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

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The Federal Bank Robbery Act, 18 U.S.C. § 2113, outlines the punishment for those who rob federally insured banks. More specifically, the Act has an "armed bank robbery" provision that imposes harsher punishment on anyone who "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." This provision was the focus of a recent Seventh Circuit decision involving a bank robber who robbed two banks brandishing a long-barreled lighter as a gun. This Comment argues that the Seventh Circuit erroneously held that the lighter was not a "dangerous weapon" under the armed bank robbery provision. Accordingly, it argues that defendants who rob banks brandishing objects as weapons can be guilty of armed bank robbery under the Federal Bank Robbery Act. To determine whether an "armed" defendant commits armed bank robbery, this Comment proposes a hybrid standard: whether a reasonable person in a bank robbery victim's position would perceive the situation as one involving an actual weapon.

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"You can't rob a bank on charm and personality."[1]

INTRODUCTION

Imagine you are working as a bank teller when someone enters the bank and yells, "Give me the money or I'll shoot!" while waving a long-barreled butane lighter. You might understandably be nervous or confused, but you likely would not immediately fear for your life. Imagine next, however, that instead of openly brandishing the lighter, the person approached you from behind, pressed the cold metal barrel against your neck, and made the same demand for money. In that instant, you would have no way of knowing what the object was, and you would likely comply with the menacing demand. The fact that a long-barreled lighter is not a particularly frightening item does not preclude bank robbers from using it to sow more fear in victims during a robbery.

Interestingly, a similar scenario gave rise to the recent case *United States v. Dixon*,[2] in which the United States Court of Appeals for the Seventh Circuit decided not to consider a long-barreled lighter a "dangerous weapon"[3] under 18 U.S.C. § 2113, commonly known as the Federal Bank Robbery Act.[4] This Comment, however, argues that the Seventh Circuit should have concluded that the lighter was a "dangerous weapon" because of how the defendant used it. Reaching this conclusion requires examining the Federal Bank Robbery Act and corresponding jurisprudence.

The Federal Bank Robbery Act provides the framework for punishing those who rob federally insured banks.[5] Under § 2113(a) of the Act, anyone who obtains a federal bank's property using force, violence, or intimidation can be fined, imprisoned, or both.[6] Section 2113(d) of the Act enhances punishment whenever an individual

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1. A quote by the famous bank robber, Willie Sutton. *See Bank Heists: Crime and Leniency*, ECONOMIST (Sept. 12, 2015), http://www.economist.com/news/finance-and-economics/21664151-after-armed-robberies-banks-give-out-loans-better-terms-crime-and-leniency.

2. 790 F.3d 758 (7th Cir.), *cert. denied*, 136 S. Ct. 425 (2015).

3. *Id.* at 760.

4. 18 U.S.C. § 2113 (2012).

5. *Id.*

6. *Id.* § 2113(a).

"assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device" during a bank robbery.[7] Over the years, courts have split in their interpretations of § 2113(d).

Courts analyze § 2113(d) under either a subjective or an objective framework.[8] The objective test requires the weapon or device to be capable of assaulting or jeopardizing someone.[9] Conversely, the subjective test hinges on whether an individual reasonably believed a bank robber's weapon or device could have assaulted or placed him or her in jeopardy.[10] Each framework, however, has its own shortcomings: a purely objective test makes § 2113(d) too rigid,[11] while a purely subjective approach requires delving into the intricate subjective responses of witnesses, all of whom react differently.[12] Exploring the drawbacks of each approach exposes the need for a better analytical framework for § 2113(d).

Accordingly, this Comment proposes a hybrid standard suitable to analyze situations—like the one in *Dixon*—in which an individual robs a bank brandishing an object as a weapon. The hybrid standard considers whether a reasonable person in a bank robbery victim's situation would have believed the object brandished was an actual weapon. To guide this standard, this approach focuses on four elements: (1) whether a bank robber made a display or gesture in a manner consistent with having an actual weapon, (2) whether a bank robber made threats indicating the object was an actual weapon, (3) whether the bank robber intended to portray the object as a weapon, and (4) whether the manner in which the bank robber used the object created a charged and hostile atmosphere.

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7. *Id.* § 2113(d).

8. *See generally* Russell J. Davis, Annotation, *What Constitutes "Puts in Jeopardy" Within Enhanced Penalty Provision of Federal Bank Robbery Act, 18 U.S.C.A. § 2113(d)*, 32 A.L.R. Fed. 279, § 3–4 (1977 & Supp. 2015) (providing a survey of various courts that apply either the subjective or objective approaches).

9. *See, e.g.*, United States v. Richardson, 562 F.2d 476, 481 (7th Cir. 1977) ("[T]he 'in jeopardy' element of [§] 2113(d) is met when a robbery victim is 'placed in an objective state of danger . . . .'" (quoting United States v. Roustio, 455 F.2d 366, 371–72 (7th Cir. 1972))).

10. *See, e.g.*, United States v. Newkirk, 481 F.2d 881, 883 (4th Cir. 1973) (per curiam) ("[T]he government is not required to prove that the weapon used in a robbery was capable of putting the lives of bank employees in actual, as opposed to apparent, jeopardy . . . .").

11. *See infra* note 88 (demonstrating that the objective approach is too inflexible and deviates from § 2113(d)'s legislative history).

12. *See infra* Section II.B (summarizing the drawbacks of the subjective approach).

Part I of this Comment provides an overview of the Federal Bank Robbery Act and pertinent jurisprudence surrounding § 2113(d). This Part also elucidates how courts interpret § 2113(d), with an emphasis on both the subjective and objective approaches. This Part concludes by giving an overview of *United States v. Dixon*. Part II explores the pitfalls of both the objective and subjective approaches and stresses the need for a hybrid approach to govern § 2113(d). Part III presents and analyzes the proposed hybrid standard, exploring each element in detail. This Part also reconsiders *Dixon* under the hybrid approach. Part IV recommends a rewording of § 2113(d) so that courts can apply it more easily to situations in which a bank robber uses a harmless object as a weapon when robbing a bank.

I. BACKGROUND

A. Evolution of the Federal Bank Robbery Act

Prior to 1934, criminal statutes protecting federal banks only proscribed embezzlement and similar offenses.[13] Bank robbery, burglary, and larceny were punishable only under state law.[14] These state statutory frameworks proved troublesome in the early 1930s when there was an outbreak of "gangsters" robbing banks and eluding authorities by operating across state lines.[15] State authorities were frequently unable to combat these interstate criminal activities, and the need for federal help arose.[16]

Responding to this increase in interstate bank robberies, Congress enacted the original Federal Bank Robbery Act in 1934.[17] The Act's purpose was to deter and severely punish individuals who ventured to

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13. *See* Jerome v. United States, 318 U.S. 101, 102 (1943) (providing a brief overview of the history of the Federal Bank Robbery Act).

14. *Id.*

15. *See generally* Jennifer M. Lota, Comment, *Analyzing 18 U.S.C. § 2113(A) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment*, 7 SETON HALL CIR. REV. 445, 449 (2011) (supplying a history of the Federal Bank Robbery Act).

16. *See* H.R. REP. NO. 73-1461, at 2 (1934) (containing the Attorney General's statement to the Committee on the Judiciary, which noted that these "organized gangsters" were "powerful and well equipped to defy local police").

17. *See* 78 CONG. REC. 2946 (1934) (statement of Rep. Ashurst) (classifying various bills, including the bill that became the original Bank Robbery Act, as "antigangster bills"); *see also* Bell v. United States, 462 U.S. 356, 363 (1983) (Stevens, J., dissenting) (explaining that the 1934 Act was a response to traveling, armed bank robbers, such as John Dillinger, who outmaneuvered police across state lines and committed a string of bank robberies).

rob federally insured banks.[18] The original Act, however, only covered bank robbery, which required taking bank property through force, intimidation, or violence.[19] Inevitably, this version of the Act led to inconsistent results because would-be robbers could escape punishment by taking money from a bank without using force, intimidation, or fear.[20] In other words, this earlier version of the Act did not encompass bank larceny.[21] To remedy this discrepancy, the Attorney General requested that Congress amend the Act, which it did in 1937.[22] Several years later, in 1948, Congress passed the Act "substantially [in] its present form."[23]

B. The Current Federal Bank Robbery Act

The present Act outlines the appropriate punishment for federal bank robbery and other incidental crimes.[24] Section 2113(a) prohibits taking or attempting to take anything of value belonging to a federal bank "by force and violence, or by intimidation."[25] This section also contains prohibitions on bank larceny, taking bank property without any force, violence, or intimidation, and bank burglary, entering a bank with the intent to commit any felony therein.[26] Violating § 2113(a) is punishable by a fine, imprisonment up to twenty years, or both.[27]

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18. S. REP. NO. 73-537, at 1 (1934); *see* 78 CONG. REC. 8148 (1934) (statement of Rep. Glover) ("The robbing of banks and killing of people for the purpose of taking away money deposited by citizens . . . is a crime that should be severely punished, and this bill provides a punishment that will deter anyone from attempting bank robbery . . . .").

19. Prince v. United States, 352 U.S. 322, 323 (1957). This earlier version of the Act also outlawed aggravated assault and homicide committed during a bank robbery. *Id.* at 325.

20. *See, e.g.*, *Bell*, 462 U.S. at 357, 361 (describing an "incongruous result" where a man using a false identity stole a check, forged the endorsement and deposited the check into an account he created with fake credentials, and then closed the account to receive the balance).

21. *See, e.g.*, *id.* at 361 ("As originally enacted in 1934, the Federal Bank Robbery Act . . . governed only robbery—a crime requiring a forcible taking.").

22. Carter v. United States, 530 U.S. 255, 281 (2000) (Ginsburg, J., dissenting).

23. *Id.* at 281–82.

24. *See* 18 U.S.C. § 2113 (2012). The Federal Bank Robbery Act contains other sections proscribing various crimes—such as kidnapping, homicide, and receiving stolen property—committed during or after a bank robbery; however, this Comment is concerned only with subsections (a) and (d).

25. *Id.* § 2113(a).

26. *Id.*

27. *Id.*

Textually, § 2113(d) of the Act is essentially an "armed bank robbery" provision.[28] This section imposes a harsher punishment if, during a bank robbery, an individual "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device."[29] Subsections 2113(d) and (a) are related in that the former aggravates the latter[30] by imposing a higher punishment of a fine or imprisonment not more than twenty-five years, or both.[31] Further, the "use of a dangerous weapon or device" clause in § 2113(d) modifies both the "assault" and "places in jeopardy" clauses.[32] An individual must also "use" the dangerous weapon or device to satisfy the section's requirements.[33] "Use" amounts to something more than possession,[34] meaning that carrying a concealed weapon or device does not satisfy § 2113(d).[35] Section 2113(d) therefore discourages violent bank robberies by punishing more harshly those who use dangerous weapons or devices.

An examination of § 2113(d)'s legislative history defines another key aspect of the provision: what constitutes a "dangerous weapon or device." Before Congress passed the present-day version of § 2113(d), it only included the phrase "dangerous weapon," not "dangerous weapon or device."[36] Representative Blanton argued that some objects, like a bottle of water declared to be nitroglycerin, or a

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28. *E.g.*, United States v. Vonn, 535 U.S. 55, 59 (2002).

29. § 2113(d).

30. *E.g.*, Green v. United States, 365 U.S. 301, 306 (1961) (plurality opinion).

31. *Compare* § 2113(d) (authorizing a maximum penalty of twenty-five years imprisonment, a fine, or both), *with* § 2113(a) (carrying a penalty of not more than twenty years imprisonment, a fine, or both).

32. Simpson v. United States, 435 U.S. 6, 11 n.6 (1978), *superseded by statute*, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 § 1005(a), 98 Stat. 2138, 2138–39, *as recognized in* United States v. Gonzales, 520 U.S. 1 (1997) (citing United States v. Beasley, 438 F.2d 1279, 1283–84 (6th Cir. 1971) (McCree, J., concurring in part and dissenting in part)).

33. *See, e.g.*, United States v. Odom, 329 F.3d 1032, 1036 (9th Cir. 2003) (concluding that "'use' . . . requires some type of 'active employment'"); United States v. De Palma, 414 F.2d 394, 396 (9th Cir. 1969) (determining that a person must use a dangerous weapon or device to trigger § 2113(d)).

34. United States v. Perry, 991 F.2d 304, 309 (6th Cir. 1993). The *Perry* court analyzed a situation in which a bank robber kept a weapon concealed throughout the robbery and decided that he did not "use" a dangerous weapon or device under § 2113(d). *Id.*

35. *See* United States v. Wardy, 777 F.2d 101, 105 (2d Cir. 1985) (positing that a bank robber who had a gun, but kept it concealed throughout a robbery, would probably not trigger § 2113(d)).

36. *See* 78 CONG. REC. 8132 (1934) (containing the Floor Debate surrounding the provision that became § 2113(d)).

wooden gun, should qualify as "dangerous weapon[s]" because of those objects' ability to incite fear.[37] He explained that a water bottle claimed to be nitroglycerin "would have the same effect psychologically on the minds of the people in the bank" as if it actually were nitroglycerin.[38] The various other representatives discussing § 2113(d) agreed with Representative Blanton about the phrase "or device," believing that it would encompass objects that incite fear.[39]

C. Pertinent Jurisprudence Surrounding § 2113(d)

Like the law in general, jurisprudence surrounding § 2113(d) is not black and white. As one would expect, a large amount of § 2113(d) case law involves a bank robber using a firearm to effectuate the robbery.[40] Loaded guns, unloaded guns, replica guns, and toy guns all satisfy § 2113(d).[41] More broadly, courts facing a § 2113(d) analysis apply either a subjective approach, contemplating a victim's reasonable belief that a weapon or device can harm, or an objective approach, contemplating the weapon or device's actual ability to harm.[42] Examining precedent surrounding actual, unloaded, and toy guns, as well as both the objective and subjective approach, provides insight into § 2113(d)'s fundamentals.

1. Actual guns, unloaded guns, and toy guns

A gun is the most common weapon of choice used when robbing a bank.[43] Individuals who use actual guns during a bank robbery conclusively satisfy § 2113(d).[44] Courts formerly held that the jury could

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37. *Id.* (statement of Rep. Blanton).

38. *Id.*

39. *See id.* (statement of Rep. Sumners).

40. *See infra* note 44 (containing examples of bank robbers using firearms to rob banks). *But see* United States v. Martinez-Jimenez, 864 F.2d 664, 666 (9th Cir. 1989) (noting that § 2113(d) is not limited to firearms).

41. *See infra* Section I.C.1 (providing the rationale as to why actual, unloaded, toy, and replica guns all satisfy § 2113(d)).

42. *See infra* Section I.C.2.a–b (detailing both the objective and subjective frameworks).

43. *See* Baker v. United States, 412 F.2d 1069, 1072 (5th Cir. 1969) (noting that § 2113(d) covers guns, the most common weapons individuals use to rob banks).

44. *See, e.g.*, United States v. Oliver, 523 F.2d 253, 260 (2d Cir. 1975) (concluding that a man satisfied § 2113(d) when he used a handgun to force his way into a bank and demanded money); Morrow v. United States, 408 F.2d 1390, 1391 (8th Cir. 1969) (holding that a shotgun was a dangerous weapon under § 2113(d)).

infer that any gun used during a bank robbery was loaded.[45] Courts rationalized this inference by determining that threatening others with a gun is tantamount to the bank robber announcing that his gun is loaded and that he will shoot if his commands are not obeyed.[46]

Inferring that any gun a bank robber used was loaded became unnecessary after *McLaughlin v. United States*,[47] in which the United States Supreme Court explicitly held that unloaded guns are per se dangerous weapons under § 2113(d).[48] In *McLaughlin*, two men robbed a bank using an unloaded handgun.[49] The Court determined it was a dangerous weapon, even when unloaded, for three reasons.[50] First, guns are characteristically manufactured and sold as dangerous devices, justifying a presumption that a gun is always dangerous even though it may not be loaded.[51] Second, displaying a gun instills fear into the average person, creating the immediate danger of a violent response from others to neutralize the gun.[52] Third and finally, a bank robber could use an unloaded gun as a bludgeon.[53] The Supreme Court held that each of these three reasons was independently sufficient to support the conclusion that an unloaded gun is a dangerous weapon under § 2113(d).[54]

While many have used both loaded and unloaded actual guns, individuals also have used toy or wooden guns to rob a bank.[55] Courts have unanimously held that toy guns and wooden guns satisfy § 2113(d).[56] Toy or wooden guns are comparable to unloaded guns

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45. *See, e.g.*, Lewis v. United States, 365 F.2d 672, 674 (10th Cir. 1966) (allowing the jury to infer the guns were loaded when there was no proof indicating otherwise); *see also* United States v. Marshall, 427 F.2d 434, 437 (2d Cir. 1970) (holding that when "a robber displays a gun to back up his demands, he wants the victim to believe that it is loaded, and the fact-finder may fairly infer that it was" (quoting Wagner v. United States, 264 F.2d 524, 530 n.8 (9th Cir. 1959))).

46. *Marshall*, 427 F.2d at 437.

47. 476 U.S. 16 (1986).

48. *Id.* at 17.

49. *Id.* at 16.

50. *Id.* at 17.

51. *Id.*

52. *Id.* at 17–18.

53. *Id.* at 18.

54. *Id.* at 17.

55. *See infra* note 56.

56. *See, e.g.*, United States v. Perry, 991 F.2d 304, 308 (6th Cir. 1993) (concluding that a wooden gun was a dangerous device or weapon); United States v. Martinez-Jimenez, 864 F.2d 664, 665 (9th Cir. 1989) (holding that a toy gun is a dangerous weapon). In *Martinez-Jimenez*, the court determined that witnesses believed a bank robber's toy gun was a real gun. 864 F.2d at 665. A codefendant testified that

because they create some of the same risks as an unloaded or inoperable gun.[57] Those risks include (1) subjecting victims to greater apprehension and fear, (2) requiring law enforcement to counter an apparently immediate threat by formulating deliberate and less efficient responses, and (3) increasing the likelihood that officers or bank guards will retaliate with deadly force.[58] Because anyone faced with what appears to be a genuine gun can reasonably believe it is a real weapon, courts have found easily that toy or wooden guns are "dangerous weapons" under § 2113(d).[59]

2. Circuit court interpretations of § 2113(d)

Although § 2113(d) analysis seems relatively simple when bank robbers use actual or replica firearms, courts faced with a § 2113(d) analysis will still employ either a subjective or an objective analytical framework.[60] Under the objective approach, the weapon or device must actually be capable of assaulting or placing lives in jeopardy.[61] Under the subjective approach, the weapon or device can satisfy § 2113(d) if witnesses or victims reasonably believe the weapon or device is capable of causing harm.[62] Each framework has various strengths and weaknesses.

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neither of the men "wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* The defendant who wielded the gun testified that he had "carried the toy gun because he felt secure with it and that . . . he held it down toward his leg . . . so that people would not see it." *Id.*

57. *Martinez-Jimenez*, 864 F.2d at 666.

58. *Id.* at 666–67. The Ninth Circuit also noted that § 2113(d) focuses on the harms created, not the manner in which the harm is created. *Id.* at 667.

59. *Id.* at 667–68. Many other circuits follow the *Martinez-Jimenez* ruling. *See, e.g.*, United States v. Medved, 905 F.2d 935, 940 (6th Cir. 1990) (finding that *Martinez-Jimenez* was decided correctly and adopting the decision as law of the 6th Circuit).

60. *See generally* Davis, *supra* note 8.

61. *See, e.g.*, United States v. Burger, 419 F.2d 1293, 1294 (5th Cir. 1969) (per curiam) (producing a "common sense" reading of jeopardy in which the jury can "reasonably consider that . . . life was in peril, not merely thought to be" (quoting Smith v. United States, 284 F.2d 789, 792 (5th Cir. 1960))).

62. *See, e.g.*, United States v. Newkirk, 481 F.2d 881, 883 (4th Cir. 1973) (per curiam) ("[T]he government is *not* required to prove that the weapon used in a robbery was capable of putting the lives of bank employees in actual, as opposed to apparent, jeopardy . . . .") (emphasis added).

a. The objective approach

The more stringent of the two frameworks is the objective approach.[63] Under this approach, courts are not interested in whether bank robbery victims feared for their lives.[64] Rather, this approach focuses on whether a bank robber used a dangerous weapon or device capable of actually placing someone's life in danger.[65] This approach requires a risk of actual danger, but not an actual injury.[66] It therefore follows that physical injury is sufficient for "actual danger," but it is not necessary.[67]

Of course, the most obvious example of an objectively dangerous weapon is a gun.[68] Even if the defendant does not fire the gun, the prosecution can still satisfy the objective approach because courts find it reasonable to infer that one who is threatening to use a gun can actually use it to back up his unlawful demands.[69] Further, the objective approach does not require a robber to continuously brandish or point a gun.[70] A robber who displays a gun—even

63. *See supra* notes 61–62 and accompanying text (suggesting that the objective standard requires that a weapon or device be actually capable of causing harm, while the subjective one requires only the reasonable belief that the weapon or device can cause harm).

64. *E.g.*, United States v. Rose, 731 F.2d 1337, 1348 (8th Cir. 1984).

65. *See* United States v. Tutt, 704 F.2d 1567, 1569 (11th Cir. 1983) (per curiam) (deciding that the purpose of § 2113(d) was "to allow higher sentences to be imposed on those who use dangerous weapons in a way reasonably calculated to put life in [actual] danger" (quoting United States v. Johnson, 401 F.2d 746, 747 (2d Cir. 1968) (per curiam))).

66. *See, e.g.*, United States v. Richardson, 562 F.2d 476, 481 (7th Cir. 1977) (holding that § 2113(d) requires a bank robber to place a robbery victim in an actual "state of danger"). The objective approach therefore only requires a *risk* or *state* of actual danger, meaning the bank robber does not have to physically injure someone. *Id.*

67. United States v. De Palma, 414 F.2d 394, 396 (9th Cir. 1969).

68. *See Tutt*, 704 F.2d at 1568 (acknowledging that guns used at the scene of a bank robbery are dangerous as a matter of law and therefore place onlookers "in an objective state of danger" (quoting United States v. Parker, 542 F.2d 932, 934 (5th Cir. 1976) (per curiam))).

69. *See* United States v. Cobbs, 481 F.2d 196, 201 (3d Cir. 1973) (determining that a jury may find that actual jeopardy exists even if a robber does not discharge the gun or actually press the barrel of the gun to someone's body); United States v. Potts, 548 F. Supp. 1239, 1242 (N.D. Cal. 1982) (noting that, while a conviction under § 2113(d) requires use of a loaded gun or other weapon capable of inflicting injury, a jury may infer that the threat to use a gun suggests that the gun was loaded); *supra* note 45.

70. *See infra* note 71 and accompanying text.

briefly—objectively places lives in danger because the display alone alludes to the possibility that the robber can actually hurt someone.[71]

The objective approach is susceptible to both praise and scrutiny. Many courts favor the objective standard because, absent a finding of objective danger, there would be no distinction between § 2113(d) and (a).[72] To elaborate, if § 2113(d) did not require an objective finding of harm, the defendant is only using intimidation or fear, which is already proscribed under § 2113(a).[73] Conversely, some disfavor the objective approach because it is more difficult for the prosecution to prove its case than under the subjective approach.[74] The prosecution must rely on the facts and whether a victim was actually placed in jeopardy, as opposed to a reasonable fear of injury, which could be easier to prove.[75]

b. The subjective approach

A bank robber can satisfy § 2113(d) under the subjective approach by using a dangerous weapon or device in a manner that causes a victim to reasonably expect danger or injury.[76] More specifically, courts look to whether witnesses reasonably believe a robber's weapon or device can cause actual harm, not whether the weapon or device can actually harm someone.[77] Accordingly, some courts have

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71. *See* United States v. Roustio, 455 F.2d 366, 372 (7th Cir. 1972) (reasoning that a robber satisfied the objective approach when he showed a teller a gun tucked in his waistband); *De Palma*, 414 F.2d at 396 (rejecting the argument that a brief display of a gun did not satisfy the objective approach).

72. *E.g.*, Bradley v. United States, 447 F.2d 264, 275 (8th Cir. 1971) (holding that an assault under § 2113(d) requires "an objective capability to cause physical harm[,]" and that holding otherwise would render (d) redundant), *vacated*, 404 U.S. 567 (1972). Recall that § 2113(a) prohibits taking bank property "by force or violence, or by intimidation." 18 U.S.C. § 2113(a) (2012).

73. *See* United States v. Marshall, 427 F.2d 434, 437–38 (2d Cir. 1970) (rejecting a jury charge defining "jeopardy" as fear of death or injury because actual risk of injury is needed to distinguish § 2113(a) and (d)).

74. *See* Davis, *supra* note 8, § 2b (indicating that the objective test places a more difficult burden on the prosecution than the subjective test).

75. *See id.* (concluding that the objective test proves more burdensome for the prosecution as it requires a reliance on the "harder" facts of the case).

76. *See, e.g.*, United States v. Newkirk, 481 F.2d 881, 883 (4th Cir. 1973) (per curiam) (noting that the government is not required to prove that a weapon used in a robbery was actually capable of endangering lives, and that apparent jeopardy was sufficient).

77. *See* United States v. Levi, 45 F.3d 453, 456 (D.C. Cir. 1995) (establishing that a bank robber violates § 2113(d) simply by displaying an object that is reasonably perceived as a dangerous weapon or device); United States v. Shelton, 465 F.2d 361, 362 (4th Cir. 1972) (rejecting the argument that the Government needed to establish that the "dangerous weapon" was actually capable of putting lives in actual,

adopted a three-pronged adaptation of the subjective approach: § 2113(d) is satisfied when a 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.[78]

The subjective approach concentrates on apparent jeopardy, meaning certain items appearing to be weapons can satisfy this approach. For instance, courts have concluded that a hoax bomb placed individuals in a reasonable expectation of danger, thereby warranting § 2113(d) punishment.[79] A device that appears to be a weapon and that a perpetrator implies is authentic will satisfy the subjective approach because the perpetrator has incited a reasonable expectation of danger.[80] An individual's reaction to what he or she believes is a dangerous weapon can further reveal whether that individual had a reasonable expectation of danger.[81] As most people reasonably expect danger when faced with an apparent weapon, every circuit has generally concluded that "'a fake weapon that was never intended to be operable' . . . constitutes a dangerous weapon for the purposes of the armed robbery statute."[82]

Some courts interpret the subjective approach in light of how one's reasonable fear of an apparently dangerous weapon can lead to deadly retaliation.[83] Courts derive this variation from the Supreme Court's decision in *McLaughlin v. United States*, which deemed an unloaded gun to be a dangerous weapon because "[it] instills fear in

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as opposed to apparent, jeopardy).

78. United States v. Beasley, 438 F.2d 1279, 1282–83 (6th Cir. 1971); *see also* United States v. Shannahan, 605 F.2d 539, 541 (10th Cir. 1979) (adopting the same framework); United States v. Kicklighter, 192 F. Supp. 2d 788, 789 (E.D. Tenn. 2002) (same).

79. *See* United States v. Zamora, 222 F.3d 756, 767 (10th Cir. 2000) (ruling that a fake bomb is a dangerous weapon when it gives a victim a reasonable expectation of danger, regardless of its actual ability to harm).

80. *See id.* (evidencing the teller's reasonable expectation of injury by noting the bank robber told her a package was a bomb and he would detonate it if she did not comply).

81. *See* United States v. Crouthers, 669 F.2d 635, 639 (10th Cir. 1982) (emphasizing the victim's reasonable expectation of danger by highlighting his stating "don't shoot, don't hurt us").

82. United States v. Hargrove, 201 F.3d 966, 968 n.2 (7th Cir. 2000) (quoting United States v. Hamrick, 43 F.3d 877, 882 (4th Cir. 1995)).

83. *See* United States v. Beckett, 208 F.3d 140, 152 (3d Cir. 2000) ("[T]he weapon or device need not actually be capable of inflicting . . . injury upon another to be dangerous, rather, a weapon or device may be considered . . . dangerous if it instills fear in the average citizen creating an immediate danger that a violent response will follow."). The lower court issued this statement in its jury instructions, and the Third Circuit affirmed the statement's accuracy. *Id.*

the average citizen" and thereby "creates an immediate danger that a violent response will follow."[84] Some circuit courts interpret *McLaughlin* as implicitly rejecting the objective approach, focusing instead on how an individual's reasonable fear of a bank robber's weapon can increase the potential of a violent response.[85] Therefore, under this subjective approach interpretation, apparent weapons are usually classified as "dangerous weapons" because of the potential that police or others will react with deadly or dangerous force.[86]

Similar to the objective approach, the subjective approach has strengths and weaknesses. First, the prosecution could more easily satisfy the subjective approach, rather than the objective approach, since a reasonable person is generally afraid of what appears to be a weapon.[87] The subjective approach also allows courts to respect more fully the legislative history behind § 2113(d). Congress intended[88] for courts to consider an object's potential "to instill fear" as part of the § 2113(d) analysis.[89] However, some courts disfavor the subjective approach because a reasonable expectation of fear falls within § 2113(a)'s "force or violence or . . . intimidation" requirement, thereby rendering the two sections indistinguishable.[90]

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84. 476 U.S. 16, 17–18 (1986).

85. *See* United States v. Spedalieri, 910 F.2d 707, 710 (10th Cir. 1990) (interpreting *McLaughlin* as rejecting an objective approach). This court determined that a victim's reasonable fear of a bank robber's apparently genuine bomb could have provoked a violent response, which led the court to conclude the fake bomb was a dangerous weapon. *Id.* at 709; *see also id.* at 710 (concluding that the objective test is not consistent with the possibility that a dangerous response could be evoked during an armed robbery, regardless of whether the device used is functional); United States v. Beasley 438 F.2d 1279, 1282 (6th Cir. 1971) (following the subjective approach and finding that § 2113(a) was satisfied "where the victim . . . [was] shown to have been placed in reasonable apprehension by the robber's conduct, regardless of the robber's ability actually to inflict harm"); United States v. Benson, 725 F. Supp. 69, 73 n.4 (D. Me. 1989) (interpreting the Supreme Court's ruling in *McLaughlin* and finding no intention of using a purely objective test).

86. *See* United States v. Beckett, 208 F.3d 140, 152 (3d Cir. 2000) (agreeing that a fake bomb instilled fear in those who saw it and provoked a police response).

87. *See* Davis, *supra* note 8, § 2a (comparing the prosecution's burden under both the subjective and objective approach and stating that the burden is easier to prove under the subjective approach).

88. *See* United States v. Shelton, 465 F.2d 361, 362 (4th Cir. 1972) (refusing to adopt an objective construction of § 2113(d) so rigid in "application as to make a nullity of the statute and to rob it of its manifest purpose"); *see also Benson*, 725 F. Supp. at 73 n.4 (observing that in light of the legislative history and jurisprudence surrounding § 2113(d), Congress probably did not intend a purely objective approach).

89. 78 CONG. REC. 8132 (1934).

90. *See supra* notes 71–73 and accompanying text.

D. United States v. Dixon

A recent Seventh Circuit decision highlights aspects of both the objective and subjective approaches. In *United States v. Dixon*, Deangelo Dixon was convicted twice for armed bank robbery under § 2113(d) and sentenced to life in prison.[91] In one robbery, Dixon waved a bag containing a stiff object at tellers threatening, "Five seconds or I'm gonna shoot."[92] In the other, Dixon displayed an object with a long barrel and told a teller to "give him the money or he would shoot."[93] The object in both robberies was a long-barreled butane lighter.[94]

On appeal, Dixon contended that the conviction should have been under § 2113(a), bank robbery by intimidation, rather than § 2113(d), armed bank robbery.[95] Dixon specifically argued that the lighter could not have been a "dangerous weapon or device," regardless of the tellers' assumptions or beliefs that he had a real gun.[96] Conversely, the government argued that the lighter should be *treated* as a dangerous weapon because the tellers could have believed it was a dangerous weapon, and the bank guards or police might have opened fire.[97]

To highlight what it thought was the foolishness of the government's argument, the court reasoned that if the lighter risked gunfire, so might a finger, a dowel, a water pistol, or a kielbasa in a pocket.[98] According to the court, the statutory question was whether Dixon used a "dangerous weapon or device," not whether a guard or teller mistook a harmless device for a weapon.[99] The court elaborated that whether a teller mistook a harmless device for a weapon would be clear if "Dixon had placed his hand in his pocket with his finger extended to simulate the barrel of a pistol, or if he had used six inches of wooden dowel sawed from the end of a broomstick to simulate a hidden gun barrel."[100]

Applying the holding of *McLaughlin*, the court decided that a lighter does not pose the same threat as an unloaded gun because it

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91. 790 F.3d 758, 759 (7th Cir.), *cert. denied*, 136 S. Ct. 425 (2015).
92. *Id.* at 760.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 761. The court specifically noted that the lighter could arguably be considered a dangerous "device" but did not discuss this notion further because the government argued it should be treated as a dangerous "weapon." *Id.* at 760–61.
98. *Id.* at 761.
99. *Id.*
100. *Id.*

does not incite fear in victims, does not create a hostile environment, and cannot be used as a bludgeon.[101] Furthermore, the court noted that a "hidden stiff object" coupled with a threat may induce fear, but that fear "differs from a dangerous weapon or device."[102] The court ultimately ruled that the statute required an actual dangerous weapon or device, not something a teller incorrectly believed was dangerous.[103] Accordingly, the court overturned Dixon's convictions under § 2113(d), leaving him with convictions under § 2113(a).[104]

II. A CLOSER LOOK AT THE CURRENT § 2113(D) SUBJECTIVE AND OBJECTIVE FRAMEWORKS

The *Dixon* decision—which was essentially an example of the objective approach[105]—illustrates that either a purely objective or a purely subjective approach is inadequate to effectively analyze *Dixon*-like situations in which someone portrays an object as a weapon to rob a bank. In *Dixon*, the objective approach barred a lighter from qualifying as a dangerous weapon, despite the risk that officers could respond with deadly force that might have harmed bystanders.[106] But the alternative, the subjective approach, might have been too difficult to prove because it would have required the court to delve into the tellers' subjective impressions.[107]

Regardless of the court's approach in *Dixon*, those faced with an object that they reasonably believe to be a weapon will likely react as though the object is, in fact, a weapon. Accordingly, those who attempt to rob a bank by portraying an object as a weapon deserve § 2113(d)'s harsher punishment. To ensure this harsher punishment is justly imposed, courts need a new standard to evaluate *Dixon*-like situations in light of § 2113(d). Arriving at this conclusion requires rethinking the

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

102. *Id.* The court noted a prior decision recognizing that a toy gun might be dangerous because of its "fear-inducing potential." *Id.* However, the court said it was skeptical to hold the same for the lighter because it was not a firearm look-alike. *Id.*

103. *Id.* The court queried the outcome in a hypothetical case where a teller was terrified of rabbits, implying that the subjective approach would require the court to conclude that rabbits were a "dangerous weapon or device." *Id.*

104. *Id.*

105. Although the Seventh Circuit did not use the phrase "objective danger" or "actual danger," it did decide that "the statute requires a dangerous weapon or device rather than something a teller believes incorrectly to be dangerous." *Id.* Therefore, because the subjective approach encompasses subjective impressions, it follows that the Seventh Circuit employed the objective approach.

106. *Id.* at 760–71.

107. *See id.* at 761.

objective approach, exploring the downfalls of a purely subjective approach, and examining the legislative history of § 2113(d).

A. Rethinking the Objective Approach: "Actual Danger" Can Come from Sources Other than the Weapon or Device Itself

Although a major aspect of the objective approach focuses on the ability of the "weapon or device" to cause actual harm, courts have found that several situations satisfy § 2113(d) even though the weapon or device itself cannot actually cause harm.[108] For instance, recall that courts consistently find that toy guns satisfy § 2113(d).[109] A toy gun cannot literally cause harm; it cannot shoot a real bullet. Due to its close resemblance to an actual gun, however, courts find that victims are reasonable in believing that a toy gun is a real gun.[110] Similarly, unloaded guns always satisfy § 2113(d), regardless of their inability to cause actual harm.[111] Because courts find that toy and

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108. *See infra* notes 110–12 and accompanying text (examining situations where the weapon or device itself cannot cause harm).

109. *E.g.*, United States v. Garrett, 3 F.3d 390, 391 (11th Cir. 1993) (per curiam); United States v. Cannon, 903 F.2d 849, 854–55 (1st Cir. 1990); United States v. Martinez-Jimenez, 864 F.2d 664, 666 (9th Cir. 1989); *cf.* United States v. DeAngelo, 13 F.3d 1228, 1234–35 (8th Cir. 1994) (classifying a starter pistol, a non-firing gun used to start races, as a dangerous weapon); *Martinez-Jimenez*, 864 F.2d at 667 (indicating that an ersatz wooden gun used in a bank robbery would amount to "a dangerous weapon or device").

110. *See* United States v. Arafat, 789 F.3d 839, 847 (8th Cir.) (highlighting that the defendant's toy gun was altered to more closely resemble a genuine gun), *cert. denied*, 136 S. Ct. 379 (2015); *Martinez-Jimenez*, 864 F.2d at 668 ("[The defendant's] decision to bluff [by carrying a toy gun] did not eliminate the harms that Congress intended to address in § 2113(d)."); United States v. Nixon, No. 12-10232-01-EFM, 2013 WL 2897055, at *2 (D. Kan. June 13, 2013) (acknowledging that every circuit court adjudicating a situation involving a fake weapon has concluded "that it constitutes a dangerous weapon for the purposes of the armed robbery statute"); *see also* Eleanor Randolph, *Toy Guns Can Be Dangerous, for Real*, N.Y. TIMES, Aug. 3, 2015, http://takingnote.blogs.nytimes.com/2015/08/03/toy-guns-can-be-dangerous-for-real/?_r=0 (contending that because some toy guns so closely resemble assault rifles, handguns, and shotguns, they can often fool everyone but a gun expert).

111. *See* McLaughlin v. United States, 476 U.S. 16, 17 (1986) (holding that unloaded guns are dangerous weapons under § 2113(d)). The Court in *McLaughlin* noted that an unloaded gun could be used as a bludgeon, so in that capacity, an unloaded gun *itself* can harm. However, the Supreme Court listed two other reasons as to why an unloaded gun is dangerous. *Id.* at 17–18. One of these other reasons was that an unloaded gun carries the potential to incite a violent police response. *Id.* A violent police response is an independent source of harm other than the unloaded gun. Therefore, by classifying an unloaded gun as a dangerous weapon due to its potential to produce a violent response, *McLaughlin* recognized that harm—or jeopardy—could arise from a source other than the weapon itself.

unloaded guns each satisfy § 2113(d) based on the potential for police or bank guards to open fire in response, a source of danger independent from an actual unloaded or toy gun, the potential harms a device creates can satisfy § 2113(d)'s jeopardy requirement.[112]

B. Drawbacks of a Purely Subjective Approach: Fear Alone Is Not Enough

The purely subjective approach is also problematic when dealing with a bank robbery involving an apparent weapon. Specifically, a purely subjective approach does not distinguish between § 2113(d) and (a).[113] Because bank robbery is, by definition, bank larceny plus force, violence, or intimidation, § 2113(d) must require something more than force, fear, threat, or intimidation to distinguish the two provisions.[114]

A simple examination of the statute indicates the two sections must be separated. Namely, § 2113(d) has a steeper penalty than (a).[115] The statute also differentiates between robberies committed using force, violence, or intimidation and robberies committed with a dangerous weapon or device.[116] These separate qualifications indicate that Congress intended to distinguish § 2113(d) and (a), as it enacted two subsections with different requirements and penalties.[117] Consequently, using the subjective approach and allowing a witness's subjective impressions to satisfy the jeopardy requirement of § 2113(d) would conflate two offenses that Congress intended to differentiate.

A purely subjective approach poses another difficulty: it requires the prosecution to delve into the subjective reactions of victims. For

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112. *See Martinez-Jimenez*, 864 F.2d at 666 (explaining that the dangerousness of a device or weapon used in a bank robbery is not *only* a function of its potential to harm directly).

113. *See supra* notes 72–73 and accompanying text. It is important to remember that the subjective approach mentioned throughout this Comment is specific to § 2113(d), not § 2113(a).

114. *See, e.g.*, United States v. Marshall, 427 F.2d 434, 437–38 (2d Cir. 1970) (declaring that if § 2113(d) did not require lives to be objectively in danger, it would be impossible to differentiate between subsections (a) and (d)); *see also* James F. Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. CRIM. L. & CRIMINOLOGY 363, 368–69 (1983) (explaining that under the subjective approach, the minimum requirements of § 2113(a), with nothing more, also satisfy § 2113(d)).

115. *See supra* note 31 (comparing § 2113(a) and § 2113(d)).

116. United States v. Wolfe, 245 F.3d 257, 262 (3d Cir. 2001).

117. *Cf.* United States v. Nixon, No. 12-10232-01-EFM, 2013 WL 2897055, at *2 (D. Kan. June 13, 2013) (explaining that a distinction between 18 U.S.C. § 924(c) (2006) and 18 U.S.C. § 2113(d) cannot be eroded because Congress enacted these different statutes, with different provisions and punishments, for a good reason).

example, a bank robber could encounter a teller who is courageous or insensitive.[118] Conversely, a bank teller could be overly fearful, having a phobia that causes an irrational belief that something inherently harmless is dangerous.[119] Section 2113(d) should not require the prosecution to explore and amplify a victim's reaction to apparently dangerous articles because individuals all react differently under different circumstances.[120] Also, a defendant who satisfies § 2113(d)'s requirements should not escape a harsher punishment simply because a victim turned out to be too brave.[121] A purely subjective approach that requires investigating subjective reactions is problematic because individuals inevitably have different personal impressions and reactions, resulting in a standard that courts cannot apply consistently.[122]

Not only is delving into witnesses' subjective reactions complicated, the subjective approach leads to an almost certain § 2113(d) conviction. The subjective approach requires a weapon or device to produce a reasonable expectation of danger, and common sense suggests that everyone becomes afraid of injury when facing a bank robber wielding a weapon.[123] This approach therefore seems to automatically generate a conviction with minimal analysis, which is troublesome because criminal statutes impose severe punishments and must strike a proper balance between fairness to the defendant and

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118. *See* United States v. Brown, 412 F.2d 381, 382 (8th Cir. 1969) (involving a situation where a bank teller boldly stood up to a bank robber by screaming, "Show me your gun, you little snot, or get out of here"); *see also* John Johnson, *Alleged Bank Robbery Attempt Fails Spectacularly*, NEWSER (July 10, 2016, 4:45 PM), http://www.newser.com/story/227890/alleged-bank-robbery-attempt-fails-spectacularly.html (reporting on a bank robbery where a teller refused to hand over any money despite the bank robber's use of a shotgun).

119. *E.g.*, United States v. Dixon, 790 F.3d 758, 761 (7th Cir.) (posing a hypothetical of a bank teller being terrified of rabbits), *cert. denied*, 136 S. Ct. 425 (2015).

120. United States v. Beasley, 438 F.2d 1279, 1282 (6th Cir. 1971).

121. *See id.* ("[A] defendant against whom the requisite elements of the offense have been proved will not be absolved on the fortuity that his victim was too courageous or insensitive to be afraid [of a bank robber].").

122. *See* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 4 (1998) (critiquing a purely subjective criminal law approach by explaining that subjective standards of reasonableness are antithetical to the "fundamental principle" that the law "should be based on a generally accepted standard of conduct applicable to all citizens alike").

123. *See, e.g.*, McLaughlin v. United States, 476 U.S. 16, 17–18 (1986) (asserting that the mere display of a gun "instills fear in the average citizen"); *cf.* United States v. Hernandez, 232 F. App'x 561, 566 (6th Cir. 2007) (determining that the mere display of a bomb "instills fear in the average citizen").

obtaining justice.[124] Thus, a purely subjective approach seems to undermine the criminal justice system's fundamental notion of fairness by allowing a stilted analysis that virtually always leads to conviction.[125]

C. Congress Intended Something Less than a Purely Objective Approach to Govern § 2113(d) Analysis

Although a purely subjective approach is problematic, Congress did not want a purely objective approach to govern § 2113(d).[126] The floor debate on this section indicates that Congress was concerned that courts would not consider an object's potential to incite fear when deciding whether that object is a "dangerous weapon."[127] Ultimately, Congress believed that adding the phrase "or device" to the section would specifically encompass objects with fear-inducing qualities,[128] essentially mirroring the subjective approach's reasoning.[129] Congress's desire to include "fear-inducing objects" indicates an intention for something less than a purely objective approach because the objective approach disregards impressions of fear.

D. The Need for a New § 2113(d) Approach When Individuals Rob Banks with Apparent Weapons

The intricacies and problems of both the objective and subjective approaches indicate the need for a new approach to govern *Dixon*-like situations: situations in which a bank robber brandishes an object as a weapon. Of course, arguing for a new approach implies that inherently harmless objects used to rob banks should fall within

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124. *See* United States v. Levine, 658 F.2d 113, 125 (3d Cir. 1981) (asserting that "repose and fairness for defendants" are historically fundamental aspects of the criminal justice system).

125. *Cf.* Younger v. Harris, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting) (contending that, in the context of the vagueness doctrine, a criminal statute could be unconstitutional in regard to the "applicable tests to ascertain guilt").

126. *See supra* Section I.B; *see also* United States v. Benson, 725 F. Supp. 69, 73 n.4 (D. Me. 1989) (speculating that "it is unlikely, in light of the legislative history of [§] 2113(d) [,] . . . that the United States Congress intended a purely objective test").

127. 78 CONG. REC. 8132 (1934) (statement of Rep. Blanton). Representative Blanton noted specifically, "Some of the largest bank robberies have been occasioned where a thug comes into the bank and goes up to the window and has a bottle" of liquid, asserting that it is nitroglycerin. *Id.*

128. *Id.* An example Representative Blanton gave of a fear-inducing object was a wooden gun. *Id.* Representative Dockweiler even suggested amending § 2113(d) by adding the phrase "device or such instrumentality intended to instill fear." *Id.* However, Representative Blanton responded by saying, "'[O]r device' would cover [it]." *Id.*

129. *See supra* Section I.C.2.b (detailing the subjective approach reasoning, which involves an individual's reasonable expectation or fear of injury).

§ 2113(d)'s purview. These objects should fall within § 2113(d) if a bank robber brandishes an inherently harmless object as a weapon. After all, this situation occurred in *Dixon*, where Dixon used a long-barreled lighter as a gun.[130] Individuals who use objects as weapons to rob banks deserve § 2113(d)'s harsher punishment, so long as it is reasonable to believe the object is an actual weapon. This reasonable belief would likely cause victims, police, or bank guards to react in the same way as if faced with a real weapon.[131]

Individuals exposed to what they reasonably believe to be a dangerous weapon would also be exposed to some of the same risks as if the robber were using an actual weapon. The apparent weapon could create a risk of retaliatory gunfire, which immediately causes the atmosphere to become hostile.[132] This risk of retaliatory gunfire evidences that § 2113(d)'s jeopardy requirement can stem from sources other than an actual "dangerous weapon or device" itself. Since § 2113(d) can be interpreted in light of the harms created, it is plausible for an inherently harmless object—such as a long-barreled lighter—to satisfy § 2113(d), as long as victims reasonably believe the object is an actual weapon. As mentioned, using a purely objective or a purely subjective approach in this situation would be ineffective.[133] Therefore, to determine whether a bank robber who uses an object as a weapon deserves § 2113(d) punishment, courts should apply a hybrid standard that effectively incorporates both subjective and objective factors.[134]

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130. *See supra* Section I.D (summarizing the facts in *Dixon*). Additionally, a number of courts have analyzed ordinary robbery—not bank robbery—situations where individuals use simulated weapons, such as a finger or other object simulating a gun. *See generally* Lynn C. Cobb, Annotation, *Robbery by Means of Toy or Simulated Gun or Pistol*, 81 A.L.R.3d 1006 (1977 & Supp. 2010) (detailing numerous robbery situations where defendants used simulated weapons).

131. *Cf.* 78 CONG. REC. 8132 (1934) (statement of Rep. Blanton) (arguing that a bottle of water asserted to be nitroglycerin would have the same psychological effect as a real bottle of nitroglycerin).

132. *See* United States v. Martinez-Jimenez, 864 F.2d 664, 668 (9th Cir. 1989) (noting that confrontations between police and robbers armed with replica or simulated guns "often lead to gunfire and casualties").

133. *See* Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 35–36 (2008) (arguing that purely subjective and purely objective approaches are undesirable).

134. *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 830 (9th ed. 2012) (describing a hybrid approach that "individualizes the objective standard," implying that hybrid standards contain both objective and subjective factors).

III. APPLYING A HYBRID STANDARD TO § 2113(D) WILL BETTER ENCOMPASS SITUATIONS IN WHICH AN INDIVIDUAL USES AN OBJECT PURPORTED TO BE AN ACTUAL WEAPON DURING A BANK ROBBERY

Broadly speaking, a hybrid framework incorporating both subjective and objective factors provides a more balanced approach.[135] A hybrid approach would serve as an effective § 2113(d) framework for analyzing instances in which a bank robber brandishes an object as a weapon because an inherently harmless object fails the objective approach and, as mentioned, the purely subjective approach is too problematic.

A. The Hybrid Approach

The proposed hybrid approach considers whether a reasonable person in a bank robbery victim's position would perceive the situation as one involving an actual weapon.[136] This standard contemplates several elements: (1) whether there was a display or gesture in a manner consistent with possessing an actual weapon, (2) whether the defendant used threats to indicate the displayed object was a real weapon, (3) whether the defendant had the intent to portray the object as a weapon, and (4) whether the defendant used the object in a way that produced a charged and hostile atmosphere. If a court finds that a reasonable person in the victim's situation would have believed that the bank robber wielded an object that was an actual weapon after considering all of these elements, then § 2113(d)'s harsher punishment should apply. Examining each element in turn will better illustrate the applicability of the approach to situations like the one that occurred in *Dixon*.

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135. *See* Nourse, *supra* note 133, at 35–36 (describing criminal law hybrid standards as reflecting "common sense"). Taken to extremes, a purely subjective approach requires deciding what is reasonable under the circumstances, which requires considering the norms of a specific individual. *Id.* Alternatively, a purely objective standard bars consideration of relevant facts surrounding a defendant or victim, such as whether that victim was blind or a child. *Id.* A more sound approach considers both subjective and objective factors. *Id.*

136. This standard is derived from hybrid approaches abundant throughout criminal law. *See id.* at 36 ("[T]he Model Penal Code and a majority of jurisdictions adopt some form of 'hybrid' standard: the jury must judge the defendant by the standards of the reasonable person, but the reasonable person in the 'situation.'").

1. Did the bank robber make a gesture or display an object in a manner consistent with an actual weapon?

For a teller to reasonably believe that an object is a weapon, a bank robber must indicate in some manner that the object is, in fact, a weapon.[137] A crucial way for a bank robber to indicate that the object is a weapon is to gesture with or display the object in a manner consistent with how one would brandish an actual weapon.[138] While a bank robber who alludes to having a weapon likely creates apprehension, a robber who displays an object or simulated weapon creates even greater apprehension because he now has the apparent capability to harm.[139]

A display or gesture is necessary because without one a bank robber has not "used" a "dangerous weapon," as required by § 2113(d).[140] Keeping an apparent weapon concealed during a bank robbery would not amount to "use," it would only amount to "possession," which does not trigger § 2113(d).[141] Further, keeping a simulated weapon concealed would be less likely to create a charged atmosphere because police or guards do not have to contemplate additional actions, such as whether to return fire, on the basis that a

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137. *See* United States v. Odom, 329 F.3d 1032, 1035 (9th Cir. 2003) (noting that a "common denominator" among robbers convicted under § 2113(d) is that they "knowingly made one or more victims at the scene aware that" they were armed with a real or fake gun).

138. A gesture or display in a manner consistent with an actual weapon can take on many forms. *See* United States v. Benson, 918 F.2d 1, 2–3 (1st Cir. 1990) (concerning a defendant who moved his hand in his jacket pocket, partially exposing a metallic object the teller believed was a gun); United States v. Roustio, 455 F.2d 366, 368, 371–72 (7th Cir. 1972) (involving a defendant who gave a teller a note stating that he had a gun and who then partially displayed the gun to the teller while it was still tucked in his waistband); State v. Elam, 312 So. 2d 318, 322 (La. 1975) (chronicling a situation where, during an ordinary robbery, a defendant kept one hand inside his jacket pocket and motioned in a manner indicating he had a weapon).

139. Brief for Respondent at 19–20, McLaughlin v. United States, 476 U.S. 16 (1986) (No. 85-5189), 1985 WL 670258, at *19–20; *see also McLaughlin*, 476 U.S. at 17–18 (concluding that a *display* of a gun leads to increased apprehension of injury).

140. 18 U.S.C. § 2113(d) (2012); *see also Odom*, 329 F.3d at 1035 (determining that an intentional display of a gun qualifies as "use" under § 2113(d)); United States v. Ray, 21 F.3d 1134, 1140 (D.C. Cir. 1994) (ruling that a "criminal must, during the commission of the bank robbery, in some manner display an object reasonably perceived as capable of inflicting bodily harm"); United States v. Perry, 991 F.2d 304, 308 (6th Cir. 1993) (holding that the display of a toy or wooden gun during a bank robbery constitutes "use").

141. *See, e.g.*, *Perry*, 991 F.2d at 309–10 (concluding that "use" clearly connotes something more than mere "possession," and that Congress had the opportunity to create an enhanced statutory penalty for mere possession of a gun but declined to do so).

bank robber is armed.[142] Overall, a display or gesture consistent with using an actual weapon contributes to a solid reasonable belief that an object is a real weapon because victims would have a concrete basis—the display or gesture—upon which to form their reasonable belief.

2. Did the robber couple a gesture or display with threats suggesting that the object was a genuine weapon?

A display or gesture coupled with a threat indicating the object was a weapon would further heighten a reasonable belief that the object was actually a weapon.[143] To begin, a mere threat would not suffice as courts consistently find that threats or words *alone* do not qualify as a "dangerous weapon or device."[144] Additionally, only alluding to a weapon would likely be enough to satisfy § 2113(a)'s "force and violence, or intimidation" requirements.[145] If, however, words alone were enough to satisfy § 2113(d), then the same problem created by the purely subjective test remains: threats alone would make § 2113(a) and (d) indistinguishable.[146] Moreover, should threats alone

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142. *See id.* at 309 (concluding that a concealed weapon would not render a deadly or extreme police response and would not pose any greater risk to victims, bystanders, or police).

143. Threats indicating an object is a weapon can take various forms. *See* United States v. Jones, 84 F.3d 1206, 1208 (9th Cir. 1996) (involving a defendant who gave a teller a note reading, "This is a robbery. I have a gun. Don't push any alarms. And don't want dye packs"); United States v. Benson, 918 F.2d 1, 2 (1st Cir. 1990) (concerning a situation in which a robber told a teller that "this is a hold up" and that he had a gun).

144. *See, e.g.*, United States v. Wolfe, 245 F.3d 257, 262 (3d Cir. 2001) (concluding that threatening words and gestures alone do not constitute a dangerous device under § 2113(d)). *But see Jones*, 84 F.3d at 1211 (convicting a defendant who told tellers he had a gun, but never revealed the gun). However, in *Jones*, the court determined that the reference to the gun during the robbery amounted to more than a threat because a gun was later found in the defendant's possession. *Id.*

145. *See* United States v. Ray, 21 F.3d 1134, 1140 (D.C. Cir. 1994) (determining that threatening words might satisfy § 2113(a) but do not amount to a "dangerous device" under § 2113(d)).

146. *See Wolfe*, 245 F.3d at 262 (concluding that permitting a mere threat of violence to count as a dangerous device would effectively circumvent legislation designed to deter criminals who commit crimes while armed with a weapon or dangerous device); *see also Ray*, 21 F.3d at 1140 ("To treat . . . [threats] as also satisfying the use-of-a-dangerous-device element in § 2113(d) would be to merge the two sections together when Congress meant them to remain apart."). *But see* United States v. Ferguson, 211 F.3d 878, 883 (5th Cir. 2000) ("[W]hen a defendant announces that he possesses a gun during a robbery, a jury may reasonably infer that the defendant actually possessed a gun."); *Jones*, 84 F.3d at 1211 (same); *Ray*, 21 F.3d at 1141 n.11 (same). However, as previously mentioned, § 2113(d) requires "use," not possession of a weapon or device. 18 U.S.C. § 2113(d) (2012) (requiring a bank

constitute a "dangerous device," the prosecution would only have to prove a bank robber *claimed* to have a weapon, not that he actually *had* a weapon.[147] To remain consistent with case law, the hybrid approach requires a threat to accompany a display or gesture.

3. Did the robber have the subjective intent to brandish the object as a weapon?

By using an object as a weapon, a bank robber believes that his victims will think the object is a dangerous weapon;[148] the robber's belief therefore justifies a victim's reasonable belief. Someone subjectively intending[149] to brandish an object as a weapon will likely do everything possible to convince victims that the object is an actual weapon,[150] as weapons are integral to bank robberies.[151] Otherwise, the bank robber might not be able to force victims to comply with his commands, which is necessary for a successful bank robbery.[152]

A bank robber might try to negate his subjective intent by making statements indicating that he did not want anyone to believe the

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robber to place one's life in jeopardy by "the *use* of a dangerous weapon or device") (emphasis added).

147. *Wolfe*, 245 F.3d at 261.

148. *See* Melissa Ellen Dyan, *Dangerousness Is in the Eye of the Beholder*—United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989)*, 23 SUFFOLK U. L. REV. 1141, 1145 (1989) (examining *Martinez-Jimenez* and concluding that a robber carrying a toy gun wants victims to believe it is a real gun).

149. The robber's subjective *intent* referred to in this section is not to be confused with the subjective *approach* mentioned above, which considers the subjective reaction of a bank robbery victim.

150. *See* United States v. Benson, 725 F. Supp. 69, 72 (D. Me. 1989) (concluding that the defendant "intended and succeeded in using the silver knife in his pocket as a mock gun in order to scare the teller into providing him with bank funds"), *aff'd*, 918 F.2d 1 (1st Cir. 1990).

151. *See* United States v. Martinez-Jimenez, 864 F.2d 664, 667 (9th Cir. 1989) (noting a robber's testimony that he carried a toy gun because he "felt secure with it" and suggested he might not have begun the robbery without it); *see also* United States v. Dobbins, No. 96-4233, 1998 WL 598717, at *6 (6th Cir. Aug. 27, 1998) (expressing that the defendant's gun was "not tangentially related" to the bank robbery because guns are an integral part of the act).

152. In the context of guns, courts allow the jury to infer a gun is loaded because a bank robber who displays a gun wants his victims to *believe* it is loaded. *See, e.g.*, Morrow v. United States, 408 F.2d 1390, 1391 (8th Cir. 1969) (holding that pointing shotguns at employees to back up demands is sufficient evidence that the robbers wanted the employees to believe the guns were loaded). Similarly, a bank robber wielding an object as a weapon likely wants his victims to believe it is actually a weapon that can harm. *See Benson*, 725 F. Supp. at 72 (describing a situation in which a defendant "intended and succeeded in using the silver knife in his pocket" as a "mock gun").

robbery involved a real weapon.[153] However, such statements could be self-serving, meaning that a robber might say anything to lessen or escape punishment.[154] The hybrid approach also alleviates this concern because it considers contextual factors, such as whether the robber threatened or displayed the object in a weapon-like manner that could corroborate the robber's subjective intent to wield the object as a weapon. Overall, identifying the bank robber's subjective intent to brandish an object as a weapon is important to consider because if the robber successfully convinces victims the object is a weapon, their compliance with the robber's demands supports a reasonable belief that the object is a real weapon.

4. Did the manner in which the object was used produce a charged and hostile environment?

A reasonable belief that a bank robber is wielding a genuine weapon does not require that the object be an actual weapon: a teller will likely react to both in the same way, and such a situation would likely create a hostile environment.[155] Recall that courts find that toy guns and unloaded guns create the risk that police or bank guards will respond to a bank robbery with deadly force.[156] Officers must also formulate quick and therefore less efficient responses to a situation that poses a threat to human life.[157] Such rushed decisions

153. *See Martinez-Jimenez*, 864 F.2d at 665 (containing a codefendant's statement that neither he nor the other defendant wanted the bank employees to believe that they were using a real gun and that they did not want the bank employees to be fearful for their lives).

154. *See* United States v. Ramirez, No. 90-10622, 1991 WL 144550, at *2 n.1 (9th Cir. Aug. 1, 1991) (allowing the district court "to disbelieve the [defendant's] self-serving statements denying that he had ever had a gun, even a fake one, at any of the robberies to which he pleaded guilty"); United States v. Cannon, 903 F.2d 849, 854 (1st Cir. 1990) (indicating that a defendant's statements regarding whether he used a toy gun during a robbery were self-serving to some extent and the jury could have rejected them); United States v. Marshall, 427 F.2d 434, 437 (2d Cir. 1970) (classifying a defendant's statement that he "took the shell out of the chamber so nobody could get hurt while [he] was in the bank," as "entirely self-serving").

155. *See Martinez-Jimenez*, 864 F.2d at 666 (noting that a bank robber carrying a toy gun forces his victims to feel apprehensive).

156. *See supra* Section I.C.1; *see also* John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 307 (2002) (suggesting that, based on the *McLaughlin* decision, an apparent weapon brings dangers beyond just those normally associated with a bank robbery).

157. *Martinez-Jimenez*, 864 F.2d at 666–67.

create the potential for a bystander, bank employee, or the bank robber himself to be caught in the crossfire.[158]

These sources of injury will likely also exist when the bank robber is using an apparent weapon, as long as police and victims reasonably believe the object is a genuine weapon.[159] To illustrate, individuals who alert authorities to the situation will relay information based on whether they believe that the bank robber's object is an actual weapon. Bank guards and police officers will likely respond with deadly force if witness information or their own assessment leads them to believe that the robber has a weapon, real or not. Consequently, if victims reasonably believe the object is a real gun, then the atmosphere will likely turn hostile or adverse, which would further corroborate a reasonable belief that the object is a real weapon.

B. Distilling the Hybrid Approach

All of the previously discussed elements aim to establish whether it was reasonable under the circumstances for a witness to believe that the bank robber was wielding a weapon during the robbery. The hybrid standard must have a high threshold to determine that a victim had a reasonable belief because it seems counterintuitive to convict a defendant of "armed bank robbery" for using an inherently harmless object to rob a bank. Also, the reasonableness of this belief is paramount to striking a proper balance between enhancing a robber's punishment when appropriate and remaining fair to the defendant.[160] Moreover, this belief must be reasonable because allowing an inherently harmless object to satisfy § 2113(d) seems to defy its plain language: jeopardizing someone with a *dangerous weapon or device*.[161] Allowing harsher punishment for inherently harmless objects could blur the lines between armed and unarmed bank robbery.[162] Considering all these concerns, the hybrid approach

158. See Decker, *supra* note 156, at 307 (noting that the use of what "appears to be a dangerous weapon" increases the danger to innocent bystanders because a security guard would feel justified in using deadly force).

159. *Id.* (interpreting *McLaughlin* and concluding that apparently dangerous weapons create increased risks).

160. *Cf.* United States v. Levine, 658 F.2d 113, 125 (3d Cir. 1981) (emphasizing that "repose and fairness for defendants" are historically fundamental to the criminal justice system).

161. One notion regarding § 2113(d) is that "common sense" leads to the conclusion that life must be in actual danger. United States v. Burger, 419 F.2d 1293, 1294 (5th Cir. 1969).

162. *See* Dyan, *supra* note 148, at 1146–47 (arguing that after *McLaughlin*, courts could characterize ineffectual weapons as dangerous and render § 2113(d)'s

necessitates a strong reasonable belief that an object is a weapon, based on all circumstances surrounding the situation.

Courts should require prosecutors to establish all elements to satisfy the hybrid standard. However, considering each element independently takes away from the overall flexible nature of a hybrid approach.[163] Courts should examine each element in light of the others because the elements are interrelated and build on one another. To illustrate, a threat alone does not satisfy the proposed hybrid approach. But a threat paired with a display or gesture heightens one's reasonable belief that the object is a weapon. Further, a bank robber displaying and using the object to threaten others in a manner consistent with a genuine weapon evidences the robber's subjective intent to portray that object as a gun.[164] Finally, if a victim maintains a reasonable belief the object is a gun, the entire situation becomes hostile with the potential for deadly consequences.[165]

As illustrated, each element builds on the others; however, the most important factor would be whether the object creates a highly charged atmosphere. The highly charged atmosphere, with the risk of violent retaliation, is the source from which § 2113(d) derives its jeopardy requirement. The "highly charged atmosphere" element is key in determining if individuals are exposed to jeopardy through the use of a "dangerous weapon or device."[166]

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dangerous weapon requirement virtually meaningless). Dyan notes that there are valid public policy reasons to support courts concluding that toy weapons are dangerous, but she argues that these reasons do not justify expanding what constitutes dangerous weapons, necessitating a literal construction of § 2113(d) to protect a defendant's rights. *See id.*; *cf.* Ponsoldt, *supra* note 114, at 382–83 (arguing that there is a significant distinction between unloaded guns and toy guns in terms of allowing the jury to infer a gun is loaded).

163. *See* Nourse, *supra* note 133, at 36 (explaining that the subjective aspects of a hybrid approach allow "standard-like flexibility").

164. *See* United States v. Benson, 725 F. Supp. 69, 72 (D. Me. 1989) (noting that the defendant "intended and succeeded" in using a knife as a "mock gun"), *aff'd*, 918 F.2d 1 (1st Cir. 1990).

165. *See* United States v. Martinez-Jimenez, 864 F.2d 664, 665–66 (9th Cir. 1989) (asserting that the bank robbery victims were fearful they would be harmed because they believed the toy gun was real).

166. *See* Baker v. United States, 412 F.2d 1069, 1072 (5th Cir. 1969) (concluding the capacity of a gun to harm, combined with a highly charged atmosphere, and the possibility of employees and others trying to prevent the robbery, is a "complex of circumstances" jeopardizing individuals in one of various ways). The same notion is applicable in a situation where an object is believed to be a weapon; people will react the same way as when faced with a real weapon, creating the same "complex of circumstances" that can jeopardize them. *Id.*

C. Possible Critiques of the Hybrid Approach

Like any criminal law standard, the hybrid approach has potential flaws. Critics will likely argue that an object portrayed as a weapon is incapable of actually jeopardizing anyone as required by § 2113(d). The hybrid approach, however, focuses on the harms stemming from using an object as a weapon and not the ability of the object itself to actually harm.[167] Though it may seem absurd to classify an inherently harmless object as a "dangerous weapon or device," an object that one reasonably believes is a weapon can still amplify the dangerousness of a bank robbery. Considering any additional harms created when a bank robber wields an object is crucial because those who subject others to high risks of injury during a bank robbery deserve harsher punishment.[168]

Another critique of the hybrid standard involves a victim's perceptions of the apparent weapon. Defendants have argued that victims faced with apparent weapons become so fearful that they cannot distinguish between a harmless object and a gun, rendering § 2113(d) inapplicable. Arguably, a victim should be able to distinguish between a real weapon and a harmless object.[169] The hybrid approach considers this argument. Because the hybrid approach considers whether a victim's belief is reasonable, it is important to remember that a victim's perceptions during a robbery can be impaired.[170] A bank robbery is a precarious situation with

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167. The hybrid approach focusing on the harms created is derived from *Martinez-Jimenez*, which concluded that § 2113(d) focuses on the harms created, not the manner creating the harm. 864 F.2d at 666. Because objects purported to be guns are inherently harmless, the "jeopardy" necessary under § 2113(d) must be derived from the entire situation. *Id.*

168. After all, the purpose of the Federal Bank Robbery Act is to severely punish people for committing crimes against banks and deterring persons from attempting those crimes. 78 CONG. REC. 8148 (1934) (statement of Rep. Glover) (stating that the bill's purpose was to "provide[] a punishment that will deter anyone from attempting bank robbery").

169. *See* United States v. Roach, 321 F.2d 1, 4 (3d Cir. 1963) (involving an argument suggesting it was likely that the teller was so overcome with fear that she was unable to distinguish a gun from a gloved hand); *see also Martinez-Jimenez*, 864 F.2d at 667 (rejecting the appellant's argument that testimony surrounding a teller's fear was based on the mistaken assessment of an apparent threat).

170. *See Martinez-Jimenez*, 864 F.2d at 667 (explaining that people faced with what they believe to be a deadly weapon "cannot be expected to maintain a high level of critical perception"); *see also* United States v. Crouthers, 669 F.2d 635, 639 (10th Cir. 1982) (indicating it would be unreasonable to expect a victim of a robbery to risk his life to positively ensure that a robber did indeed have a functional weapon); *cf.* Baker v. United States, 412 F.2d 1069, 1071–72 (5th Cir. 1969) (explaining that guns are

fears of injury, or even death. Victims—faced with what they believe to be an actual weapon—are under immense pressure because of the apparent threat of harm. Accordingly, the reasonable belief that the object is a weapon creates the same fear of injury as would a real weapon, and victims cannot always be expected to make accurate assessments of the situation in light of this apprehension.

D. Reanalyzing United States v. Dixon *Under the Hybrid Approach*

The Seventh Circuit would likely have affirmed Dixon's § 2113(d) convictions under the proposed hybrid approach. Recall that the Seventh Circuit decided that the lighter Dixon used did not constitute a dangerous weapon.[171] The prosecution's argument essentially mirrored certain components of the hybrid standard: the tellers reasonably believed an object—the lighter—was a gun, and the object had the potential to invoke a violent response.[172] Ignoring this argument, the Seventh Circuit instead used the objective approach: the proper analysis was not whether the tellers mistakenly believed the lighter was a weapon, but whether the lighter was actually a weapon.[173] While mentioning that the lighter might have been considered a "dangerous device," the court barely discussed how Dixon brandished the lighter as a gun.[174] However, Dixon *did* brandish the lighter as a gun—the exact situation that the proposed hybrid standard encompasses—and a reasonable person in the teller's position likely would have perceived the situation as one involving a real gun.

First, Dixon satisfied both the "threat" and "display" elements of the hybrid test by making gestures, displays, and threats all in a manner indicating the lighter was a real gun. While robbing one bank, Dixon waved a bag containing a "stiff object" at tellers and threatened

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commonly known and treated as dangerous and a person confronted with a gun would still think it was dangerous without knowing whether there was a round in the chamber). Similarly, a person confronted with an object he or she believed to be a weapon would perceive the object as dangerous until he or she learned otherwise.

171. *See* United States v. Dixon, 790 F.3d 758, 760 (7th Cir. 2015) (holding that the long-barreled lighter could have been considered a dangerous device but not a dangerous weapon), *cert. denied*, 136 S. Ct. 425 (2015).

172. *See id.* at 761 (recounting the prosecution's argument).

173. *Id.*

174. *Id.* at 760–61. The court mentioned briefly that whether the teller mistook the lighter for a gun would have been clear if Dixon had pointed his finger simulating a gun or used a wooden dowel to simulate a gun barrel. *Id.* However, the court did not extensively comment on the fact that Dixon was actually brandishing the lighter as a gun.

them saying, "Five seconds or I'm gonna shoot."[175] While robbing another bank, Dixon brandished the long-barreled lighter and directed a teller to "give him the money or he would shoot."[176] Dixon also pressed the lighter against a teller's neck while simultaneously threatening to shoot.[177] These gestures and threats to "shoot" could have implied only one thing: that Dixon had a gun. A teller who feels a cold, barrel-like object against the back of her neck, while also hearing the word "shoot," would probably immediately believe the encounter involved a real gun. All of the threats and gestures Dixon made were consistent with how one would brandish an actual gun, satisfying the "threat" and "gesture" prongs of the hybrid approach.

Second, Dixon also satisfied the "subjective intent" element of the hybrid approach, as a court could reasonably infer that Dixon intended to brandish the lighter as a firearm based on his threats, gestures, and displays. Primarily, his threats to "shoot" strongly indicate his intent to brandish the lighter as a gun. Had Dixon wanted to rob the bank using the lighter as a *lighter*, he likely would have threatened to burn the teller or set the bank on fire. Instead, he threatened to "shoot," which is specific to a gun. Further, if he wanted to use the lighter as a lighter, he probably would not have concealed it in the bag. Dixon keeping the lighter in the bag indicates that he did not want the tellers to know he only had a lighter, and instead wanted the tellers to infer it was a gun. Dixon also pressed the lighter's barrel to a teller's neck. While this act *alone* could indicate Dixon wanted to use the lighter as a lighter, Dixon *simultaneously* threatened to "shoot."[178] This combination of actions clearly evinces his intent to brandish the lighter as a gun. Because Dixon did not use the lighter in a manner consistent with an actual lighter and instead used the lighter in a manner consistent with an actual gun, his subjective intent was likely to brandish the lighter as a gun.

Finally, Dixon's use of the lighter likely satisfies the "hostile environment" element, although it is unclear from the opinion. The court responded to the prosecution's "risk of gunfire" argument by stating that "[i]f the lighter risked gunfire, so might a finger in a pocket or a dowel in a pocket or a water pistol in a pocket or even a kielbasa in a pocket."[179] The court's hypothetical commentary

175. *Id.* at 760.
176. *Id.*
177. *Id.* at 760–61. The opinion does not indicate during which robbery this occurred.
178. *Id.*
179. *Id.* at 761.

indicates that it was either skeptical or did not consider that jeopardy can stem from sources other than the object itself.[180] The court also did not consider the possibility that tellers or guards would likely have reacted the same way to a kielbasa—or the lighter—if they reasonably believed it was a gun. While the opinion does not indicate that police or bank guards opened fire, the possibility of a deadly response still existed, assuming the tellers reasonably believed the lighter was actually a gun.[181] Overall, if the tellers or guards reasonably believed the lighter was a gun, then police or guard retaliatory measures would likely have included deadly force, satisfying § 2113(d)'s jeopardy requirement.

The hybrid standard would eradicate the need to delve into the tellers' subjective intricacies. Responding to the prosecution's argument that the tellers reasonably believed the lighter was dangerous, the court hypothesized of a teller being terrified of rabbits, implying that rabbits could be considered "dangerous weapons."[182] The hybrid approach effectively reconciles this seemingly absurd reasoning. Because the hybrid standard calls for a reasonable person in the victim's situation *and* details the specific elements—displays, gestures, threats, robber intent, and hostile situation—to consider, it necessarily eliminates having to examine any specific subjective features of a victim herself. To illustrate, a victim's phobia of rabbits would not be considered because the elements focus on the situation objectively and how a *reasonable teller in that specific situation* would experience them. Put another way, the approach views a totality of the circumstances to determine the reasonableness of the teller's belief that the lighter was a gun. A fear of rabbits is extremely subjective, and a person with a phobia of rabbits would likely fall outside the hybrid's "reasonable person" standard. Conversely, a fear of a gun or weapon will almost always be reasonable.[183] Therefore, the hybrid approach would still consider

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180. The court specifically articulated that the *McLaughlin* characteristics, as to why an unloaded gun is dangerous, do not apply to a kielbasa. *See id.* (outlining the *McLaughlin* opinion and stating that "[n]one of these things is true about a kielbasa").

181. Case law indicates that a violent response does not *actually* have to occur, merely that there is an increased risk that a violent response *could* occur. *See* McLaughlin v. United States, 476 U.S. 16, 18 (1986) (ruling that an unloaded gun creates an immediate *danger* of a violent response).

182. *Dixon*, 790 F.3d at 761.

183. *See McLaughlin*, 476 U.S. at 17 (noting that a "gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one"); United States v. Arafat, 789 F.3d 839, 847 (8th Cir. 2015) (highlighting that guns instill fear in average citizens), *cert. denied*, 136 S. Ct. 379

subjective qualities in a sense, but it considers those subjective qualities of a reasonable person in the situation, not the idiosyncrasies of each individual victim.

The Seventh Circuit adhered to the purely objective standard when analyzing whether the lighter was a dangerous weapon, but the hybrid approach renders a different outcome. The tellers likely had a reasonable belief that the lighter was a gun based on Dixon's gestures and threats, creating the potential for a violent response placing everyone in jeopardy, as § 2113(d) requires. Essentially, analyzing *Dixon* under the hybrid approach would likely have caused the Seventh Circuit to affirm Dixon's § 2113(d) convictions.

IV. A RECOMMENDED REWORDING OF § 2113(D)

Considering the language of § 2113(d), a harmless object brandished as a weapon cannot literally be defined as a "dangerous weapon or device."[184] However, a specific rewording of the section could encompass situations such as the one in *Dixon*. Section 2113(d) could be reworded to address that issue:

> 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 an actual dangerous weapon or device, *or by any object, which the user intended to convince his or her victim was a gun or other weapon and did so convince the victim*, shall be fined under this title or imprisoned not more than twenty-five years, or both.[185]

The above language would encompass situations that the hybrid approach aims to analyze, and under this language, the *Dixon*

(2015).

184. 18 U.S.C. § 2113(d) (2012).

185. This language is derived from the Kentucky Supreme Court's interpretation of a Kentucky regular armed robbery statute. *See* Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965) ("We hold that within the context of this [armed robbery] statute any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one."). Indeed, many state courts and state statutes contemplate objects purported to be weapons used during an ordinary robbery. *See, e.g.*, COLO. REV. STAT. § 18-4-302 (1)(d) (2013) (proscribing aggravated robbery, which occurs when a defendant "possesses any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or represents verbally or otherwise that he is then and there so armed"); People v. Dwyer, 155 N.E. 316, 317 (Ill. 1927) (holding that when the character of the weapon used in a robbery is doubtful, it is a question for the jury to consider the weapon, the manner in which it was used, and the circumstances of the case).

decision would have been simple: Dixon intended to convince the tellers the lighter was a gun, and he likely did convince them. Moreover, because a goal of the Federal Bank Robbery Act is to deter persons from attempting bank robberies, increasing the punishment for bank robbers who endeavor to use objects as weapons arguably could deter individuals from even attempting this specific act.[186]

CONCLUSION

The "armed bank robbery" provision of the Federal Bank Robbery Act can logically encompass situations like the one in *Dixon*. Bank robbery victims encountering a bank robber wielding an object during a bank robbery can reasonably believe that object is actually a weapon. This Comment argued that a hybrid approach would effectively help courts analyze situations like the one that occurred in *Dixon*. Specifically, under the hybrid approach, a bank robber brandishing an object as a weapon would violate § 2113(d) when a reasonable person in the victim's situation would have believed the object was actually a weapon.

Someone who chooses to use an object—as opposed to a genuine weapon—to rob a bank should not be absolved of harsher punishment when the robbery victims reasonably believe the object is a weapon. Under this reasonable belief, those involved would likely react to the object as if it were a real weapon. These reactions would likely include retaliatory deadly force, which is where § 2113(d) derives its jeopardy requirement. Under the hybrid approach, if those involved discover, in whatever way, the object is not a weapon, then there is no longer a reasonable belief and § 2113(d) is not applicable.[187] However, it seems counterintuitive not to impose a higher punishment on a bank robber who attempts to rob, or even *successfully* robs, a bank by convincing everyone involved that an object

186. It is important to keep in mind that if a court decided, under the hybrid approach, that a victim did *not* have a reasonable belief the object was a weapon, he could still be punished under § 2113(a). However, individuals who use inherently harmless objects as weapons to rob a bank should, at least, have the *potential* to receive § 2113(d)'s harsher punishment, pending whether a victim's belief that the object was a weapon was reasonable.

187. For an interesting example of a clearly simulated weapon, see Patrick Edgell, *Irate Customer Raises 'Finger Guns' in Attempted Bank Robbery*, KESQ (Aug. 4, 2015 1:29 PM) http://www.kesq.com/news/irate-customer-uses-finger-guns-in-attempted-bank-robbery/34528620, covering an incident in which a woman attempted to rob a bank by raising a finger, imitating a gun. Under the hybrid approach, any reasonable belief that the woman was wielding an actual would be destroyed upon seeing the simulated "gun."

is actually a weapon. Accordingly, the hybrid approach proposes a framework effectively balancing the need to punish defendants appropriately, while also remaining fair to those defendants.

Dixon raised an interesting question: how is a kielbasa in a bank robber's pocket different from a gun? Logic would certainly argue there is a huge difference, and that no one has ever been shot with a kielbasa. However, there may be a time when a sly bank robber convinces everyone that the kielbasa he wields is actually a gun, rendering the innocent nature of this otherwise harmless delectable sinister.