. See *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1047-48 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982). See *supra* pt. II(B).

117. See *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *United States v. Mangus*, 33 F. Supp. 596, 597 (N.D. Ind. 1940) (construing predecessor to § 2113(b), 12 U.S.C. § 588b). See *supra* note 8 for a definition of larceny by trick.

the owner (bank),¹¹⁸ but excludes non-trespassory thefts such as taking by false pretenses because they were not part of larceny at common law.¹¹⁹ Distinctions between these forms of dishonest acquisition, however, fail to "correspond to [any] essential difference in the character of the acts."¹²⁰

118. See *supra* note 8 for definition of larceny by unilateral mistake of the owner. In *United States v. Sellers*, 670 F.2d 853 (9th Cir. 1982) (per curiam), the defendant took and recashed a check that the teller mistakenly left on the counter. *Id.* at 854. A larceny conviction was upheld because the bank was deemed to retain constructive possession. *Id.* In *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961), the teller misread a paycheck in the amount of \$97.92 by using the date as the amount to be paid, \$1206.59. *Id.* at 434. This constituted larceny by unilateral mistake, which was larceny at common law, and therefore covered by § 2113(b). *Id.* at 438. In *United States v. Posner*, 408 F. Supp. 1145 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977), the defendant's spending of money erroneously deposited into his account by the bank was larceny by mistake, covered by § 2113(b). *Id.* at 1150-51.

119. *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *United States v. Feroni*, 655 F.2d 707, 708, 710-11 (6th Cir. 1981); *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967). In *United States v. Patton*, 120 F.2d 73 (3d Cir. 1941), the defendant altered a check, forged a signature and withdrew over \$10,000. *Id.* at 74. The court held that this was not common-law larceny because the bank intended to pass title and possession. *Id.* at 75-76. In *Bennett v. United States*, 399 F.2d 740 (9th Cir. 1968), the defendant's conduct was not covered by § 2113(b) because the bank's consent to defendant's taking money for acting as an intermediary in procuring loans precluded the finding of a trespass. *Id.* at 743-44. In *United States v. Starr*, 48 F. Supp. 910 (S.D. Fla. 1943), the defendant presented a forged check which the bank paid. The statute did not cover taking by deceit or fraud. *Id.* at 910-11.

120. Fletcher, *supra* note 11, at 469-70 (quoting *Van Vechten v. American Eagle Fire Ins. Co.*, 239 N.Y. 303, 306, 146 N.E. 432, 433 (1925) (Cardozo, J.)). The essential character of an act of theft, whether it be larceny, embezzlement or taking by false pretenses, is the wrongful deprivation of money, goods or property from the owner or possessor of such property. The many technical differences existing between these related theft offenses, however, can be explained in part by their historical development. See generally Fletcher, *supra* note 11.

At common law, larceny encompassed only the trespassory taking of another's property. W. LaFave & A. Scott, *supra* note 8, § 84, at 618. Early courts, in determining the scope of larceny, apparently considered it a crime "designed to prevent breaches of the peace." *Id.* Non-trespassory thefts, such as embezzlement or false pretenses, evoked less "danger of an immediate breach of the peace." *Id.* at 618-19. The crime of common-law larceny did not include enticing a person to willingly give up possession by means of fraud. Note, *The Old Montana Dilemma and the New Approach to Larceny by Trick and Obtaining Goods by False Pretenses*, 35 Mont. L. Rev. 161, 162 (1974) [hereinafter cited as *Montana Dilemma*]. Courts responded to this inadequacy not by eliminating the requirement of a trespassory taking but by devising a legal fiction called "constructive possession." This allowed a finding of trespass in "situations where in reality it is most difficult to find any trespass." W. LaFave & A. Scott, *supra* note 5, § 84, at 619-20; accord *Montana Dilemma*, *supra*, at 162. Thus, larceny by trick evolved, using "constructive possession" in order to punish the wrongdoer who obtained possession but not title to property by defrauding the owner. W. LaFave & A. Scott, *supra* note 8, § 84, at 620. See *supra* note 8.

That such technical distinctions based upon title versus possession no longer prove helpful¹²¹ and would produce anomalous results,¹²² especially when the thefts involve money,¹²³ is illustrated by the following example. In a recent case,¹²⁴ the defendant requested a bank teller to provide a \$100 bill in exchange for four twenty-dollar bills and two ten-dollar bills. The defendant then "palmed" the \$100 bill for a ten-dollar bill, asserted that the teller had erred, and thereby received another \$100 bill.¹²⁵ This action apparently fits within the

If, however, a wrongdoer induced an owner to part with both possession and title by means of false representations, he could not be convicted of larceny. The common law sharply distinguished between the interests of possession of property and title. *Montana Dilemma*, *supra*, at 161-62. If title was voluntarily passed to a wrongdoer, he could not be convicted of larceny or larceny by trick, which were only crimes against possession. Regardless of the scheme used to acquire title, the wrongdoer was not viewed as a trespassor against property to which he now held title. *Id.* at 162.

Nor did common-law larceny cover the situation in which a person entrusted with property misappropriates it, such as a bank teller who receives money from a depositor but does not record it as held by the bank. W. LaFave & A. Scott, *supra* note 8, § 84, at 620-21. Courts refused to extend the device of "constructive possession" to these situations. Consequently, the new crimes of embezzlement and false pretenses were statutorily created to punish such takings, although less severely than for crimes of larceny. See *Montana Dilemma*, *supra*, at 162-63. The first false pretenses statute, 30 Geo. 2, c.24 (1757), was passed by Parliament in 1757. See W. LaFave & A. Scott, *supra* note 8, § 84, at 621. An earlier statute, 33 Hen. VII, c.1 (1541), "made it a crime to obtain property by means of something more tangible than spoken lies, a 'false Token or counterfeit Letter made in any other Man's Name,' being required." *Id.* at 621 n.11. "The generative English embezzlement statute, 39 Geo. 3, c.85 (1799), was limited to servants and clerks who having 'receive[d] or take[n] into possession' an itemized list of chattels, 'fraudulently embezzle, secret or make away with the same.'" Fletcher, *supra* note 11, at 469-70 n.1.

Thus, a gap in the law still existed. A thief who was clever enough to obtain both title and possession by a false promise could not be convicted under any theory. He was not guilty of any form of common-law larceny because no trespass occurs when title is willingly given away. Nor was he guilty of taking by false pretenses because that crime only included takings by a false representation of a past or present fact, and not takings induced by a false promise. *Montana Dilemma*, *supra*, at 163-64.

The courts' refusal to expand larceny and the use of "constructive possession" to include non-trespassory takings, may be explained by "a revulsion against capital punishment which was the penalty for all except petty larceny during much of the 18th century. [Its] savagery . . . not only would cause a judge to hesitate to enlarge felonious larceny, but is sufficient to account for the host of artificial limitations . . . engrafted on that crime." W. LaFave & A. Scott, *supra* note 8, § 84, at 621 (quoting Model Penal Code, art. 206, appendix A, at 102 (Tent. Draft No. 1, 1952); see *United States v. Patton*, 120 F.2d 73, 76 (3d Cir. 1941).

121. *United States v. Shoels*, 685 F.2d 379, 382, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); see *United States v. Patton*, 120 F.2d 73, 76 (3d Cir. 1941); *Montana Dilemma*, *supra* note 120, at 164, 167-68.

122. Memorandum, *supra* note 6, at 8-9.

123. *Montana Dilemma*, *supra* note 120, at 164; see W. LaFave & A. Scott, *supra* note 8, § 90, at 663-65.

124. *United States v. Johnson*, 575 F.2d 678 (8th Cir. 1978).

125. *Id.* at 679.

definition of taking by false pretenses; the defendant induced the teller to part with possession and title by means of his false representation. Had the court found that the defendant's actions constituted taking by false pretenses, the defendant could not have been convicted under a narrow definition of section 2113(b). The court, however, labeled his action larceny by trick,¹²⁶ which was part of common-law larceny, and therefore included it under a strict interpretation of section 2113(b).

In larceny by trick, the artificial legal device of "constructive possession" is used to find the necessary trespassory element.¹²⁷ Although the teller voluntarily relinquished actual possession, the bank retained "constructive possession" because the defendant's lie negated the bank's true intent to part with possession. Arguably, the court was in error because the teller intended to pass both title and possession, in which case the theft could not have been larceny by trick, but rather it would have been taking by false pretenses.¹²⁸ An assertion that the bank intended to retain title in such a transaction is implausible; the bank hardly expected the same coins or bills to be returned.¹²⁹

The "maze of arbitrary distinctions" and the technical rules used to distinguish these offenses have been subject to heavy criticism by "[v]irtually all the academic writing in the field,"¹³⁰ including commentary contemporaneous with Congress' enactment of the amendment.¹³¹ Striving for consistency, the penal laws of most states and the Model Penal Code have abrogated these differences by creating a unified law of theft offenses.¹³² Nevertheless, courts favoring a narrow construction perpetuate the archaic and long-discredited distinctions found at common law,¹³³ thereby obstructing the statute's policy of

126. *Id.* at 680.

127. W. LaFave & A. Scott, *supra* note 8, § 84, at 619-20; *see* United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam). *See supra* note 120.

128. *See* United States v. Mangus, 33 F. Supp. 596, 597 (N.D. Ind. 1940).

129. *See* United States v. Posner, 408 F. Supp. 1145, 1151 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977); *Montana Dilemma*, *supra* note 120, at 164.

130. Fletcher, *supra* note 11, at 469-70 & n.4. *But see* Beatty, *supra* note 8, at 221 (arguing that Congress intended to preserve these distinctions in § 2113(b)).

131. *See supra* note 86.

132. *See* Fletcher, *supra* note 11, at 470-72; Model Penal Code § 223.1 (Proposed Official Draft 1962). Many states have consolidated the offenses of larceny, embezzlement and false pretenses into one statute proscribing "theft" or "larceny." *E.g.*, Ariz. Rev. Stat. Ann. § 13-1802 (1956 and Supp. 1982-1983); Cal. Penal Code §§ 484, 490a (West 1970 & Supp. 1982); Conn. Gen. Stat. Ann. § 53a-119 (West 1958 & Supp. 1982); Wis. Stat. Ann. § 943.20 (West 1982). *See supra* note 87.

133. *See* United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); United States v. Feroni, 655 F.2d 707, 710-11 (6th Cir. 1981); United States v. Pinto, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); Bennett v. United States, 399 F.2d 740, 744 (9th Cir. 1968); United States v. Patton, 120 F.2d 73, 75-76 (3d Cir. 1941) (construing predecessor to § 2113(b), 12 U.S.C. § 588b); United States v. Starr, 48 F. Supp. 910, 911 (S.D. Fla. 1943) (same).

protecting federally insured banks.¹³⁴ The end result of a theft, whether or not it constitutes common-law larceny, is the same: The defendant has wrongfully obtained money to the bank's detriment.¹³⁵

A narrow interpretation based upon technical refinements of common-law larceny is also contrary to common sense because "[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion."¹³⁶ Application of the rule of lenity creates such a "loophole" because the non-trespassory offenses of taking by false pretenses and embezzlement might not be punishable under any other federal statute.¹³⁷ The statute was designed to protect banks against the very risk of loss created by such thefts;¹³⁸ therefore, non-trespassory offenses should also be included within section 2113(b).

134. See *United States v. Marrale*, No. 82-1182, slip op. at 726-27 (2d Cir. Dec. 13, 1982); *United States v. Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), *petition for cert. filed*, No. 82-5550 (U.S. Oct. 8, 1982); *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *Way v. United States*, 268 F.2d 785, 786 (10th Cir. 1959).

135. See *United States v. Turley*, 352 U.S. 407, 416-17 (1957) (construing "stolen" in 18 U.S.C. § 2312 as not limited to common-law larceny; an automobile is no less "stolen" because it is embezzled or obtained by false pretenses).

136. *United States v. Turley*, 352 U.S. 407, 416-17 (1957); see *McElroy v. United States*, 102 S. Ct. 1332, 1339 (1982) (broadly construing 18 U.S.C. § 2314 (1976), holding a forged instrument need not be proven forged before it crossed state lines, otherwise a "patient forger [could] evade the reach of federal law"); *Morissette v. United States*, 342 U.S. 246, 271 (1952) (dictum) (construing 18 U.S.C. § 641 (1976), stating "[w]hat has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches [in] cases drawing fine distinctions between slightly different circumstances").

137. A criminal may escape federal prosecution because, although embezzlement from a federally insured bank, for example, is punished by 18 U.S.C. § 656 (1976), it applies only to bank officers and employees. Taking by false pretenses is punished by 18 U.S.C. § 1025 (1976), but only if it is committed upon the high seas or within an area of exclusive federal jurisdiction. Unless the criminal commits other offenses covered by Title 18 in furtherance of a scheme to defraud the bank, e.g., 18 U.S.C. § 371 (1976) (requires conspiracy); *id.* § 1014 (1976) (prohibits false representations in connection with loan applications); *id.* §§ 1341-1342 (1976) (mail fraud); *id.* § 2314 (1976) (prohibits transportation in interstate or foreign commerce of forged checks, stolen money or goods), he cannot be prosecuted under federal law. See Memorandum, *supra* note 6, at 9 & n.7 (narrow construction leaves a "gap of uncertain dimensions in federal protection for federally insured institutions").

138. See *Williams v. United States*, 102 S. Ct. 3088, 3102-03 (1982) (Marshall, J., dissenting) (majority's application of the rule of lenity to exclude check-kiting schemes from ambit of 18 U.S.C. § 1014 (1976) was misguided because conduct fit within literal terms of statute, which was intended "to protect against the very risk created by such conduct").

IV. POLICY OF JUDICIAL RESTRAINT REGARDING FEDERAL JURISDICTION

Another argument advanced in favor of a limited interpretation of section 2113(b) is the policy of judicial restraint regarding congressional intent when construing statutes that affect the relationship between federal and state criminal jurisdiction.¹³⁹ The Supreme Court discussed this policy in *Jerome v. United States*,¹⁴⁰ in which it stated that because "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly proscribed by Congress . . . where [such] offenses . . . duplicate . . . state law, courts should be reluctant to expand the defined offenses beyond the clear requirements . . . of the statute."¹⁴¹ This policy of judicial restraint was adopted by the court in *LeMasters*,¹⁴² which saw no reason why Congress "should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts."¹⁴³ The court stated that "such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law."¹⁴⁴

These claims concerning the inclusion of non-trespassory offenses within section 2113(b)¹⁴⁵ are unpersuasive. A narrow construction

139. See *Williams v. United States*, 102 S. Ct. 3088, 3093, 3095 (1982); *United States v. Bass*, 404 U.S. 336, 349-50 (1971). See *supra* note 16. The Court in *Williams*, in holding that 18 U.S.C. § 1014 (1976) did not encompass a check-kiting scheme, considered the fact that fraudulent checking activities were already addressed by state law and that the subject matter was traditionally regulated by the states. 102 S. Ct. at 3093, 3095. In *Bass*, a second principle which supported the narrow construction of 18 U.S.C. § 1202(a)(1) (1976), was the traditional reluctance of Congress to define as a federal crime conduct denounced as criminal by the states. The Court noted the corresponding hesitancy of the courts to assume, absent clear language and intent, that Congress meant to significantly change the "sensitive relation between federal and state criminal jurisdiction." 404 U.S. at 349-50.

140. 318 U.S. 101 (1943).

141. *Id.* at 104-05.

142. *LeMasters v. United States*, 378 F.2d 262, 268 (9th Cir. 1967). Several other courts have also relied on this policy to support a narrow construction. *E.g.*, *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *Bennett v. United States*, 399 F.2d 740, 744 (9th Cir. 1968).

143. 378 F.2d at 268.

144. *Id.*

145. See *id.*; *United States v. Bass*, 404 U.S. 336, 350 (1971) (Court rejected broad interpretation of 18 U.S.C. § 1202(a), which would render "traditionally local criminal conduct a matter for federal enforcement"); *United States v. Turley*, 352 U.S. 407, 418 (1957) (Frankfurter, J., dissenting) (in the absence of express congressional direction, 18 U.S.C. § 2312 should be construed narrowly to prevent a flood of minor offenses that are local in nature in federal courts).

based upon these arguments assumes that state law regarding non-trespassory offenses is both adequate and enforced.¹⁴⁶ Under this interpretation of the statute, only burglary and common-law larceny were made federal crimes by the 1937 amendment.¹⁴⁷ Yet these two crimes already were covered by state law.¹⁴⁸ Thus, Congress duplicated state laws, presumably because it deemed them inadequate to deal with burglary and larceny from federal banks.¹⁴⁹ When interstate schemes are involved, state laws regarding non-trespassory thefts may also be inadequate.¹⁵⁰ Arguably, Congress intended to include both types of theft in section 2113(b). Furthermore, the danger of diluting state responsibility for local crimes is not present when the financial institutions involved are federally insured; trespassory or non-trespassory thefts committed against them may no longer be purely local in nature.¹⁵¹

The concern that innumerable small cases will deplete federal resources, *see* *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *LeMasters v. United States*, 378 F.2d 262, 268 (9th Cir. 1967), is questionable. The Justice Department has discretion as to the offenses it chooses to prosecute as federal crimes. Therefore, any theft offense, trespassory or non-trespassory, which involves a small amount of money need not deplete valuable federal resources but may be left to state enforcement agencies.

Arguably, broad construction of § 2113(b) would not create a flood of cases unlike the result in other statutes. *See Williams v. United States*, 102 S. Ct. 3088, 3093, 3095 (1982) (check-kiting not included in 18 U.S.C. § 1014 (1976) to avoid flood of cases). The inclusion of taking by false pretenses will not make a "broad range of [otherwise] unremarkable conduct a violation of federal law," *id.* at 3093 (construing 18 U.S.C. § 1014 (1976)), because of the mens rea element, "with intent to steal or purloin." 18 U.S.C. § 2113(b) (1976).

146. *Bennett v. United States*, 399 F.2d 740, 744 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 268 (9th Cir. 1967).

147. *See Jerome v. United States*, 318 U.S. 101, 103, 106 (1943) (dictum); *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam); *Bennett v. United States*, 399 F.2d 740, 744 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967).

148. *United States v. Turley*, 352 U.S. 407, 413 (1957) ("By 1919, the law of most States against local theft had developed so as to include not only common-law larceny but embezzlement, false pretenses, larceny by trick, and other types of wrongful taking."); *see, e.g.,* Mass. Gen. Laws, ch. 266, §§ 14-15 (1932) (burglary); Remington's Rev. Stat. of Wash. tit. 14, ch. 9, §§ 2578-2579 (1932) (burglary). *See supra* note 87 for consolidated larceny statutes.

149. *See* S. Rep. No. 1259, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937).

150. *See McElroy v. United States*, 102 S. Ct. 1332, 1339 (1982); *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

151. *See United States v. Bailes*, 120 F. Supp. 614, 637 (S.D.W. Va. 1954) ("The enforcement of the general criminal laws is a local matter [and] [f]ederal courts have no jurisdiction over ordinary acts of violence, because such acts are offenses only against the State and are not offenses against the Federal Government."). The inclusion of non-trespassory offenses would not interfere with or dilute the authority

Congress' broadening of the Federal Bank Robbery Act "to include burglary and larceny" indicates a more comprehensive purpose than its concern in 1934 of stopping interstate gangster bank robberies.¹⁵² By its 1937 legislation, Congress sought to further the federal interest in protecting the assets of federally insured banks.¹⁵³ This interest applies equally to protecting banks from non-trespassory offenses of taking by false pretenses and embezzlement as to protection from burglary and the trespassory offenses of common-law larceny.¹⁵⁴ Some courts voice concern, however, that the policy of judicial restraint will be violated by an expansion of federal jurisdiction in section 2113(b) when Congress has not more explicitly proscribed non-trespassory thefts.¹⁵⁵ The paramount federal interest in protecting federally in-

of the states to regulate these criminal activities because States may prosecute under their own criminal statutes. See *Williams v. United States*, 102 S. Ct. 3088, 3102 & n.5 (1982) (Marshall, J., dissenting). Justice Marshall found "completely unjustified" the majority's "attempt to buttress its decision" to exclude check-kiting from the scope of 18 U.S.C. § 1014 (1976) with the argument that federal enforcement might interfere with traditional State regulation of this area. 102 S. Ct. at 3102. He noted that inclusion of check-kiting would not "displace the authority of the States," but rather it would "[complement] state law in an area where the federal interest is substantial." *Id.* at 3102 n.5 (citing *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981) (the RICO statute does not interfere with the police powers of the states to define and prosecute crimes, and it is no restriction of "the separate administration of criminal justice by the States" if some of these crimes are also violations of federal law)).

152. *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), *petition for cert. filed sub nom.* *Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

153. See *Williams v. United States*, 102 S. Ct. 3088, 3097, 3102 & n.5 (1982) (Marshall, J., dissenting) ("In Title 18, Congress has provided comprehensive criminal sanctions to protect federally insured institutions."); *United States v. Marrale*, No. 82-1182, slip op. at 726-27 (2d Cir. Dec. 13, 1982) (purpose of Act is to protect the banks in which the federal government has an interest); *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982) (Congress' concern directed to federal government's potential obligation as an insurer to reimburse various financial institutions), *petition for cert. filed sub nom.* *Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *Way v. United States*, 268 F.2d 785, 786 (10th Cir. 1959) (purpose of Act is "to protect and safeguard the financial stability of the Federal Reserve Bank System and the members thereof"). See *supra* note 94 and accompanying text.

154. See *Williams v. United States*, 102 S. Ct. 3088, 3097 (1982) (Marshall, J., dissenting) (check-kiting threatened assets of federally insured banks "in precisely the same way as a misrepresentation in a loan application" and "should not be excluded . . . simply because the terms of the statute and its legislative history [did] not specifically identify check-kiting by name"); *United States v. Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982) (statute broadly construed due, in part, to federal interest in protecting insured banks), *petition for cert. filed sub nom.* *Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982); *Way v. United States*, 268 F.2d 785, 786 (10th Cir. 1959) (§ 2113(b) violated regardless of whether funds stolen were bank's assets or from deposits therein).

155. *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *Bennett v. United States*, 399 F.2d 740, 744 (9th Cir. 1968); *LeMasters v. United States*, 378 F.2d 262, 268 (9th Cir. 1967).

sured banks negates this concern.¹⁵⁶ The federal government has a strong interest in permitting its prosecutors to come to the aid of states in combatting crime affecting it,¹⁵⁷ whatever label is attached to the theft.¹⁵⁸ This is especially true when non-trespassory takings may involve larger sums of money than cases of common-law larceny.¹⁵⁹

CONCLUSION

The strong federal interest in protecting federally insured banks mandates a broad construction of section 2113(b) to include both trespassory and non-trespassory takings. The statute's language and legislative history, viewed in the light of this compelling interest, outweigh considerations of the rule of lenity and the policy of judicial restraint regarding federal criminal jurisdiction. In 1937, Congress sought to further the protections afforded federally insured banks. It did not intend to compromise the scope of this protection based upon hypertechnical distinctions among thefts at common law.

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156. See *Williams v. United States*, 102 S. Ct. 3088, 3102 (1982) (Marshall, J., dissenting); *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

157. See *Williams v. United States*, 102 S. Ct. 3088, 3102 & n.5 (1982) (Marshall, J., dissenting); *McElroy v. United States*, 102 S. Ct. 1332, 1339, 1341 (1982); *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

158. See *United States v. Simmons*, 679 F.2d 1042, 1048-49 (3d Cir. 1982), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982).

159. Compare *United States v. Simmons*, 679 F.2d 1042, 1044 (3d Cir. 1982) (forged check scheme making profits of up to \$7000 per week covered by broad construction of § 2113(b)), *petition for cert. filed sub nom. Brown v. United States*, No. 82-5201 (U.S. Aug. 7, 1982) and *United States v. Fistel*, 460 F.2d 157, 159 & n.2 (2d Cir. 1972) (scheme involving embezzlement of \$1,700,000 in treasury bills covered by broad construction) with *United States v. Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam) (conviction upheld under § 2113(b) for common-law larceny of \$2000) and *United States v. Johnson*, 575 F.2d 678, 679 (8th Cir. 1978) (conviction under § 2113(b) for larceny by trick of \$90). But see *United States v. Posner*, 408 F. Supp. 1145 (D. Md. 1976) (conviction under narrow construction, larceny by mistake of \$183,000), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977).

