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## Construing Federal Criminal Statutes Employing Terms which Have No Established Common-Law Meaning: Section 2113(b) of the Federal Bank Robbery Act, 16 J. Marshall L. Rev. 125 (1982)

Linas J. Kelecius

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CONSTRUING FEDERAL CRIMINAL STATUTES  
EMPLOYING TERMS WHICH HAVE NO  
ESTABLISHED COMMON-LAW  
MEANING: SECTION 2113(b) OF  
THE FEDERAL BANK ROBBERY ACT

The Federal Bank Robbery Act<sup>1</sup> in section 2113(b) provides that whoever "takes and carries away, with intent to steal or purloin, any property or money" of a bank is liable for a fine and imprisonment.<sup>2</sup> The circuits are in disagreement as to the meaning of this language; four circuits<sup>3</sup> have construed the language to cover only common-law larceny,<sup>4</sup> but four other circuits

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1. 18 U.S.C. §§ 2113(a)—2113(h) (1976).

2. The text of 18 U.S.C. § 2113(b) provides:

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 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). See 18 U.S.C. §§ 2113(f)—2113(h) for the definition of the banking institutions which are covered by the Bank Robbery Act.

The language of 12 U.S.C. § 588(b), the predecessor of 18 U.S.C. § 2113(b), differed insignificantly from the language of § 2113(b): "[W]hoever shall take and carry away, with intent to steal or purloin, any property or money. . . ." 12 U.S.C. § 588(b) (1940).

3. The Sixth, Third, Ninth, and Fourth Circuits have taken the view that the language includes only common-law larceny. See, e.g., *United States v. Feroni*, 655 F.2d 707 (6th Cir. 1981) (§ 2113(b) does not proscribe the taking of money by false pretense, but rather, it applies only to actions which constitute common-law larceny); *United States v. Pinto*, 646 F.2d 833 (3d Cir. 1981) (defendant's dissipation of funds credited to his bank account because of another bank's unilateral error is not conduct punishable under § 2113(b)); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967) (§ 2113(b) does not cover the crime of obtaining money by false pretense); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961) (§ 2113(b) covers larceny as defined at common law and not embezzlement or obtaining goods by false pretense) (dictum). But see *United States v. Simmons*, 679 F.2d 1042, 1049 (3d Cir. 1982) (broadly construing § 2113(b) without specifically overruling *Pinto*).

4. The principle element of common law larceny is a trespass to possession. Originally, the thief had to take the goods or money from the actual possession of another without the other's consent. W. LAFAYE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 618, 622 (1972) [hereinafter cited as LAFAYE & SCOTT]; R. PERKINS, *CRIMINAL LAW* 245 (2d ed. 1969) [hereinafter cited as PERKINS]. Over the years, the courts have expanded the trespass-

have construed the language to cover not only common-law larceny but also taking by false pretense and embezzlement.<sup>5</sup> This comment will suggest that the circuits which broadly construe section 2113(b) have misunderstood the effect of the leading Supreme Court decision on construing federal criminal statutes employing terms which have no established common-law meaning.<sup>6</sup>

#### INTRODUCTION

A long line of Supreme Court decisions establishes that, under the due process clauses of the fifth and fourteenth amendments, a person may not be deprived of life, liberty, or property for violating a criminal statute unless its language provides a fair warning of the conduct that is proscribed.<sup>7</sup> Underly-

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sory-taking element to encompass certain situations where property is not taken from the actual possession of another or is taken from the possession of another with consent. See LAFAVE & SCOTT, *supra*, at 619-30; Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976). For example, a taking is trespassory where the thief acquires possession of, but not title to, property with consent which is induced by lies. This form of common-law larceny is called "larceny by trick." See *infra* note 51.

5. The Tenth, Seventh, Eighth, Second, and Fifth Circuits have taken the view that the language covers not only common-law larceny, but also taking by false pretense and embezzlement. See, e.g., *United States v. Shoels*, 685 F.2d 379 (10th Cir. 1982) (§ 2113(b) encompasses false pretense); *United States v. Guiffre*, 576 F.2d 126 (7th Cir.) (§ 2113(b) covers taking by means of depositing stolen checks into bank accounts), *cert. denied*, 439 U.S. 833 (1978); *United States v. Johnson*, 575 F.2d 678 (8th Cir. 1978) (dictum suggesting that § 2113(b) is not limited to conduct constituting common-law larceny); *United States v. Fistel*, 460 F.2d 157 (2d Cir. 1972) (§ 2113(b) covers embezzlement by a bank official or employee and other takings with intent to deprive the owner of permanent use of the property taken); *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965) (§ 2113(b) covers all felonious takings), *cert. denied*, 383 U.S. 958 (1966).

In false-pretense theft, the thief acquires both possession of, and title to, the property of another with consent, but that consent is induced by knowingly false or fraudulent representations. False pretense takings are non-trespassory because not only possession of, but also title to, property is obtained. LAFAVE & SCOTT, *supra* note 4, at 655; PERKINS, *supra* note 4, at 306-08. In embezzlement, the thief fraudulently converts the property after being entrusted with lawful possession of property either by or for the owner. LAFAVE & SCOTT, *supra* note 4, at 644; PERKINS, *supra* note 4, at 288-93. Although only possession of, but not title to, property is obtained with consent in embezzlement, such takings are not trespassory because the consent is not induced by lies. Since these takings are not trespassory, a larceny conviction could not be sustained. See *supra* note 4.

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

7. "This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law." *Jordan v. De George*, 341 U.S. 223, 230 (1951). See, e.g., *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . ."); *United States v.*

ing this procedural due process requirement is the principle that fair play and justice demand that persons not be held criminally responsible for conduct they could not reasonably understand to be forbidden.<sup>8</sup> A criminal statute must, therefore, be drawn in terms sufficiently definite and clear to enable a person to reasonably estimate what conduct is proscribed<sup>9</sup> and must not be construed by the courts to prohibit a broader range of conduct than is reasonably ascertainable from its language.<sup>10</sup>

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Reese, 92 U.S. 214, 220 (1875) ("If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind.").

8. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). See generally *Bouie v. Columbia*, 378 U.S. 347, 350-63 (1964).

9. Under the "void for vagueness" doctrine, a criminal statute is void if it is drawn in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. See, e.g., *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). This is not to say that a criminal statute is unconstitutional "merely because it throws upon men the risk of rightly estimating a matter of degree. . . ." *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223 (1914). As Justice Holmes pointed out, in many instances "between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and . . . the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust." *Id.* See also *Nash v. United States*, 229 U.S. 373, 377 (1913) (criminal antitrust statute not unconstitutional merely because it throws upon persons the risk of rightly estimating what is an undue restraint of trade). See generally *Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 216-33 (1967); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

10. In *McBoyle v. United States*, 283 U.S. 25 (1931), the Supreme Court refused to extend the National Motor Vehicle Theft Act to cover airplanes. Felix Frankfurter, commenting on the decision, said:

In *McBoyle v. United States*, Mr. Justice Holmes had to decide whether an aeroplane is a "motor vehicle" within the meaning of the Motor Vehicle Theft Act. He thus disposed of it: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction. . . . But in everyday speech 'vehicles' calls up a picture of a thing moving on land."

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947). The rule requiring clear definition of proscribed behavior was expressed by the Supreme Court in *Todd v. United States*, 158 U.S. 278 (1895):

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. "There can be no constructive offences, and, before a man can be punished, his case must be plainly and unmistakably within the statute."

A criminal statute, however, need not enumerate in detail every element of the proscribed conduct to satisfy procedural due process. A legislature may utilize terms which have established meanings to incorporate by reference the cluster of ideas attached to those terms.<sup>11</sup> Therefore, when Congress employs in a criminal statute a term which has an established meaning at common law without otherwise defining it, the presumption is the Congress employs the term instead of expressly enumerating all of the particulars included within the term.<sup>12</sup> Defining an offense by reference to the common law does not violate procedural due process because all persons are presumed to know the

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*Id.* at 282 (quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890)). See *Kordel v. United States*, 335 U.S. 345, 348-49 (1948) (criminal statutes should not be read broadly to include what is not plainly within their language). See also *infra* note 125.

11. The Supreme Court has recognized that requiring Congress to enumerate in detail every element of every crime Congress creates would unduly encumber the legislative process. The difficulty of such a requirement was illustrated in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). A 1790 federal statute, making the commission of robbery or murder on the high seas a federal crime, simply employed the words "murder" and "robbery" without defining them. The Court stated:

In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation.

*Id.* at 160. Because of the impracticality of an express enumeration requirement, "Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term." *Id.* at 159.

12. [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

*Morissette v. United States*, 342 U.S. 246, 263 (1952). See also *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at that time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.").

The common law, however, is generally not the common law of any particular state. "[N]o one would argue that recourse to common law for that purpose imports into the federal Constitution or statutes the laws of any particular state." *United States v. Jerome*, 130 F.2d 514, 524 (2d Cir. 1942) (Frank, J., concurring in part, dissenting in part). See also *D'Oench, Duhme & Co. v. Federal Dep. Ins. Corp.*, 315 U.S. 447, 468-72 (1942) (Jackson, J., concurring).

common law.<sup>13</sup> Accordingly, where a federal criminal statute employs a common-law term which has an established meaning,<sup>14</sup> the general practice is to give the term its common-law meaning.<sup>15</sup> For example, if Congress would enact a statute making it a crime to "take and carry away, with intent to commit larceny, property or money" of a bank, the courts would con-

13. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159-60 (1820). In *Smith*, the Supreme Court found that an 1819 federal criminal statute making it a crime to commit "piracy, as defined by the law of nations," was sufficiently certain because the crime of piracy was defined by the law of nations with reasonable certainty. *Id.* at 157, 162.

Justice Livingston's dissenting opinion in *Smith* is worthy of note. Although he argued that Congress should not refer United States citizens to statutes or laws of any foreign country for rules of conduct, he had no objections to the practice of defining crimes with reference to the common law:

But it is said, that murder and robbery have been declared to be punishable by the laws of the United States, without any definition of what act or acts shall constitute either of these offenses. This may be; but both murder and robbery, with arson, burglary, and some other crimes, are defined by writers on the common law, which is part of the law of every State in the Union, of which, for the most obvious reasons, no one is allowed to allege his ignorance in excuse for any crime he may commit. Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live . . . .

*Id.* at 182. But see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 84 (1960) (common-law terms employed in a criminal statute "may have no more illuminating clarity to the layman offender than the neologisms of Ronsard. . ."). For a discussion of why ignorance and mistake of the criminal law are generally not defenses, see LAFAYE & SCOTT, *supra* note 4, at 363-65; PERKINS, *supra* note 4, at 920-38.

14. A word may have a settled common-law meaning in one time period and not in another. As Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Although the meaning of a word may be "known to the common law" at a given point in time, that does not necessarily mean that the word has a "settled meaning" at common law at that time. The meaning of a word may be "known" to the common law in the sense that the word may have recently been construed to have that meaning. However, that meaning should not be regarded as "settled" unless that word has been consistently construed to have the same meaning over time. If a term is construed to have a meaning which is not settled, but merely known at common law, and that meaning is not reasonably ascertainable from either the language of the statute or the common law, then serious due process problems are created. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 442 (1959). See *supra* notes 7-10 and accompanying text.

15. *United States v. Turley*, 352 U.S. 407, 411 (1957). It is the general practice to give such terms their common-law meaning because when Congress employs such terms to define crimes by reference to the common law, "we must look for the definition of the term in the common law, or we shall find it nowhere . . ." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 640 (1818) (Johnson, J., concurring in part, dissenting in part). See Von Moschzisker, *The Common Law and Our Federal Jurisprudence, Part II*, 74 U. PA. L. REV. 270 (1926). But see *infra* note 132.

strue the statute to cover only common-law larceny.<sup>16</sup> Since the term "larceny" has an established meaning at common law, the presumption would be that Congress employed the term instead of expressly enumerating the elements of larceny as that crime was known at common law.<sup>17</sup>

A construction problem arises, however, when a criminal statute employs a generic term which has no established meaning at common law. The word "stolen" (or "stealing") is such a term.<sup>18</sup> Although commonly identified with larceny, "stolen" has never been confined exclusively to larceny at common law; it is a term which has commonly been used to denote any of several theft offenses, including embezzlement and false pretense.<sup>19</sup>

In *United States v. Turley*,<sup>20</sup> the Supreme Court set out the proper analysis to be applied in construing terms which have no established common-law meaning. The *Turley* Court construed the National Motor Vehicle Theft Act,<sup>21</sup> which makes it a federal crime to knowingly transport a "stolen" motor vehicle across state lines.<sup>22</sup> Several circuits had construed the term "stolen" to

16. "If § 2113(b) had used the word larceny and had simply said that larceny from a bank . . . was made a federal crime, it would be difficult to construe the statute as including obtaining money by false pretense." *LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967) (construing § 2113(b) to cover only common-law larceny).

17. See *infra* notes 64-67 and accompanying text, and *supra* note 4.

18. In construing federal criminal statutes, the federal courts have generally held that the term "steal" is a generic term commonly used to denote any of several theft offenses. See, e.g., *Boone v. United States*, 235 F.2d 939, 940 (4th Cir. 1956) (the term "stealing" originally implied a taking through secrecy and was later expanded to become the generic designation for dishonest acquisition); *United States v. Handler*, 142 F.2d 351, 353 (2d Cir.) ("[W]e cannot accept the . . . argument that a taking with intent to steal is synonymous with technical larceny."), *cert. denied*, 323 U.S. 741 (1944); *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938) ("Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership. . . .").

The word "purloin" is also a generic term which has no established common-law meaning. The word is essentially synonymous with "steal" though stealing may or may not involve an element of stealth usually attributed to the word "purloin." See *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938). See also *infra* note 68.

19. *United States v. Feroni*, 655 F.2d 707, 709 (6th Cir. 1981).

20. 352 U.S. 407 (1957).

21. 18 U.S.C. § 2312 (1976).

22. The National Motor Vehicle Theft Act provides: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both." 18 U.S.C. § 2312 (1976). The Act was amended to include "or aircraft" after *McBoyle v. United States*, 283 U.S. 25 (1931). See *supra* note 10.

encompass only common-law larceny; other circuits had construed the term to include not only larceny, but also taking by false pretense and embezzlement.<sup>23</sup> The Court recognized that when a statute employs a term which has an established meaning at common law, the general practice is to give the term that meaning.<sup>24</sup> The *Turley* Court, however, found "stolen" to be a generic term which has never been exclusively confined to any particular offense at common law.<sup>25</sup> Terms such as "stolen," unencumbered by an established common-law meaning, should be given a meaning consistent with the context in which they appear.<sup>26</sup> To determine what meaning is consistent with the context, it is appropriate to consider the purpose of the statute and to consider what guidance is available from the legislative history.<sup>27</sup> Applying this analysis, the *Turley* Court examined the purpose and legislative history of the National Motor Vehicle Theft Act, and concluded that the term "stolen," as used in that statute, included all felonious takings and was not limited to common-law larceny.<sup>28</sup>

23. Recent Cases, *Courts Split on Whether "Stolen" as Used in Dyer Act is Restricted to Larceny or Includes Embezzlement and False Pretenses*, 105 U. PA. L. REV. 118 (1956).

24. *United States v. Turley*, 352 U.S. 407, 410-11 (1957). See *supra* notes 11-17 and accompanying text.

25. 352 U.S. at 411-12. See *supra* note 18.

26. "Freed from a common-law meaning, we should give 'stolen' the meaning consistent with the context in which it appears." 352 U.S. at 412-13.

27. "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." It is, therefore, appropriate to consider the purpose of the Act and to gain what light we can from its legislative history.

*United States v. Turley*, 352 U.S. 407, 413 (1957) (citations omitted) (quoting *United States v. Bramblett*, 348 U.S. 503, 509-10 (1955)). See *infra* note 125.

28. 352 U.S. at 413-17. "'Stolen' as used in 18 U.S.C. § 2312 includes all felonious takings of motor vehicles 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. The Court used the term "felonious" to distinguish takings with criminal intent from innocent takings, rather than to distinguish between felonies and misdemeanors. *Id.* at 410 n.4. Cf. *infra* note 69.

See generally Comment on Recent Case, *Criminal Law—Interpretation of "Stolen" as Used in Dyer Act*, 43 IOWA L. REV. 137 (1957); Notes and Comments, *Criminal Law—Applicability of the National Motor Vehicle Theft Act to Embezzlement and False Pretenses*, 35 N.C.L. REV. 496 (1957); Recent Case Note, *Criminal Law—Statutes—Construction of Word "Stolen"*, 11 Sw. L.J. 376 (1957); Case Comment, *Statutes—Interpretation—Term "Stolen" as Used in the National Motor Vehicle Theft Act*, 59 W. VA. L. REV. 394 (1957). Cf. Recent Developments, *Federal Courts Divided Over Meaning of Dyer Act*, 57 COLUM. L. REV. 130 (1957) (Ninth Circuit view, ultimately adopted by Supreme Court in *Turley*); Recent Case, *Criminal Law—National Motor Vehicle Theft Act—Construction of "Stolen"*, 33 N.D.L. REV. 114 (1957) (same).



Despite the analysis set out by the Supreme Court in *Turley*, the circuits are once again in disagreement on the meaning of the term "steal" as used in a federal criminal statute.<sup>29</sup> With a view toward promoting uniformity of interpretation, this comment proposes to show that a correct application of the *Turley* analysis compels a narrow construction of section 2113(b) of the Federal Bank Robbery Act. The textual context<sup>30</sup> and legislative history,<sup>31</sup> the title of the act,<sup>32</sup> federalism and double jeopardy concerns,<sup>33</sup> and the maxim that criminal statutes are to be strictly construed<sup>34</sup> will be considered.

#### BROAD CONSTRUCTION OF SECTION 2113(b)

The Seventh, Eighth, Second, and Fifth Circuits have all cited *Turley* as authority for construing section 2113(b) broadly to cover not only common-law larceny, but also embezzlement and taking by false pretense.<sup>35</sup> The Court of Appeals for the Fifth Circuit apparently concluded that the result in *Turley* established that the term "stolen" in any federal criminal statute includes all felonious takings; the court neither discussed nor applied the *Turley* analysis for construing terms which have no established common-law meaning.<sup>36</sup> The Court of Appeals for the Second Circuit noted part of the *Turley* analysis, that terms of no established common-law meaning should be given a meaning consistent with the context in which they appear, and compared the construction given the term "stolen" as used in the context of two other federal criminal statutes.<sup>37</sup> The court, however, neither discussed nor applied the other part of the *Turley* analysis, that legislative history and purpose should be considered to determine what meaning is consistent with the context.<sup>38</sup> Moreover, the texts of the two statutes which were compared differed substantially from the text of section

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29. As a result, a person's guilt or innocence of violating § 2113(b) may depend on the geographical location of apprehension and trial. The same is true for violations of 18 U.S.C. § 2113(c), which prohibits the receipt, possession, sale, and disposal of property or money knowing the same to have been taken from a bank in violation of § 2113(b). See *infra* note 46. The same may also be true for violations of 18 U.S.C. § 2113(a). See *infra* note 48.

30. See *infra* notes 64-75 and accompanying text.
31. See *infra* notes 76-115 and accompanying text.
32. See *infra* notes 116-19 and accompanying text.
33. See *infra* notes 120-24 and accompanying text.
34. See *infra* note 125.
35. See *supra* note 5.
36. See *infra* notes 42-45 and accompanying text.
37. See *infra* notes 46-48 and accompanying text.
38. See *infra* note 48.

2113(b).<sup>39</sup> The Court of Appeals for the Eighth Circuit indicated, in dictum and without explanation, that it favored a broad construction.<sup>40</sup> The Court of Appeals for the Seventh Circuit cited the Fifth and Second Circuit decisions as authority for broadly construing section 2113(b), having concluded, without any analysis of those decisions, that they had relied on *Turley*.<sup>41</sup>

In *Thaggard v. United States*,<sup>42</sup> the Court of Appeals for the Fifth Circuit upheld a conviction under section 2113(b) based on conduct which constituted taking by false pretense, but not common-law larceny. At the outset, the court noted that section 2113(b) was couched in terms of "steal and purloin" and that "larceny" was not mentioned.<sup>43</sup> Citing *Turley* as authority, the court rejected the view that section 2113(b) reached only common-law larceny.<sup>44</sup> The opinion contains no analysis of *Turley* and only quotes language from *Turley* which, out of context, implies that the term "steal" has a necessarily broad meaning including all felonious takings.<sup>45</sup>

The Court of Appeals for the Second Circuit concluded, in

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39. See *infra* note 47.

40. See *infra* notes 49-51 and accompanying text.

41. See *infra* notes 52-57 and accompanying text.

42. 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 384 U.S. 958 (1966). In *Thaggard*, a bank's bookkeeping error had caused a large sum of money to be credited to the defendant's account. Upon discovering this windfall and making certain that the amount had in fact been credited to his account, the defendant prepared a check payable to "cash" in the amount of the excess sum and presented the check to a teller for withdrawal. The teller called the bookkeeping department, found the defendant's balance supported the withdrawal, and paid the amount to the defendant. Although noting that the trial judge had instructed the jury as though common-law larceny had to be shown and that the defendant was convicted on that basis, the court stated that § 2113(b) was not limited to common-law larceny. *Id.* at 735-38.

43. *Id.* at 736. If the statute had been framed in terms of larceny, the presumption would have been that Congress intended the statute to cover only common-law larceny. See *supra* notes 11-17 and accompanying text. Larceny was mentioned, however, in the title of the amendment which enacted § 2113(b). See *infra* notes 116-19 and accompanying text.

44. *Thaggard* rejected the view expressed in dictum by the Court of Appeals for the Fourth Circuit in *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961). The *Rogers* court rejected the defendant's argument that his conduct amounted to taking by false pretense, not larceny, but noted that § 2113(b) covers only common-law larceny and not embezzlement or obtaining goods by false pretense. *Id.* at 437-38.

The *Thaggard* court did not mention *United States v. Starr*, 48 F. Supp. 910 (S.D. Fla. 1943), but it apparently also rejected the reasoning of that decision, which held that § 588(b), the predecessor of § 2113(b), covered only common-law larceny. 48 F. Supp. at 911. The *Starr* court reasoned that if Congress had intended to cover false pretense, Congress could easily have added appropriate language. See *infra* note 57.

45. 354 F.2d at 736-37. The essence of the opinion in *Turley* was not that the term "stolen" had a necessarily broad meaning, but that it had no fixed common-law meaning and, therefore, could have a broad or narrow meaning, depending on the context in which it is used. As used in the National

*United States v. Fistel*,<sup>46</sup> that the word "steal," as used in section 2113(b), encompassed embezzlement and other unlawful takings. The court noted the Supreme Court's holding in *Turley* that "stolen" has no accepted common-law meaning and should, therefore, be given a meaning consistent with the context in which it is used. Also noting that two other federal criminal statutes in which "steal" appears had been broadly construed under previous decisions,<sup>47</sup> the court concluded that section

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Motor Vehicle Theft Act, "stolen" had a broad meaning. See *supra* notes 20-28 and accompanying text.

46. 460 F.2d 157 (2d Cir. 1972). In *Fistel*, the defendant was convicted of unlawfully possessing nine \$100,000 United States Treasury Bills in violation of 18 U.S.C. § 2113(c). Section 2113(c) provides in pertinent part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of, any property or money or other thing of value *knowing the same to have been taken from a bank . . . in violation of subsection (b) of this section* shall be subject to the punishment provided by said subsection (b) for the taker.

18 U.S.C. § 2113(c) (1976) (emphasis added). The evidence showed that the nine bills found in defendant's possession had been received by a bank, and then discovered missing, and that there was no record that the bills ever lawfully left the bank's custody. On appeal, the defendant contended that under the facts of the case it was impossible for the government to prove the required scienter because it was unknown how the securities had left the bank. This argument was premised on the contention that § 2113(b) reaches only larcenous takings and that it was as likely that the securities were embezzled as that they were taken larcenously. The court of appeals rejected the defendant's contention that § 2113(b) reaches only larcenous takings. *Id.* at 160-63.

47. The Second Circuit relied on its earlier construction of the words "with intent to steal or purloin" as used in the National Stolen Property Act, 18 U.S.C. § 415 (1940) (now 18 U.S.C. § 2314 (1976)). That statute provided:

Whoever shall transport . . . in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, . . . shall be punished . . . .

18 U.S.C. § 415 (1940). The Court of Appeals for the Second Circuit, relying on the legislative history of the statute and the flexible meaning of "steal," had held that this statute was "applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefits of ownership." *United States v. Handler*, 142 F.2d 351, 353 (2d Cir.), *cert. denied*, 323 U.S. 741 (1944).

The texts of the two statutes are identical in the language "with intent to steal or purloin." In the National Stolen Property Act, however, this phrase is not conjoined with the phrase "takes and carries away." Thus in § 415, the words "steal" and "purloin" do not appear within the context of the classic language used to define larceny. See *infra* notes 64-70 and accompanying text. In contrast, the phrase "with intent to steal or purloin" in the Federal Bank Robbery Act is used in conjunction with the phrase "takes and carries away" and, as the Ninth Circuit pointed out in *LeMasters*, "these are the classic words used to define larceny." *LeMasters v. United States*, 378 F.2d 262, 267 (9th Cir. 1967).

The Second Circuit also relied on its earlier construction of 18 U.S.C. § 409 (1940), now incorporated in 18 U.S.C. § 659 (1976), in *United States v.*

2113(b) was not limited to common-law larceny.<sup>48</sup>

De Normand, 149 F.2d 622 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945). That statute provided:

[W]hoever shall steal or unlawfully take, carry away, or conceal . . . with intent to convert to his own use any goods . . . which are a part of or which constitute an interstate or foreign shipment of freight . . . , or shall . . . have in his possession any such goods . . . , knowing the same to have been stolen [shall be punished].

18 U.S.C. § 409 (1940). In *De Normand*, the defendants had held up two truck drivers at gunpoint in an attempt to hijack two interstate shipments of liquor, but were apprehended before driving the trucks away. In appealing their convictions, the defendants contended that § 409 covered only common-law larceny and, because there had been no asportation of the truckloads of liquor, that their conduct did not amount to common-law larceny. *See infra* note 66 and accompanying text. The Court of Appeals for the Second Circuit held that, since the statute was not framed merely in terms of larceny, the asportation element of larceny was not necessary to constitute an offense under that statute. 149 F.2d at 624.

Like the National Stolen Property Act, this statute is of little value for determining which meaning of the words "steal" and "purloin" is consistent with the § 2113(b) context because the texts of the two statutes are substantially different. A more appropriate comparison would have been 18 U.S.C. § 661 which is framed in language substantially identical to that of § 2113(b). *See infra* note 70.

48. The court failed to consider the legislative history and purpose of § 2113(b), as required under the *Turley* analysis, in determining which meanings of "steal" and "purloin" are consistent with the context of § 2113(b). *See United States v. Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972). Of the decisions cited by the court as authority for the conclusion that § 2113 was not limited to common-law larceny, one had been overruled. *Chapman v. United States*, 346 F.2d 383 (9th Cir.), *cert. denied*, 382 U.S. 909 (1965), *overruled by LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967). Another court, having found the conduct in question to be common-law larceny, concluded that "we need not decide . . . to what extent § 2113(b) proscribes crimes other than larceny." *United States v. Pruitt*, 446 F.2d 513, 515 (6th Cir. 1971). The remaining decision was *Thaggard*, which failed to apply the analysis set out by the Supreme Court in *Turley* for construing federal criminal statutes which use terms which have no established common-law meaning. *See supra* notes 42-45 and accompanying text. Moreover, the *Thaggard* opinion implied that "stolen" necessarily has a broad meaning, a proposition that the Supreme Court rejected in *Turley*. *See supra* notes 18-28 & 45 and accompanying text, and *infra* note 59.

The *Fistel* holding, moreover, was given a very narrow interpretation in a Second Circuit district court decision holding that, although § 2113(b) prohibits more than common-law larceny, it does not encompass takings by fraud or false pretense. *United States v. Rollins*, 383 F. Supp. 494 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). In *Rollins*, the defendant was charged with entering a bank with intent to commit a felony in violation of the burglary provision of § 2113(a) of the Bank Robbery Act. *See infra* notes 91 & 103 and accompanying text. That provision in pertinent part states that "[w]hoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny [shall be guilty of a crime]." 18 U.S.C. § 2113(a) (1976). The defendant had entered the bank intending to transfer \$650,000 from another's account in another bank to his own account by means of fraudulent mail transfer forms which bore invalid signatures. The Government contended that this scheme, had it been accomplished, would have constituted a § 2113(b) violation. Since a violation under § 2113(b) involving anything which exceeds \$100 in value constitutes a felony within the

In *United States v. Johnson*,<sup>49</sup> the Court of Appeals for the Eighth Circuit stated, in dictum, that it "entertain[ed] some doubt" about the position that section 2113(b) embraces only common-law larceny.<sup>50</sup> However, the court found it unnecessary to reach the issue because the conduct in question constituted "larceny by trick" which "even at common law . . . was classified as larceny."<sup>51</sup> The Court of Appeals for the Seventh Circuit, in *United States v. Guiffre*,<sup>52</sup> upheld a conviction under section 2113(b) based on conduct which did not amount to common-law larceny. The court noted that the Fifth and Second Circuits, "relying on the Supreme Court's analysis in *Turley*," had

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meaning of § 2113(a), the Government contended that entering a bank with intent to commit such a violation was punishable under § 2113(a). 383 F. Supp. at 495.

The *Rollins* court rejected that argument. The court noted the Second Circuit's holding in *Fistel* that § 2113(b) was not limited in scope to larceny, as that crime was known at common law, but embraced "embezzlement by a bank official or employee and other takings with intent to deprive the owner of permanent use of the property taken." *United States v. Rollins*, 383 F. Supp. 494, 495 (S.D.N.Y. 1974) (quoting *United States v. Fistel*, 460 F.2d 157, 163 (2d Cir. 1972)), *aff'd*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). Nevertheless, the court held that § 2113(b) does not encompass takings by fraud or false pretense and that, therefore, the defendant's intended scheme would not have constituted a § 2113(b) violation. The court found that the legislative history "plainly shows that Congress refused to enact the 'bank fraud' statute which had been proposed to it in 1934, finding adequate sanctions for such conduct elsewhere in the law" and concluded that Congress did not intend to resurrect that statute when Congress enacted the predecessor of § 2113(b) in 1937. 383 F. Supp. at 496-97. *See infra* notes 77-89 and accompanying text. Thus, at least one district court in the Second Circuit has refused to extend the scope of § 2113(b) to taking by false pretense.

49. 575 F.2d 678 (8th Cir. 1978).

50. *Id.* at 680.

51. *Id.* The defendant handed a bank teller four twenty- and two ten-dollar bills and requested a hundred-dollar bill. The teller placed a hundred-dollar bill on the counter. While the teller turned away to place the other bills in her cash drawer, the defendant surreptitiously replaced the hundred with a ten. The defendant showed the ten to the teller, asserting that she had mistakenly given him a ten instead of a hundred. After conferring with a superior, the teller exchanged the ten-dollar bill for another hundred-dollar bill. Since the bank willingly surrendered possession of the hundred-dollar bill, there was no trespass to the bank's actual possession. Nevertheless, the court found that the taking constituted a form of common-law larceny called "larceny by trick." One commits larceny by trick where one, intending to appropriate another's property, obtains possession of, but not title to, the property with consent which is induced by lies. *Id.* at 679-80. *See generally* Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 504-07 (1976); LAFAVE & SCOTT, *supra* note 4, at 620, 627; PERKINS, *supra* note 4, at 247.

52. 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978). The defendant, with the knowing aid of a teller, had obtained a bank's money by depositing stolen checks with forged endorsements into accounts and withdrawing cash. The defendant contended that taking by presenting forged checks did not constitute common-law larceny. *Id.* at 127-28.

held that section 2113(b) was not to be narrowly construed as limited to common-law larceny.<sup>53</sup> The court cited *Thaggard*<sup>54</sup> and *Fistel*,<sup>55</sup> but acknowledged that other circuits had construed section 2113(b) narrowly.<sup>56</sup> Nevertheless, the court concluded that the *Thaggard* and *Fistel* decisions provided the better construction because they relied "directly on the Supreme Court's interpretation in *Turley* of the term 'stolen' as a basis for broadly interpreting" section 2113(b).<sup>57</sup>

The Supreme Court's interpretation of the term "stolen," however, affords a basis for broadly construing the language of section 2113(b) only insofar as the Court held "stolen" to have no fixed common-law meaning.<sup>58</sup> "Stolen" could have a broad meaning, but could also have a narrow meaning limited to common-law larceny.<sup>59</sup> In *Turley*, the Court set out the proper analysis for construing such terms, applied that analysis to the statute being construed, and found that the meaning of "stolen" in that particular statute was broad.<sup>60</sup> Although *Guiffre* asserted that *Thaggard* and *Fistel* were relying on the Supreme

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53. *Id.* at 127.

54. *See supra* notes 42-45 and accompanying text.

55. *See supra* notes 46-48 and accompanying text.

56. 576 F.2d at 127-28.

57. *Id.* at 128. Although it did not explicitly mention the decision, the *Guiffre* court apparently rejected the reasoning of *United States v. Mangus*, 33 F. Supp. 596 (N.D. Ind. 1940), which held that 12 U.S.C. § 588(b), the predecessor of § 2113(b), did not cover obtaining property by false pretense. The defendant in *Mangus* had obtained money from a bank by fraudulently representing that the checks he tendered for cashing were good. The district court pointed out that this constituted taking by false pretense, not larceny by trick, because the bank cashed the checks believing they were good and parted with both possession and title to the money. *Id.* at 597. *See supra* notes 4, 5 & 51. The district court held that § 588(b) did not proscribe obtaining property by false pretense, reasoning that if Congress had intended to cover that crime, Congress could easily have added appropriate language: "whoever obtains money or anything of value by false representations or falsely representing that a tendered check is good, shall be guilty." *Id.*

58. *See supra* note 18 and text accompanying notes 20-25.

59. The circuits which have endorsed a broad construction of § 2113(b) have miscalculated the effect of *Turley* on the question. *Turley* does not establish that the word "stolen" in any federal criminal statute includes all felonious takings. The Court simply found that the word is unencumbered by common law meanings. The opinion explicitly states that the meaning of the word should be consistent with the context in which it appears, and further that it is appropriate to consider the purpose of the statute and to gain what light is available from the legislative history. It is clear that the Court contemplated that "stolen" could have different meanings in different statutes.

*United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981) (§ 2113(b) covers only common-law larceny) (footnote and citations omitted).

60. *See supra* notes 26-28 and accompanying text.

Court's analysis in construing section 2113(b), neither decision applied the analysis which the Court prescribed.<sup>61</sup>

### NARROW CONSTRUCTION OF SECTION 2113(b)

The Sixth, Third, and Ninth Circuits have cited *Turley* as authority for narrowly construing section 2113(b) as covering only common-law larceny.<sup>62</sup> The Fourth Circuit has narrowly construed section 2113(b) without discussing *Turley*.<sup>63</sup> All of these circuits have correctly applied the analysis set out in *Turley* for construing terms of no established common-law meaning by examining the context in which the terms appear and the legislative history and purpose of the statute. The *Turley* analysis as applied by these circuits follows.

#### *The Textual Context*

Perkins defines common-law larceny as "the trespassory taking and carrying away of the personal property of another with intent to steal the same."<sup>64</sup> The taking must be "trespassory"; that is, the taker must either take possession of the goods from another without the other's consent or take only possession of, but not title to, the goods with consent which was induced by lies.<sup>65</sup> There must be a carrying away,<sup>66</sup> and the

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61. None of the circuits which purport to follow *Turley* by broadly construing § 2113(b) examines the legislative history of that enactment. Each of those decisions is nothing more than a mechanical application of *Turley*. They provide no discussion of why the context of § 2113(b) suggests that a broad interpretation of its provisions is appropriate. *Guiffre* . . . at 128; *Fistel* . . . at 162; *Thaggard* . . . at 737. In short, while those cases appear to apply the result in *Turley*, they fail to apply the analysis which *Turley* prescribes.

United States v. Feroni, 655 F.2d 707, 710 (6th Cir. 1981) (footnote omitted).

62. See, e.g., United States v. Feroni, 655 F.2d 707 (6th Cir. 1981) (§ 2113(b) does not proscribe the taking of money by false pretense, but rather, it only applies to actions which constitute common-law larceny); United States v. Pinto, 646 F.2d 833 (3d Cir. 1981) (defendant's dissipation of funds credited to his bank account because of another bank's unilateral mistake is not conduct punishable under § 2113(b)); LeMasters v. United States, 378 F.2d 262 (9th Cir. 1967) (§ 2113(b) does not cover the crime of obtaining money by false pretense). But see United States v. Simmons, 679 F.2d 1042, 1049 (3d Cir. 1982) (broadly construing § 2113(b) without specifically overruling *Pinto*).

63. United States v. Rogers, 289 F.2d 433 (4th Cir. 1961) (§ 2113(b) covers larceny as defined at common law and not embezzlement or obtaining goods by false pretense) (dictum).

64. LAFAYE & SCOTT, *supra* note 4, at 622; PERKINS, *supra* note 4, at 234.

65. See *supra* note 4.

66. The word "carrying" is not to be taken literally; one can be guilty of larceny of property which cannot be picked up in the hand, e.g., an automobile. The distance "away" which the property must be moved need not be substantial; a slight movement will do. LAFAYE & SCOTT, *supra* note 4, at 631-33; PERKINS, *supra* note 4, at 263-65.

carrying away must be done with intent to steal.<sup>67</sup>

Thus, the key language of section 2113(b), "takes and carries away, with intent to steal or purloin, any property or money," is descriptive, at least primarily, of common-law larceny. Except for the omission of the word "trespassory," and for the added word "purloin,"<sup>68</sup> the language is almost identical to Perkins' definition. The language is also very close to Blackstone's definition: "the felonious taking and carrying away of the personal goods of another."<sup>69</sup> Arguably, therefore, "steal" and "purloin" should be construed as denoting nothing more than common-law larceny if they are to be given a meaning consistent with the context in which they appear. The similarity of the language of section 2113(b) to language traditionally used to define common-law larceny makes a broader reading strained.<sup>70</sup>

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67. LAFAYE & SCOTT, *supra* note 4, at 637-44; PERKINS, *supra* note 4, at 265-73.

68. The use of the word "purloin" in § 2113(b) appears to be of no significance on the construction issue. See, e.g., *United States v. Feroni*, 655 F.2d 707, 710 n.3 (6th Cir. 1981); *LeMasters v. United States*, 378 F.2d 262, 266 (9th Cir. 1967). See also *supra* note 18.

69. 4 W. BLACKSTONE, COMMENTARIES 229 (Hammond ed. 1890). By "felonious," Blackstone meant done with intent to steal. *Id.* at 232. Cf. *supra* note 28.

70. See, e.g., *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir. 1981); *LeMasters v. United States*, 378 F.2d 262, 264-65, 267 (9th Cir. 1967) ("The words [steal and purloin] are used in conjunction with the words 'takes and carries away,' and these are classic words used to define larceny.").

The phrase "takes and carries away, with intent to steal or purloin," has been broadly construed within the context of another criminal statute. Title 18 U.S.C. § 661 (1976) provides in pertinent part: "Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows . . ." 18 U.S.C. § 661 (1976). In *United States v. Henry*, 447 F.2d 283 (3d Cir. 1971), the Court of Appeals for the Third Circuit held that § 661 and its predecessor statutes were not codifications of common-law larceny, but were intended to broaden that offense. "To accomplish that purpose," the court pointed out, "the words 'steal' and 'purloin' were used instead of simply using the term 'larceny' to describe the punishable offense." *Id.* at 286. The court noted that several courts had taken the view 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.

The Court of Appeals for the Ninth Circuit followed the Third Circuit's decision in *Henry* and broadly construed § 661. *United States v. Maloney*, 607 F.2d 222 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). The court reaffirmed its holding in *LeMasters* that the words "takes and carries away, with intent to steal or purloin," were classic words used to describe common-law larceny, but rejected the argument that this fact compelled a narrow construction of § 661. The court clarified its *LeMasters* decision by pointing out that "the mere use of the phrase does not indicate that the criminal statute wherein it appears is *per se* limited to the common law crime of larceny." *Id.* at 230. The court re-emphasized that, as noted in



Consistency, however, is itself a term of no established meaning. Consistent may, on the one hand, be defined as "not contradictory."<sup>71</sup> Under such a view, any meaning ascribed to the terms "steal" and "purloin" would be consistent with the context so long as that meaning would not negate or contradict any express terms of the statute in which they appear. A broad construction of "steal" and "purloin" would be consistent with the language of section 2113(b) because there is no express requirement that a section 2113(b) taking must be "trespassory."<sup>72</sup> On the other hand, consistent may be defined as "in reasonable harmony."<sup>73</sup> Under this view, to be consistent with the context, the meaning ascribed would have to be not only uncontradictory, but also reasonably harmonious with the express terms of the statute. Although a broad construction of "steal" and "purloin" would not contradict the express terms of section 2113(b), such a construction would not be reasonably harmonious with the language of section 2113(b), which is framed in the classic language used to define common-law larceny. Although the "reasonably harmonious" meaning approach seems sounder than the "uncontradictory" meaning approach for determining the meanings of words in statutes,<sup>74</sup> the opinion in *Turley* did not explain what the Supreme Court meant by "a meaning consistent with the context."<sup>75</sup> Arguably, therefore, a broad as well as a narrow meaning of the words "steal" and "purloin" could be consistent with the language of section 2113(b), depending on the definition of consistency.

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*LeMasters*, "an examination of the legislative history and the total statutory language is required to ascertain the intended meaning of the words 'steal' and 'purloin' even when used in conjunction with the phrase 'takes and carries away.'" 607 F.2d at 230. Distinguishing § 661 from 18 U.S.C. § 2113(b) on the basis of legislative history and purpose, duplication-of-state-law concerns, and the titles of the enactments, the court concluded that § 661, unlike § 2113(b), was not limited in application to offenses amounting to common-law larceny. *Id.* at 230-31.

71. *See, e.g.*, *Hunt Foods & Indus., Inc. v. Doliner*, 26 A.D. 2d 41, 43, 270 N.Y.S.2d 937, 940 (N.Y. App. Div. 1966) ("To be inconsistent the term must contradict or negate a term of the writing."); *Michael Schiavone & Sons v. Securalloy Co.*, 312 F. Supp. 801, 804 (D. Conn. 1970) (same).

72. A construction of "steal" and "purloin" as including not only common-law larceny but also theft offenses which do not require a trespassory taking, such as embezzlement and false pretense crimes, would not contradict the letter of § 2113(b).

73. *See, e.g.*, *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal*, 600 F.2d 103, 111 (7th Cir. 1979); *Snyder v. Herbert Greenbaum & Assoc., Inc.*, 38 Md. App. 144, 152, 380 A.2d 618, 623 (1977) (defining inconsistency as "the absence of reasonable harmony").

74. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-38 (1947).

75. *United States v. Turley*, 352 U.S. 407, 413 (1957).

### *The Purpose and Legislative History*

Although the textual context alone may not require a narrow construction of section 2113(b), *Turley* establishes that to determine what meaning is consistent with the context, it is appropriate to consider the purpose and legislative history of the statute.<sup>76</sup> There is evidence that when Congress enacted section 2113(b), Congress did not intend to cover embezzlement and false pretense thefts.<sup>77</sup> Prior to 1934, although banks operating under federal law were protected by a federal criminal statute against embezzlement,<sup>78</sup> such banks were protected against false pretense thefts, robberies, burglaries, and larcenies only by state law.<sup>79</sup> In 1934, a bill intended to punish gangster activities in relation to banks in the United States was introduced in the Senate.<sup>80</sup> The bill expressly created four federal crimes

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76. *Id.* See generally Carro & Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 295-97 (1982); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540-44 (1947).

77. The legislative history of § 2113(b) of the Federal Bank Robbery Act is fully discussed in *LeMasters v. United States*, 378 F.2d 262, 264-68 (9th Cir. 1967). See also *United States v. Rogers*, 289 F.2d 433, 437 n.14 (4th Cir. 1961); Note, *Obtaining Money by False Pretenses From a Bank is Not a Violation of the Federal Bank Robbery Statute*, 5 HOUS. L. REV. 531, 532-33 (1968). The legislative history of the statute which enacted both § 2113(b) and the burglary provision of 18 U.S.C. § 2113(a) was discussed in construing the burglary provision. *Jerome v. United States*, 318 U.S. 101, 102-08 (1943). See also *United States v. Jerome*, 130 F.2d 514, 519-24 (2d Cir. 1942) (Frank, J., concurring in part, dissenting in part).

78. R.S. § 5209, 40 Stat. 972, 12 U.S.C. § 592 (1940). See *United States v. Northway*, 120 U.S. 327 (1887) (construing R.S. § 5209).

79. See, e.g., *Jerome v. United States*, 318 U.S. 101, 102 (1943) (construing burglary provision of the 1937 statute which enacted that provision and § 2113(b)).

80. S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 2946 (1934). "By 1934 great concern had been expressed over interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope. The Attorney General, in response to that concern, recommended legislation embracing certain new federal offenses." *Jerome v. United States*, 318 U.S. 101, 102 (1943) (citation omitted). Although bank robberies remained local crimes, by 1934 the apprehension of bank robbers had become a task which required the coordinated efforts of law enforcement agencies over wide territories. The automobile, by increasing the mobility of criminals, had placed a strain on local police systems that was felt peculiarly with respect to bank robberies. In the Midwest particularly, raids were made on banks in smaller communities by bandits who, once having outdistanced pursuit, retreated to other states. Note, *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 LAW & CONTEMP. PROB. 445, 448 (1934). The chief weapon of the gangsters, noted one commentator, was no longer the firearm, but the automobile. Editorial, *The Motor Car and Crime*, 22 J. CRIM. L. & CRIMINOLOGY 650 (1932). The rapid development of motor vehicle transportation has made escape from a crime scene "so easy and so certain that practically no well planned 'job' is carried out today in which an automobile fails to figure." *Id.* at 651.

against banks: larceny, false pretense, burglary, and robbery.<sup>81</sup> The bill unanimously passed the Senate<sup>82</sup> and went to the House. The House Judiciary Committee, however, amended the bill by striking the larceny, false pretense, and burglary provisions, leaving only the robbery provisions.<sup>83</sup> This action was not unnatural; the Attorney General, in recommending the legislation, emphasized gangster interstate bank robbery activity as the evil to be cured.<sup>84</sup> The House adopted this version of the bill.<sup>85</sup> The conflicting versions were referred to a conference committee<sup>86</sup> which accepted the House version without explanation.<sup>87</sup> Both houses finally agreed to the House version,<sup>88</sup> which

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81. Section 2 of that bill made it a crime to take and carry away bank property either (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." Section 3 made burglary of a bank a crime. Section 4 made a taking of bank property by force and violence, or by putting in fear, a crime. S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934). "Thus, S. 2841 covered, in plain language, larceny, § 2(1); false pretense, § 2(2); burglary, § 3; and robbery, § 4." *LeMasters v. United States*, 378 F.2d 262, 264 (9th Cir. 1967).

82. 78 CONG. REC. 5738 (1934).

83. The House Judiciary Committee amended the bill by striking §§ 2 and 3, i.e., the provisions covering takings without consent, takings with consent obtained by false representations, and burglary. H.R. REP. NO. 1461, 73d Cong., 2d Sess. (1934). See 78 CONG. REC. 8132 (1934). See also *Jerome v. United States*, 318 U.S. 101, 103 (1943); *LeMasters v. United States*, 378 F.2d 262, 264-65 (9th Cir. 1967).

84. *LeMasters v. United States*, 378 F.2d 262, 265 n.3 (9th Cir. 1967). The Attorney General stated that the purpose of the bill was to enable the federal government to deal with "gangsters who operate habitually from one State to another in robbing banks." S. REP. NO. 537, 73d Cong., 2d Sess. (1934). See also 78 CONG. REC. 2946-47 (1934); H.R. REP. NO. 1461, 73d Cong., 2d Sess. (1934). Representative Hatton Sumners, Chairman of the House Judiciary Committee, "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. PROB. 445, 448-49 (1934). Sumners warned Congress that extensions of federal power would encourage state and local authorities to become derelict in their law enforcement responsibilities. 78 CONG. REC. 1201-06, 8126-27, 8133 (1934); 75 CONG. REC. 13,291-92 (1932). Others expressed the same concern. See, e.g., Report of Raymond Moley to the President and the Attorney General on the Federal Enforcement of Criminal Law, First Section, N.Y. Times, May 24, 1934, at 2. It was evident, wrote one commentator, "that to have brought all cases in which money is taken fraudulently from banks within the scope of federal criminal jurisdiction would have placed a heavy enforcement burden upon the federal government" in an area where federal assistance was not imperative because "the element of interstate flight is frequently absent." Note, *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 LAW & CONTEMP. PROB. 445, 449 (1934).

85. 78 CONG. REC. 8132-33 (1934).

86. *Id.* at 8322.

87. *Id.* at 8767, 8776.

88. *Id.* at 8778, 8855-57.

became the original Federal Bank Robbery Act.<sup>89</sup>

In 1937, the Bank Robbery Act was amended to include the language of what is now section 2113(b).<sup>90</sup> The amendment also contained a burglary provision making it a federal crime to enter or attempt to enter a bank with intent to commit a felony or larceny.<sup>91</sup> The question is whether, by using the language "take and carry away, with intent to steal or purloin, any property or money" along with the burglary provision, Congress intended to include all of the conduct originally proposed for, but ultimately excluded from, coverage under the 1934 statute. Reason and evidence indicate that in 1937, Congress intended to include only larceny and burglary and not takings by false pretense and other means.

As the Court of Appeals for the Ninth Circuit pointed out in *LeMasters v. United States*,<sup>92</sup> if Congress was unwilling to make even larceny and burglary of a bank a federal crime in 1934, apparently because those crimes were not involved in interstate gangster activities and were adequately treated by local law and authority, it is "hard to believe" that in 1934 Congress was willing to involve the federal government "in the multiplicitous bad debt, forgery and other fraudulent transaction cases which occupy so much of the attention of local authorities but which . . . have no aspects of interstate gangster activities, and which present no danger that state law enforcement will be lacking in diligence."<sup>93</sup> That Congress in 1937 was willing to involve the federal government in larceny and burglary cases, on the other hand, is not surprising because several considerations may well have persuaded Congress to change its decision with regard to larceny and burglary as opposed to false pretense and embezzlement.

The likelihood of the use of a dangerous weapon, a killing, or other violence was considerable in burglary and larceny cases,

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89. 48 Stat. 783 (1934).

90. 50 Stat. 749 (1937).

91. *LeMasters v. United States*, 378 F.2d 262, 265 (9th Cir. 1967). The burglary provision is now in the second paragraph of 18 U.S.C. § 2113(a). See *infra* note 103.

92. 378 F.2d 262 (9th Cir. 1967).

93. *Id.* at 266. See also *supra* note 84. It should be noted that bringing false pretense within the ambit of the Bank Robbery Act in 1937 would have placed a much heavier enforcement burden on the federal government than a similar extension in 1934. In 1935, the Bank Robbery Act was amended to cover not only national banks, but also numerous state banks insured by the Federal Deposit Insurance Corporation. This increased the number of banks covered from about 8,000 to more than 14,000. By the end of fiscal year 1938, over 19,000 banks were protected. 1938 ATT'Y GEN. ANN. REP. 172; 1936 ATT'Y GEN. ANN. REP. 1, 66, 130. See 49 Stat. 720 (1935).

as it was in robbery cases.<sup>94</sup> In contrast, such likelihood in embezzlement and false pretense cases was doubtful.<sup>95</sup> Furthermore, an extension of the Bank Robbery Act into the area of false pretense crimes would not only have duplicated state law,<sup>96</sup> but would have brought under federal jurisdiction innumerable small cases which would otherwise be handled adequately in state courts.<sup>97</sup>

The legislative history shows that the 1934 statute was amended in 1937 because the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by the Act.<sup>98</sup> The fact that the 1934 statute was limited to robbery, the Attorney General said, had led to "some incongruous results."<sup>99</sup> The incongruous results were burglaries and larcenies which could not be prosecuted under a federal criminal statute when they were accomplished without display of force and violence or without "putting in fear," the necessary elements of robbery.<sup>100</sup> The proposed

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94. See *infra* note 106 (Congressman Rankin's comments during House deliberations on the enactment of the 1937 legislation). See also LAFAYE & SCOTT, *supra* note 4, at 618-19.

95. *LeMasters v. United States*, 378 F.2d 262, 265-66 (9th Cir. 1967). See also LAFAYE & SCOTT, *supra* note 4, at 618-19.

96. Section 4 of the 1934 statute expressly provided that the Bank Robbery Act did not preempt state law: "Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States." 48 Stat. 783 (1934). Because the 1937 amendment left this provision intact, the provision was also applicable to the new offenses included by the amendment within the coverage of the Bank Robbery Act.

97. Extending the Bank Robbery Act into the area of takings with consent induced by false representations would have meant "duplicating state law which was adequate and effectively enforced, . . . the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts" and would have served "no purpose except to confuse and dilute state responsibility for local crimes which were adequately dealt with by state law." *LeMasters v. United States*, 378 F.2d 262, 268 (9th Cir. 1967). See *supra* notes 84 & 93.

The Court of Appeals for the Ninth Circuit, in *United States v. Maloney*, 607 F.2d 222 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980), noted that the converse situation was presented with respect to 18 U.S.C. § 661 (1976). Broadly construing the language "takes and carries away, with intent to steal or purloin," the court pointed out that "§ 661 deals with areas outside of the normal state jurisdiction and, consequently, the rationale for the *LeMasters* decision would not be applicable here." *Id.* at 231 n.14.

98. H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937).

99. *Id.*

100. The original version of the Federal Bank Robbery Act in § 2(a) provided:

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.

legislation, the Attorney General explained, would amend the 1934 statute "to include within its provisions the crimes of burglary and larceny."<sup>101</sup>

The bill was introduced in the House and referred to the House Judiciary Committee.<sup>102</sup> The Committee reported the bill favorably to the House with an amendment changing the wording of the burglary provision.<sup>103</sup> The Committee's report stated that "[t]he Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute . . . to include larceny and burglary" and that the Committee concurred in that recommen-

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48 Stat. 783 (1934). A "striking instance" of the incongruous results which had arisen under the 1934 statute, the Attorney General explained, was the case of a man who, during a bank employee's momentary absence, had managed to take and carry away a large sum from a bank, but could not be prosecuted under any federal criminal statute because the taking was accomplished without display of force and violence and without putting anyone in fear, the necessary elements of robbery. H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937). The "incongruous results," in other words, were burglaries and larcenies which could not be prosecuted under any federal criminal statute because they did not amount to robberies. *Cf. Jerome v. United States*, 318 U.S. 101, 103 (1943).

101. H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937). The Justice Department bill, with the new matter proposed to be inserted in italics, provided:

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; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any larceny or other depredation; or whoever shall take and carry away, with intent to steal or purloin, 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 20 years, or both.

H.R. 5900, 75th Cong., 1st Sess., 81 CONG. REC. 5376 (1937).

102. H.R. 5900, 75th Cong., 1st Sess., 81 CONG. REC. 2731 (1937).

103. H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937). *See also* 81 CONG. REC. 4074 (1937). The burglary provision of the Justice Department bill provided: "or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any larceny or other depredation; . . ." *See supra* note 101. "For reasons not disclosed in the legislative history, the House Judiciary Committee substituted 'any felony or larceny' for 'any larceny or other depredation.'" *Jerome v. United States*, 318 U.S. 101, 103-04 (1943) (construing the burglary provision). Thus, the amended version of the burglary provision of the Justice Department bill provided: "or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny; . . ." H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937). The Supreme Court has narrowly construed this provision to prohibit entering a bank with intent to commit offenses which are federal felonies and which affect banks protected by the Bank Robbery Act. *Jerome v. United States*, 318 U.S. 101, 108 (1943).

dation.<sup>104</sup> The Attorney General's recommendation letter was attached to the report.

When this bill came up for consideration in the House, an objection was raised to the fact that no distinction had been made in the penalty between simple larceny<sup>105</sup> and the more serious crimes of burglary and robbery.<sup>106</sup> The bill was tabled without prejudice.<sup>107</sup> When the bill again came up for consideration, the committee amendment changing the wording of the burglary provision<sup>108</sup> was adopted and, to eliminate the objectionable feature of the larceny provision, an amendment distinguishing between grand and simple larceny was adopted.<sup>109</sup> Without any effort to expand the reach of the bill to include other crimes, the bill passed the House unanimously.<sup>110</sup>

The bill then went to the Senate, where it was referred to the Senate Judiciary Committee.<sup>111</sup> The Committee reported the House version of the bill favorably to the Senate and

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104. H.R. REP. NO. 732, 75th Cong., 1st Sess. (1937).

105. At common law, a distinction has traditionally been drawn between petit or simple larceny, i.e., larceny of items of small value, and grand larceny, i.e., larceny of items of large value. See LAFAYE & SCOTT, *supra* note 4, at 634-36; PERKINS, *supra* note 4, at 273-75.

106. 81 CONG. REC. 4656 (1937). The Justice Department bill provided for a maximum penalty of 20 years imprisonment and \$5,000 in fine regardless of which of the three crimes, burglary, robbery, or larceny, were committed. In the House debate, Congressman Walcott made an objection to the possible severity of the bill in that it placed "simple larceny" on the same plane as robbery and breaking and entering to commit larceny. Congressman Rankin apparently misunderstood Congressman Walcott and responded by pointing out that no distinction between burglary and robbery should be made because the potential for violence was equally as great: "If a man breaks into a house or bank he will kill anyone in it to carry out his purpose." Congressman Walcott reiterated his point that a distinction should be made between petty larceny and the more serious crimes, burglary and robbery: "If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny." *Id.*

107. 81 CONG. REC. 4656 (1937).

108. See *supra* note 103.

109. 81 CONG. REC. 5376-77 (1937). The amendment to the larceny provision struck the remainder of the bill after the words "any felony or larceny" of the amended burglary provision and instead inserted language providing maximum penalties of \$5,000 in fine and 20 years imprisonment for violations of the burglary provision, \$5,000 in fine and 10 years imprisonment for taking and carrying away property or money of value exceeding \$50, and \$1,000 in fine and 1 year imprisonment for taking and carrying away property or money of value not exceeding \$50. *Id.* at 5376. Thus, the original larceny provision was replaced by one distinguishing between simple and grand larceny with respect to maximum penalty. Compare this amended version with the original wording in the Justice Department bill. See *supra* note 101.

110. 81 CONG. REC. 5377 (1937).

111. *Id.* at 5409.

adopted as its report the House Committee report.<sup>112</sup> The bill unanimously passed the Senate without debate and became law.<sup>113</sup> Thus it appears from the legislative history that the sole purpose of the 1937 amendment was to bring larceny and burglary under the purview of the Federal Bank Robbery Act,<sup>114</sup> there is no evidence of any effort by Congress to expand the reach of the 1934 statute to include other crimes.<sup>115</sup>

#### OTHER CONSIDERATIONS

##### *Title of the Act*

The holding in *Turley*, that terms of no established common-law meaning should be given a meaning consistent with the context in which they appear, placed no restrictions on the concept of "context."<sup>116</sup> The well-established principle that the title of an act may be used as an aid in resolving ambiguity, therefore, is especially applicable in construing words of no established common-law meaning.<sup>117</sup> The title of the statute which included section 2113(b), "AN ACT TO amend the bank-robbery statute to include burglary and larceny,"<sup>118</sup> indicates that the statute's purpose was to include larceny and burglary, but no other crimes, within the coverage of the Bank Robbery Act.<sup>119</sup>

##### *Federalism and Double Jeopardy Concerns and Strict Construction of Penal Statutes*

With the exception of crimes explicitly proscribed by Congress, the administration of criminal justice in the United States

112. S. REP. NO. 1259, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 9198 (1937).

113. 81 CONG. REC. 9331 (1937).

114. The 1937 amendment left in effect the bank robbery provisions of the 1934 statute. *LeMasters v. United States*, 378 F.2d 262, 265 (9th Cir. 1967).

115. The legislation was consistently referred to in Congress as a bill to amend the bank-robbery statute to include burglary and larceny. *See* 81 CONG. REC. 2731, 4074, 4656, 5376, 5409, 9198, 9331 (1937). It is interesting to note that when the Supreme Court construed the burglary provision of the 1937 amendment in *Jerome v. United States*, 318 U.S. 101 (1943), the Court stated that defrauding a bank by uttering a forged promissory note, a taking by false pretense, was not a felony "under any federal statute." *Id.* at 102.

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

117. *See* *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959) (title of enactment useful aid in resolving ambiguity); *Maguire v. Commissioner*, 313 U.S. 1, 9 (1944) (same).

118. 50 Stat. 749 (1937).

119. *See, e.g.*, *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir. 1981); *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).



has traditionally rested with the states.<sup>120</sup> The Supreme Court has admonished the courts to be especially mindful of that tradition when they construe federal criminal statutes which duplicate state law, because the double jeopardy provision of the fifth amendment<sup>121</sup> does not bar federal prosecutions for such offenses, even if a state conviction for the same acts has already been obtained.<sup>122</sup> Since larceny from a bank, as well as takings from a bank by false pretense and embezzlement, are covered by state law, section 2113(b) is a federal criminal statute which duplicates state law.<sup>123</sup> Therefore, because section 2113(b) does not explicitly proscribe false pretense and embezzlement, the courts should be reluctant to extend section 2113(b) to those crimes.<sup>124</sup> Finally, the similarity of the language of section

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120. *Jerome v. United States*, 318 U.S. 101, 104-05 (1943). Congress has consistently been hesitant to define as a federal crime conduct which is already criminal under state law and has done so only when for some exceptional reason the state laws needed federal reinforcement. This congressional policy is rooted in the doctrine of federalism. H. HART, JR. & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1241 (1958). See also *supra* note 84. The Supreme Court has followed a similar policy in construing federal criminal statutes, recognizing that broad construction of federal criminal statutes could alter sensitive federal-state relationships and could overextend limited federal police resources. *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Screws v. United States*, 255 U.S. 91, 105 (1945).

121. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." U.S. CONST. amend. V.

122. *Jerome v. United States*, 318 U.S. 101, 105 (1943). Supreme Court decisions which interpret the double jeopardy provision to allow successive state and federal prosecutions are based on sovereignty concerns. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 316-18 (1978). See also Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979); 1935 *ATT'Y GEN. ANN. REP.* 64.

123. See *supra* notes 96-97.

124. *United States v. Pinto*, 646 F.2d 833, 836 (3d Cir. 1981). In *Jerome v. United States*, the Supreme Court construed the word "felony" in the burglary provision, now 18 U.S.C. § 2113(a) (1976), of the same 1937 statute that enacted § 2113(b). 318 U.S. 101 (1943). See *supra* note 103. The Court gave the word a narrower construction than urged by the government. On the general subject of interpreting federal criminal statutes the Court said:

Since there is no common law offense against the United States, the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law.

*Id.* at 104-05 (citations omitted). The Court pointed out that the inapplicability of the double jeopardy provision to federal prosecutions under federal criminal statutes which duplicate state law is a consideration which gives "additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." *Id.* at 105.

2113(b) to classic language used to define common-law larceny, the legislative history, the title of the enactment, and federalism and double jeopardy concerns should all be considered together under the maxim that criminal statutes are to be strictly construed.<sup>125</sup> All of these factors taken together compel a narrow construction of section 2113(b).

#### CONCLUSION

In *Turley*, the Supreme Court established the proper analysis for determining the meaning of federal criminal statutes which employ terms which have no established common-law meaning.<sup>126</sup> The circuits which narrowly construe section 2113(b) have correctly applied the *Turley* analysis in determining that the statute covers only common-law larceny. In 1934, the Justice Department presented a bill to Congress expressly creating four federal crimes against banks: larceny, false pretense, burglary, and robbery. Congress rejected the larceny, false pretense, and burglary provisions and enacted the Federal Bank Robbery Act making only bank robbery a federal crime. If the Justice Department had remained intent on making it a federal crime to take property from a bank by false pretense, it

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125. *United States v. Feroni*, 655 F.2d 707, 711 (6th Cir. 1981). The maxim that criminal statutes are to be construed strictly is a rule that "arose to meet a very definite situation, and for a very definite purpose." Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749 (1935). It arose in England during a time when hundreds of crimes, many relatively minor, were punishable by death. Parliament pursued a policy of deterrence through severity and the courts, in response, tempered this severity "with strict construction carried to its most absurd limits." *Id.* at 751. "Statutes which were quite clear in their meaning were completely distorted. 'Strict construction' then, was any interpretation, however fantastic, which saved minor offenders from the capital penalty." J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 47 (2d ed. 1960). See generally J. HALL, *THEFT, LAW AND SOCIETY* 110-41 (2d ed. 1952).

The rule, often called the "rule of lenity," is different in the United States and exists for different reasons. Courts must take words in the sense that best manifests the intent of the legislature, but must decline to impose punishment for conduct that is not plainly and unmistakably within the statutory language. See, e.g., *Dunn v. United States*, 442 U.S. 100, 112-13 (1979); *Barret v. United States*, 423 U.S. 212, 217-18 (1976).

The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

*United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867). The rule is rooted in the concern of the law for individual rights, the belief that fair warning as to what conduct is proscribed should be given, and the awareness that legislators and not the courts should define criminal conduct. *Huddleston v. United States*, 415 U.S. 814, 831 (1974). See *supra* notes 7-17.

126. 352 U.S. 407 (1957).

could simply have included in the proposed 1937 amendment to the Bank Robbery Act language which expressly covered false pretense. If Congress had changed its mind in 1937 and had decided to make taking property from a bank by false pretense a federal crime, Congress would have enacted a provision expressly covering false pretense. Instead, the Justice Department introduced, and Congress enacted, an amendment containing only a provision making it a crime to enter or attempt to enter a bank with intent to commit a felony and a provision couched in the classic language of common-law larceny. Not once were the words embezzlement or false pretense even mentioned. The Attorney General explained that the purpose of the proposed legislation was to amend the Bank Robbery Act to include the crimes of burglary and larceny. The proposed legislation was consistently referred to in Congress as a bill to amend the Bank Robbery Act to include burglary and larceny. There is absolutely no evidence of any effort by Congress to extend the Bank Robbery Act to false pretense and embezzlement. Moreover, in 1937, embezzlement from a bank already was a federal offense under the express terms of another federal criminal statute.<sup>127</sup> Although the circuits which broadly construe section 2113(b) cite *Turley* as authority for broadly construing the statute, they provide no discussion of why the context of section 2113(b) suggests that a broad interpretation is appropriate. Neither do they examine the legislative history of that enactment. They apparently take the position that if the language of a federal criminal statute is broad enough to encompass false pretense and embezzlement without running afoul of procedural due process, then the statute should be construed as encompassing those crimes.<sup>128</sup> That philosophy has been rejected in American jurisprudence,<sup>129</sup> and today it is almost universally

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127. See *infra* note 78.

128. The argument that a person of average intelligence would be unable to conclude from this language that the statute precluded all unlawful takings, including takings by false pretense and embezzlement, is untenable given the fact that the word "steal" is commonly used to denote any unlawful taking. See *United States v. Stone*, 8 F. 232, 247-48 (W.D. Tenn. 1881) (the word "steal" is "a common word applied to denote almost any unlawful taking, without regard to exactness of use or accurate technical terminology"). Thus, even if Congress had intended § 2113(b) to cover all unlawful takings, the procedural due process requirement that criminal statutes be drawn in terms sufficient to enable a person to reasonably ascertain what conduct is proscribed would have been met.

129. When help in construing the meaning of a statute is available, there can be no rule of law which forbids its use, no matter how clear the words may appear upon superficial examination. *Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976). See also *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943) ("But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legis-

recognized that the aim of a court in construing a statute is to ascertain and effectuate, as nearly as possible<sup>130</sup> within constitutional limits,<sup>131</sup> the intent of the legislature.<sup>132</sup> The process of construction should not be an opportunity for judges to use words as empty vessels into which they can pour anything they will.<sup>133</sup> The circuits which broadly construe section 2113(b) should either re-construe section 2113(b) as covering only common-law larceny, or demonstrate why the context and legislative history of section 2113(b) require a broad interpretation.

*Linas J. Kelecius*

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lative history no matter how 'clear the words may appear on 'superficial examination.'"); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

130. MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940).

131. See *supra* notes 7-17 & 125.

132. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). Even when construing a term which has an established meaning at common law, a court should examine the context in which it is used and the legislative history and purpose of the statute. If Congress intended a meaning other than the common-law one, a court would re-write the law by giving the term its common-law meaning. See, e.g., *Perrin v. United States*, 444 U.S. 37, 41-49 (1979) (after examining context and legislative history, holding that Congress used the term bribery in its full, generic, contemporary sense, rather than its narrow, common-law sense). See *supra* notes 125 & 129.

133. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

