SUPREME COURT OF THE UNITED STATES

No. 99–5716

FLOYD J. CARTER, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 12, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

At common law, robbery meant larceny *plus* force, violence, or putting in fear. Because robbery was an aggravated form of larceny at common law, larceny was a lesser included offense of robbery. Congress, I conclude, did not depart from that traditional understanding when it rendered "Bank robbery and incidental crimes" federal offenses. Accordingly, I would hold that petitioner Carter is not prohibited as a matter of law from obtaining an instruction on bank larceny as a lesser included offense. The Court holds that Congress, in 18 U. S. C. §2113, has dislodged bank robbery and bank larceny from their common-law mooring. I dissent from that determination.

I

The Court presents three reasons in support of its conclusion that a lesser included offense instruction was properly withheld in this case under the elements-based test of *Schmuck* v. *United States,* 489 U. S. 705 (1989). First, the Court holds that bank larceny contains an "intent to steal" requirement that bank robbery lacks. *Ante,* at 10–14. Second, the Court concludes that larceny con-

tains a requirement of carrying away, or "asportation," while robbery does not. *Ante*, at 15. And third, the Court states that the "value exceeding $1,000" requirement in the first paragraph of the larceny statute is an element for which no equivalent exists in the robbery statute. *Ante*, at 15–17. The Court's first and second points, I conclude, are mistaken. As for the third, I agree with the Court that the "value exceeding $1,000" requirement is an element essential to sustain a conviction for the higher degree of bank larceny. I would hold, however, that Carter was not disqualified on that account from obtaining the lesser included offense instruction he sought.

I note at the outset that the structure of §2113 points strongly toward the conclusion that bank larceny is a lesser included offense of bank robbery. Section 2113(c) imposes criminal liability on any person who knowingly "receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank . . . in violation of subsection (b)." If bank larceny, covered in §2113(b), contains an intent or asportation element not included in bank robbery, covered in §2113(a), then §2113(c) creates an anomaly. As the Court concedes, *ante*, at 6, under today's decision the fence who gets his loot from a bank larcenist will necessarily receive property "stolen . . . in violation of subsection (b)," but the one who gets his loot from a bank robber will not. Once it is recognized that bank larceny is a lesser included offense of bank robbery, however, the anomaly vanishes. Because anyone who violates §2113(a) necessarily commits the lesser included offense described in §2113(b), a person who knowingly receives stolen property from a bank robber is just as guilty under §2113(c) as one who knowingly re-

ceives stolen property from a bank larcenist.[1]

I emphasize as well that the title of §2113 is "Bank robbery and incidental crimes." This Court has repeatedly recognized that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 234 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947)).[2] Robbery, all agree, was an offense at common law, and this Court has consistently instructed that courts should ordinarily read federal criminal laws in accordance with their common-law origins, if Congress has not directed otherwise. See *Neder* v. *United States,* 527 U. S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (internal quotation marks and modifications omit-

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[1] I further note, and the Court does not dispute, that under today's holding the Double Jeopardy Clause would not bar the Government from bringing a bank larceny prosecution against a defendant who has already been acquitted– or, indeed, convicted– by a jury of bank robbery on the same facts. See *Blockburger* v. *United States,* 284 U. S. 299 (1932) (Double Jeopardy Clause does not bar consecutive prosecutions for a single act if each charged offense requires proof of an element that the other does not); Tr. of Oral Arg. 46–47 (in response to Court's inquiry, counsel for the Government stated that, under the Government's construction of §2113, if a jury acquitted a defendant on an indictment for bank robbery, it would be open to the prosecution thereafter to seek the defendant's reindictment for bank larceny).

[2] The majority says that courts may use a statutory title or heading only to "shed light on some ambiguous word or phrase," but not as a guide to a statute's overall meaning. See *ante*, at 10. Our cases have never before imposed such a wooden and arbitrary limitation, and for good reason: A statute's meaning can be elusive, and its title illuminating, even where a court cannot pinpoint a discrete word or phrase as the source of the ambiguity.

ted)); *Evans* v. *United States,* 504 U. S. 255, 259 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' ") (quoting *Taylor* v. *United States,* 495 U. S. 575, 592 (1990)); *United States* v. *Turley,* 352 U. S. 407, 411 (1957) ("We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."). As we explained in *Morissette* v. *United States,* 342 U. S. 246 (1952):

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.,* at 263.

In interpreting §2113, then, I am guided by the common-law understanding of "robbery and incidental crimes." At common law, as the Government concedes, robbery was an aggravated form of larceny. Specifically, the common law defined larceny as "the felonious taking, and carrying away, of the personal goods of another." 4 W. Blackstone, Commentaries *230 (Blackstone) (internal quotation marks omitted). Robbery, in turn, was larceny effected by taking property from the person or presence of another by means of force or putting in fear. Brief for United States 29–30 (citing 2 W. LaFave & A. Scott, Substantive Criminal Law §8.11, pp. 437–438 (1986) (LaFave & Scott)). Larceny was therefore a lesser included offense of robbery at common law. See 4 Blackstone *241 (robbery is "[o]pen and violent larciny from the person" (emphasis

deleted)); 2 E. East, Pleas of the Crown §124, p. 707 (1803) (robbery is a species of "aggravated larceny"); 2 W. Russell & C. Greaves, Crimes and Misdemeanors *101 ("robbery is an aggravated species of larceny").

Closer inspection of the common-law elements of both crimes confirms the relationship. The elements of common-law larceny were also elements of robbery. First and most essentially, robbery, like larceny, entailed an intentional taking. See 4 Blackstone *241 (robbery is "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear"); 2 East, *supra,* at 707 (robbery is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"). Second, as the above quotations indicate, the taking in a robbery had to be "felonious," a common-law term of art signifying an intent to steal. See 4 Blackstone *232 ("This taking, and carrying away, must also be *felonious;* that is, done *animo furandi* [with intent to steal]: or, as the civil law expresses it, *lucri causa* [for the sake of gain]."); Black's Law Dictionary 555 (5th ed. 1979) ("Felonious" is "[a] technical word of law which means done with intent to commit crime"). And third, again like larceny, robbery contained an asportation requirement. See 2 LaFave & Scott §8.11, at 439 ("Just as larceny requires that the thief both 'take' (secure dominion over) and 'carry away' (move slightly) the property in question, so too robbery under the traditional view requires both a taking and an asportation (in the sense of at least a slight movement) of the property." (footnotes omitted)). Unlike larceny, however, robbery included one further essential component: an element of force, violence, or intimidation. See 4 Blackstone *242 ("[P]utting in fear is the criterion

that distinguishes robbery from other larcinies.").[3]

Precedent thus instructs us to presume that Congress has adhered to the altogether clear common-law understanding that larceny is a lesser included offense of robbery, unless Congress has affirmatively indicated its design, in codifying the crimes of robbery and larceny, to displace their common-law meanings and relationship.

Far from signaling an intent to depart from the common law, the codification of §2113's predecessor statute suggests that Congress intended to adhere to the traditional ranking of larceny as a lesser included offense of robbery. There is no indication at any point during the codification of the two crimes that Congress meant to install new conceptions of larceny and robbery severed from their common-law foundations.

Prior to 1934, federal law did not criminalize bank robbery or larceny; these crimes were punishable only under state law. Congress enacted the precursor to

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[3] English courts continue to recognize larceny as a lesser included offense of robbery. See, *e.g., Regina* v. *Skivington,* 51 Crim. App. 167, 170 (C. A. 1967) ("[L]arceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offense of robbery . . . ."). After the enactment of the Theft Act, 1968, which consolidated the crimes of larceny, embezzlement, and fraudulent conversion into the single crime of theft, see *Director of Public Prosecutions* v. *Gomez,* 96 Crim. App. 359, 377 (H. L. 1992) (Lord Lowry, dissenting), English courts reaffirmed that theft remains a lesser included offense of robbery, see *Regina* v. *Guy,* 93 Crim. App. 108, 111 (C. A. 1991) ("[Section 8(1) of the Theft Act, 1968] makes it clear that robbery is theft with an additional ingredient, namely the use of force, or putting or seeking to put any person in fear of being subjected to force. Therefore anyone guilty of robbery must, by statutory definition, also be guilty of theft.").

Leading commentators agree that larceny is a lesser included offense of robbery. See, *e.g.,* 2 LaFave & Scott §8.11, at 437 ("Robbery . . . may be thought of as aggravated larceny . . . ."); 3 C. Wright, Federal Practice and Procedure §515, p. 22 (2d ed. 1982) ("Robbery necessarily includes larceny . . . .").

§2113(a) in response to an outbreak of bank robberies committed by John Dillinger and others who evaded capture by state authorities by moving from State to State. See *Jerome* v. *United States,* 318 U. S. 101, 102 (1943) (1934 Act aimed at "interstate operations by gangsters against banks– activities with which local authorities were frequently unable to cope"). In bringing federal law into this area, Congress did not aim to reshape robbery by altering the common-law definition of that crime. On the contrary, Congress chose language that practically jumped out of Blackstone's Commentaries:

> "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783.

It soon became apparent, however, that this legislation left a gap: It did not reach the thief who intentionally, though not violently, stole money from a bank. Within a few years, federal law enforcers endeavored to close the gap. In a letter to the Speaker of the House, the Attorney General conveyed the Executive Branch's official position: "The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results." See H. R. Rep. No. 732, 75th Cong., 1st Sess., 1 (1937) (reprinting letter). In particular, the Attorney General cited the example of a thief apprehended after taking $11,000 from a bank while a teller was temporarily absent. *Id.,* at 1–2. He therefore asked Congress to amend the bank robbery statute, specifically to add a larceny provision shorn of any force, violence, or fear requirement. *Id.,* at 2. Congress responded by passing an

Act "[t]o amend the bank robbery statute to include burglary and larceny." Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The Act's new larceny provision, which Congress placed in the very same section as the robbery provision, punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. *Ibid.* There is not the slightest sign that, when this new larceny provision was proposed in terms tracking the common-law formulation, the Attorney General advocated any change in the definition of robbery from larceny *plus* to something less. Nor is there any sign that Congress meant to order such a change. The Act left in place the 1934 Act's definition of bank robbery, which continued to include the word "feloniously," requiring (as the Court concedes, *ante*, at 13) proof by the Government of an intent to steal. 50 Stat. 749.

In its 1948 codification of federal crimes, Congress delineated the bank robbery and larceny provisions of §§2113(a) and 2113(b) and placed these provisions under the title "Bank robbery and incidental crimes." Act of June 25, 1948, §2113, 62 Stat. 796–797. In this codification, Congress deleted the word "feloniously" from the robbery provision, leaving the statute in substantially its present form.

II

That 1948 deletion forms the basis of the Government's prime argument against characterizing §2113(b) as a lesser included offense of §2113(a), namely, that robbery unlike larceny no longer requires a specific intent to steal. The Government concedes that to gain a conviction for robbery at common law, the prosecutor had to prove the perpetrator's intent to steal. The Government therefore acknowledges that when Congress uses the terms "rob" or "robbery" "without further elaboration," Congress intends to retain the common-law meaning of robbery. Brief for

United States 16, n. 9. But the Government contends that the 1948 removal of "feloniously" from §2113(a) showed Congress' purpose to dispense with any requirement of intent to steal.

It is true that the larceny provision contains the words "intent to steal" while the current robbery provision does not.[4] But the element-based comparison called for by *Schmuck* is not so rigid as to require that the compared statutes contain identical words. Nor does *Schmuck* counsel deviation from our traditional practice of interpreting federal criminal statutes consistently with their common-law origins in the absence of affirmative congressional indication to the contrary. Guided by the historical understanding of the relationship between robbery and larceny both at common law and as brought into the federal criminal code, I conclude that the offense of bank robbery under §2113(a), like the offense of bank larceny under §2113(b), has always included and continues to include a requirement of intent to steal.

This traditional reading of the robbery statute makes common sense. The Government agrees that to be convicted of robbery, the defendant must resort to force and violence, or intimidation, to accomplish his purpose. But what purpose could this be other than to steal? The Government describes two scenarios in which, it maintains, a person could commit bank robbery while nonetheless lacking intent to steal. One scenario involves a terrorist who temporarily takes a bank's money or property aiming only to disrupt the bank's business; the other involves an ex-convict, unable to cope with life in a free society, who robs a bank because he wants to be apprehended and returned to prison. Brief for United States 22, n. 13.

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[4] Notably, the Court would read a requirement of intent to steal into §2113(b) even if that provision did not contain such words. *Ante*, at 12.

The Government does not point to any cases involving its terrorist scenario, and I know of none. To illustrate its ex-convict scenario, the Government cites *United States* v. *Lewis*, 628 F. 2d 1276 (CA10 1980), which appears to be the only reported federal case presenting this staged situation. The facts of *Lewis*– a case on which the Court relies heavily, see *ante*, at 11, 14– were strange, to say the least. Hoping to be sent back to prison where he could receive treatment for his alcoholism and have time to pursue his writing hobby, Lewis called a local detective and informed him of his intention to rob a bank. 628 F. 2d, at 1277. He also discussed his felonious little plans with the police chief, undercover police officers, and a psychologist. *Ibid.* He even allowed his picture to be taken so that it could be posted in local banks for identification. *Ibid.* Following his much-awaited heist, Lewis was arrested in the bank's outer foyer by officers who had him under surveillance. *Id.,* at 1278.

I am not sure whether a defendant exhibiting this kind of "bizarre behavior," *ibid.*, should in fact be deemed to lack a specific intent to steal. (The Tenth Circuit, I note, determined that specific intent was present in *Lewis*, for "[t]he jury, charged with the duty to infer from conflicting evidence the defendant's intent, could have concluded that if Lewis was not arrested he would have kept the money and spent it." *Id.*, at 1279.) But whatever its proper disposition, this sort of case is extremely rare– the Government represents that, nationwide, such indictments are brought no more than once per year. Brief for United States 22, n. 13. Moreover, unlike a John Dillinger who foils state enforcers by robbing banks in Chicago and lying low in South Bend, the thief who orchestrates his own capture at the hands of the local constable hardly poses the kind of problem that one would normally expect to trigger a federal statutory response. In sum, I resist the notion– apparently embraced by the Court, see *ante*, at

14– that Congress' purpose in deleting the word "feloniously" from §2113(a) was to grant homesick ex-convicts like Lewis their wish to return to prison. Nor can I credit the suggestion that Congress' concern was to cover the Government's fictional terrorist, or the frustrated account holder who "withdraws" $100 by force or violence, believing the money to be rightfully his, or the thrill seeker who holds up a bank with the intent of driving around the block in a getaway car and then returning the loot, or any other defendant whose exploits are seldom encountered outside the pages of law school exams.

Indeed, there is no cause to suspect that the 1948 deletion of "feloniously" was intended to effect any substantive change at all. Nothing indicates that Congress removed that word in response to any assertion or perception of prosecutorial need. Nor is there any other reason to believe that it was Congress' design to alter the elements of the offense of robbery. Rather, the legislative history suggests that Congress intended only to make "changes in phraseology." H. R. Rep. No. 304, 80th Cong., 1st Sess., A135 (1947). See *Prince* v. *United States,* 352 U. S. 322, 326, n. 5 (1957) ("The legislative history indicates that no substantial change was made in this [1948] revision" of §2113); *Morissette*, 342 U. S, at 269, n. 28 ("The 1948 Revision was not intended to create new crimes but to recodify those then in existence."). As the Third Circuit has recognized, "it seems that the deletion of 'feloniously' was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U. S. C. §1," a statute that has since been repealed.[5] *United States* v. *Mosley*, 126 F. 3d 200, 205 (CA3 1997). See also *United States* v.

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[5] The various classes of federal felonies and misdemeanors are now defined at 18 U. S. C. §3559.

Richardson, 687 F. 2d 952, 957 (CA7 1982) (giving the same account of the 1948 revision). I would not attribute to Congress a design to create a robbery offense stripped of the requirement of larcenous intent in the absence of any affirmative indication of such a design.[6]

Our decision in *Prince* supports this conclusion. The petitioner in that case had entered a bank, displayed a revolver, and robbed the bank. He was convicted of robbery and of entering the bank with the intent to commit a felony, both crimes prohibited by §2113(a). The trial judge sentenced him, consecutively, to 20 years for the robbery and 15 years for the entering-with-intent crime. 352 U. S., at 324. This Court reversed the sentencing decision. The entering-with-intent crime, we held, merges with the robbery crime once the latter crime is consummated. Thus, we explained, the punishment could not exceed 20 years, the sentence authorized for a consummated robbery. *Id.,* at 329. In reaching our decision in *Prince*, we noted that, when the federal bank robbery proscription was enlarged in 1937 to add the entering-with-intent and larceny provisions, "[i]t was manifestly the purpose of Congress to establish lesser offenses." *Id.*, at 327. We further stated that the "heart of the [entering] crime is the intent to steal," and that "[t]his mental element merges into the completed crime if the robbery is consummated." *Id.,* at 328. *Prince* thus conveys the Court's comprehension that an intent to steal is central not only to the entry and larceny crimes, but to robbery as well.

United States v. *Wells,* 519 U. S. 482 (1997), relied on by

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[6] Congress could have provided such an affirmative indication in any number of ways. The simplest would have been to say so in the statute, *e.g.:* "It shall not be a defense that the accused person lacked an intent to steal." Cf. 18 U. S. C. §645 (criminalizing embezzlement by judicial officers, and providing that "[i]t shall not be a defense that the accused person had any interest in [the embezzled] moneys or fund").

the Court, *ante*, at 7–8, is not in point. In that case, we held that the offense of making a false statement to a federally insured bank, 18 U. S. C. §1014, did not include a requirement of materiality. We reached that holding only after concluding that the defendants in that case had not "come close to showing that at common law the term 'false statement' acquired any implication of materiality that came with it into §1014." 519 U. S., at 491. Indeed, the defendants made "no claims about the settled meaning of 'false statement' at common law." *Ibid.* Moreover, we held that "Congress did not codify the crime of perjury or comparable common-law crimes in §1014; . . . it simply consolidated 13 statutory provisions relating to financial institutions" to create a single regulatory offense. *Ibid.* Three of those 13 provisions, we observed, had contained express materiality requirements and lost them in the course of consolidation. *Id.,* at 492–493. From this fact, we inferred that "Congress deliberately dropped the term 'materiality' without intending materiality to be an element of §1014." *Id.,* at 493. Here, by contrast, it is clear that Congress' aim was to codify the common-law offenses of bank robbery and bank larceny; that intent to steal was an element of common-law robbery brought into §2113(a) via the word "feloniously"; and that Congress' deletion of that word was not intended to have any substantive effect, much less to dispense with the requirement of intent to steal.

Having accepted the Government's argument concerning intent to steal, the Court goes on to agree with the Government that robbery, unlike larceny, does not require that the defendant carry away the property. As with intent to steal, the historical linkage of the two crimes reveals the Court's error. It is true that §2113(b) includes the phrase "takes and carries away" while §2113(a) says only "takes." Both crimes, however, included an asportation requirement at common law. See *supra,* at 5. Indeed,

the text of §§2113(a) and (b)– which the Court maintains must be the primary focus of lesser included offense analysis– mirrors the language of the common law quite precisely. At common law, larceny was typically described as a crime involving both a "taking" and a "*carrying away.*" See 4 Blackstone *231 (helpfully reminding us that "*cepit et asportavit* was the old law-latin"). Robbery, on the other hand, was often defined in "somewhat undetailed language," LaFave & Scott §8.11, at 438, n. 6, that made no mention of "carrying away," see 4 Blackstone *231, but was nevertheless consistently interpreted to encompass an element of asportation. The Court overlooks completely this feature of the common-law terminology. I note, moreover, that the asportation requirement, both at common law and under §2113, is an extremely modest one: even a slight movement will do. See LaFave & Scott §8.11, at 439; 2 Russell & Greaves, Crimes and Misdemeanors, at *152–*153. The text of §§2113(a) and (b) thus tracks the common law. The Court's conclusory statement notwithstanding, nothing in the evolution of the statute suggests that "Congress adopted a different view in §2113(a)," *ante*, at 15, deliberately doing away with the minimal asportation requirement in prosecutions for bank robbery. I would hold, therefore, that both crimes continue to contain an asportation requirement.

Finally, the Court concludes that the "value exceeding $1,000" requirement of the first paragraph of §2113(b) is an element of the offense described in that paragraph. I agree with this conclusion and with the reasoning in support of it. See *ante*, at 16. It bears emphasis, however, that the lesser degree of bank larceny defined in §2113(b)'s second paragraph contains no dollar value element even arguably impeding its classification as a lesser included offense of bank robbery. The Government does not contend that the "value not exceeding $1,000" component of that paragraph is an element of the misdemeanor offense,

and such a contention would make scant sense. Surely Congress did not intend that a defendant charged only with the lower grade of bank larceny could successfully defend against that charge by showing that he stole *more* than $1,000. In other words, if a defendant commits larceny without exhibiting the distinguishing characteristics of robbery (force and violence, or intimidation), he has necessarily committed at least the lesser degree of larceny, whether he has taken $500 or $5,000. Under *Schmuck*, then, a defendant charged with bank robbery in violation of §2113(a) is not barred as a matter of law from obtaining a jury instruction on bank larceny as defined in the second paragraph of §2113(b).

I see no reason why a defendant charged with bank robbery, which securely encompasses as a lesser included offense the statutory equivalent of petit larceny, should automatically be denied an instruction on the statutory equivalent of grand larceny if he wants one. It is clear that petit and grand larceny were two grades of the same offense at common law. See 4 Blackstone *229 (petit and grand larceny are "considerably distinguished in their punishment, but not otherwise"). And, as earlier explained, *supra*, at 4–5, robbery at common law was an aggravated form of that single offense. One of the key purposes of *Schmuck*'s elements test is to allow easy comparison between two discrete crimes. See 489 U. S., at 720–721. That purpose would be frustrated if an element that exists only to distinguish a more culpable from a less culpable grade of the same crime were sufficient to prevent the defendant from getting a lesser included offense instruction as to the more culpable grade. I would therefore hold that a defendant charged with the felony of bank robbery is not barred as a matter of law from requesting and receiving an instruction describing as a lesser in-

cluded offense the felony grade of bank larceny.[7]

To be sure, any request by the defendant for an instruction covering the higher grade of bank larceny would be tantamount to a waiver of his right to notice by indictment of the "value exceeding $1,000" element. See *Stirone* v. *United States*, 361 U. S. 212, 215 (1960) (Fifth Amendment requires the Government to get a grand jury indictment before it may prosecute any felony). The constitutional requirement of notice would likely prevent the prosecution from obtaining the same instruction without the defendant's consent. I would limit any such asymmetry, however, to the unusual circumstance presented here, where an element serves only to distinguish a more culpable from a less culpable grade of the very same common-law crime and where the less culpable grade is, in turn, a lesser included offense of the crime charged.

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In sum, I would hold that a defendant charged with bank robbery as defined in 18 U. S. C. §2113(a) is not barred as a matter of law from obtaining a jury instruction on bank larceny as defined in 18 U. S. C. §2113(b). In reaching the opposite conclusion, the Court gives short shrift to the common-law origin and statutory evolution of §2113. The Court's woodenly literal construction gives rise to practical anomalies, see *supra*, at 2–3, and n. 1, and effectively shrinks the jury's choices while enlarging the prosecutor's options. I dissent.

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[7] The court could instruct the jury as to the common elements of both grades of bank larceny, and then add that in order to return a conviction of the higher grade, the jury must also find that the value of the stolen property exceeded $1,000. See Tr. of Oral Arg. 35; 3 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions ¶53.03, p. 53–55 (1999) ("The issue of valuation should be considered by the jury only after they have determined that the defendant is guilty of some type of bank larceny within the meaning of section 2113(b).").