

HOW TO GET AWAY WITH ARMED BANK ROBBERY

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ABSTRACT

The Federal Bank Robbery Act’s armed robbery provision has been heavily litigated since its inception. Confusion among circuits regarding how to interpret the Act has resulted in three separate circuit splits. Most recently, the Ninth Circuit analyzed the Act in United States v. Bain to determine whether inadvertent placement of a knife in front of a bank teller before the commission of a bank robbery qualifies as armed bank robbery. The Ninth Circuit’s holding in Bain established that revealing a weapon during a bank robbery does not qualify for a conviction of armed bank robbery, even though announcing possession of a weapon absent actual possession does. This holding results in a Fourth Circuit split interpreting the Act. Although there are short-term judicial remedies to solve Bain’s detrimental outcomes, considering the consistent circuit disagreement in interpreting the Act’s armed robbery provision, Congress should amend the Act.

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INTRODUCTION

Nerves checked. Security vetted. Ski mask on. You burst through the entrance of the Grand View Bank. You find the nearest teller. You demand all the money in the cash drawer. You sweat, knowing the average police response time for a bank robbery is six to ten minutes. The teller is not moving fast enough. You yell. You lie. You tell her you have a gun and she better hurry. You have no gun. In fact, you just have a toy gun tucked in your waistband. The teller accelerates her pace. Hundreds are haphazardly thrown in a Trader Joe’s knapsack bag. You have the money. You run. You run out the door with \$11,472 in your knapsack. But rather than euphoria, you are greeted by Grand View police. You are arrested. You are indicted. You are tried. And now you are convicted of armed bank robbery, facing a 25-year prison sentence.

Pause. Rewind. Again, nerves checked. Security vetted. Ski mask on. You burst through the entrance of the Grand View Bank. You find the nearest teller. But this time, you don’t carry a toy gun. Instead, you carry a knife. This time, you greet the teller by simultaneously placing your knife and knapsack in front of her. Now you demand the money. The teller immediately sees the knife. She’s scared. She hurriedly places every hundred-dollar bill she has in the knapsack. Again, you have the money, you run out the bank with the cash, and you are greeted by the police. Again, you are arrested, indicted, and tried. But this time, you are not convicted of armed bank robbery. This time, you are merely convicted of bank robbery through intimidation. Because you silently carried a real weapon into the bank instead of announcing you had a toy weapon, you are facing at least five fewer years in prison than you would under the first scenario.

Today, courts applying the Federal Bank Robbery Act¹ convict bank robbers of armed robbery for merely stating they have a weapon,² but do not convict bank robbers of armed robbery for placing a weapon in front of a bank teller.³ In other words, speech is penalized, but action is not. Accordingly, actions no longer speak louder than words.

The Federal Bank Robbery Act's armed robbery provision appears straightforward. The provision states that any person who "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device" while robbing a federally insured bank will be sentenced to up to 25 years in prison.⁴ Despite the provision's brevity,⁵ the provision has resulted in an influx of litigation. Not one,⁶ not two,⁷ but three⁸ different circuit splits have arisen over the provision's interpretation.

Following the Act's legislative intent, in 1979 the Ninth Circuit stated the armed bank robbery provision places more consideration on the weapon's impact on victims than on the weapon's manner of use.⁹ Based on this reasoning, courts have convicted robbers of armed bank robbery even when the robbers only use toy guns.¹⁰ However, 30 years later, the Ninth Circuit in *Bain v. United States* held that inadvertently placing a weapon in front of a bank teller that intimidates the bank teller into complying with the robber's demands does not constitute armed bank robbery.¹¹ By focusing solely on how the weapon was used, and ignoring the weapon's impact, the decision not only disregards policy and precedent, but forms a Fourth Circuit split.¹²

This Comment makes two arguments. First, this Comment argues the Ninth Circuit improperly decided *United States v. Bain*. Second, this Comment argues Congress should amend the Federal Bank Robbery Act.

¹ 18 U.S.C. § 2113 (2018).

² See *United States v. Martinez-Jimenez*, 864 F.2d 664, 668 (9th Cir. 1989) (holding that a toy gun used in the commission of a robbery constituted a "dangerous weapon" within the meaning of § 2113(d)).

³ See *United States v. Bain*, 925 F.3d 1172, 1179 (9th Cir. 2019).

⁴ 18 U.S.C. § 2113(d).

⁵ 78 CONG. REC. 8132 (1934) (containing the floor debate surrounding the provision that became § 2113(d)).

⁶ *Simpson v. United States*, 435 U.S. 6, 11–12 n.6 (1978).

⁷ *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986).

⁸ *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996).

⁹ See *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989).

¹⁰ *Id.* at 668.

¹¹ See *United States v. Bain*, 925 F.3d 1172, 1178 (9th Cir. 2019).

¹² See, e.g., *United States v. Benson*, 918 F.2d 1, 3 (1st Cir. 1990); *accord* *United States v. Medved*, 905 F.2d 935, 940 (6th Cir. 1990).

Part I first discusses the Act and its legislative history. Part II then describes litigation over the Act and shows how the Act has consistently produced inconsistency among circuits. Next, Part II discusses the case law that laid the foundation for *Bain* and details the litigation surrounding *Bain*. Part III first analyzes the pros and cons of *Bain*, concluding the cons outweigh the pros. Part III then advises how bank robbers and attorneys should navigate the Act under current law. Part III offers two solutions to resolve the problems arising from *Bain*: (1) a judicial solution providing a model discussion section that district courts under the Ninth Circuit can adopt to avoid the pitfalls of *Bain* while maintaining precedent; and (2) a legislative solution that provides a model statute Congress could adopt to remedy problems caused by the provision's language. Part IV concludes.

I. BACKGROUND

This Part highlights conflicting interpretations of the Federal Bank Robbery Act across circuits and discusses recent case law that may lead to further conflict. Section A begins by reviewing the Act's language and legislative history. Section B then describes three circuit splits that arose over the Act's language. Section C concludes by reviewing the case law that laid the foundation for *United States v. Bain* and by analyzing *Bain*.

A. The Federal Bank Robbery Act

Prior to 1934, federal law only protected banks against embezzlement and similar offenses.¹³ At that time, bank robbery, burglary, and larceny were only punishable under state law.¹⁴ This statutory framework proved troublesome as criminal organizations increasingly pursued interstate operations against banks to elude authorities.¹⁵ Accordingly, Congress desired to grant federal courts jurisdiction over prosecuting bank robberies.¹⁶

¹³ *Jerome v. United States*, 318 U.S. 101, 102 (1943) (citing 12 U.S.C. § 592).

¹⁴ *Id.*

¹⁵ *Id.*; Cory A. Hutchens, *Is That a Kielbasa in Your Pocket? Applying a Hybrid Standard to the Federal Bank Robbery Act When Bank Robbers Wield Objects as Weapons During a Bank Robbery*, 65 AM. U. L. REV. 1497, 1501 (2016).

¹⁶ *Jerome*, 318 U.S. at 102 (citing H.R. REP. NO. 73-1461, at 2(1934)).

In 1934, Congress passed the original Federal Bank Robbery Act, aiming to deter or severely punish individuals who contemplate or commit bank robbery.¹⁷ The original Act covered bank robbery, bank robbery involving aggravated assault, and bank robbery resulting in homicide.¹⁸ By 1937, the Attorney General recognized these crimes all necessitate force and violence, and thus the Act failed to cover instances where individuals peacefully steal from banks during momentary absences of bank employees.¹⁹ Accordingly, the Act was amended in 1937 to include the lesser crime of larceny, which omits the elements of force, violence, or intimidation.²⁰

Today, the Act remains virtually unchanged.²¹ The Act provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take . . . any other thing of value belonging to . . . any bank . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to . . . any bank . . . shall be fined under this title or imprisoned not more than ten years

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, *assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device*, shall be fined under this title or imprisoned not more than twenty-five years, or both.²²

¹⁷ Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934); S. REP. NO. 73-537, at 51 (1934); *see* 78 CONG. REC. 8148 (May 5, 1934) (statement of Rep. Glover) (“[Bank robbery] is a crime that should be severely punished, and this bill provides a punishment that will deter anyone from attempting bank robbery . . .”).

¹⁸ *Prince v. United States*, 352 U.S. 322, 325 (1957).

¹⁹ *Id.*

²⁰ *Id.* at 325–26; 12 U.S.C. § 588b (1946 ed.).

²¹ 18 U.S.C. § 2113. In 1948, the Federal Bank Robbery Act was amended with only minimal changes to phrasing. *Prince*, 352 U.S. at 326 n. 5 (1957) (noting larceny was separated into its own provision under § 2113(b)).

²² 18 U.S.C. § 2113(a)–(d) (emphasis added).

Thus, § 2113(a) punishes stealing from a federal bank “by force and violence, or by intimidation” for up to 20 years, whereas § 2113(d) punishes stealing from a federal bank by “assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon or device” for up to 25 years.²³ In effect, § 2113(d) is the Act’s armed robbery provision.²⁴ Within the Act’s armed robbery provision, individuals may be charged under the assault clause, the jeopardy clause, or both.²⁵

Section 2113(d)’s legislative history shows Congress intended the armed robbery provision to widely apply; for example, Congress added the phrase “or device” to ensure objects such as gas bombs or “bottle[s] of nitroglycerin” were covered by the Act.²⁶ Moreover, senators expressed that adding the phrase “or such instrumentality intended to instill fear” after “dangerous weapon or device,” was unnecessary because “or device” entailed the same meaning.²⁷ Therefore, the legislative history reveals three critical policy considerations: (1) Congress intended the “dangerous weapon or device” clause to criminalize more, rather than less, conduct; (2) Congress decided the Act should focus more on the impact of the device than the criminal’s mens rea; and (3) Congress intended the line between § 2113(a) and § 2113(d) to be crossed when a bank robber uses objects to enforce threats.

B. Circuit Splits Regarding the Armed Robbery Provision

Prior to the most recent split created by *Bain*, the Act’s armed robbery provision inspired three circuit splits regarding statutory interpretation. First, circuits disagreed on what the clause “by use of a dangerous weapon” qualifies.²⁸ Second, circuits disagreed on whether a firearm needs to be loaded.²⁹ Third, circuits disagreed on whether “put in jeopardy the life of any

²³ *Id.* § 2113(a), (d).

²⁴ *Id.* § 2113(d); *Hutchens*, *supra* note 15, at 1503; *see, e.g.*, *United States v. Dixon*, 790 F.3d 758, 762 (7th Cir. 2015).

²⁵ *See United States v. Boyle*, 675 F.2d 430, 433 (1st Cir. 1982).

²⁶ *See Simpson v. United States*, 435 U.S. 6, 10 n.4 (1978).

²⁷ 78 CONG. REC. 8132 (1934).

²⁸ *See, e.g.*, *United States v. Crew*, 538 F.2d 575, 577–78 (4th Cir. 1976); *United States v. Beasley*, 438 F.2d 1279, 1282 (6th Cir. 1971).

²⁹ *See, e.g.*, *Boyle*, 675 F.2d at 433; *United States v. Bennett*, 675 F.2d 596, 599 (4th Cir. 1982).

person” requires a person’s life to be objectively placed in danger, or if a victim’s reasonable subjective fear is sufficient.³⁰

Reviewing the past circuit splits is helpful for four reasons. First, it highlights how the Act applies in various contexts. Second, reviewing the past circuit splits shows how courts have struggled to apply the Act. Third, reviewing the past circuit splits shows how the court has a consistent history of holding that the Act should criminalize more rather than less conduct. Last, reviewing the circuit splits establishes the state of the law prior to *Bain*. Each of the three pre-*Bain* splits are discussed in order below.

1. The First Split: Does “by use of a dangerous weapon” apply to the assault clause?

Section 2113(d) sustains convictions when defendants “assault[] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device”³¹ Critically, § 2113(d) lacks a comma after the second use of the word “person” in the jeopardy clause.³² As a result, the initial circuit split arose as to whether “by the use of a dangerous weapon or device” modifies (1) both the assault provision and the jeopardy provision or (2) only the jeopardy provision.³³ In other words, in some circuits, a person could be charged under § 2113(d) for punching a teller while robbing a bank, for the punch would be an assault; conversely, in other circuits, the person would not be charged under § 2113(d), for the assault did not use a dangerous weapon.

Some courts only applied “by the use of a dangerous weapon or device” to the jeopardy provision.³⁴ In *United States v. Beasley*, the defendant attempted to rob a bank using a fake bomb made out of a soda can and a flashbulb.³⁵ On appeal, the Sixth Circuit affirmed the defendant’s conviction under § 2113(d).³⁶ Significantly, the court noted, “It has been well established that subsection (d) is to read disjunctively, being violated either

³⁰ See, e.g., *United States v. Spedalieri*, 910 F.2d 707, 709 (10th Cir. 1990); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996).

³¹ 18 U.S.C. § 2113(d).

³² *Id.*; *Simpson v. United States*, 435 U.S. 6, 11–12 n.6 (1978).

³³ *Simpson*, 435 U.S. at 11–12 n.6; *Crew*, 538 F.2d at 577; *Beasley*, 438 F.2d at 1282.

³⁴ See, e.g., *Beasley*, 438 F.2d at 1282.

³⁵ *Id.* at 1280.

³⁶ *Id.* at 1283.

by an ‘assault,’ or by putting life in jeopardy with a dangerous weapon.”³⁷ The court affirmed the conviction under § 2113(d) because even if the fake bomb was not a dangerous weapon, the defendant committed an assault.³⁸

Conversely, some courts applied “by the use of a dangerous weapon or device” to both the jeopardy and the assault provisions.³⁹ In *United States v. Crew*, the defendant robbed a bank while carrying a firearm.⁴⁰ On appeal, the Fourth Circuit affirmed the conviction under § 2113(d), reasoning the clause “using a dangerous weapon or device” modified both the assault provision and the jeopardy provision.⁴¹

The Supreme Court resolved this initial circuit split in *United States v. Simpson* by concluding “by the use of a dangerous weapon or device” modifies both the assault and the jeopardy provisions of § 2113(d).⁴² Here, the Supreme Court held that individuals may not be sentenced under both § 2113(d) and a statute penalizing the use of firearms⁴³ for committing one bank robbery.⁴⁴ In the analysis, the Supreme Court wrote a lengthy footnote stating that although § 2113(d) lacks a comma after the word “person,” the clause “‘by the use of a dangerous weapon or device’ must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision.”⁴⁵ Moreover, the Court reasoned that § 2113(d) must require an assault during a bank robbery to accompany a dangerous weapon, or else there would be nothing to distinguish § 2113(a) from § 2113(d).⁴⁶ This approach was consistent with Congress’s intent for the Act to apply broadly.

2. The Second Split: Must the gun be loaded?

Section 2113(d) is silent as to whether the “dangerous weapon or device” must be objectively dangerous and capable of inflicting serious

³⁷ *Id.* at 1282.

³⁸ *Id.* at 1282–83.

³⁹ *United States v. Crew*, 538 F.2d 575, 577–78 (4th Cir. 1976).

⁴⁰ *Id.* at 577.

⁴¹ *Id.* at 578.

⁴² *Simpson v. United States*, 435 U.S. 6, 12 n.6 (1978) (citing *United States v. Beasley*, 438 F.2d 1279, 1283–84 (6th Cir. 1971) (McCree, J., concurring in part and dissenting in part)).

⁴³ 18 U.S.C. § 924(c) (1976).

⁴⁴ *Simpson*, 435 U.S. at 16.

⁴⁵ *Id.* at 12 n.6 (quoting *Beasley*, 438 F.2d at 1283–84 (McCree, J., concurring in part and dissenting in part)).

⁴⁶ *Id.*

bodily harm.⁴⁷ As a result, circuits were divided on whether firearms must be loaded to qualify as dangerous weapons under the statute.⁴⁸

In *United States v. Boyle*, the First Circuit required the jury to not only find that a firearm was used in the bank robbery, but also that the firearm was loaded.⁴⁹ The court reasoned that to convict the defendant under the jeopardy provision, the jury “was required to find that a gun was used in the robbery and that this gun was capable of being fired and inflicting serious bodily harm.”⁵⁰ Here, the court upheld the conviction under the assault provision of § 2113(d) because the bank robber aimed a loaded pistol at the bank teller.⁵¹

Alternately, in *United States v. McAvoy*, the Second Circuit required the jury to find the weapon was loaded, but allowed the jury to infer the weapon was loaded from its manner of use.⁵² On appeal, the court noted a preferable jury instruction would have required the jury to find evidence the weapon was loaded and objectively capable of inflicting deadly injury.⁵³ Still, the Second Circuit held that the trial court’s instruction allowing the jury to infer the weapon was loaded due to its use in the bank robbery was not erroneous.⁵⁴ Thus, the court affirmed the conviction under § 2113(d).⁵⁵

Conversely, in *United States v. Bennett*, the Fourth Circuit affirmed the conviction even though the robber’s firearm was unloaded.⁵⁶ In *Bennett*, the court stated, “A weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates section 2113(d).”⁵⁷ Thus, the court affirmed the conviction under § 2113(d).⁵⁸

The Supreme Court resolved this circuit split in *McLaughlin v. United States* by concluding unloaded firearms are always dangerous weapons under

⁴⁷ 18 U.S.C. § 2113(d).

⁴⁸ See, e.g., *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986); *United States v. Boyle*, 675 F.2d 430, 433 (1st Cir. 1982).

⁴⁹ *Boyle*, 675 F.2d at 433.

⁵⁰ *Id.*

⁵¹ *Id.* at 431, 433.

⁵² *United States v. McAvoy*, 574 F.2d 718, 721 (2d Cir. 1978).

⁵³ *McAvoy*, 574 F.2d at 722.

⁵⁴ *Id.*

⁵⁵ *Id.* at 719.

⁵⁶ *United States v. Bennett*, 675 F.2d 596, 599 (4th Cir. 1982).

⁵⁷ *Id.*

⁵⁸ *Id.*

§ 2113(d).⁵⁹ The entire opinion comprises one paragraph, which is provided in full due to its significance as a landmark armed bank robbery case:

Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a “dangerous weapon.” First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon . . . Affirmed.⁶⁰

Therefore, the Supreme Court resolved both splits in favor of applying the Act broadly and emphasized the weapon’s impact over the robber’s intent.

3. The Third Split: Does “put in jeopardy the life of any person” require the victim’s life to be objectively placed in danger?

Section 2113(d) does not specify whether the jeopardy clause requires the victim’s life to be objectively placed in danger, or if the victim’s reasonable belief their life is in jeopardy is sufficient.⁶¹ In other words, some circuits require the device used in the robbery to be objectively dangerous, while other circuits deem inherently non-dangerous instruments dangerous if the victims reasonably perceive the weapon as dangerous.⁶² Unlike the prior circuit splits, the U.S. Supreme Court has not resolved this issue.

Some circuits have held the jeopardy clause requires the victim’s life to be objectively placed in danger.⁶³ In *United States v. Dixon*, the defendant

⁵⁹ *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986).

⁶⁰ *Id.*

⁶¹ 18 U.S.C. § 2113(d).

⁶² *Hutchens*, *supra* note 15, at 1507–08.

⁶³ *United States v. Dixon*, 790 F.3d 758, 761–62 (7th Cir. 2015); *United States v. Thomas*, 521 F.2d 76, 81 (8th Cir. 1975); *United States v. Coulter*, 474 F.2d 1004, 1005 (9th Cir. 1973); *United States v. Roustio*, 455 F.2d 366, 371 (7th Cir. 1972); *United States v. Marshall*, 427 F.2d 434, 437–38 (2d Cir. 1970); *United States v.*

attempted to rob a bank with a long-barreled lighter, and the tellers believed the lighter was a firearm.⁶⁴ The Seventh Circuit stated, “The statutory question, however, is whether the bank robber used a ‘dangerous weapon or device’ rather than whether a guard or teller mistook a harmless device for a weapon.”⁶⁵ Thus, the court held the defendant could not be convicted under § 2113(d), for the lighter was not an objectively dangerous weapon.⁶⁶

Conversely, some circuits have held the jeopardy clause only requires proof of apparent, not actual, danger.⁶⁷ In *United States v. Spedalieri*, the defendant attempted to rob the bank using a fake bomb.⁶⁸ The Tenth Circuit stated, “We have held that a fake bomb, as a matter of law, may constitute a dangerous weapon, regardless of its actual capabilities, when a victim confronted with it is placed in reasonable expectation of danger.”⁶⁹ Accordingly, because the bank tellers reasonably believed their lives were in danger, the defendant’s fake bomb was considered a dangerous weapon, and the defendant was convicted under § 2113(d).⁷⁰

Some courts deem actions that create subjective fear within victims as objectively dangerous because fear leads to violence.⁷¹ In *United States v. Smith*, the Seventh Circuit explained, “Any use of a dangerous weapon that qualifies as an assault (by creating reasonable fear in victims) would therefore almost always put lives in jeopardy if only because of the risk of a violent response.”⁷² In other words, even if the instrument used to rob a bank is non-dangerous, when victims are placed in reasonable fear, their responses

Burger, 419 F.2d 1293, 1294 (5th Cir. 1969); *United States v. Roach*, 321 F.2d 1, 5 (3d Cir. 1963).

⁶⁴ *Dixon*, 790 F.3d at 760.

⁶⁵ *Id.* at 761.

⁶⁶ *Id.* at 761–62.

⁶⁷ *United States v. Levi*, 45 F.3d 453, 456 (D.C. Cir. 1995); *United States v. Spedalieri*, 910 F.2d 707, 710 (10th Cir. 1990). Some circuits have applied a three-part test to evaluate whether mere apparent danger is sufficient, which weighs whether the defendant: (1) creates an apparently dangerous situation, (2) intends to intimidate a victim beyond the mere use of language, and (3) places the victim in a reasonable expectation of death or serious bodily harm. *United States v. Beasley*, 438 F.2d 1279, 1282–83 (6th Cir. 1971).

⁶⁸ *Spedalieri*, 910 F.2d at 708.

⁶⁹ *Id.* at 709.

⁷⁰ *Id.* at 710 (citing *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986)).

⁷¹ *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996) (citing *McLaughlin v. United States* 476 U.S. 16, 17–18 (1986)).

⁷² *Id.*

create an objectively dangerous situation.⁷³ Thus, there is no practical difference between the assault and jeopardy clauses under § 2113(d).⁷⁴

United States v. Martinez-Jimenez best exemplifies this interpretation.⁷⁵ In *Martinez-Jimenez*, the defendant attempted to rob a bank with a toy gun.⁷⁶ Although the toy gun was not objectively dangerous on its own, the Ninth Circuit reasoned: (1) the United States Supreme Court in *McLaughlin* held that an unloaded gun is a dangerous weapon, and a toy gun is similar to an unloaded gun;⁷⁷ (2) the appellant's possession of the toy gun created fear and apprehension in the victims;⁷⁸ and (3) police must assume the gun is real, so these confrontations lead to actual gun fire and casualties.⁷⁹ Accordingly, the Ninth Circuit deemed the toy gun a dangerous weapon, establishing that individuals who rob banks with toy guns may be convicted under § 2113(d).⁸⁰

In doing so, the court once again furthered the general policy of being tough on crime for the protection of citizens, over-criminalizing rather than under-criminalizing, and placing greater emphasis on the impact of the robbery on the victim than the intent of the criminal.

C. The Inception of *United States v. Bain*

In 1989, the Ninth Circuit in *Martinez-Jimenez* said: "Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm."⁸¹ Fast forward 30 years. The Ninth Circuit in *United States v. Bain* held that placing a knife in front of a bank teller did not constitute armed robbery because the placement was inadvertent.⁸² Because *Martinez-Jimenez* held § 2113(d) is not concerned with the manner in which the robber displays the weapon,⁸³ *Bain* is inconsistent with binding precedent. Moreover, by

⁷³ *Id.*

⁷⁴ *See id.* The Seventh Circuit also explained that in practice, federal prosecutors may charge defendants under both the assault and jeopardy clauses of § 2113(d), and thus the "dangerous weapon" distinction should "have little practical consequence."

⁷⁵ *See United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989).

⁷⁶ *Id.* at 665.

⁷⁷ *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986).

⁷⁸ *Martinez-Jimenez*, 864 F.2d at 667.

⁷⁹ *Id.* at 668.

⁸⁰ *Id.*

⁸¹ *Id.* at 667.

⁸² *United States v. Bain*, 925 F.3d 1172, 1178 (9th Cir. 2019).

⁸³ *Martinez-Jimenez*, 864 F.2d at 667.

emphasizing the robber's intent over the weapon's impact, *Bain* runs contrary to legislative history⁸⁴ and the Supreme Court's decisions.⁸⁵ This Section explores the trilogy of cases leading to *Bain*. It concludes by detailing the Ninth Circuit's procedural history and opinion in *Bain*.

1. Cases Chronologically Leading to *Bain*

The story begins in 1995 with *Bailey v. United States*, a case not involving bank robbery, where the Supreme Court analyzed whether a defendant's actions supported a conviction for *use* of a firearm under a drug offense statute.⁸⁶ Here, during a routine traffic stop, officers found 27 bags of cocaine in the glove compartment of Bailey's car and a loaded pistol in the trunk.⁸⁷ The issue was whether Bailey *used* this pistol in the commission of drug trafficking.⁸⁸ The Court held storing a weapon in close proximity to drugs without active employment of the weapon does not constitute *use*.⁸⁹

The Court reasoned that "use" of a firearm includes firing, striking with, bartering, displaying, brandishing, and even referencing the firearm.⁹⁰ Significantly, the Court noted that "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'"⁹¹ Because the gun was not disclosed or mentioned by the offender, it was not actively employed and thus was not "used."⁹²

The second case in the trilogy followed a year later with *United States v. Jones*, in which the Ninth Circuit applied *Bailey* to armed bank robbery.⁹³ In *Jones*, the defendant entered a bank, told the teller he had a gun, never showed the teller a gun, acquired cash from the teller, escaped the bank in a cab, and was arrested in the cab where police found both the money and a

⁸⁴ See *infra* Part II.A.

⁸⁵ See *infra* Part II.B.

⁸⁶ *Bailey v. United States*, 516 U.S. 137, 148 (1995), *superseded by statute on other grounds as explained in* *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016). The drug offense statute, 18 U.S.C. § 924(c)(1) (1998), penalizes "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm."

⁸⁷ *Bailey*, 516 U.S. at 139.

⁸⁸ *Id.* at 138–39.

⁸⁹ *Id.* at 149.

⁹⁰ *Id.* at 148.

⁹¹ *Id.* (emphasis added).

⁹² *Id.*

⁹³ *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996).

firearm.⁹⁴ The issue was whether the defendant sufficiently “use[d]” the firearm to be convicted under § 2113(d).⁹⁵ The Ninth Circuit held the defendant sufficiently used the firearm, and affirmed the conviction under § 2113(d).⁹⁶

The Ninth Circuit reasoned, “When a defendant claims to possess a gun during a robbery, a jury may reasonably infer that the defendant possessed a gun during the robbery.”⁹⁷ The court reviewed *Bailey*’s interpretation of “use” and adopted the same reasoning to analyze “use” under § 2113(d).⁹⁸ Relying on *Bailey*, the court further reasoned “an offender’s reference to a firearm in his possession could satisfy the ‘use’ requirement.”⁹⁹ Because the jury reasonably inferred possession of the firearm, and because the defendant referenced the firearm during the robbery, the court affirmed the defendant’s conviction under § 2113(d).¹⁰⁰ *Jones* is consistent with the policy surrounding § 2113(d) by maintaining § 2113(d) applies widely.

The third and final case of the trilogy is *United States v. Odom*, in which the defendant possessed, but did not reference, a firearm during a bank robbery.¹⁰¹ In *Odom*, the defendant entered a bank and told the manager to place money in a pillowcase.¹⁰² Upon leaving the bank, the defendant raised his jacket to put the pillow case under his shirt; in doing so, the defendant inadvertently revealed a firearm tucked in his pants’ waistband.¹⁰³ The issue on appeal was whether the defendant used the firearm in the bank robbery.¹⁰⁴

The Ninth Circuit relied on *Jones* and *Bailey* to suggest “‘use’ under § 2113(d) . . . requires some type of ‘active employment’” of the weapon.¹⁰⁵ The court quoted *Jones* and stated, “Mere possession of a concealed gun during a robbery without referring to it is not sufficient to support a violation

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1211–12.

⁹⁷ *Id.* at 1211.

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting *Bailey v. United States*, 516 U.S. 137, 148 (1995)).

¹⁰⁰ *Id.* at 1211–12.

¹⁰¹ *United States v. Odom*, 329 F.3d 1032, 1033 (9th Cir. 2003).

¹⁰² *Id.* at 1034.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1033.

¹⁰⁵ *Id.* at 1036.

of section 2113(d).”¹⁰⁶ The court declared the defendant did not explicitly reference the gun and thus could not be convicted under § 2113(d).¹⁰⁷

The court in *Odom* based its holding on a misquoted sentence from *Jones*. *Jones* actually says, “Mere possession of a concealed gun during a robbery *without revealing it or* referring to it is not sufficient to support a violation of section 2113(d).”¹⁰⁸ Thus, *Odom* omitted the phrase “without revealing it.”¹⁰⁹ *Odom*’s outcome would have been different if the opinion accurately quoted *Jones*, for no party disputed *Odom* revealed his weapon to the bank teller.¹¹⁰ Significantly, this misquoted sentence established misguided precedent, forming the foundation upon which *United States v. Bain* stands.

Although *Odom* misquotes *Jones* and departs from *Jimenez-Martinez*’s reasoning that § 2113(d) does not weigh the manner of creating the harm, *Odom*’s holding is consistent with *Jimenez-Martinez*’s reasoning that § 2113(d) cares about the harms created.¹¹¹ In *Odom*, the defendant only revealed the weapon as he was leaving the bank, and as such, the weapon had little impact on the bank employees and the commission of the crime.¹¹² Thus, *Odom* does not fully depart from the policy that § 2113(d) should apply broadly, for the weapon had minimal impact on the commission of the crime as compared to conduct in most bank robberies penalized under § 2113(d).

Nonetheless, in a footnote in *Odom*, the Ninth Circuit acknowledged how its holding establishes inconsistent results.¹¹³ Footnote two provides:

We acknowledge that it may seem anomalous to conclude that a defendant who intentionally carries a loaded gun into a bank robbery (where he can reach for it and do real harm if he is cornered or if he panics, but who hides it in the meantime) cannot

¹⁰⁶ *Id.* at 1035 (quoting *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996)).

¹⁰⁷ *Id.* at 1036.

¹⁰⁸ *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996) (emphasis added).

¹⁰⁹ *United States v. Odom*, 329 F.3d 1032, 1035 (9th Cir. 2003).

¹¹⁰ In *Jones*, the defendant admittedly intended to intimidate the teller. *Jones*, 84 F.3d at 1211. Thus, the court never questioned whether revealing a weapon requires intent, or if accidentally revealing the weapon satisfies the use requirement.

¹¹¹ *Jones*, 84 F.3d at 1211; *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989).

¹¹² *Odom*, 329 F.3d at 1034.

¹¹³ *Id.* at 1036 n.2.

be convicted of *armed* bank robbery, while a bank robber holding a toy gun can. That result flows from the words used in the statute, however. In § 2113(d), Congress could cover simple “possession” instead of just active “use,” but so far it has not done so.¹¹⁴

Therefore, the Ninth Circuit blames Congress for the inconsistent results and punts the issue to Congress to fix.¹¹⁵ Significantly, this is the first instance a court called upon Congress to amend the Act. Because neither Congress nor the judiciary have resolved the issues underlying the anomalous results, the issues have developed into the Ninth Circuit’s problematic decision in *Bain*.

2. *United States v. Bain*

The facts of *United States v. Bain*¹¹⁶ are straightforward. During the summer of 2014, Neal Bain committed three bank robberies.¹¹⁷ The issue on appeal surrounds the facts of one of the three robberies Bain committed.¹¹⁸ On July 2, 2014, Bain entered the Tempe MidFirst Bank, walked up to a teller, and demanded \$100 bills.¹¹⁹ Bain then pulled a closed pocket knife and a plastic bag out of his pocket, and set both on the counter in front of the teller.¹²⁰ Bain “never opened the blade or threatened to use the knife, but ‘the victim teller felt threatened and did everything to get [Bain] out of the bank.’”¹²¹ Bain placed all the money in the plastic bag and escaped the Tempe MidFirst Bank with \$11,115.¹²²

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *United States v. Bain*, 925 F.3d 1172, 1175 (9th Cir. 2019).

¹¹⁷ Brief of Appellee at 4–5, *United States v. Bain*, 925 F.3d 1172 (9th Cir. 2019) (No. 17-10107). (“On or about June 3, 2014, the defendant robbed Sunwest Federal Credit Union in Phoenix, Arizona,” “On or about July 2, 2014, the defendant robbed MidFirst Bank in Tempe, Arizona,” and “On July 31, 2014, the defendant robbed the Washington Federal Credit Union in Phoenix, Arizona.”).

¹¹⁸ *Bain*, 925 F.3d at 1175.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Brief of Appellee, *supra* note 117, at 5.

¹²² *Bain*, 925 F.3d at 1175.

The procedural posture is less straightforward and begins with Bain's indictment on three counts, with count two charging Bain with armed robbery under 18 U.S.C. § 2113(d).¹²³ On June 21, 2016, the magistrate court held an initial change of plea hearing.¹²⁴ Because Bain was pleading guilty to the indicted charges without benefits of a plea agreement, Bain's defense counsel was required to argue to the magistrate judge supporting Bain's plea for each count.¹²⁵ The magistrate judge was not persuaded that the factual foundations supported Bain's requested plea to count two.¹²⁶ Thus, the magistrate judge affirmed the trial date for arguments to be heard regarding count two.¹²⁷

Pursuant to an additional motion, on August 4, 2016, the magistrate judge held a second change of plea hearing.¹²⁸ At this second change of plea hearing, the magistrate judge reviewed the Ninth Circuit's Model Jury Instructions regarding armed bank robbery, and compared the instructions to the agreed-upon facts.¹²⁹ The judge then had Bain affirm each stipulated fact was true.¹³⁰ The judge then concluded the law and facts supported the plea and recommended the District Court accept Bain's plea to count two.¹³¹

On August 30, 2016, District Court Judge Murray Snow adopted the magistrate judge's findings and recommendations as to Bain's guilty pleas on all three counts.¹³² On February 27, 2017, Judge Snow sentenced Bain to 137 months for counts one and three, and to 197 months for count two, with the sentences to run concurrently.¹³³ Bain retained new counsel and appealed.

Bain's opening brief on appeal raised the issue of whether the District Court erred in accepting Bain's guilty plea as to count two.¹³⁴ Bain first noted that his indictment stated he "did assault *and* put in jeopardy the life of [the bank teller], by the use of a dangerous weapon or device, that is, a knife."¹³⁵

¹²³ Appellant's Opening Brief at 4, *United States v. Bain*, 925 F.3d 1172 (9th Cir. 2019) (No. 17-10107). Bain was charged with two counts of bank robbery in violation of 18 U.S.C. § 2113(a) and one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). *Bain*, 925 F.3d at 1175.

¹²⁴ *Bain*, 925 F.3d at 1175.

¹²⁵ *Id.*

¹²⁶ Appellant's Opening Brief, *supra* note 123, at 7–8.

¹²⁷ *Id.* at 8.

¹²⁸ *Id.* at 9.

¹²⁹ Brief of Appellee, *supra* note 117, at 9.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Appellant's Opening Brief, *supra* note 123, at 12.

¹³³ *Id.* at 16–17.

¹³⁴ *Id.* at 3.

¹³⁵ *Id.* at 21 (emphasis added).

The use of the word “and” required Bain to not only put the bank teller’s life in jeopardy with a dangerous weapon, but also assault the bank teller with a dangerous weapon.¹³⁶ Bain suggested that the assault clause under § 2113(d) required four elements: (1) Defendant acted intentionally; (2) Defendant generated a reasonable apprehension in the bank teller; (3) Defendant threatened, and had the ability to inflict, bodily harm on the bank teller; and (4) Defendant actively employed the dangerous weapon.¹³⁷ Bain argued that because he merely placed the knife on the counter, Bain neither intentionally used the knife, nor actively employed the knife.

The Government’s answering brief asserted that despite the conjunctive “and” in the indictment, well-settled law provided the government need only prove Bain assaulted the bank teller with a dangerous weapon *or* that Bain put the bank teller’s life in jeopardy with a dangerous weapon.¹³⁸ The Government then argued that Bain’s four-prong test is inapplicable, for the test only applies to the assault clause, and the Government sought to convict under the jeopardy clause.¹³⁹ Thus, the appropriate test was whether: (1) Defendant had a dangerous weapon; (2) Defendant used the dangerous weapon; and (3) Defendant placed the bank teller in an objective state of danger.¹⁴⁰ The Government then argued knives are inherently dangerous, placing a knife on a counter “reveals” the weapon and creates a “silent but obvious and forceful presence” that constitutes “use,” and displaying a weapon necessarily creates dangerous circumstances.¹⁴¹

Bain’s reply brief maintained the Government must prove Bain violated the assault clause under § 2113(d).¹⁴² In the alternative, Bain not only asserted that he was improperly uninformed as to what he was pleading to, but also that he did not satisfy the Government’s three-prong test for the jeopardy clause.¹⁴³ Bain contended (1) he inadvertently placed the knife and thus the knife was not “used;” (2) pocket knives are not necessarily dangerous; and (3) an unopened pocket knife does not create an objective state of danger.¹⁴⁴

¹³⁶ *Id.* at 21–23.

¹³⁷ *Id.* at 24, 26, 28–30.

¹³⁸ Brief of Appellee, *supra* note 117, at 16–17.

¹³⁹ *Id.* at 19.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 20–25.

¹⁴² Appellant’s Reply Brief at 4, *United States v. Bain*, 925 F.3d 1172 (9th Cir. 2019) (No. 17-10107).

¹⁴³ *Id.* at 11–12.

¹⁴⁴ *Id.* at 15–16, 24.

The issue before the Ninth Circuit was whether Bain *used* a dangerous weapon during the bank robbery.¹⁴⁵ The court began by advancing two rules from *Odom*.¹⁴⁶ First, “use” under § 2113(d) requires the weapon’s active employment.¹⁴⁷ The court reasoned active employment requires more than inadvertent display, for the weapon must be brandished, mentioned, or have installed an obvious and forceful presence that aids the commission of the robbery.¹⁴⁸ Second, the robber must knowingly make the teller aware he has a dangerous weapon, whether the weapon is real or not.¹⁴⁹

The Ninth Circuit reasoned that Bain did not actively employ the knife.¹⁵⁰ The court first stated that, like the robber in *Odom*, Bain never mentioned or referred to his weapon during the robbery.¹⁵¹ Further, “Bain also did not appear to realize that he was showing the weapon to the teller as he removed it from his pocket,” for Bain simultaneously removed the plastic bag and the knife from his pocket.¹⁵² Thus, like the robber in *Odom*, Bain revealed his weapon to the teller when his attention was focused elsewhere.¹⁵³ As a result, Bain inadvertently displayed the knife.¹⁵⁴ Accordingly, like the robber in *Odom*, Bain did not knowingly make the teller aware he had a dangerous weapon.¹⁵⁵ Further, the Ninth Circuit reasoned that even though the knife was placed on the counter, the presence of the knife was not sufficiently “obvious and forceful” because the knife was closed, Bain did not reference the knife, and a second teller did not notice its presence.¹⁵⁶

Accordingly, the Ninth Circuit held that Bain’s display of the knife neither knowingly nor actively employed a dangerous weapon, and thus the evidence was insufficient to convict Bain of armed robbery under

¹⁴⁵ United States v. Bain, 925 F.3d 1172, 1177 (9th Cir. 2019).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (citing United States v. Odom, 329 F.3d 1032, 1033 (9th Cir. 2003)).

¹⁴⁸ *Id.* (citing *Odom*, 329 F.3d at 1033).

¹⁴⁹ *Id.* (citing *Odom*, 329 F.3d at 1035).

¹⁵⁰ *Id.* at 1177–78.

¹⁵¹ *Id.* at 1178.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Brief of Appellee at 21, United States v. Bain, 925 F.3d 1172 (9th Cir. 2018) (No. 17-10107). While the Court noted a second teller did not notice the knife, they failed to mention “the victim teller felt threatened and did everything to get [the defendant] out of the bank.” *Id.* at 5.

§ 2113(d).¹⁵⁷ As such, the Ninth Circuit reversed the judgment, vacated the sentence, and remanded for further proceedings.¹⁵⁸

Thus, *Bain* departed from *Jimenez-Martinez*'s reasoning because the Ninth Circuit focused on the manner of harm created and ignored the impact the weapon had on the commission of the crime. Thus, *Bain* not only departed from the Ninth Circuit's precedent surrounding § 2113(d), but also departed from the legislative intent and policy that § 2113(d) should apply broadly.

II. ANALYSIS

This Part evaluates the law following *Bain*. First, section A analyzes the pros and cons of *Bain*, concluding *Bain*'s benefits are outweighed by its detriments. Next, section B advises how bank robbers and attorneys should navigate the Act post-*Bain*. After recognizing *Bain* is problematic, section C provides two solutions. The first solution suggests how courts facing cases similar to *Bain* may frame their analysis to produce a well-reasoned opinion with equitable results. Although the first solution is a short-term fix, the second solution aims to provide long-term equity. The second solution supplies a revised model statute Congress could adopt to replace § 2113(d).

A. Pros and Cons of *Bain*

Bain produces both beneficial and detrimental results. However, the detrimental results outweigh the apparent benefits in both number and significance. Accordingly, *Bain* is a problem that requires a solution.

1. Pros of *Bain*

While *Bain* is a flawed decision, it may provide four benefits: (1) other circuits may support *Bain*; (2) the opinion strengthens the dichotomy between § 2113(a) and § 2113(d); (3) the decision can lead to less harsh sentences; and (4) the decision may better promote retribution, deterrence, incapacitation, and rehabilitation by requiring a knowing mens rea.

First, other circuits may rule similarly to *Bain*, and cross-circuit uniformity is valuable to promote "efficient public law administration, equal

¹⁵⁷ *Bain*, 925 F.3d at 1178.

¹⁵⁸ *Id.* at 1179–80.

treatment, and respect for judicial authority.”¹⁵⁹ In *United States v. Villiard*, a defendant possessed a firearm in a fanny pack during the commission of a bank robbery.¹⁶⁰ Like in *Bain*, the issue before the Eighth Circuit in *Villiard* was whether the defendant *used* the firearm during the bank robbery.¹⁶¹ Relying on *Jones* and *Bailey*, the Eighth Circuit reasoned mere possession of a firearm is insufficient to convict under § 2113(d); rather, the offender must reference the firearm in a “calculated” manner “to bring about a change in the predicate offense.”¹⁶² Here, the court held the defendant did not use the firearm.¹⁶³ The court reasoned “there [was] no evidence that [the defendant] referred to his possession of a weapon or suggested through his actions to those present at the credit union that he had a firearm so as to bring about a change in the predicate robbery.”¹⁶⁴ Because *Villiard* held a defendant’s actions must be “*calculated* to bring about a change in the predicate offense”¹⁶⁵ to constitute a use, inadvertent display may not qualify for armed bank robbery. Thus, the Eighth Circuit would likely rule similarly to *Bain*.

Second, *Bain* strengthens the dichotomy between § 2113(a) and § 2113(d). Judges have critiqued judicial interpretations of the Act because the interpretations have diminished the line between § 2113(a) (bank robbery by intimidation) and § 2113(d) (bank robbery by intimidation through use of a dangerous weapon or device).¹⁶⁶ When courts convict defendants under § 2113(d) for announcing they have a firearm when they merely possess a toy gun, the dichotomy between § 2113(a) and § 2113(d) becomes less clear.¹⁶⁷ *Bain* requires a weapon to be actively employed to be penalized under § 2113(d), creating a higher standard for defendants to be convicted under § 2113(d), thus creating a greater distinction between § 2113(a) and § 2113(d).

Third, *Bain* may lead to less harsh sentences for individuals who inadvertently display weapons when robbing banks. Under the Act, displaying a weapon in the course of a bank robbery can increase a federal

¹⁵⁹ Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 855 (1994).

¹⁶⁰ *United States v. Villiard*, 186 F.3d 893, 895 (8th Cir. 1999).

¹⁶¹ *Id.* at 896–97.

¹⁶² *Id.* at 897.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *United States v. Ray*, 21 F.3d 1134, 1143 (D.C. Cir. 1994) (Will, J., concurring in part and dissenting in part).

¹⁶⁷ *Id.*

prison sentence up to five years.¹⁶⁸ In *Bain*, the Ninth Circuit accepted Bain was distracted, causing Bain to accidentally take a closed pocket knife out of his pocket, where Bain not only did not use or mention the weapon, but also did not even notice he took the knife out of his pocket.¹⁶⁹ Sentencing defendants for five additional years for this conduct may be unduly harsh.¹⁷⁰

Fourth, *Bain* imparts a knowing mens rea on the Act, which may promote deterrence, retribution, incapacitation, and rehabilitation. The justice system has historically recognized four sentencing goals: retribution, deterrence, incapacitation, and rehabilitation.¹⁷¹ Mens rea is a defendant's mental state at the time of the crime, and the "knowing" mens rea means the defendant committed a specific action and was aware the action was wrongful.¹⁷² The knowing mens rea better promotes retribution because the punishment should reflect moral culpability, and moral culpability is elevated when individuals knowingly, rather than inadvertently, commit wrongful acts.¹⁷³ Next, the knowing mens rea better serves deterrence, for deterrence requires a rational agent weighing consequences prior to pursuing a course of action, and this rationalized thought does not occur when individuals inadvertently commit crimes.¹⁷⁴ Further, the knowing mens rea better serves incapacitation, because individuals who knowingly commit crimes are more likely to be repeat offenders than individuals who inadvertently commit crimes.¹⁷⁵ Last, the knowing mens rea better serves rehabilitation, for

¹⁶⁸ See 18 U.S.C. § 2113(d).

¹⁶⁹ United States v. Bain, 925 F.3d 1172, 1175–78 (9th Cir. 2019).

¹⁷⁰ See Joshua Fershee, *Choosing a Better Path: The Misguided Appeal of Increased Criminal Liability After Deepwater Horizon*, 36 WM. & MARY ENV'T. L. & POL'Y REV. 1, 7 n.39 (2011).

¹⁷¹ Paul Boudreaux, *Criminal Law: Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989).

¹⁷² Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 552 (1999).

¹⁷³ See Thomas E. Robins, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PENN STATE L. REV. 885, 891–92 (2015).

¹⁷⁴ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 183, 194 (1968).

¹⁷⁵ See Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 231–32 (1990).

mistaken actions are not intended, and thus there is no malicious mental state to be reformed.¹⁷⁶

2. Cons of *Bain*

The *Bain* decision is detrimental for seven reasons: (1) *Bain* relies on misquoted case law; (2) *Bain* relies on flawed legal research; (3) *Bain* analogizes itself to distinguishable case law; (4) *Bain* employs flawed logical reasoning; (5) *Bain* produces inconsistent policy; (6) *Bain* creates a circuit split; and (7) *Bain* provides criminal loopholes.

First, *Bain* is based on a misquote from *Odom*. In *Bain*, the Ninth Circuit emphasized that *Bain* did not reference or mention his knife,¹⁷⁷ citing *Odom* stating, “Mere possession of a concealed gun during a robbery without referring to it is not sufficient to support a violation of section 2113(d).”¹⁷⁸ *Odom* cited *Jones* for this proposition; however, *Odom* misquoted *Jones*. *Jones* states, “Mere possession of a concealed gun during a robbery *without revealing it or referring to it* is not sufficient to support a violation of section 2113(d).”¹⁷⁹ Thus, *Bain* relied on the misquote. No case law has analyzed *Jones* and imparted a mens rea to “revealing it.” Thus, if *Bain* was based on the accurate proposition, then the fact that *Bain* “revealed” his knife would have been dispositive, and he would have been convicted under § 2113(d).

Second, *Bain* is based on flawed research from *Odom*. In *Bain*, the Ninth Circuit imparted the knowing standard on the armed bank robbery provision, citing *Odom* for the proposition that “[t]he common denominator” to the decisions affirming convictions under § 2113(d) is “that the robber knowingly made one or more victims at the scene of the robbery aware that he had a gun, real or not.”¹⁸⁰ Although the Ninth Circuit deduced a knowing action is “the common denominator,” in *Martinez-Jimenez* the court stated, “Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm.”¹⁸¹ Thus, if *Odom* followed binding

¹⁷⁶ See Steven J. Mulroy, *The Duress Defense’s Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 192 (2006).

¹⁷⁷ United States v. *Bain*, 925 F.3d 1172, 1178 (9th Cir. 2019).

¹⁷⁸ United States v. *Odom*, 329 F.3d 1032, 1035 (9th Cir. 2003).

¹⁷⁹ United States v. *Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996) (emphasis added).

¹⁸⁰ *Bain*, 925 F.3d at 1177 (quoting *Odom*, 329 F.3d at 1035).

¹⁸¹ *Id.*; United States v. *Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989).

precedent, then the display of a weapon alone should have been sufficient for conviction due to its impact, despite the manner of display. Accordingly, if *Bain* was based on the binding precedent in *Martinez-Jimenez*, then Bain's placement of the knife on the counter would be sufficient for conviction under § 2113(d).

Third, *Bain* relies on *Odom* even though *Odom* is distinguishable. Unlike the bank robber in *Odom*, who displayed the weapon while exiting the bank after receiving the money,¹⁸² Bain displayed the weapon prior to receiving any money.¹⁸³ Thus, the display of the weapon had a greater impact by intimidating the bank teller, which aided the commission of the crime.¹⁸⁴ Additionally, unlike the bank robber in *Odom*, who inadvertently displayed the weapon while lifting up his shirt while hiding the money,¹⁸⁵ Bain reached in to his pocket, took out a knife, and placed the knife in front of the teller on the teller's counter.¹⁸⁶ Thus, Bain conducted an affirmative act of setting the knife on the counter, which is more akin to the plain meaning of "use."¹⁸⁷

Fourth, *Bain* relies on flawed reasoning. In *Bain*, the Court applied *Bailey*'s helpful language while ignoring disadvantageous language. *Bain* cites *Bailey* to state, "the 'use' of a weapon under § 2113(d) requires some type of 'active employment of the weapon.'"¹⁸⁸ However, *Bailey* also provided "the silent but obvious and forceful presence of a gun on a table can be a 'use.'"¹⁸⁹ Although *Bain* acknowledged this quote, *Bain* departed from *Bailey*'s point that the silent presence of a gun is *inherently* obvious and forceful and is thus a use, and instead decided the presence of a gun on a table *must* be obvious and forceful to be a use.¹⁹⁰ In other words, *Bain* converted *Bailey*'s example of a use into a conditional requirement for a use. Then, the Ninth Circuit reasoned that because Bain did not call attention to the knife and a second teller did not see the knife, the condition was not satisfied; thus, there was not an obvious and forceful use.¹⁹¹ However, the Ninth Circuit's

¹⁸² *Odom*, 329 F.3d at 1034.

¹⁸³ *Bain*, 925 F.3d at 1175.

¹⁸⁴ Brief of Appellee, *supra* note 117, at 4–5.

¹⁸⁵ *Odom*, 329 F.3d at 1034.

¹⁸⁶ *Bain*, 925 F.3d at 1175.

¹⁸⁷ *Bailey v. United States*, 516 U.S. 137, 146 (1995) (considering the plain language of the word "use" and subsequently applying a statutory inclusion of the word "use" broadly).

¹⁸⁸ *Bain*, 925 F.3d at 1177 (citing *Bailey*, 516 U.S. at 148).

¹⁸⁹ *See Bailey*, 516 U.S. at 148.

¹⁹⁰ *Bain*, 925 F.3d at 1178.

¹⁹¹ *Id.*

reasoning failed to acknowledge the impact of how “the victim teller felt threatened [by the knife] and did everything to get [the defendant] out of the bank.”¹⁹² Thus, *Bain* improperly imposed an “obvious and forceful” test on *Bailey*’s language and failed to consider all evidence when applying the test.

Fifth, *Bain* produces contradictory results and policy. The Ninth Circuit convicts defendants of armed robbery when they lack a weapon,¹⁹³ but does not convict people of armed robbery when they possess a weapon.¹⁹⁴ The Ninth Circuit in *Odom* even acknowledged its anomalous results.¹⁹⁵ Additionally, *Bain* produces policy that is irreconcilable with the Act’s legislative intent, for *Bain* criminalizes less conduct, places greater emphasis on the criminal’s mens rea than the impact of the criminal’s weapon on the victims, and departs from Congress’s intended categorization of non-oral threats being convicted under § 2113(a) instead of § 2113(d).¹⁹⁶

Sixth, *Bain* creates a circuit split. *Bain*’s outcome hinged *Bain*’s inadvertent display.¹⁹⁷ However, in *Martinez-Jimenez*, the Ninth Circuit held “Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm.”¹⁹⁸ The Supreme Court denied certiorari of *Martinez-Jimenez*’s appeal.¹⁹⁹ Because *Bain* focuses on the manner of creating the harm and ignores the harms created, *Bain* and *Martinez-Jimenez* are irreconcilable. Thus, at the minimum, *Bain* disregards binding precedent. Significantly, other circuits have adopted *Martinez-Jimenez*’s reasoning.²⁰⁰ In *United States v. Benson*, the First Circuit agreed, “Subsection 2113(d) is not concerned with the manner in which the dangerous weapon or device is

¹⁹² Brief of Appellee, *supra* note 117, at 5.

¹⁹³ See, e.g., *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986); *United States v. Boyd*, 924 F.2d 945, 948 (9th Cir. 1991); see *United States v. Martinez-Jimenez*, 864 F.2d 664, 668 (9th Cir. 1989).

¹⁹⁴ See, e.g., *Bain*, 925 F.3d at 1177; *United States v. Odom*, 329 F.3d 1032, 1035 (9th Cir. 2003).

¹⁹⁵ *Odom*, 329 F.3d at 1036 n.2.

¹⁹⁶ See *supra* Part I.A (discussing the Act’s legislative history).

¹⁹⁷ *Bain*, 925 F.3d at 1178.

¹⁹⁸ *Martinez-Jimenez*, 864 F.2d at 667; see also *United States v. Cabrera*, No. 90–50410, 931 F.2d 898 (9th Cir. May 2, 1991).

¹⁹⁹ *United States v. Martinez-Jimenez*, 864 F.2d 664, 668 (9th Cir. 1989), *cert. denied*, 489 U.S. 1099 (1989).

²⁰⁰ *United States v. Benson*, 918 F.2d 1, 3 (1st Cir. 1990); *United States v. Medved*, 905 F.2d 935, 940 (6th Cir. 1990).

displayed, but with whether its use jeopardizes human life.”²⁰¹ In *United States v. Medved*, the Sixth Circuit stated, “*Martinez–Jimenez* was decided correctly, in our view, and we adopt it as the law of this circuit.”²⁰² Thus, the holding in *Bain* departs from the law of at least two circuits.

Seventh, *Bain* provides a loophole for criminal activity. Practically, determining whether defendants inadvertently show weapons is difficult. No teller testified, nor did a jury ever find, that Bain placed the weapon on the counter inadvertently.²⁰³ Rather, the Ninth Circuit merely accepted the inadvertent placement as fact.²⁰⁴ Bain reached into his pocket, simultaneously pulled out a knife and a plastic bag, and then never referenced the knife.²⁰⁵ The bank teller noticed the knife, and gave him the money as a result,²⁰⁶ but Bain was not convicted of armed bank robbery.²⁰⁷ What prevents another bank robber from emulating Bain to minimize liability? What if the bank robber copies *Odom* and “accidentally” flashes his firearm? Because *Bain* allows inadvertence to be a dispositive factor in evaluating use, and inadvertence can be staged, *Bain* provides a loophole in the Act’s application.

3. The Cons of *Bain* Outweigh the Pros

The cons of *Bain* outweigh the pros. Although *Bain* aligns with the Eighth Circuit, *Bain* solidifies a circuit split by departing from the First and Sixth Circuits. Although *Bain* strengthens the dichotomy between § 2113(a) and (d), *Bain* weakens the application of § 2113 (a) and (d) by misquoting case law and ignoring precedent. Although *Bain* may lead to less harsh results for some, *Bain* promotes arbitrary results and injustice for others, for in some cases possessing a weapon will carry a lesser sentence than not possessing a weapon. And although a knowing mens rea may better promote justice in theory, in practice the mens rea element is easily manipulated to provide for a loophole for criminals in robbing banks. Every pro comes with a heavier con. As a result, *Bain* not only leaves the law surrounding § 2113(d) in a state

²⁰¹ *Benson*, 918 F.2d at 3 (1st Cir. 1990) (citing *Martinez–Jimenez*, 864 F.2d at 667).

²⁰² *Medved*, 905 F.2d at 940.

²⁰³ Brief of Appellee, *supra* note 117, at 4.

²⁰⁴ *United States v. Bain*, 925 F.3d 1172, 1175–78 (9th Cir. 2019).

²⁰⁵ *Id.*

²⁰⁶ Brief of Appellee, *supra* note 117, at 5.

²⁰⁷ *Bain*, 925 F.3d at 1178.

of confusion, but also thwarts predictability and trust in the criminal justice system. Accordingly, *Bain* is a problem that requires a solution.

B. Dismissing the Problem: The Current State of the Law

This Comment provides two categories of advice under current law: (1) advice to bank robbers on how to mitigate liability and maximize returns while robbing a bank; and (2) advice to attorneys highlighting the factors they should argue to advocate for clients. First, if *Bain* remains the governing source on inadvertent armed bank robbery, a gaping hole exists in the practical application of § 2113(d). This hole permits bank robbers to pretend they “accidentally” displayed a weapon to receive the benefits of armed bank robbery while limiting risk of a conviction under § 2113(a). Second, if *Bain* remains the governing source on inadvertent armed bank robbery, then attorneys should be aware of the five indicia for use of a dangerous weapon the Ninth Circuit considers when evaluating convictions under § 2113(d).

1. Advice to Bank Robbers: How to Get Away with Armed Bank Robbery

Bank robbers benefit by using weapons in bank robberies; a weapon causes bank employees to give robbers more money and work at a faster pace.²⁰⁸ But by using a weapon, bank robbers not only risk increased violence from bank employees, police, and private citizens,²⁰⁹ but also risk an additional five-year prison sentence.²¹⁰ However, under *Bain* and *Odom*, bank robbers may enjoy benefits of using weapons while mitigating risks.

Bain and *Odom* establish an inadvertent display of a weapon during a bank robbery is insufficient to convict an individual of armed bank robbery.²¹¹ A robber may display a weapon while robbing a bank without being convicted of armed bank robbery if two conditions are met. First, the bank robber cannot “mention or insinuate” possession of a weapon.²¹² This

²⁰⁸ See, e.g., Jason Koebler, *What You Should Know Before Robbing a Bank*, U.S. NEWS & WORLD REP. (June 11, 2012), <https://www.usnews.com/news/articles/2012/06/11/what-you-should-know-before-robbing-a-bank>.

²⁰⁹ *Id.*

²¹⁰ See 18 U.S.C. § 2113.

²¹¹ *Bain* 925 F.3d at 1177; *United States v. Odom*, 329 F.3d 1032, 1035 (9th Cir. 2003) (citing *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996)).

²¹² *Bain*, 925 F.3d at 1177; *Odom*, 329 F.3d at 1033.

means the bank robber can neither announce,²¹³ nor suggest or hint they possess a weapon. Second, the bank robber must “inadvertently” display their weapon.²¹⁴ This means if a bank robber with a weapon wishes to avoid an armed bank robbery conviction, the robber must display the weapon unintentionally or unknowingly. In sum, if the court decides an individual “knowingly” displayed the weapon, then the individual may be convicted of armed robbery. Conversely, if the court decides an individual accidentally displayed the weapon, then the individual may not be convicted.

As mentioned in Part III.A.2, this law is easily manipulated because courts may have trouble analyzing whether a robber displayed a weapon on purpose or on accident. In *Odom*, the bank robber told the teller to place money in a pillowcase and the bank teller complied.²¹⁵ The bank robber then placed the pillowcase filled with money in his jacket, and in doing so, revealed a firearm within the waistband of his pants to the bank employee.²¹⁶ The court held this was an inadvertent display of the weapon. Because the bank robber did not actively use the weapon, he was not guilty of armed bank robbery.²¹⁷ Other bank robbers could easily replicate these circumstances, and simply make the display look accidental. Bank robbers can create numerous situations where bank employees accidentally see a weapon. And a bank robber need not go to great lengths to perform this “accidental display on purpose.”²¹⁸ A bank robber could:

Place the firearm in the waistband of pants and raise arms in front of teller, causing the firearm to “accidentally” be exposed.

Place a bag and a weapon in a jacket pocket, then simultaneously take out the bag and weapon and place them in front of the teller.

²¹³ See, e.g., *United States v. Martinez-Jimenez*, 864 F.2d 664, 668 (9th Cir. 1989).

²¹⁴ *Bain*, 925 F.3d at 1177; *Odom*, 329 F.3d 1032, 1034–35 (9th Cir. 2003).

²¹⁵ *Odom*, 329 F.3d at 1034.

²¹⁶ *Id.*

²¹⁷ *Id.* at 1036.

²¹⁸ See generally *Curb Your Enthusiasm: The Accidental Text on Purpose* (HBO television broadcast Nov. 5, 2017).

Place a firearm in the back of the waistband of pants and drop a duffle bag on the ground. Then, bend over to pick up the bag, and display the weapon “by accident.”²¹⁹

Place a firearm in a duffle bag’s side compartment. Open the bag and tell a bank teller to put the money in the bag. Upon looking in the bag, the bank teller may “accidentally” see the firearm.

If working with multiple bank robbers, stage an altercation between two robbers. Bank robber # 1 could smack bank robber # 2, causing a firearm to “accidentally” fall out of bank robber # 2’s jacket pocket.

In an open carry state, find a bank that lacks firearm restrictions. Walk in the bank with a duffle bag and a gun openly holstered to the waist, then demand the teller place money in the bag.

By maintaining the accidental nature of the display, the bank robber: (1) effectively intimidates the bank teller causing the bank employees to give the bank robber more money and work at a faster rate,²²⁰ (2) mitigates risk that bank employees, police, or private citizens will draw their own weapon and shoot the bank robber, and (3) limits liability, for the robber—if caught—will be convicted under § 2113(a) rather than § 2113(d), and thus the bank robber will avoid at least five years in prison. Accordingly, bank robbers should embrace the case law under *Bain* and *Odom* with open (fire)arms.

2. How to Advocate for Your Client: The Five Indicia of Armed Bank Robbery

The Ninth Circuit relies on a series of cases to determine whether a dangerous weapon was used. These cases suggest the following five indicia of armed bank robbery courts weigh when evaluating whether a dangerous weapon was used.

²¹⁹ See *LEGALLY BLONDE* (MGM Home Entertainment 2001) (“In my experience, it has a 98% success rate of getting a man’s attention, and, when used appropriately, it has an 83% rate of return on a dinner invitation. It’s called the bend and snap.”).

²²⁰ Koebler, *supra* note 208.

1. *Impact.* Impact measures the effect of the weapon on the commission and success of the crime. If, for example, a bank robber puts a knife on the counter in front of a bank teller, and the bank teller sees the knife, causing the bank teller to be scared and comply with the robbery, then the court should be more persuaded that the robber used a dangerous weapon.

2. *Intent.* Intent reflects the mens rea behind displaying the weapon. The court should be less persuaded that a robber used a dangerous weapon if the robber negligently or inadvertently displays a weapon compared to if the robber knowingly or purposefully displays a weapon.

3. *Degree of utilization.* The degree of utilization reflects what the bank robber did with the weapon: whether a weapon was revealed, silently placed on a counter, brandished, or aimed at others. The court should be more persuaded that a robber used a dangerous weapon if a bank robber aims a weapon than if the robber merely places the weapon on a counter.

4. *Harm.* Harm focuses on the injury that results from the robbery, ranging from property damage and emotional trauma to serious injury and death. The court should be more persuaded a dangerous weapon was used if a robber injures a civilian compared to if the robbery is relatively peaceful.

5. *Professionalism.* Professionalism is similar to intent, but greater serves to display control, sophistication, and premeditation for the use. The more professional and planned an operation appears, the more persuaded a court should be that a dangerous weapon was used.

C. Solutions: Judicial and Legislative

This Section provides two solutions to address *Bain*: one judicial and one legislative. The judicial solution provides a model discussion section for district courts under the Ninth Circuit to decide contrary to *Bain* while maintaining precedent. The second solution is legislative. Given the history of circuit splits inspired by the Act, and the contradictory case law that has emerged from its text, Congress should rewrite the statute. The legislative solution provides a model revised version of § 2113(d) that Congress could adopt to create circuit uniformity and mitigate confusion.

1. Judicial Solution

A short-term solution to resolve problems raised by *Bain* is for district courts under the Ninth Circuit to choose not to follow *Bain*, and instead follow other binding precedent. A sample judicial opinion is provided below:

DISCUSSION

Under the Ninth Circuit's precedent, Defendant used a dangerous weapon during the bank robbery. In an early case, the Ninth Circuit held that for aggravated robbery, the weapon must be used such that "the life of the person being robbed is placed in an objective state of danger." *Wagner v. United States*, 264 F.2d 524, 530 (9th Cir. 1959). More recently, the Supreme Court held that displaying a weapon "instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue." *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986). Following *McLaughlin*, in *United States v. Martinez-Jimenez*, the court reasoned, "Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm." 864 F.2d 664, 667 (9th Cir. 1989), *cert. denied*, 489 U.S. 1099, (1989).

In *United States v. Odom*, the Ninth Circuit held that "the 'use' of a weapon under § 2113(d) requires some type of 'active employment' of the weapon." 329 F.3d 1032, 1033 (9th Cir. 2003). In *Bailey v. United States*, the Supreme Court defined "active employment" as "certainly includ[ing] brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." 516 U.S. 137, 148 (1995) (superseded by statute on other grounds). Significantly, the Supreme Court also provided, "[T]he silent but obvious and forceful presence of a gun on a table can be a 'use.'" *Id.* The Court notes that "[m]ere possession of a concealed gun during a robbery without revealing it or referring to it is not sufficient to support a violation of section 2113(d)." *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996) (emphasis added).

Here, the Defendant's alleged inadvertent placement of the weapon on the counter in front of the bank teller constitutes "active employment" of the weapon. During the robbery, Defendant clearly revealed the weapon to the bank teller. Even if the placement was inadvertent, § 2113(d) is not concerned with the

manner the weapon is displayed. Similar to a gun on a table, a knife placed directly before the bank teller is sufficient for use. The displayed weapon reasonably instilled fear in the bank teller, which not only facilitated the crime, but also created an objectively dangerous situation.

The defense cites *Odom* to argue that inadvertently placing a knife on a counter does not constitute a “use” of a weapon under § 2113(d). In that case, Odom robbed a bank while he had a gun tucked in his waistband. He used a pillowcase to carry out the stolen money and when he put the pillowcase back in his jacket after securing the money, he inadvertently displayed his gun to the bank’s branch manager. *Odom*, 329 F.3d at 1036. The court noted, “[I]t seems unlikely that if he meant to actively employ the gun during the robbery, he would have waited until the end, after he had been given the money and was about to depart, before doing so.” *Id.* Therefore, the court held that Odom did not actively employ a weapon in accordance with the “use” requirement of § 2113(d) and reversed his conviction. *Odom* is distinguishable from the present facts. First, unlike the bank robber in *Odom* who displayed the weapon while exiting the bank after receiving the money, the defendant here displayed the weapon prior to receiving any money. Thus, the display of the weapon helped aid the commission of the crime. Second, unlike the bank robber in *Odom* who displayed the weapon while lifting up his shirt while hiding the money, the defendant here placed the weapon before the bank teller on the bank teller’s counter. Thus, the conduct amounts to the plain meaning of the word “use.”

Accordingly, the Court finds that Defendant’s placement of the weapon on the bank counter supports a conviction under 18 U.S.C. § 2113(d) because the Defendant “put[] in jeopardy the life of any person by the use of a dangerous weapon or device.”

This discussion is ideal for three reasons. First, the discussion adheres to binding precedent pre-*Bain*²²¹ and reinforces Congress’s established legislative intent.²²² Second, the discussion is decided narrowly and avoids

²²¹ *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986); *United States v. Jones*, 84 F.3d 1206, 1212 (9th Cir. 1996); *see United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989).

²²² *See supra* Part II.A.

unnecessary dicta that could potentially lead to further intra-circuit disagreement, or even further circuit splits. Third, the decision is intuitive, avoids stretches in logic, and installs predictability within the justice system.

2. Legislative Solution

A permanent solution to resolve the problems raised by *Bain* is for Congress to revise the Act. The Act has produced a history of confusion regarding statutory interpretation, resulting in circuit splits.²²³ After *Bain*, the Act's armed robbery provision has inspired four separate circuit splits. Thus, Congress should revise § 2113(d). The armed bank robbery provision is:

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.²²⁴

The initial circuit split disputed what “by use of a dangerous weapon” qualifies.²²⁵ Second, circuits disagreed on whether a firearm need be loaded.²²⁶ Third, circuits disagreed on whether “put in jeopardy the life of any person” requires a person's life to be objectively placed in danger.²²⁷ Now, circuits disagree on what is “use” of a dangerous weapon. Provided is a model statute aimed to remedy all four concerns:

(d) An individual shall be fined under this title or imprisoned not more than twenty-five years, or both, if in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, the individual:

²²³ See *supra* Part II.B.

²²⁴ 18 U.S.C. § 2113(d) (2018).

²²⁵ See, e.g., *United States v. Crew*, 538 F.2d 575, 577 (4th Cir. 1976); *United States v. Beasley*, 438 F.2d 1279, 1282 (6th Cir. 1971).

²²⁶ See, e.g., *United States v. Boyle*, 675 F.2d 430, 433 (1st Cir. 1982); *United States v. Bennett*, 675 F.2d 596, 599 (4th Cir. 1982).

²²⁷ See, e.g., *United States v. Spedalieri*, 910 F.2d 707, 709 n.1 (10th Cir. 1990); *United States v. Smith*, 103 F.3d 600, 604–05 (7th Cir. 1996).

(i) assaults any person by actively employing an instrument perceived by a reasonable person as a dangerous weapon or dangerous device, where

(1) assault is:

(a) an act that is intended to create in the victim an apprehension of an imminent touching that would constitute a battery; and

(b) the act does create a reasonable apprehension of an imminent touching.

(2) active employment is negligent, reckless, knowing, or intentional displaying, brandishing, or referencing an instrument or device; Or

(ii) endangers the life of any person by actively employing an instrument perceived by a reasonable person as a dangerous weapon or dangerous device, where

(1) endangers includes any action that puts another person's life in jeopardy, whether:

(a) the endangering action directly puts another person's life in jeopardy, or

(b) the endangering action indirectly puts another person's life in jeopardy, including the creation of circumstances where citizens or law enforcement will reasonably respond violently.

(2) active employment is negligent, reckless, knowing, or intentional displaying, brandishing, or referencing an instrument or device.

This proposed provision shows that the dangerous weapon requirement modifies both the assault and jeopardy provisions. It also establishes that a weapon neither needs to be loaded nor real, for the instrument will be considered dangerous if the victim reasonably perceived the instrument as

dangerous. Section (ii)(1)(b) acknowledges that actions by the bank robber that reasonably cause victims to respond in a violent manner put victims' lives in danger, and thus a victim's reasonable subjective fear is sufficient for their life to be in danger. Finally, by providing a definition of use as "active employment" to include a negligent mens rea, individuals who inadvertently place weapons in front of bank tellers will be convicted under § 2113(d).

Under this proposed provision, *Bain* would be convicted under § 2113(d). *Bain* could be convicted pursuant to the proposed § 2113(d)(i) because he assaulted the bank teller when he demanded the \$100 bills, actively employed the knife through negligent display by pulling the knife out of his pocket, and the bank teller reasonably perceived the knife as a dangerous weapon.²²⁸ Alternately, *Bain* could be convicted under § 2113(d)(ii) because placing the knife endangered the teller's life by creating circumstances where citizens or law enforcement would reasonably respond violently.²²⁹

CONCLUSION

The Act has confused circuit courts since it was originally passed. Today, disagreements between circuits remain unresolved, and inconsistency within individual circuits remains prevalent. Recent interpretations of the Act's armed robbery provision affirm that an individual will be convicted of armed robbery for merely stating they have a weapon, but will not be convicted for placing a weapon in front of a bank teller. The current law of the land is in disarray. Although courts may provide a short-term solution to this problem, real change requires legislation action. Congress should amend the Act to address past confusion, and remedy current contradiction. Without such a change, the law remains vulnerable to robbers who seek to exploit legal loopholes to limit their liability when committing armed bank robbery.

²²⁸ *United States v. Bain*, 925 F.3d 1172, 1175–76 (9th Cir. 2019).

²²⁹ *Id.*