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NOTE

THE FEDERAL BANK ROBBERY ACT—THE PROBLEM OF SEPARATELY PUNISHABLE OFFENSES

The Federal Bank Robbery Act¹ provides a comprehensive scheme for prosecuting and penalizing those who steal from a federally insured bank. The Act encompasses the underlying crimes of entering with felonious intent, robbery, petit and grand larceny, and receiving property stolen from a bank. In addition, the Act has

1. 18 U.S.C. § 2113 (1970). The Act provides in pertinent part:

(a) Whoever, by force and violence, or by intimidation, takes, or 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, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

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

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

provisions directed toward accompanying aggravated circumstances including assault, jeopardizing lives by means of a dangerous weapon, kidnapping, and homicide. The Act establishes penalties for each step of the offense culminating in a maximum of life imprisonment.² The failure of the Supreme Court³ to delineate the precise scope⁴ of the Act has left doubtful whether certain subsections create separately punishable offenses. Asserting that the Act creates merely one offense with alternative means of commission, many courts nevertheless have imposed multiple penalties for each of the various subsections of the Act. In *Prince v. United States*,⁵ the Supreme Court sought to resolve the issue of multiple penalties, striking down pyramided sentences imposed under certain subsections⁶ of the Act. Courts, however, often have ignored or misapplied this decision and have persistently imposed illegal multiple sentences.⁷ Further conflict is evidenced by the differing methods for curing such incorrect sentences and by the opposing views of whether the Act proscribes multiple convictions as well as multiple sentences. This confusion and disagreement demonstrates a need for a thor-

2. The Solicitor General conceded that the provision in the Act for the death penalty upon direction of the jury is a constitutionally impermissible infringement upon the right to trial by jury. *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded*, 392 U.S. 651 (1968). *Cf. United States v. Jackson*, 390 U.S. 570 (1968) (similar provision in Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1970), held unconstitutional; this case was the basis for the concession in *Pope*).

3. *United States v. Gaddis*, 96 S. Ct. 1023 (1976); *Green v. United States*, 365 U.S. 301 (1961); *Heflin v. United States*, 358 U.S. 415 (1959); *Prince v. United States*, 352 U.S. 322 (1957).

4. *See United States v. Gaddis*, 96 S. Ct. 1023 (1976), in which it is noted in the concurring opinion that "district judges have nonetheless made mistakes and there is no reason to believe that the mistakes will completely cease just because the Court today reiterates the correct instructions." *Id.* at 1028 n.* (White, J., concurring).

5. 352 U.S. 322 (1957).

6. *Id.* at 327. Prince was sentenced to 20 years imprisonment for robbery and received a consecutive 15 year sentence for entering the bank with felonious intent under subsections (a), (b), and (d).

7. Illustrative of this failure to heed the *Prince* mandate, as to sentencing, is *Kelsey v. United States*, 484 F.2d 1198 (3d Cir. 1973), in which the appellate court quoted a colloquy between the district judge and defense counsel as to the permissible penalties under the statute:

The Court: Do you know on each of those counts [(a), (b) and (d)] . . . you could be sentenced to a term of imprisonment of 20 years

. . . .

Defense Counsel: Your Honor, I believe it is 20 years on the first two counts [10 on the third] and 25 years on the fourth . . . a total of 75 years. The Court: All right, I stand corrected.

Id. at 1199 n.3.

ough examination of the Federal Bank Robbery Act to determine its correct interpretation and application. Through consideration of double jeopardy implications, statutory construction, and probable adverse collateral consequences engendered by multiple convictions or sentences, this Note will present a proper interpretation of the Act and a desirable method for its implementation in both the indictment and the sentencing stages of prosecution.

LIMITATIONS ON THE POWER OF COURTS TO MULTIPLY OFFENSES UNDER THE ACT

Courts are uncertain about the consequences of a course of conduct violative of more than one provision of the Act; a single robbery of a federally insured bank conceivably could comprehend violations of every subsection. A person could enter the bank with intent to commit robbery,⁸ rob the teller at gunpoint,⁹ walk out of the bank with over \$100,¹⁰ kidnap or kill a bystander in the course of the robbery,¹¹ and later dispose of the proceeds.¹² As each subsection of the Act carries its own separate penalty, such a person theoretically could be convicted under each subsection, with a potential consecutive sentence of over 100 years.

Generally, when such potential for multiple conviction and cumulative sentencing exists, two factors have operated to limit unjust results: the constitutional prohibition against double jeopardy,¹³ and the intent of Congress, when ascertainable, in enacting the criminal statute. The double jeopardy clause of the Constitution not only bars retrial of the same offense after a person has been put in "jeopardy" for a given crime, but also bars multiple punishments for the same offense.¹⁴ The need for a just and workable definition

8. 18 U.S.C. § 2113(a) (1970).

9. *Id.* § 2113(d).

10. *Id.* § 2113(b).

11. *Id.* § 2113(e).

12. *Id.* § 2113(c).

13. "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

14. *See, e.g.,* North Carolina v. Pearce, 395 U.S. 711, 717 (1969); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Holiday v. Johnston*, 313 U.S. 342 (1941), the Supreme Court stated in dictum that "[t]he erroneous imposition of two sentences for a single offense of which the accused has been convicted . . . does not constitute double jeopardy." *Id.* at 349. This statement flatly contradicts the Court's earlier statement in *Lange* that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." 85 U.S. (18 Wall.) 163, 173 (1873). It is surprising that so few courts have

of "same offense" is an inherent problem in this latter prohibition. Courts, struggling to formulate a satisfactory definition, have devised a myriad of tests for determining whether more than one offense have been committed.¹⁵ A majority of jurisdictions follow the "same evidence" test, which the Supreme Court adopted and has never overruled. This test provides that when the same act violates two statutory provisions, two offenses may be charged if each provi-

criticized the *Holiday* dictum, because it states a concept totally repugnant to well established double jeopardy doctrine. The First Circuit has contested the dictum's validity, noting the "brevity and lack of citation for [the] statement and the strong precedent both before [*Holiday*] and since" *O'Clair v. United States*, 470 F.2d 1199, 1204 n.5 (1st Cir. 1972), *cert. denied*, 412 U.S. 921 (1973). The court refused to read *Holiday* as approving multiple punishment for the same offense, commenting that at most it meant that "a sentence 'erroneous' under the [Federal Bank Robbery Act] cannot rise to a constitutional complaint, at least for purposes of collateral attack." *Id.*

The only other cases that have considered the *Holiday* dictum are two early Eighth Circuit cases; both mechanically reiterate the standard that "the erroneous imposition of two penalties for a single offense does not constitute double jeopardy." *Michener v. United States*, 157 F.2d 616, 620 (8th Cir. 1946), *rev'd on other grounds*, 331 U.S. 789 (1947); *White v. Lescor*, 155 F.2d 902, 904 (8th Cir. 1946). In neither case, however, was a double punishment sustained. The court in *Michener* implied that no true double jeopardy situation existed because the imposition was erroneous and the sentence was void as to the excess. 157 F.2d at 620. Thus it seems that the court did not take the *Holiday* dictum at face value. Similarly, in *White*, the court noted that the sentence was erroneous but provided no remedy because the defendant was clearly guilty of the offense that carried the maximum penalty (aggravated bank robbery), and the lesser penalty (for bank robbery) ran concurrently with the greater. 155 F.2d at 904. Therefore, these cases support the *Holiday* dictum in a qualified fashion only. See also Note, *Criminal Law—Multiple Punishment Resulting from a Single Course of Criminal Conduct*, 25 ARK. L. REV. 181 (1971) [hereinafter referred to as *Criminal Law—Multiple Punishment*]; Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

15. These tests have split into two groups: those based on evidentiary requirements (the "same evidence" test) and those based on the defendant's behavior (the "same act," "same transaction," and "same intent" tests). *Criminal Law—Multiple Punishment*, *supra* note 14, at 183. In addition, the "rule of lenity" provides that when doubt exists as to whether Congress intended the same act to constitute more than one offense, the doubt should be resolved in favor of the defendant and against dividing the act into multiple offenses. See *O'Clair v. United States*, 470 F.2d at 1201-02. For a thorough analysis of these various tests, see *Irby v. United States*, 390 F.2d 432, 437-39 (D.C. Cir. 1967) (Leventhal, C.J., concurring); *Thessen v. State*, 508 P.2d 1192, 1194-95 (Alas. 1973); *Whitton v. State*, 479 P.2d 302, 306-09 (Alas. 1970); *Neal v. State*, 55 Cal. 2d 11, 357 P.2d 839, 843, 9 Cal. Rptr. 607, 611 (1960); Carroway, *Pervasive Multiple Offense Problems—A Policy Analysis*, 1971 UTAH L. REV. 105; Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937); Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357 (1970); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); Sigler, *Federal Double Jeopardy Policy*, 19 VAND. L. REV. 375 (1966); Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 YALE L.J. 132 (1947) [hereinafter cited as *Double Jeopardy*]; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339 (1956).

sion requires proof of a fact that the other does not.¹⁶ The judiciary has criticized this test for some time and has suggested that it has outlived its usefulness.¹⁷ Critics of the test charge that it allows an imaginative prosecutor to divide a single criminal transaction into an almost limitless number of offenses, it provides a poor measure of criminal culpability, and it affords the defendant little protection against double jeopardy.¹⁸

The doctrine of lesser included offenses is a significant but limited protection against the ability of the prosecutor to multiply one criminal transaction into several punishable offenses. This principle forbids punishment for both the greater and any necessarily included lesser offenses.¹⁹ A lesser offense is "necessarily included" within the greater if it is impossible to commit the greater without also committing the lesser.²⁰ Punishment may be imposed for either the

16. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The test, as originally stated, is that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." *The King v. Vandercomb and Abbott*, 168 Eng. Rep. 455, 461 (Crown 1796).

17. The original purpose of the "same evidence" test was to enable the prosecution to avoid the adverse consequences of a finding of variance between the pleading and the proof. If the state is allowed to charge "in various ways and in many counts what is essentially a continuing offense motivated by a single intent," *Irby v. United States*, 390 F.2d 432, 437 n.6 (D.C. Cir. 1967) (Leventhal C. J., concurring), the criminal will be unable to avoid punishment for his offense because of a procedural technicality. See *Kirchheimer*, *supra* note 15, at 528-29.

18. See, e.g., *Lugar*, *supra* note 15, at 322-24; *Double Jeopardy*, *supra* note 15, at 133-37. Many courts simply have misinterpreted the test by holding that if two statutory provisions call for different proof, separate sentences may be imposed on each. Under this interpretation of the "same evidence" test, a defendant could be sentenced for both a greater and a lesser included offense. This result clearly is forbidden under the "same evidence" rule. See, e.g., *United States v. Harris*, 26 F. Supp. 788, 791-92 (S.D. Calif. 1939). Statements such as the one made by the court in *Harris* and similar misinterpretations of the test (i.e., "[I]f the offense defined in one [statute] embraces an element not included in the other [double jeopardy does not attach]," *Slade v. United States*, 85 F.2d 786, 791 (10th Cir. 1936)), were probably the result of somewhat vague language in several Supreme Court decisions. For example, in *Morgan v. Devine*, 237 U.S. 632 (1915), the Supreme Court stated: "[T]he test of identity of offenses is whether the same evidence is required to sustain them" *Id.* at 641. Such poor treatment of the "same evidence" test is somewhat surprising because the Court cited *Gavieres v. United States*, 220 U.S. 338 (1911), among other cases, as supportive of this statement. In *Gavieres* the Court clearly stated the test of identity of offenses to be whether "each [offense has] an element not embraced in the other." *Id.* at 345 (emphasis added).

19. See *Neal v. State*, 55 Cal. 2d 11, 357 P.2d 839, 843, 9 Cal. Rptr. 607 (1960); *Johnson*, *supra* note 15, at 358; *Kirchheimer*, *supra* note 15, at 529. The protection against double jeopardy afforded by the lesser included offense doctrine is minimal at best, because the scope of its coverage remains uncertain. *Id.*

20. For a more extensive analysis of lesser included offenses, see notes 286-96 *infra* & accompanying text.

greater or the lesser offense, but not for both.

Another protection against the potentially harsh results of the "same evidence" test is the Congressional intent that may be evidenced within a given statute. Although Congress may not dictate a scheme of punishment affording less double jeopardy protection than that provided by the "same evidence" test, it may establish a scheme providing more protection. The issue then is to determine "[w]hat Congress has made the allowable unit of prosecution."²¹ A criminal transaction violating more than one statutory provision, and thus theoretically capable of sustaining multiple penalties under the "same evidence" test, might actually be capable of sustaining but one because of legislative intent.²² More often than not, however, the penalty scheme intended by Congress is not readily discernible, even following careful analysis of statutory language and legislative history.

The Supreme Court has devised the "rule of lenity," a statutory rule of interpretation that bars double punishment when Congressional intent is uncertain. The "rule of lenity" provides that when "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. . . ."²³ The courts have used this rule increasingly in cases in which Congressional intent as to multiple punishment is doubtful.²⁴ Judges Bazelon and Wright, dissenting in one case, even have suggested that the rule "may well be a constitutionally compelled canon of construction."²⁵

In determining whether the various subsections of the Federal Bank Robbery Act create more than one punishable offense, courts

21. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952).

22. For example, a person who robs a teller at gunpoint and kills a bystander *while committing* the robbery has violated two provisions of the Bank Robbery Act (specifically, subsections (d) and (e)). Yet courts generally have held that Congressional intent was not to multiply such criminal transactions into two punishable offenses. See notes 63-65 *infra* & accompanying text.

23. *Bell v. United States*, 349 U.S. 81, 84 (1955). The petitioner in *Bell* had been charged in two counts with violation of the Mann Act, 18 U.S.C. § 2421 (1910), *as amended* 18 U.S.C. § 2421 (1970). Each count referred to the transportation across state lines of a different woman. The Court refused to find that petitioner had committed two offenses, as it could have by applying the "same evidence" test. Rather, the Court decided that the ambiguity in the statute as to Congressional intent should be resolved in favor of lenity. 349 U.S. at 84.

24. See, e.g., *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952); *Cramer v. Wise*, 501 F.2d 959, 962 (5th Cir. 1974); *O'Clair v. United States*, 470 F.2d 1199, 1202 (1st Cir. 1972).

25. *Irby v. United States*, 390 F.2d 432, 440 (D.C. Cir. 1967) (Bazelon & Wright, JJ., dissenting).

have been confronted with the above restraints on the prosecution's power to multiply one criminal transaction into several punishable offenses. A court's finding that any two of the Act's subsections do not create separate, punishable offenses, however, is not dispositive of whether other subsections are separately punishable. A careful analysis of each subsection is therefore necessary.

PUNISHMENT ALLOWABLE UNDER THE VARIOUS SUBSECTIONS

Subsection (d)

A clear majority of the courts have recognized that subsection (d),²⁶ for purposes of punishment at least, does not create an offense separate and distinct from subsections (a) and (b).²⁷ Rather, subsection (d) merely provides a greater penalty for anyone who assaults²⁸ or puts any person's life in jeopardy by the use of a dangerous weapon while committing or attempting to commit any offense described in subsections (a) or (b).²⁹ Subsections (a) and (b), and subsection (d), taken together, merely establish the permissible range of penalties. If the higher penalty authorized under (d) is imposed, it is *in lieu of, and not in addition to*, the penalty authorized under subsections (a) and (b). Some courts have based their conclusion that a defendant may not be punished for an of-

26. Formerly 12 U.S.C. § 588b(b) (1940), *as amended*, 18 U.S.C. § 2113(d) (1970) [hereinafter referred to as § 2113(d)].

27. Formerly 12 U.S.C. § 588b(a) (1940), *as amended*, 18 U.S.C. §§ 2113(a) and (b) (1970) [hereinafter referred to as §§ 2113(a) and (b)].

28. See notes 75-78 *infra* & accompanying text.

29. See, e.g., *United States v. Tomaiolo*, 249 F.2d 683, 696 (2d Cir. 1957); *Ward v. United States*, 183 F.2d 270, 272 (10th Cir. 1950); *Remine v. United States*, 161 F.2d 1020, 1021 (6th Cir. 1947); *Gant v. United States*, 161 F.2d 793, 795 (5th Cir. 1947); *O'Keith v. United States*, 158 F.2d 591, 592 (5th Cir. 1946); *Crum v. United States*, 151 F.2d 510 (9th Cir. 1945); *Dimenza v. Johnston*, 130 F.2d 465, 466 (9th Cir. 1942); *Hewitt v. United States*, 110 F.2d 1, 11 (8th Cir. 1940). Language in *Hewitt*, insofar as it relates to § 2113(d), is representative of the view that subsection (d) does not create a separate offense: "Congress in enacting [sections 2113(d) and 2113(e)], was dealing with the crime of bank robbery, and not with forcible taking, putting in fear, assault, putting lives in jeopardy, killing and kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree; first, that which was accompanied by force or putting in fear; second, that which was accompanied by assault or putting lives in jeopardy; and third, that which was accompanied by killing or kidnapping." *Id.* at 11.

The Supreme Court, though never expressly ruling on the nature of subsection (d), stated in *Holiday v. Johnston*, 313 U.S. 342 (1941), that respondent had admitted, in a habeas corpus proceeding, that robbery and jeopardizing the lives of bank officials in the course of the robbery did not constitute two separate crimes, but that the statute merely prescribed different penalties depending on the manner of the crime's perpetration. *Id.* at 349.

fense under (a) or (b) and also for an offense under (d) on the theory of merger, under which the lesser degree of the crime merges into the greater degree of that crime.³⁰ Thus, if a defendant is charged with robbery [(a)] and endangering lives by means of a dangerous weapon while committing that robbery [(d)], the former crime is said to merge into the latter and to lose its identity as a separate, punishable offense.³¹

Subsections (a) and (b)

A more difficult problem for the courts has been whether the four types of proscribed conduct under subsections (a) and (b)—robbery, entry with felonious intent, petit larceny, and grand larceny—constitute four phases of a single offense, or whether they constitute four separate and distinct offenses. Prior to *Prince v. United States*,³² those circuits holding that violations of subsections (a) and (b) constituted but one offense³³ did so indirectly, speaking only in terms of the *statute* creating “but a single offense with various degrees of aggravation permitting sentences of increasing severity.”³⁴ In most of these cases the Government was charging the

30. See, e.g., *United States v. Tomaiolo*, 249 F.2d 683, 696 (2d Cir. 1957) (count charging bank robbery and count charging endangering lives during robbery merge into one substantive crime); *Coy v. United States*, 156 F.2d 293, 294 (6th Cir.), *cert. denied*, 328 U.S. 841 (1946) (recognizing the doctrine of merger in bank robbery cases).

At common law, if a single criminal act constituted both a misdemeanor and a felony, the misdemeanor was said to merge into, and thus be extinguished by, the felony. J. MILLER, *CRIMINAL LAW* §13, at 50 (1934). This common law rule has been changed by statute in many states; the present test of whether merger applies is “not . . . whether the two criminal acts are ‘successive steps in the same transaction’ but . . . whether one crime necessarily involves another” *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, —, 21 A.2d 920, 921 (1941). In *Remine v. United States*, 161 F.2d 1020 (6th Cir. 1947), the court gave a very expansive reading to the doctrine of merger by stating that the offense on which the lighter sentence had been imposed (not necessarily the lesser offense) merged into the offense carrying the greater sentence. *Id.* at 1021.

31. Some courts, in declining to adopt the merger theory expressly, simply state that whether subsection (d) provides a greater punishment for the same offense when committed under aggravated circumstances, or whether the lesser offense merges into the greater, it is certain that the Act clearly expresses Congressional intent to punish only the greater offense where the testimony necessary to prove it is also necessary to prove the lesser. E.g., *Durrett v. United States*, 107 F.2d 438, 439 (5th Cir. 1939).

32. 352 U.S. 322 (1957). The narrow holding in *Prince* that the crime of entering a bank with felonious intent merges into the crime of robbery overrules pre-*Prince* cases only to the extent they directly contradict that holding.

33. See, e.g., *Simunov v. United States*, 162 F.2d 314 (6th Cir. 1947); *Barkdoll v. United States*, 147 F.2d 617 (9th Cir. 1945); *Wilson v. United States*, 145 F.2d 734 (9th Cir. 1944); *Hewitt v. United States*, 110 F.2d 1 (8th Cir.), *cert. denied*, 310 U.S. 641 (1940).

34. *Simunov v. United States*, 162 F.2d 314, 315 (6th Cir. 1947).

violation of only one provision of subsection (a) or (b), usually robbery, in one count, and the aggravated form of that provision in another. Therefore, when these courts spoke of the Act as defining one crime, aggravated or not aggravated,³⁵ they were not faced with a violation of more than one provision under (a) and (b), such as larceny and robbery, but only with the violation of one provision under (a) or (b), such as robbery, perpetrated in its aggravated form.³⁶

In contrast, those circuits that held the various provisions of subsections (a) and (b) to constitute four separate and distinct crimes³⁷ dealt directly with this issue. These courts based their reasoning on the clear language of the statute,³⁸ decisions under analogous statutes that declined to interpret them as supporting only one conviction,³⁹ and the reenactment by Congress of the 1934 bank robbery statute in substantially identical form after it had been read to create separate offenses.⁴⁰ Therefore, when the defendant was indicted for violating two provisions of (a) and (b) and also for violating one of these two provisions in its aggravated form, the offense charged in both its simple and aggravated forms could sustain one sentence only;⁴¹ the remaining charge under (a) and (b), however, remained a separate and distinct offense, capable of supporting a separate sentence.⁴² Under this interpretation of (a) and (b) a defendant charged with felonious entry into a bank [(a)], robbery [(a)], and robbery by use of a dangerous weapon [(d)], could receive only a single sentence for the two robbery violations, but he could receive a separate, additional sentence for the felonious entry violation.

35. *Barkdoll v. United States*, 147 F.2d 617 (9th Cir. 1945).

36. *See, e.g., id.* (robbery aggravated by kidnapping). A further indication that these courts were not contemplating the four courses of conduct proscribed under (a) and (b) when they spoke of one crime, aggravated or not aggravated, is that it strains ordinary English usage to characterize robbery as an "aggravated" form of larceny, or larceny as an "aggravated" form of entering a bank with felonious intent.

37. *E.g., Ward v. United States*, 183 F.2d 270 (10th Cir.), *cert. denied*, 340 U.S. 864 (1950); *Holbrook v. Hunter*, 149 F.2d 230, 231 (10th Cir. 1945); *Wells v. United States*, 124 F.2d 334, 335 (5th Cir. 1941), *cert. denied*, 316 U.S. 661 (1942); *Durrett v. United States*, 107 F.2d 438, 439 (5th Cir. 1939).

38. *Prince v. United States*, 230 F.2d 568, 571 (5th Cir. 1956).

39. *Id.*

40. *Id.*

41. *See* notes 26-31 *supra* & accompanying text.

42. *See, e.g., Wells v. United States*, 124 F.2d 334 (5th Cir. 1941); *Durrett v. United States*, 107 F.2d 438 (5th Cir. 1939).

Prince v. United States

In *Prince*,⁴³ the Court of Appeals for the Fifth Circuit held that a defendant was properly convicted and sentenced for both entering a federally insured bank with intent to commit a felony and aggravated robbery. The Supreme Court reversed.⁴⁴ Although acknowledging the Act's meager legislative history, the Court nevertheless found that Congress, by amending the Act in 1937, had inserted the felonious entry provision to ensure that one who entered a bank for the purpose of committing a crime but who was unsuccessful in his attempt would not escape punishment.⁴⁵ According to the Court, the felonious entry provision was not intended to double the punishment of one who entered a bank with felonious intent and successfully completed the crime. The 1937 amendment merely created lesser offenses; Congress did not authorize pyramided penalties, for the gravamen of the offense is the intent to steal, not the act of entering. This mental element merges into the completed crime if the robbery is consummated.⁴⁶

The holding of *Prince* is puzzling in many respects. First, because the Court granted certiorari to resolve the division among the circuits concerning the identity of offenses under subsections (a) and (b), it is surprising that the Court used a legislative intent analysis rather than a double jeopardy approach based on the same evidence test. Three of the four acts proscribed by (a) and (b)—robbery, grand larceny, and petit larceny—do not qualify as separate and distinct offenses under the same evidence test because of the lesser included offense rule.⁴⁷ To commit robbery, one necessarily commits larceny;⁴⁸ the same relationship exists between grand and petit larceny. Therefore, the same evidence test, limited by the doctrine of lesser included offenses, would have mandated a ruling that at least these three acts were not separate and distinct offenses capable of sustaining separate penalties. A second problem *Prince* presented was the Court's limitation of its holding to the two offenses of felon-

43. *Prince v. United States*, 230 F.2d 568 (5th Cir. 1956), *rev'd*, 352 U.S. 322 (1957).

44. 352 U.S. 322 (1957).

45. *Id.* at 328.

46. *Id.*

47. See notes 19 & 20 *supra* & accompanying text.

48. See, e.g., *Lamore v. United States*, 136 F.2d 766 (D.C. Cir. 1943); 8 J. MOORE, *FEDERAL PRACTICE* § 31.03[2], at 31-12 (2d ed. 1975) (impossible to commit robbery without first committing larceny; thus, larceny is a necessarily included offense of robbery as a matter of law).

ious entry and robbery.⁴⁹ The critical question of whether the other provisions of (a) and (b) constituted separate offenses was left unresolved.

Finally, the Court's use of the merger theory to justify its holding that entry and robbery created but one offense was unfortunate. Of the four "offenses" proscribed under subsections (a) and (b), entry with felonious intent is the only one to which the theory of merger technically should *not* be applied. Although the role of merger in today's criminal law system is uncertain,⁵⁰ the generally accepted test governing whether one offense merges into another is whether one crime necessarily is subsumed by the other.⁵¹ Inasmuch as a person may formulate the intent to commit robbery *after* entering a bank, entry with felonious intent is not necessarily included in robbery.⁵²

The Court's technical misapplication of the merger doctrine has created confusion in two situations. First are those in which a court, in sentencing a defendant, has not imposed the heaviest sentence on the most inclusive count.⁵³ Second are those in which a defendant is charged with both felonious entry and larceny.⁵⁴ Because double jeopardy proscribes the increasing of a sentence once imposed, the strict application of merger in the former situation results in a defendant's escaping the heavier punishment because the count on which that sentence was based is merged into the offense for which a lesser sentence has been imposed. In the second instance, the merger of the lesser offense of entry into the larceny count precludes

49. 352 U.S. at 325.

50. See note 30 *supra* & accompanying text. See also *Pivak v. State*, 202 Ind. 417, 175 N.E. 278, 280 (1931).

51. See, e.g., *Price v. State*, 3 Md. App. 155, —, 238 A.2d 275, 277 (1968); *Commonwealth v. Comber*, 374 Pa. 570, —, 97 A.2d 343, 349 (1953) (test of merger is whether one crime necessarily involves another, and *not* whether the two criminal acts are "successive steps in the same transaction."); *Pivak v. State*, 202 Ind. 417, 175 N.E. 278 (1931) (doctrine rejected).

52. For an analysis of necessarily included offenses, see notes 286-96 *infra* & accompanying text.

53. See, e.g., *United States v. Corson*, 449 F.2d 544 (3d Cir. 1971) (ten years for entering with felonious intent; five years for robbery; five years probation for aggravated robbery); *Sawyer v. United States*, 312 F.2d 24 (8th Cir.), *cert. denied*, 374 U.S. 837 (1963) (20 years for robbery; ten years for aggravated robbery); *United States v. Leather*, 271 F.2d 80 (7th Cir. 1959), *cert. denied*, 363 U.S. 831 (1960) (15 years for robbery; five years for aggravated robbery).

54. See, e.g., *Moore v. United States*, 454 F.2d 286 (6th Cir.), *cert. denied*, 406 U.S. 946 (1972); *Counts v. United States*, 263 F.2d 603 (5th Cir.), *cert. denied*, 360 U.S. 920 (1959); *Purdum v. United States*, 249 F.2d 822 (10th Cir. 1957), *cert. denied*, 355 U.S. 913 (1958).

sentencing under subsection (a), which carries a maximum penalty of 20 years imprisonment, leaving only subsection (b), which carries a maximum of only 10 years confinement.⁵⁵ These anomalous results have prompted judicial refusal to apply the *Prince* merger principle in the above circumstances.⁵⁶

If the Supreme Court in *Prince* intended felonious entry to merge into robbery, then logic compels the merging of entry into larceny as well, for the mental element of felonious entry cannot merge into robbery without also merging into the necessarily lesser included offense of larceny. Alternatively, if the Court's merger language was meant to apply to sentencing only, then those courts refusing to extend the merger doctrine to larceny have not substantively thwarted the Court's underlying purpose. By disallowing more than one sentence upon convictions of both felonious entry and larceny, those tribunals, though rejecting the theory of merger, have complied with the Supreme Court's mandate that there be no pyramiding of penalties.

Prince established that the imposition of multiple punishments for violations under subsections (a) and (b) is invalid, but the analy-

55. Because the penalty scheme under the Act provides a maximum of 20 years imprisonment for felonious entry and only ten years for larceny, a person who entered a bank intending to commit larceny actually would be penalized, under the merger theory, for failing to consummate the larceny. Moreover, had he taken under \$100 his maximum punishment would be only one year in prison. Such a result renders the theory of *locus poenitentiae* a nullity, for a person, having entered the bank intending to commit larceny, could be "rewarded" with ten extra years in prison for abandoning his larcenous intent.

56. To avoid these incongruous results of a strict application of *Prince*'s merger language to entry and larceny, several circuits have interpreted *Prince* as requiring merger of the offenses for sentencing purposes only. These courts hold that both the entry with felonious intent and the larceny provisions of (a) and (b) retain their identity for purposes of making violative charges, *Hardy v. United States*, 292 F.2d 192, 194 (8th Cir. 1961), but under *Prince*, sentence may be imposed on only one of them. *Id. See, e.g., Moore v. United States*, 454 F.2d 286, 287 (6th Cir.), *cert. denied*, 355 U.S. 913 (1958) (where both entry with felonious intent and larceny charged, there is no merger of offenses, but only merger for sentencing purposes); *United States v. Fried*, 436 F.2d 784, 786 (6th Cir. 1971) (merger for sentencing purposes only); *Counts v. United States*, 263 F.2d 603, 604 (5th Cir.), *cert. denied*, 360 U.S. 920 (1959) (no merger of offenses); *Williamson v. United States*, 265 F.2d 236, 238 (5th Cir.), *cert. denied*, 358 U.S. 941 (1959) (merger of offenses not mandated by *Prince*; only pyramiding of sentences proscribed); *La Duke v. United States*, 253 F.2d 387, 389 (8th Cir. 1958) (felonious entry does not merge into larceny); *Purdom v. United States*, 249 F.2d 822, 826 (10th Cir. 1957) (common law doctrine of merger applies only to situations where same act constitutes both misdemeanor and felony; does not apply where two felonies are charged).

Occasionally, courts confronted with this situation will endorse the contention that the two offenses merge. Not surprisingly, however, the courts do so only when the sentences imposed on both counts are identical, and applying the doctrine results in no anomaly. *See, e.g., Schutz v. United States*, 432 F.2d 25, 29 (10th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971).

sis underlying this result left unclear whether the Court intended to deal with the issue in terms of lesser included offenses. The merger language in the opinion does not compel the conclusion that the lesser offenses defined by the Act invariably merge into a consummated greater offense, thereby extinguishing them as separate and distinct violations.⁵⁷ Because the Court's usage neither conforms with common law merger theory⁵⁸ nor develops a satisfactory new doctrine,⁵⁹ it cannot be accepted without question.

Subsection (e)

The relationship of subsection (e) to the other subsections also remains unclear after *Prince*. Subsection (e) provides:

[w]hoever, [1]⁶⁰ in committing any offense defined in this section, or [2] in avoiding or attempting to avoid apprehension for the commission of such offense, or [3] in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the jury shall so direct.⁶¹

Because the Supreme Court in *Prince* did not mention this subsection, substantial doubt still exists whether it defines separate and distinct offenses for which separate punishments may be imposed.⁶²

Those courts dealing with type [1] killing or kidnapping have held that subsection (e) does not create a separate and distinct crime, but encompasses only an aggravated form of the offense of bank robbery, commission of which merely enhances the penalty.⁶³

57. This question is not merely academic, for adverse collateral consequences accompany the imposition of multiple convictions, even in the absence of multiple sentences. See notes 210-13 and note 238 *infra* & accompanying text.

58. See note 30 *supra* & accompanying text.

59. *United States v. Corson*, 449 F.2d 544, 549 (3d Cir. 1971).

60. Numeration is added for convenience in distinguishing the three types of killing and kidnapping.

61. 18 U.S.C. § 2113(e) (1970). The death penalty as provided in this subsection has been declared invalid. *Pope v. United States*, 392 U.S. 651 (1968). See note 2 *supra*.

62. The Commission on Revision of the Federal Court Appellate System has noted this confusion. In particular, the Commission found that the confusion among the courts was greatest regarding the status of subsection (e). Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendation for Change*, 67 F.R.D. 195, 284 (1975) (Appendix B).

63. See, e.g., *United States v. Faleafine*, 492 F.2d 18, 25 (9th Cir. 1974); *Jones v. United States*, 396 F.2d 66, 69 (8th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); *United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957). To the extent that three earlier Ninth Circuit cases,

The courts have reached this conclusion by analogy to subsection (d), the language of which closely resembles that of (e) [1].⁶⁴ The operation of both subsection (d) and subsection (e) [1] is dependent upon a concurrent violation of some provision of the Act. Thus subsection (e) [1] has been accorded the same treatment as subsection (d).⁶⁵

The agreement among the circuits as to type [1] killing or kidnapping does not extend to types [2] and [3]. Those courts which, when confronted with types [2] or [3] killing or kidnapping, held that but one offense has been committed, made no attempt to distinguish among the three types of killing and kidnapping proscribed by subsection (e).⁶⁶ Rather, these courts simply reiterated the arguments successfully propounded in the past to deny subsection (d) status as a separate offense, and to establish (e) [1] killing or kidnapping as a single offense only.⁶⁷ These courts found further

Clermont v. United States, 432 F.2d 1215 (9th Cir. 1970) (for each victim under (d), and thus impliedly under (e), a separate sentence will lie); *Crum v. United States*, 151 F.2d 510 (9th Cir. 1945) ((e) can sustain a separate sentence); *Barkdoll v. United States*, 147 F.2d 617 (9th Cir. 1945) (count under (e) charged a separate offense), were inconsistent with the ruling in *Faleafine*, they were overruled by *Faleafine*. 492 F.2d at 25-26.

64. Subsection (d) provides in pertinent part: "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person . . ." 18 U.S.C. § 2113(d) (1970). This language is paralleled in that portion of subsection (e) dealing with type [1] killing or kidnapping: "Whoever, in committing any offense defined in this section . . . kills any person, or forces any person to accompany him . . ." 18 U.S.C. § 2113(e) (1970).

65. Under this interpretation of subsection (e), the offenses defined in (a), (b), and (d) are included in, and thus are merged into, subsection (e) [1] killing or kidnapping. Whether subsection (d) is necessarily included under subsection (e) [1] killing or kidnapping is uncertain. For instance, it is quite possible to both kidnap and kill a person in the commission of robbery without placing lives in jeopardy by the use of a dangerous weapon, just as it is possible to commit the offense described in (d) without also killing or kidnapping. Each section potentially contains elements not contained in the other; thus neither would be a necessarily included offense of the other. This supposition is premised on a reading of the Act that requires the assault defined in (d) to be by the use of a dangerous weapon, see notes 75-82 *infra* & accompanying text, and a literal interpretation of the doctrine of lesser included offenses, see notes 286-96 *infra* & accompanying text.

66. In *United States v. Drake*, 250 F.2d 216 (7th Cir. 1957), which dealt with type [1] kidnapping, one judge emphasized that he concurred in the majority result (subsection (e) does not create a separate, punishable offense) only because it had been a type [1] kidnapping which occurred during the commission of the robbery. Had it been a type [2] or [3] kidnapping, he noted, a separate crime would have been charged. *Id.* at 218 (Schnackenberg, J., concurring).

67. Included among these arguments are: 1) The Act creates but a single offense with various degrees of aggravation, see, e.g., *Garza v. United States*, 498 F.2d 1066, 1068 (5th Cir. 1974); *Sullivan v. United States*, 485 F.2d 1352, 1353 (5th Cir. 1973); *United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957); *Simunov v. United States*, 162 F.2d 314, 315 (6th Cir. 1947);

corroboration in *Prince*, in which the Court stated that the Bank Robbery Act was a unique statute of limited purposes that should be differentiated from similar problems in this general field raised under other statutes.⁶⁸

The substantive distinctions among the three types of killing and kidnapping proscribed by subsection (e) are central to the contention of other circuits that (e) [2] and [3] create separate and distinct offenses. In support of their position, these circuits point to Congressional use of the disjunctive word "or" in defining the offenses under subsection (e),⁶⁹ the distinctive penalty scheme of that subsection,⁷⁰ and the contemplation of criminal conduct that may occur *after* the underlying offense has been fully consummated and even after arrest.⁷¹

2) Congress did not intend to pyramid the penalties in the subsections of the Act, *see, e.g.*, *United States v. Turner*, 518 F.2d 14, 16 (7th Cir. 1975); *United States v. Delay*, 500 F.2d 1360, 1368 (8th Cir. 1974); *United States v. Drake*, 250 F.2d 216, 217 (7th Cir. 1957); and 3) The severity of the punishment allowed under the statute depends, not on the number of subsections violated, but on the nature of the aggravating circumstances, *see, e.g.*, *O'Clair v. United States*, 470 F.2d 1199, 1202 (1st Cir. 1972).

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

69. *United States v. Parker*, 283 F.2d 862, 864 (7th Cir. 1960) (type [3] kidnapping); *Gilmore v. United States*, 124 F.2d 537, 540 (10th Cir. 1942) (type [3] murder). The judge writing the majority opinion in *Parker* cited *United States v. Drake*, 250 F.2d 216 (7th Cir. 1957), as authority for the proposition that types [2] and [3] constitute separate offenses. The court in *Drake*, however, made no such ruling. *Id.* at 218. Rather, the judge in *Parker* cited *his own concurring opinion in Drake*. It would seem, then, that the holding in *Parker* is based on questionable precedent.

70. *Clark v. United States*, 281 F.2d 230, 233 (10th Cir. 1960) (type [2] kidnapping).

71. *Ward v. United States*, 183 F.2d 270, 272 (10th Cir. 1950) (type [2] kidnapping). The court also noted that subsections (a), (b), and (d) were included under section 2 of the statute as originally enacted, subsection (e) was included under section 3, and that section 3 embraced elements in addition to, and separate from, those included under section 2. *Id.* at 272. After carefully outlining its reasons for considering subsection (e) a separate and distinct offense, the court concluded with the surprising statement: "[A]ssuming, but not deciding, that [defendant] should not have been sentenced for a lesser term on count one [aggravated robbery]" *Id.* Such a statement reduces the court's analysis of subsection (e) as a separate offense to an exercise in futility, for the purpose of finding (e) to be a separate and distinct offense is to enable the court to impose separate sentences thereunder. There is no indication in *Ward* that the court was endeavoring to preserve subsection (e)'s status as a separate and distinct offense merely for purposes of sustaining a multiple conviction, but not multiple sentences. *See* notes 249-61 *infra* & accompanying text.

A reason not mentioned by the courts for viewing the conduct proscribed under (e) as separate offenses and not merely as an aggravated form of the underlying offense of bank robbery is that none of the three types of killing and kidnapping can be said to be more aggravated than the other. The other subsections of the Act can be regarded as successive phases of one criminal transaction, each succeeding phase encompassing conduct of a more culpable nature (entry with felonious intent, petit larceny, grand larceny, robbery, and robbery accompanied by assault or jeopardizing lives by the use of a dangerous weapon); the

Although a majority of courts that have passed upon the separate offense status of (e) have grounded their reasoning on legislative intent, sometimes the double jeopardy provision of the Constitution should supersede any perceived contrary Congressional purpose. Because kidnapping is punishable under the Bank Robbery Act only when some other offense comprehended by that statute has been committed, a defendant charged with, for example, both robbery [(a)] and kidnapping to avoid apprehension for that robbery [(e)[2]], could not be sentenced separately on both offenses because of the same evidence limitation. Proof of the (e) [2] violation requires proof of the underlying violation of (a). A charge of violations of (a) and (e) alone apparently has not yet come before the courts. Combined charges of robbery [(a)], aggravated robbery [(d)], and kidnapping [(e)], however, are common.⁷² Double jeopardy does not arise as between (d) and (e) when there are different victims under each subsection. If the charges under (d) and (e) stem from the same victims, however, the constitutional issue is not resolved so easily.

A requirement that the offense be committed with a dangerous weapon can be read into subsection (d). Such an interpretation would remove (d) and (e) from the ambit of the same evidence test because an assault might be committed with a dangerous weapon and a kidnapping or killing without. If no such requirement is imposed, or if a subjective test of lesser included offense is used, separate sentencing on both counts would raise double jeopardy implications. The case law does not establish a clear rule on the requirement of a dangerous weapon. Subsection (d) speaks to an offender

types of proscribed conduct under (e), however, cannot be arranged in ascending order according to the level of culpability, for it cannot be said that any one type of conduct under (e) is more egregious than any other.

Although the above argument might suggest a legislative intent that (e) establishes separate offenses, the countervailing argument, that Congress included the three types of conduct under (e) to ensure that all criminal conduct within the *res gestae* of the underlying robbery would be covered, is equally persuasive. Under this view it is immaterial which of the three types of kidnapping or killing is the most aggravated. Whichever type occurs during the course of a robbery simply will be the additional element under the statute that warrants the imposition of a higher sentence. Should more than one type of killing or kidnapping occur, the matter should be treated as one offense involving multiple victims. See notes 84-87 *infra* & accompanying text.

72. See, e.g., *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *United States v. Fleming*, 504 F.2d 1045 (7th Cir. 1974); *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974); *Forrester v. United States*, 456 F.2d 905 (5th Cir. 1972); *United States v. Parker*, 283 F.2d 862 (7th Cir. 1960); *United States v. Drake*, 250 F.2d 216 (7th Cir. 1957); *Ward v. United States*, 183 F.2d 270 (10th Cir. 1950).

who "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device. . . ." ⁷³ Shortly after the passage of the Act, several courts read this provision literally, concluding that "or" was used in the disjunctive, and that it was unnecessary to allege in an indictment both the assault of a person and the placing of that person's life in jeopardy by means of a dangerous weapon. ⁷⁴ A majority of courts considering this problem, however, concluded that something more than simple assault was necessary to trigger subsection (d) with its enhanced penalties. ⁷⁵ Because assault traditionally is defined as "putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm," ⁷⁶ to require no more for subsection (d) would make any violation of subsection (a) an aggravated offense because (a) speaks in terms of "force," "violence," and "intimidation." ⁷⁷ Construing "assault" in (d) to mean simple assault, then, would render that provision superfluous. ⁷⁸

A few courts, including, by implication, the Supreme Court, ⁷⁹

73. 18 U.S.C. § 2113(d) (1970) (emphasis added).

74. See, e.g., *Larson v. United States*, 172 F.2d 386, 387 (6th Cir. 1949) (elements of offense cited in the alternative, thus assault alone suffices); *Gant v. United States*, 161 F.2d 793, 796 (5th Cir. 1947) (alleged assault against cashier in commission of robbery); *United States v. Murray*, 149 F.2d 932, 933 (3d Cir. 1945) ("or" to be read disjunctively). Had Congress intended the two phrases to be read in the conjunctive, reasoned these courts, it would have used the word "and" instead of the word "or."

75. The confusion concerning the elements of subsection (d) assault is due to the failure of Congress to define "assault" anywhere in the Federal Criminal Code. *United States v. Beasley*, 438 F.2d 1279, 1284 (6th Cir. 1971).

76. *Ladner v. United States*, 358 U.S. 169, 177 (1958).

77. "Whoever, by force and violence, or by intimidation, takes . . . from the person of another any property . . . shall be fined . . . or imprisoned." 18 U.S.C. § 2113(d) (1970) (emphasis supplied).

78. *United States v. Beasley*, 438 F.2d 1279, 1284 (6th Cir. 1971) (use of fake bomb during attempted robbery).

A basic canon of statutory construction is that every word and clause, if possible, should be given effect. 2 A. SUTHERLAND, *STATUTORY CONSTRUCTION* § 46.06 at 63 (4th ed. C. Sands ed. 1973). Inasmuch as a violation of subsection (a) necessarily would constitute an assault, construing subsection (d) as requiring nothing more than simple assault is unwarranted; or "[t]o borrow the homely metaphor of Judge Aldrich in the First Circuit, 'If there is a big hole in the fence for the big cat, need there be a small hole for the small one?'" *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (no citation given for quotation from Judge Aldrich). As further explained by that court: "The statute [unrelated to bank robbery] admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy." *Id.* at 307-08.

79. In *Prince v. United States*, 352 U.S. 322, 329 n.11 (1957), the Supreme Court stated that conviction of robbery aggravated by assault with a deadly weapon subjects a robber to

have concluded that the phrase "by the use of a dangerous weapon" should be read to modify both the assault provision and the "putting in jeopardy" provision of subsection (d).⁸⁰ Most courts that require more than simple assault, however, have sought to construct a workable definition of assault for subsection (d) purposes. The recent trend has been to require the bank robbers not only to intend and in fact to create a reasonable apprehension in the victim, but additionally to have the objective capability to cause physical harm to the victim by the means threatened.⁸¹ Although not expressly stipulating that a dangerous weapon be used in the course of the assault, all the cases adopting this "objective capability" test were cases of attempted robberies by means of a potentially dangerous weapon. Arguably, these cases imply a dangerous weapon prerequisite. Otherwise, an unarmed robber who verbally threatens a bank teller with physical harm theoretically could meet the "objective capability" test. This situation is not far removed from the "taking by force, *fear or intimidation*" of subsection (a). It is thus reasonable to assume that the "objective capability" test requires the use of a dangerous weapon.⁸²

Interpreting (d) to mandate the use of a dangerous weapon, however, would allow an unarmed bank robber who seriously injures a person in the course of the robbery to escape the heavier punishment

a possible punishment of 25 years. This language implies that the assault must be by means of a dangerous weapon.

80. The Tenth Circuit, by the clever use of ellipsis, reached this desired reading in *Holbrook v. Hunter*, 149 F.2d 230 (10th Cir. 1945), by stating: "[S]ubsection (b) [now section 2113(d)] provides that '[w]hoever, in committing, or in attempting to commit, any offense defined in subsection (a) [now subsections (a) and (b)] . . . assaults any person, . . . by the use of a dangerous weapon or device, shall be fined . . . or imprisoned,' *Id.* at 231. *Accord*, *United States v. Beasley*, 438 F.2d 1279, 1283 (6th Cir. 1971) (McCree, J., dissenting).

Further support for the proposition that the phrase "by the use of a dangerous weapon" modifies both provisions of (d) can be gleaned from a reading of the Act, 18 U.S.C. § 254, as reported out of the House Judiciary Committee. The committee report used different language from that later adopted in the statute: "If an assault be committed or the life of any person put in jeopardy by the use of a dangerous weapon" H.R. REP. NO. 1461, 73d Cong., 2d Sess. 29 (1934).

81. *Bradley v. United States*, 447 F.2d 264, 275 (8th Cir. 1971) (use of fake bomb during attempted robbery). The Second and Seventh Circuits similarly interpret the "jeopardy" provision of (d). See *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975); *United States v. Marshall*, 427 F.2d 434, 437-38 (2d Cir. 1970); *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969).

82. Such an interpretation of the "objective capability" test is bolstered by the court's statement in *Bradley v. United States*, 447 F.2d 264, 272-73 (8th Cir. 1971), that it was adopting the result reached by the dissent in *United States v. Beasley*, 438 F.2d 1279 (6th Cir. 1971). The dissent in *Beasley* concluded that subsection (d) assault required the use of a dangerous weapon. *Id.* at 1283.

of that provision. Under such an interpretation of the Act all serious batteries not causing death and not committed by the use of a dangerous weapon could only be punished under subsection (a). A solution that preserves the progressive penalty scheme of the Act would, in addition to requiring the use of a dangerous weapon for a violation of (d), include a provision in the Act for battery committed during the robbery.⁸³

Multiple Victims

There is no constitutional objection to charging several offenses under separate counts when there is more than one victim. Most courts confronted with the issue of multiple victims, however, have declared that Congress did not intend the imposition of multiple punishments,⁸⁴ stressing that the crime is *bank* robbery, and that the statute is entitled "Bank Robbery and Incidental Crimes."⁸⁵

83. This additional subsection could distinguish between simple battery and battery committed by the use of a dangerous weapon. Moreover, such a subsection might be extended to cover batteries that occur during the three phases of robbery set out in subsection (e).

84. See, e.g., *United States v. Fleming*, 504 F.2d 1045, 1053 (7th Cir. 1974) (defendant charged in separate counts with robbery of different tellers); *United States v. Delay*, 500 F.2d 1360, 1368 (8th Cir. 1974) (defendant charged in separate counts with killing three people in attempting to avoid apprehension); *United States v. Faleafine*, 492 F.2d 18, 25 (9th Cir. 1974) (different persons were the victims of (d) and (e) ([1] kidnapping); *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972) (defendant charged in separate counts with assaulting three persons by means of a dangerous weapon); *Dimenza v. Johnston*, 130 F.2d 465, 466 (9th Cir. 1942) (defendant charged in three separate counts with three aggravated assaults). Earlier cases either refused to reach the issue of multiple victims, see, e.g., *Duboice v. United States*, 195 F.2d 371 (8th Cir. 1952) (several people kidnapped under (e) [2] circumstances; court upheld all convictions on ground that the longest concurrent sentence lawfully could be sustained under the statute), or mechanically applied the "same evidence" test in concluding that a separate punishment could be sustained for each victim involved, see, e.g., *Clermont v. United States*, 432 F.2d 1215 (9th Cir. 1970), *cert. denied*, 402 U.S. 997 (1971) (separate convictions allowed for each person assaulted); *McDonald v. Hudspeth*, 129 F.2d 196 (10th Cir. 1942) (lives of several people put in jeopardy by means of a dangerous weapon). The Ninth Circuit, in *United States v. Faleafine*, *supra* at 24, 26, expressed strong disapproval of *Clermont*, noting that the court in *Clermont* had not cited *Dimenza v. Johnston*, *supra*, and overruled *Clermont* to the extent it allowed multiple punishment for each victim assaulted under subsection (d).

85. See *United States v. Fleming*, 504 F.2d 1045, 1054 (7th Cir. 1974); *United States v. Canty*, 469 F.2d 114, 126 (D.C. Cir. 1972). The court in *Canty* was confronted with a situation in which the defendant was charged with four counts of bank robbery under the federal statute and with three counts of assault with a dangerous weapon under the District of Columbia Code (22 D.C. Code § 502 (1967)). The court held that the effect of charging the defendant with the latter offenses under the District of Columbia Code was the circumvention of the federal statute's "carefully crafted hierarchy of penalties." *Id.* at 128. The imposition of sentence under the federal statute for bank robbery (§ 2113(a)) and under the District of Columbia Code for assault with a dangerous weapon (22 D.C. Code § 502), was an illegal

Courts viewing sentence pyramiding with disfavor on the *Prince* rationale have extended that rationale to cases involving multiple victims.⁸⁶ But this general proscription of multiple punishments for offenses against multiple victims is not applied universally to cases in which more than one type of violation under subsection (e) has occurred. In those circuits holding that (e) [2] or (e) [3] killing or kidnapping constitutes a separate offense, multiple victims clearly can provide the basis for separate convictions and sentences. Thus, if a bank robber kills or kidnaps three persons while attempting to avoid apprehension, he commits only one offense. If he kills or kidnaps three persons while avoiding apprehension, and also kills or kidnaps two others while freeing or attempting to free himself from arrest or confinement, then two offenses may be charged—not because there was more than one victim, but because there were two types of killing or kidnapping.⁸⁷

Subsection (c)

Distinguishable from the other subsections of the Act is subsection (c), which provides that “[w]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of, any property or money⁸⁸

pyramiding of sentences. The court found the separate sovereign doctrine, which allows both federal and state prosecutions for the same offense, to be inapplicable because both the District of Columbia Code and the Federal Bank Robbery Statute were enacted by the same sovereign, the federal government. *Id.* at 128 n.20. In *United States v. Cooper*, 504 F.2d 260 (D.C. Cir. 1974), the District of Columbia Circuit, although citing *Canty* for the proposition that only two of the three bank robberies charged could stand (separate victims were the basis for each count), held that separate convictions could be sustained, under the District of Columbia Code, for each person assaulted by means of a dangerous weapon. *Id.* at 263. Why the District of Columbia Circuit refused to follow *Canty* is unclear, but inasmuch as the separate convictions for each assault victim were based on the District of Columbia Code, the ruling in *Cooper* is not dispositive of the propriety of multiple punishments based on offenses against multiple victims under the Federal Bank Robbery Act.

86. *United States v. Delay*, 500 F.2d 1360, 1368 (8th Cir. 1974). That a bank robber cannot receive multiple sentences under the Act on the basis of offenses against multiple victims does not mean that he escapes punishment for his crimes against such victims. Rather, the separate robbing, assaulting, killing, or kidnapping of each victim still provides a basis for punishment under state law.

87. Few cases have dealt with offenses against different victims under different subsections of the Act (for example, aggravated assault of victim A under subsection (d) and kidnapping of victim B under subsection (e)). *United States v. Faleafine*, 492 F.2d 18 (9th Cir. 1974), which prohibited separate punishments on the basis of multiple victims, dealt only with aggravated assault (d) and (e) [1] kidnapping. The court did not decide whether separate punishments on the basis of offenses against multiple victims would be allowed if aggravated assault (d), and (e) [2] or (e) [3] kidnapping were involved. *Id.* at 24.

88. The Ninth Circuit is apparently the only circuit that makes a distinction between the various offenses delineated in subsection (c). See *United States v. Tyler*, 466 F.2d 920 (9th

. . . knowing the same to have been taken from a bank . . . shall be subject to the punishment provided by . . . subsection (b) for the taker."⁸⁹ The Supreme Court, in *Heflin v. United States*,⁹⁰ held that subsection (c) was designed not to increase the punishment for one who robs a bank,⁹¹ but to reach a different group of wrongdoers.⁹² The circuits are split, however, as to the proper remedy when the trial court misinterprets subsection (c) and fails to instruct the jury that it can convict the defendant either of robbery, or of receiving, but not both.⁹³ Such a failure occurred in *Milanovich v. United States*,⁹⁴ in which the Supreme Court held that, because there was no way of discerning how a properly instructed jury would have found in the case, the proper remedy was to remand for a new trial.⁹⁵ Notwithstanding *Milanovich*, the circuits remain divided in similar cases. Although a majority of courts remanded for a new trial in cases in which the trial court failed to give proper instructions,⁹⁶

Cir. 1972) (receipt of and possession of stolen property are two separate offenses); *D'Argento v. United States*, 353 F.2d 327 (9th Cir. 1965) (by analogy, theft and possession of stolen property are separate offenses). This circuit reads the two Supreme Court decisions on this issue, *Milanovich v. United States*, 365 U.S. 551 (1961); *Heflin v. United States*, 358 U.S. 415 (1959), as holding only that a person convicted of larceny cannot be convicted also of receiving. The dissent in *Tyler*, *supra* at 926-27, following the position of the majority of the circuits, emphatically rejected this distinction between the offenses delineated in subsection (c). Congress, noted the dissent, did not intend to differentiate between the offenses covered in (c), but meant only to reach an entirely new group of wrongdoers. *Id.* at 927. To the extent that *Tyler* and *D'Argento* are in conflict with *United States v. Gaddis*, 96 S. Ct. 1023 (1976), they seemingly are overruled.

89. 18 U.S.C. § 2113(c) (1970).

90. 358 U.S. 415 (1959).

91. Subsection (c) is not a different degree of the crime of bank robbery as is subsection (d), *Heflin v. United States*, 358 U.S. 415 (1959) (by implication), nor is it a separate offense for which one found guilty of bank robbery can be given a separate sentence as, in certain circuits, are (e) [2] and (e) [3] killing and kidnapping. *Id.* at 419-20.

92. *Id.* at 420. The Senate report, providing for the addition of subsection (c), is entitled "Punishment for Receivers of Loot from Bank Robbers." S. REP. NO. 1801, 76th Cong., 3d Sess. (1940). See H.R. REP. NO. 1668, 76th Cong., 3d Sess. 1 (1940), which also states that Congress did not intend to pyramid penalties for lesser offenses of the bank robber following the robbery but rather intended to make the knowing receipt or possession of property stolen from a bank a separate and substantive offense.

93. See notes 99-103 *infra* & accompanying text.

94. 365 U.S. 551 (1961).

95. *Id.* at 555-56. *Milanovich* did not deal with the Federal Bank Robbery Act but with convictions for counts of both larceny and receiving the proceeds in violation of 18 U.S.C. § 641 (1940). These offenses, under that section of the Code, serve roles corresponding to robbing and receiving under subsection (c) of the Bank Robbery Act. *Milanovich v. United States*, 275 F.2d 716, 719 (4th Cir. 1960), *modified*, 365 U.S. 551 (1961).

96. See, e.g., *Rose v. United States*, 448 F.2d 389 (5th Cir. 1971); *Thomas v. United States*, 418 F.2d 567 (5th Cir. 1969); *Keating v. United States*, 413 F.2d 1028 (9th Cir. 1969); *Glass*

some adopted other approaches.⁹⁷ For example, in cases in which the sentence imposed on the subsection (c) conviction was concurrent with that imposed on the robbery conviction, some courts refused to remand for retrial.⁹⁸ When the trial court failed to instruct the jury properly and the evidence was overwhelming on the possession count and merely derivative on the robbery count, however, one circuit held that the Government was allowed to stipulate to dis-

v. United States, 351 F.2d 678 (10th Cir. 1965); United States v. Roach, 321 F.2d 1 (3d Cir. 1963).

There are several dangers inherent in the "either/or" instructions required by *Milanovich*. The facts adduced at trial might support a conviction for both robbery and receiving, yet because of the court's instructions the jury would have to convict on only one and acquit on the other, or simply return no verdict on the other count, which might work as an implied acquittal. If the defendant's conviction should be overturned on appeal because of insufficiency of the evidence, for example, the defendant would go free. The constitutional prohibition against double jeopardy would prohibit the imposition of a sentence on the other count, even though the evidence adduced at trial overwhelmingly proved defendant guilty of that crime. Brief for United States at 10-11, United States v. Gaddis, 96 S. Ct. 1023 (1976).

Another danger is that the court might elevate the instructions to a rule of evidence, as did the Fourth Circuit in *Phillips v. United States*, 518 F.2d 108 (4th Cir. 1975). The trial judge in *Phillips*, inexplicably failing to apply the doctrine of principals in the second degree, instructed the jury that if it found the defendant not to have been physically present in the bank during the robbery, it could not find him guilty of the crime of robbery of the bank. The judge did instruct the jury, however, that it could convict the defendant of possession of the proceeds of the robbery, styled incorrectly by the judge as a "lesser included offense" of robbery, and the jury did so convict him. The conviction was set aside on the ground that the charge as to possession was not included in the indictment. The grand jury issued a new indictment, charging defendant with possession. At trial, the prosecution attempted to prove defendant's knowing possession of stolen bank money by proving that he had been present at the bank during the robbery. The evidence was admitted, and defendant was found guilty of possessing stolen money under subsection (c). On appeal, the Fourth Circuit held that because the first jury had acquitted the defendant of bank robbery by implication, the prosecution was foreclosed from introducing any evidence tending to show defendant's presence at the bank during the robbery. Defendant was, according to the appellate court, either guilty of receiving and possessing the stolen money or wholly innocent. Permitting the jury to believe he actually participated in the robbery would violate the "mutually exclusive" offense rule propounded in *Heflin* and *Milanovich*. *Id.* at 110. The appellate court thus raised this rule, originally formulated merely to prevent an illegal pyramiding of sentences, to the level of an evidentiary rule. The appellate court did hold, it is comforting to note, that the defendant was estopped in the future from offering evidence that he was one of the bank robbers as a defense to the charge of receiving and possessing. *Id.*

97. One approach was to restrict the application of *Milanovich* to robbing and receiving cases and to refuse to apply its rationale to robbing and possession cases. See *United States v. Tyler*, 466 F.2d 920 (9th Cir. 1972). *Contra*, *United States v. Roach*, 321 F.2d 1 (3d Cir. 1963). To the extent *Tyler* is inconsistent with the recent Supreme Court decision in *United States v. Gaddis*, 96 S. Ct. 1023 (1976), seemingly it is overruled.

98. See *United States v. Tyler*, 466 F.2d 920 (9th Cir. 1972) (concurrent sentence doctrine applied in refusing to remand for retrial). *Contra*, *Glass v. United States*, 351 F.2d 678 (10th Cir. 1965) (new trial granted even though sentences on (d) and (c) were concurrent).

missal of the robbery count.⁹⁹ The conviction was thereby upheld, and only resentencing was required.¹⁰⁰

The Supreme Court granted certiorari to resolve this conflict among the circuits as to the proper application of *Heflin* and *Milanovich*. In *United States v. Gaddis*,¹⁰¹ the defendant was charged, *inter alia*, with both robbing a federally insured bank and possessing the funds stolen in the robbery. The trial court permitted the jury to convict defendant on both counts.¹⁰² The Court of Appeals for the Fifth Circuit reversed and remanded for a new trial, holding that *Heflin* prohibited conviction on both counts, and that *Milanovich* mandated a new trial.¹⁰³ The Supreme Court affirmed the holding of the court of appeals that the defendant could not be convicted of both robbing the bank and receiving or possessing the proceeds, but, because the case could be distinguished factually from *Milanovich*, found error in remanding for a new trial.¹⁰⁴

In *Milanovich*, petitioner had driven the car which transported the robbers to a Naval Commissary. She drove away, however, while the robbers were still inside the Commissary. Seventeen days after learning of the location of the money, she retrieved it and concealed it in her home. Thus there was evidence from which the jury could find petitioner guilty both of the robbery itself and of the receipt and concealment of the money. Because the trial court allowed the jury to convict on both counts, the Court held that the proper remedy was remanding for a new trial because there was no way to determine upon which offense a properly instructed jury would have convicted.¹⁰⁵

The Court in *Gaddis*, however, found that the only evidence implicating respondent in receiving was his participation in the robbery itself. This factual distinction warranted a different remedy—mere vacation of the conviction and sentence under the receiving count. The Court in *Gaddis* further noted that there could be situations, as in *Milanovich*, in which the evidence would show that the defendant was an accessory to the robbery as well as the receiver or possessor of the robbery proceeds. In these situations an indict-

99. *United States v. Sellers*, 520 F.2d 1281, 1286 (4th Cir. 1975).

100. *Id.*

101. 96 S. Ct. 1023 (1976).

102. *United States v. Gaddis*, 506 F.2d 352, 354 (5th Cir. 1975), *modified*, 96 S. Ct. 1023 (1976).

103. *Id.*

104. 96 S. Ct. 1023, 1026 (1976).

105. *Id.* at 1026-27.

ment charging both offenses is perfectly proper and the trial judge should instruct the jury to first consider the robbery count under subsection (a), (b), or (d).¹⁰⁶ Only if the evidence is insufficient to convict on that count should the jury consider the charge under subsection (c).¹⁰⁷

As long as the *Gaddis* instructions are correctly given, therefore, the *Milanovich* remedy of remand for a new trial is unnecessary.¹⁰⁸ If the jury finds the defendant guilty of both robbing and receiving, the remedy is vacation of the conviction and sentence on the receiving count. Because the jury considered the robbery count initially,

106. *Id.* at 1027.

107. *Id.*

108. The majority, in refusing to overrule *Milanovich*, apparently was distinguishing between the results of convicting a principal in the first degree of both robbing and possessing the loot and of convicting an accessory of those same offenses. At common law, a principal in the first degree (the robber) could not be convicted of both robbing and possessing. Brief for United States at 25-26, *United States v. Gaddis*, 96 S. Ct. 1023 (1976). When, therefore, the jury erroneously convicted him of both offenses, the proper remedy was to set aside the possession conviction and allow the robbery conviction to stand. *Id.* There existed a clear priority of offenses; if the jury found the defendant guilty of robbing, it was improper to find him guilty of possessing the proceeds as well. Had the jury done so, however, there would have been no need to remand for a new trial to remedy the error. *Id.* at 28.

An accomplice who did not participate in the asportation of the loot from the scene of the crime could be guilty under common law of committing both robbery and possession of the proceeds. Moreover, there was no priority between the two offenses. *Id.* at 26. *Milanovich* changed the common law as it applied to the Federal Bank Robbery Act by not allowing an accessory to be convicted of both robbing and receiving. *Milanovich v. United States*, 365 U.S. 551, 554 (1961). It did not establish, however, an order of priority between the two crimes. The Court therefore thought it necessary to remand for a new trial whenever the trial court failed to give "either/or" instructions to the jury and erroneously convicted the defendant of both offenses. Brief for United States at 27, *United States v. Gaddis*, 96 S. Ct. 1023 (1976). The Government argued for a rule of priority in *Milanovich* situations under which an accessory consistently could be convicted, on the facts, of either crime. *Id.* at 21. It maintained that the lack of priority in such cases was at odds with Congressional intent to include the receivers and possessors of stolen property within the scope of the Act by the addition of subsection (c). This Congressional intent, urged the Government, when "read in context and in light of the near-universal rule that the offense with the higher authorized penalty is established as the offense to receive priority of consideration, extends such priority to the offense of robbery." *Id.*

The Court seemingly accepted this argument, for it adopted a rule of priority that would require a jury in *Milanovich* situations to consider the robbery counts ((a), (b), and (d)) first, and only consider the receiving and possessing count (c) if the evidence were insufficient to warrant a conviction under the robbery count. 96 S. Ct. at 1027. Apparently the *Milanovich* remedy of a new trial will be necessary only for those pre-*Gaddis* cases involving *Milanovich* fact situations in which the trial court failed to give the proper "either/or" instructions. In the future, however, should the jury ignore the *Gaddis* instructions and convict the defendant of both robbing and receiving, there will be no need to remand for a retrial. The conviction on the receiving count will not taint the conviction on the robbery count, and the proper remedy will be merely to vacate the receiving conviction.

it apparently found sufficient evidence to convict on that charge. The additional verdict on the receiving count is mere surplusage; it does not taint the robbery conviction.

Still unresolved is the proper remedy for those cases in which the trial judge fails to give the proper *Gaddis* instructions. History suggests that district judges will continue to make mistakes after *Gaddis*.¹⁰⁹ Of the hundreds of pre-*Gaddis* bank robbery cases dealing with erroneous cumulative sentences, only two¹¹⁰ seem to suggest a procedural cure similar to that proposed in *Gaddis*. That *Gaddis* did not overrule *Milanovich* indicates that remand for a new trial still may be an appellate court's only solution for these situations. The concurring opinion in *Gaddis* suggests that vacation of the possession count is appropriate even when the jury erroneously was permitted to convict on two counts, as long as the court correctly instructed on all the elements of robbery.¹¹¹

Draftsmanship and the Punishment Problems

Careful drafting could have prevented many of the problems arising under the Act.¹¹² The most glaring instance of poor drafting was the imposition of a 20 year sentence for entering a bank with felonious intent under subsection (a). Because this penalty scheme authorizes a heavier sentence for an unsuccessful thief than for a successful one, thus rewarding the completion of the crime,¹¹³ the courts have circumvented it by refusing to apply the merger language of *Prince* to larceny and entry with felonious intent.¹¹⁴ Although this approach avoids an anomalous result, it entails a narrow reading of *Prince* that needlessly circumscribes the usefulness of that case.

A better solution to the felonious entry problem would have been to omit the felonious entry provision entirely. If, as implied by

109. "[T]here is no reason to believe that the mistakes will completely cease just because the Court today reiterates the correct instructions." *United States v. Gaddis*, 96 S. Ct. 1023, 1028 n.* (1976) (White, J., concurring).

110. *Wright v. United States*, 519 F.2d 13 (7th Cir. 1975); *O'Clair v. United States*, 470 F.2d 1199 (1st Cir. 1972), *cert. denied*, 412 U.S. 921 (1973).

111. "It may be concluded with satisfactory certainty that the jury, having convicted for both offenses, would have convicted of robbery if it had been properly instructed." 96 S. Ct. at 1028 (White, J., concurring).

112. One such troublesome aspect of the Act that could have been avoided by careful drafting is the prevailing uncertainty as to whether the disjunctive language of subsection (e) creates separate offenses. See note 62-71 *supra* & accompanying text.

113. See note 55 *supra* & accompanying text.

114. See note 56 *supra* & accompanying text.

Prince,¹¹⁵ Congress inserted the unlawful entry provision to cover a person who enters a bank for the purpose of committing a felony but is unsuccessful in completing the crime, it appears to be redundant inasmuch as the statute as originally enacted proscribed not only robbery, but attempted robbery as well.¹¹⁶ The larceny provision adopted in 1937,¹¹⁷ however, did not make attempted larceny a crime. The gap left between felonious entry and completed larceny by the statutory language does not make sense. The only rational inference to be drawn is that Congress intended the felonious entry provision to be the equivalent of an attempted larceny provision.¹¹⁸ Moreover, interpreting the entry provision as punishing conduct that does not even amount to an attempt would raise serious constitutional problems. Whether an unarmed person who enters a bank during regular banking hours, intending to rob it, but who makes no attempt to do so can be convicted under the entry provision of the Act has never been expressly decided.¹¹⁹ If such conduct does not amount to an overt act sufficient to constitute an attempt,¹²⁰ it is questionable whether Congress can make it a crime. If such conduct does amount to an overt act, it is covered by attempt law and the entry provision is superfluous.

The assault language of subsection (d), unless it requires something more than the "force, violence and intimidation" of subsec-

115. 352 U.S. 322, 328 (1957).

116. The statute as originally enacted, before the entry provision was added in 1937, provided: "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another . . . shall be imprisoned not more than twenty years . . ." 12 U.S.C. § 588(a) (1934), as amended, 18 U.S.C. § 2113(a) (1970) (emphasis supplied).

117. 12 U.S.C. § 588b(a) (1937), as amended, 18 U.S.C. § 2113(b) (1970).

118. The defendant in *United States v. Foster*, 478 F.2d 1001 (7th Cir. 1973), argued that the entry provision of the Act was essentially an attempted robbery offense requiring proof of some overt act. *Id.* at 1004. The court, noting that no other court had decided such a question, declined to rule on the issue. *Id.*

119. In *Audett v. Johnston*, 142 F.2d 739 (9th Cir.), cert. denied, 323 U.S. 743 (1944), the court rejected the contention that the entry provision violated the Constitution on the ground that the statute did not make it a crime merely to intend to commit larceny, but only criminalized the intent to commit larceny when accompanied by and motivated by the overt act of entry. *Id.* at 740. In *Audett*, however, the defendant had committed larceny as well as entered with felonious intent; the case therefore is not dispositive of whether an entry with felonious intent, unaccompanied by any other overt act (even carrying a dangerous weapon), is punishable.

120. The court in *United States v. Harrison*, 522 F.2d 693 (D.C. Cir. 1975), noted that the defendant, who had entered a bank intending to commit robbery, might not have been guilty of attempted robbery had he withdrawn from the enterprise before committing the overt act of drawing his pistol. *Id.* at 695.

tion (a), also appears superfluous.¹²¹ A comprehensive definition of the term "assault" by Congress would have prevented the confusion.¹²² Further, if Congress intended subsection (d) to require the use of a dangerous weapon,¹²³ it should have included a provision covering aggravated battery to ensure that a serious injury to a person, by means other than a dangerous weapon, would receive greater punishment than that provided under subsection (a).

CORRECTION OF ERRONEOUS CUMULATIVE SENTENCES—TRADITIONAL THEORIES

The ambiguities in the Act have created considerable confusion as the judiciary struggles with differing interpretations of the underlying offense of bank robbery. In particular, sentencing under the Act manifests the difficulties courts have in understanding the purposes sought to be effectuated by this legislation.

Disparity in sentencing is acknowledged as a critical problem in the federal criminal justice system.¹²⁴ The present structure is irrational and inconsistent, often occasioning punishment disproportionate to the seriousness of the offense.¹²⁵ Yet absent a gross abuse of discretion¹²⁶ by the trial judge, appellate courts will not review

121. See notes 73-78 *supra* & accompanying text.

122. Congress could have provided a definition of assault for § 2113 purposes only, or it could have provided a general assault definition for all of Title XVIII. This same lack of definition extends, to some extent, to the other offenses under § 2113 that may accompany the underlying robbery. "Reference could [have been] made . . . to a separate set of definitions for such common forms of aggravating conduct as assault, murder, and theft, thus eliminating inconsistencies of definition and assuring that all the requisite elements of the conduct, including the appropriate degree of culpability, would be clearly set forth." Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209, 1240 (1972). Inherent in any comprehensive definition of offenses, no matter how carefully drafted, is the possibility that certain criminal conduct under the Act will not be covered appropriately by the definition. *Id.* at 1241.

123. See notes 73-82 *supra* & accompanying text.

124. A statement of the general theory of sentencing or of the forms of sentences available for particular types of offenders appears nowhere in the present code. S. REP. NO. 94-00, 94th Cong., 1st Sess. at 893 (1975). For a general discussion of the critical problems resulting from a lack of any coherent sentencing procedure see Stanton, *Sentencing Provisions in Proposals for a New Federal Criminal Code*, 7 IND. L. REV. 348, 350 (1973); Comment, *Present Limitations on Appellate Review of Sentencing—McGee v. United States*, 58 IOWA L. REV. 469 (1972).

125. S. REP. NO. 94-00, 94th Cong., 1st Sess. at 5 (1975).

126. *Cramer v. Wise*, 501 F.2d 959, 962 (5th Cir. 1974); *Moore v. United States*, 454 F.2d 286, 287 (6th Cir. 1972). The reasoning behind this marked deference to the trial court judge's discretion is that sentencing is principally dependent upon matters within the knowledge, experience, and judgment of he who tries the case. See *Moore v. United States*, 454 F.2d 287 (6th Cir. 1972).

excessively harsh sentences.¹²⁷ Sentences violative of a constitutional or statutory right, however, are subject to vacation and correction.¹²⁸ Consequently, there have been many appeals of sentences¹²⁹ imposed under the Bank Robbery Act in contravention of the *Prince*¹³⁰ mandate against cumulative sentences. Courts agree that multiple sentencing constitutes error¹³¹ and that such error is correctible,¹³² rendering the judgment not void but merely voidable.¹³³ Courts have not developed a uniform method of curing the erroneous sentences. Rather, they have developed three general theories to govern appellate treatment of sentences invalidated under *Prince*:¹³⁴ the exhaustion theory,¹³⁵ by which only the sentence on the first count is retained; the merger theory,¹³⁶ by which only the sentence imposed on the aggravated offense count is retained; and

127. *United States v. Maples*, 501 F.2d 985, 986 (4th Cir. 1974).

128. *United States v. Maples*, 501 F.2d 985, 986 (4th Cir. 1974); *Cramer v. Wise*, 501 F.2d 959, 962 (5th Cir. 1974); *United States v. McGhee*, 488 F.2d 781, 786 (5th Cir. 1974); *Rogers v. United States*, 304 F.2d 520, 522 (5th Cir. 1962); *United States v. LoDuca*, 274 F.2d 57, 59 (2d Cir. 1960).

129. These challenges, in which defendants have contested the legality of the sentences, may come through direct appeal, a Rule 35 motion for correction of an illegal sentence, or a post-conviction collateral attack under 18 U.S.C. § 2255. For a description of the differences and interrelations of Federal Rule 35 and section 2255 motions to vacate or correct a sentence see C. Wright, *FEDERAL PRACTICE & PROCEDURE*, 551-606 (1969). One notable difference is that a Rule 35 motion reaches only errors in the sentence rendered under a valid conviction and is not a means of reexamining errors occurring at the trial prior to the imposition of the sentence, *id.* § 585, at 558, whereas the section 2255 remedy covers all grounds for collateral attack on the conviction. *Id.* § 583, at 563. An illegal sentence may be corrected at any time under either. *Id.* at 565.

130. *Prince v. United States*, 352 U.S. 322 (1957); see notes 43-59 *supra* & accompanying text.

131. Even before *Prince* courts generally agreed that multiple punishments for a single bank robbery were impermissible. See, e.g., *Ward v. United States*, 183 F.2d 270, 272 (10th Cir.), *cert. denied*, 340 U.S. 864 (1950); *Ekberg v. United States*, 167 F.2d 380, 384-85 (1st Cir. 1948); *Coy v. Johnston*, 136 F.2d 818, 820 (9th Cir. 1943); and notes 13-15 *supra* & accompanying text.

132. *Gant v. United States*, 161 F.2d 793, 796 (5th Cir. 1947).

133. E.g., *Green v. United States*, 365 U.S. 301, 306 (1961); *United States v. Chester*, 407 F.2d 53, 55 (3d Cir. 1969); *McMillen v. United States*, 386 F.2d 29, 37 (1st Cir. 1967), *cert. denied*, 398 U.S. 1031 (1968); *Bayless v. United States*, 347 F.2d 354, 356 (9th Cir. 1965); *United States v. Leather*, 271 F.2d 80, 86-87 (7th Cir. 1959); *Campbell v. United States*, 269 F.2d 688, 692 (1st Cir. 1959); *Gant v. United States*, 161 F.2d 793, 797 (5th Cir. 1947). See *Holiday v. Johnston*, 313 U.S. 342, 349 (1941), in which the Court asserted that the imposition of multiple sentences for a single offense under the Bank Robbery Act was not fatal error.

134. The three approaches for ascertaining the valid sentences are described in *United States v. Corson*, 449 F.2d 544, 547 (3d Cir. 1971); and *Sawyer v. United States*, 312 F.2d 24, 26-27 (8th Cir. 1963).

135. See notes 138-40 *infra* & accompanying text.

136. See notes 141-45 *infra* & accompanying text.

the judge's intent theory,¹³⁷ which indorses the right of courts to declare either of the sentences valid.

The exhaustion theory, followed in only a few older cases,¹³⁸ was based on the rationale that once a permissible sentence on the first count was pronounced, the court had exhausted its power to sentence and could not thereafter act on the remaining counts. This principle was discredited when the Supreme Court, in *Green v. United States*,¹³⁹ adhered to the judge's intent theory and allowed a second (and longer) sentence to stand.¹⁴⁰

The merger theory, which assumes a merger of the non-aggravated offense into the aggravated,¹⁴¹ has been applied only when the sentence imposed on the aggravated offense was the more severe.¹⁴² When a heavier penalty was pronounced on a felonious entry charge so that a merger of that count into the greater completed offense effectively would reward a defendant for having completed the offense,¹⁴³ courts have refused to apply the merger doctrine.¹⁴⁴ The Court of Appeals for the Third Circuit has rejected this

137. See notes 146-51 *infra* & accompanying text.

138. *Holbrook v. Hunter*, 149 F.2d 230, 232 (10th Cir. 1945); *United States v. Sims*, 72 F. Supp. 631, 632 (W.D. Mo. 1946). See also *Holiday v. Johnston*, 313 U.S. 342, 349 (1941) in which the Court conceded (without deciding the issue) that the defendant was correct in asserting that only the sentence under count I was valid.

139. 365 U.S. 301 (1961).

140. *Id.* at 306. Apparently, whatever credibility the exhaustion doctrine may have had was nullified by *Green*. *United States v. Corson*, 449 F.2d 544, 547 n.3 (3d Cir. 1971); *Sawyer v. United States*, 312 F.2d 24, 26 (8th Cir. 1963).

141. Apparently this doctrine was derived in part from the merger language of *Prince v. United States*, 352 U.S. 322 (1957), in which the Court stated that the offense of entry merged into the consummated crime of robbery. *Id.* at 328. See *Gerberding v. United States*, 471 F.2d 55, 62 (8th Cir. 1973).

The merger theory was applied by several pre-*Prince* cases as well. *Gebhart v. Hunter*, 184 F.2d 644 (10th Cir. 1950); *Remine v. United States*, 161 F.2d 1020, 1021 (6th Cir.), *cert. denied*, 331 U.S. 862 (1947); *Coy v. United States*, 156 F.2d 293, 295 (6th Cir.), *cert. denied*, 328 U.S. 841 (1946).

142. See *Coy v. United States*, 156 F.2d 293, 295 (6th Cir.), *cert. denied*, 328 U.S. 841 (1946) (decisions proclaiming that lesser degree of the offense merges with greater, if both are charged in separate counts, must be viewed in light of practical fact that sentences imposed in these cases were greater upon aggravated charge than upon other). *Accord*, *United States v. Welty*, 468 F.2d 594, 595 (3d Cir. 1972); *United States v. Conway*, 415 F.2d 158, 166 (3d Cir. 1969); *United States v. McKenzie*, 414 F.2d 808, 811 (3d Cir. 1969); *Bayless v. United States*, 347 F.2d 354, 356 (9th Cir. 1965); *United States v. Machibroda*, 338 F.2d 947, 949 (6th Cir. 1964); *United States v. Trumblay*, 286 F.2d 918, 920 (7th Cir. 1961).

143. Such an anomalous result is possible under the statute because the defendant may receive 20 years and a \$5000 fine under subsection (a) for entry with intent to commit a felony, yet only 10 years and a \$5000 fine under (b) for grand larceny or one year and a \$1000 fine for petit (under 100 dollars) larceny.

144. Whenever application of the doctrine would produce the incongruous result that one

doctrine as inconsistent with sound judicial policy.¹⁴⁵

A majority of courts¹⁴⁶ apparently have adhered to the more flexible approach of retaining whichever sentence best reflects the intent of the trial court.¹⁴⁷ Assuming that the sentencing judge sought to impose at least as severe a penalty as that pronounced on any one count,¹⁴⁸ the courts following the intent theory invariably have vacated all but the longest sentence.¹⁴⁹ The underlying rationale is that

whose attempt is aborted may be punished with 20 years but one who actually fulfills his intent receives only ten years or one year, "the right of the court . . . to simply vacate the shorter sentence and allow the longer one to stand has been recognized." *Hardy v. United States*, 292 F.2d 192, 194 (8th Cir. 1961). *Accord*, *Sawyer v. United States*, 312 F.2d 24, 28 (8th Cir. 1963); *Williamson v. United States*, 265 F.2d 236, 238 (5th Cir. 1959); *Counts v. United States*, 263 F.2d 603, 604 (5th Cir.), *cert. denied*, 360 U.S. 920 (1959); *LaDuke v. United States*, 253 F.2d 387, 389-90 (8th Cir. 1958); *Purdum v. United States*, 249 F.2d 822, 827 (10th Cir. 1957), *cert. denied*, 355 U.S. 913 (1958); *Kitts v. United States*, 243 F.2d 883, 885 (8th Cir. 1957).

This practice is criticized by the dissent in *Purdum v. United States*, 249 F.2d 822 (10th Cir. 1957), which states that the critical question is not the effect that application of the doctrine of merger has upon the penalty but "whether the act of entering with the intent of committing larceny merged into the completed act of stealing If appropriate application of the doctrine of merger leads to the undesired result of less punishment than might otherwise be imposed, it is a matter to be corrected by Congress." *Id.* at 827-28 (Bratton, J., dissenting).

145. *United States v. Corson*, 449 F.2d 544, 547, 550 (3d Cir. 1971).

146. Those courts rejecting the merger theory if a heavier sentence was imposed on the lesser charge resolved the problem by retaining the longer period of confinement. *E.g.*, *Sawyer v. United States*, 312 F.2d 24, 28-29 (8th Cir. 1963) (court vindicated judge's intention by upholding larger sentence); *Williamson v. United States*, 265 F.2d 236, 238 (5th Cir. 1959) (looked to Congress' purposes in drafting statute); *Kitts v. United States*, 243 F.2d 883, 885 (8th Cir. 1957) (trial court's intention was to subject defendant to maximum term of imprisonment).

147. *See, e.g.*, *Wright v. United States*, 519 F.2d 13, 17 (7th Cir.), *cert. denied*, 96 S. Ct. 285 (1975) (court clearly intended to sentence appellant for aggravated version of crime); *United States v. Vasquez*, 504 F.2d 555, 556 (5th Cir. 1974) (by imposing concurrent sentences judge intended maximum to be 15 years); *United States v. Pietras*, 501 F.2d 182, 188 (8th Cir.), *cert. denied*, 95 S. Ct. 660 (1974) (obvious intent of judge was to impose a sentence at least equal to longest imposed); *White v. United States*, 419 F.2d 374, 376 (5th Cir. 1969) (remand for entry of sentence on whichever count trial court determines is appropriate vehicle for effectuating jury's intent).

148. *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971). Significantly, the practical effect of applying any of these doctrines is to impose the most severe penalty. In *Miller v. United States*, 147 F.2d 372 (2d Cir. 1945), the court was unconcerned whether relief was afforded appellant on the basis of merger, exhaustion, or judge's intent, stating it was immaterial which theory was applied as "the sentence imposed on each of the counts [was] for the same number of years." *Id.* at 374.

149. *See, e.g.*, *United States v. Welty*, 468 F.2d 594, 595 (3d Cir. 1972); *United States v. Foster*, 440 F.2d 390, 393 (7th Cir. 1971); *Jones v. United States*, 396 F.2d 66, 68-69 (8th Cir. 1968); *Bayless v. United States*, 347 F.2d 354, 356 (9th Cir. 1965); *Lowe v. United States*, 257 F.2d 409, 410 (6th Cir. 1958); *Hewitt v. United States*, 110 F.2d 1, 11 (8th Cir.), *cert. denied*, 310 U.S. 641 (1940).

an appellant should not profit unjustifiably from a mere technical error by the trial court.¹⁵⁰ This doctrine seems inherently more reasonable and effective than the merger and exhaustion approaches in assuring that the punishment is commensurate with the crime and that it will not be affected by mere priority of pronouncement.¹⁵¹

Whenever the judge's intent is ascertainable a remand for resentencing is unnecessary; vacation of all sentences except that which most closely approximates the trial court's intention is sufficient.¹⁵² If, however, the trial judge's misperception that petitioner was guilty of separately punishable offenses may have significantly affected the result, some courts decline to apply this procedure.¹⁵³ This is logical; the judge's intent theory is obviously inappropriate whenever the judge's intent is unclear.¹⁵⁴

When not faced with the *Prince* problem of pyramided sentences for multiple convictions, in which consecutive sentences may be imposed, a court that chooses to impose concurrent sentences thereby refutes the conclusion that the imposition of the maximum sentence on both evidences the judge's intent to impose the limit on defendant. See *Natarelli v. United States*, 516 F.2d 149, 152-53 (2d Cir. 1975).

150. "Sentencing should not be a game in which a wrong move by the judge means immunity for the prisoner." *King v. United States*, 98 F.2d 291, 296 (D.C. Cir. 1938), *quoted in* *Coy v. United States*, 156 F.2d 293, 295 (6th Cir. 1946). *Accord*, *Green v. United States*, 365 U.S. 301, 306 (1961). The Court, in maintaining the longer sentence in *Green*, noted: "Plainly enough, the intention of the district judge was to impose the maximum . . . twenty-five years . . . and the formal defect in his procedure should not vitiate his considered judgment." *Id.* Although this statement clearly manifests approval of the judge's intent theory, in *United States v. Corson*, 449 F.2d 544 (3d Cir. 1971), the court merely asserted that the Supreme Court in *Green* "may, arguably, have endorsed [the court's intention] approach." *Id.* at 547 n.5.

151. *Cf. O'Keith v. United States*, 158 F.2d 591, 592 (5th Cir. 1946) (punishment should not be dependent upon fortuity of priority in pronouncement of sentences).

152. See *Gorman v. United States*, 456 F.2d 1258, 1260 (2d Cir. 1972), in which the court deemed a remand for resentencing to be "needlessly time consuming and a meaningless act," inasmuch as the judge's intent was "crystal clear." *Id.* An example of such an unnecessary remand is found in *United States v. Parson*, 452 F.2d 1007, 1009 (9th Cir. 1971), in which the court ordered *both* sentences vacated and appellant resentenced on only the more aggravated count even though the original sentences had been equal and concurrent.

153. See *Parker v. United States*, 442 F.2d 779, 781 (D.C. Cir. 1971) (because sentences for affirmed robbery convictions may have been influenced by impermissible entry convictions, proper remedy was remand for resentencing and vacation of entry convictions). *Accord*, *Bryant v. United States*, 417 F.2d 555, 558 (D.C. Cir. 1969).

154. See *Gerberding v. United States*, 471 F.2d 55, 63 (8th Cir. 1973) (court forced to remand for imposition of a general sentence because death of trial judge made it impossible to ascertain his reasons for imposition of heavier penalties on lesser offenses).

The judge's intent theory may not be used to enhance a valid sentence after the defendant has begun serving it. The court in *United States v. Turner*, 518 F.2d 14 (7th Cir. 1975), observed that increasing a defendant's sentence would contravene the constitutional guarantee against double jeopardy, and held that even though the enhancement sought was for the purpose of carrying out the intentions of the judge (as well as the expectation of the district

AN ALTERNATIVE APPROACH—REMAND FOR RESENTENCING AND IMPOSITION OF A GENERAL SENTENCE

United States v. Corson

In *United States v. Corson*,¹⁵⁵ the Court of Appeals for the Third Circuit reviewed the sentencing problems arising under the Bank Robbery Act and found the traditional theories for curing defective sentences inadequate implementations of *Prince*.¹⁵⁶ The court refused to interpret the merger language of *Prince* as restricting a sentence to the most inclusive count, and instead construed *Prince* as proscribing only cumulative penalties.¹⁵⁷ The court considered the judge's intent approach defective because it failed to remedy the principal dilemma created by *Prince*: maintaining appealable judgments on all counts, while complying with the *Prince* prohibition of cumulative penalties.¹⁵⁸ Nor is this question resolved by suspending sentence with probation;¹⁵⁹ *Corson* viewed such a disposition to contravene *Prince*.¹⁶⁰ Even assuming the validity of suspending sent-

attorney resulting from plea bargaining), an exception to the general prohibition of enhancement was unwarranted by the facts. *Id.* at 16. In *United States v. Welty*, 426 F.2d 615 (1970), *aff'd*, 468 F.2d 594 (3d Cir. 1972), the court held that the result urged by the Government, increasing the sentence under the remaining count to effectuate the intent of the judge, could not be justified because such a result violated double jeopardy protection and also precluded any future determination whether the judge would have imposed a greater sentence had he realized that the maximum sentence allowable was 30 years, rather than the 80 years he presumed it to be. Apparently the court in *Welty* would be willing to assume that the trial court intended to impose a sentence equal to the most severe penalty pronounced.

Similarly, in *Miller v. United States*, 147 F.2d 372 (2d Cir. 1945), the court held that a valid sentence could not be set aside and a more severe sentence imposed, for although the judge "could have imposed on one count a sentence equal to the consecutive sentences he imposed on the two, the matter may not be treated as though he had done so." *Id.* at 374.

155. 449 F.2d 544 (3d Cir. 1971).

156. *Id.* at 549-51.

157. 449 F.2d at 549-51. Further, the court condemned the merger doctrine as inconsistent with sound judicial policy. *Id.* at 549.

158. *Id.* at 550. Imposition of sentence on each count is a prerequisite to an appealable conviction, *see Berman v. United States*, 302 U.S. 211, 212 (1937). Cases prior to *Corson*, however, demonstrate that this principle is not adhered to rigidly. *See* notes 262-63 *infra* & accompanying text.

159. This would be the minimum disposition upon which an appeal could be based, as a suspension of sentence without probation is invalid. *See United States v. Fried*, 436 F.2d 784, 787 (6th Cir. 1971), *cited in United States v. Corson*, 449 F.2d 544, 550 (3d Cir. 1971).

160. 449 F.2d at 550. *Cf. Moore v. United States*, 432 F.2d 730, 740 (3d Cir. 1970) (multiple sentences constituted impermissible pyramiding notwithstanding all but one were suspended).

Arguably, because this sentencing procedure does not result in more severe punishment than is allowed by *Prince* this type of sentence is a mere technical violation of that decision. *Compare Prince v. United States*, 352 U.S. 322, 329 (1957) with *Gorman v. United States*,

ence with probation on all but one count, *Corson* raised the objection that a reversal of the conviction upon which the non-suspended sentence was imposed would leave only probation operative.¹⁶¹ Moreover, as such a sentence is legal once it is final and affirmed on appeal, it could not be modified under Rule 35 of the Federal Rules of Criminal Procedure. Most significantly, revocation of suspension of sentence absent a probation violation would infringe double jeopardy immunity.¹⁶²

As an alternative to the merger and judge's intent theories, *Corson* advocated imposing a general sentence on all counts for a term not exceeding the limit of the count carrying the heaviest penalty.¹⁶³ The court reasoned that this procedure would comply

456 F.2d 1258 (2d Cir. 1972). Furthermore, the Court of Appeals for the Sixth Circuit declared in *United States v. Fried*, 436 F.2d 784, 787 (1971), that suspension of imposition of sentence was not even a technical violation of *Prince*. The court found support in section 3651 of the Probation Act, 18 U.S.C. § 3651 (1970), reading it to mean that such a disposition was not a sentence. *Accord*, *Borelli v. United States*, 333 F. Supp. 369, 370-71 (D. Conn. 1971). For authority supporting this interpretation of probation see *United States v. Fultz*, 482 F.2d 1, 2 (8th Cir. 1973), and *Zarogian v. United States*, 367 F.2d 959, 963 (1st Cir. 1966). *But cf.* *Nix v. United States*, 131 F.2d 857, 858 (5th Cir. 1942), *cert. denied*, 318 U.S. 771 (1943) (probation involves a judgment of conviction even when the imposition of sentence is suspended). Use of the Probation Act for the purpose of avoiding *Prince*, however, ignores its objective of awarding youthful or unhardened offenders a fresh start unburdened by a criminal stigma, see *Roberts v. United States*, 320 U.S. 264, 272 (1943). This application of the "non-sentence" status accorded suspended sentences under the Probation Act is thus not altogether satisfactory.

161. This result might be avoided by retrial if the reversal is without prejudice; otherwise, reversal of the count upon which sentence was imposed does not permit reassignment of that penalty to another, valid count. See, e.g., *Pugliese v. United States*, 353 F.2d 514 (1st Cir. 1965), affirming that the district court after appeal has no power to increase a sentence "not infected by error." *Id.* at 516. As noted in *United States v. Welty*, 426 F.2d 615, 618 (3d Cir. 1970), an attack by a defendant on an illegal sentence cannot provide grounds under Rule 35 for reconsideration of the valid sentences on the other counts to afford the government the same term of punishment as that originally imposed on all counts. *Id.* at 618.

162. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (Constitution designed as much to prevent criminal from being twice punished for same offense as from being twice tried for it); *United States v. Welty*, 426 F.2d 615, 618 (1970), *aff'd*, 468 F.2d 594 (3d Cir. 1972) (fifth amendment prohibition against double jeopardy forbids government obtaining increase in term of imprisonment under valid count to compensate for invalidity of sentences under related counts). *Cf.* *Ekberg v. United States*, 167 F.2d 380, 385 (1st Cir. 1948) (cited in *Corson* as corroborative of this contention but emphasizing the bar to subsequent prosecution rather than multiple punishment).

If an unattached concurrent sentence remains after reversal of one count, courts, without consideration of the double jeopardy implications, have changed the sentencing to run consecutively. See, e.g., *United States v. Welty*, 426 F.2d 615, 618 (1970), *aff'd*, 468 F.2d 594 (3d Cir. 1972); *United States v. Chester*, 407 F.2d 53 (3d Cir.), *cert. denied*, 394 U.S. 1020 (1969); *Williamson v. United States*, 265 F.2d 236 (5th Cir. 1959).

163. 449 F.2d at 551.

with the *Prince* mandate yet would preclude the possibility of an anomalous result in the event of a reversal of conviction on any one count.¹⁶⁴ Following reversal, resentencing not exceeding the maximum allowed under any of the remaining counts would be permissible¹⁶⁵ and would not engender double jeopardy problems as long as the new sentence is no greater than the original term pronounced.¹⁶⁶

The court in *Corson* was faced with invalid multiple sentencing; the heaviest penalty was imposed on a lesser count. Rather than arbitrarily designating one of the sentences valid, the court held that the entire sentence had been tainted by the cumulative punishments and remanded for resentencing.¹⁶⁷ Arguably, this disposition of invalid multiple sentencing better protects the defendant because he is entitled to be present at resentencing¹⁶⁸ and the trial court is

164. *Id.*

165. *Id.* For an example of an incorrect general sentence see *United States v. Stewart*, 523 F.2d 1263 (2d Cir. 1975), in which the district court had imposed a "general" sentence that was the sum of the maximum penalties prescribed by each subsection.

166. Because a general sentence is not apportioned among the several counts, *Vautrot v. United States*, 144 F.2d 740, 741 (8th Cir. 1944); *Levine v. Hudspeth*, 127 F.2d 982, 984 (10th Cir. 1942), reimposition of the same sentence would not equal an increase in sentence even though it covered fewer counts. See also *United States v. Benz*, 282 U.S. 304 (1931), which affirms the power of courts to amend but not to increase sentences not because "the court has lost control of the judgment in the latter case, but [because] to increase the penalty is to subject the defendant to double punishment" *Id.* at 307.

Illustrative of the limitations on a general sentence imposed upon remand is *United States v. Turner*, 518 F.2d 14, 15 (7th Cir. 1975). One defendant had been sentenced to two ten year consecutive sentences and the district court, after the sentence had been vacated and the judgment remanded for resentencing, imposed a general sentence on the whole indictment of 20 years. Despite the judge's clear intent to sentence the defendant to twenty years, the appellate court held unwarranted this enhancement of a sentence the defendant had commenced to serve and consequently limited the general sentence to ten years. *Id.* at 16.

167. 449 F.2d at 551. Accord, e.g., *United States v. Jasper*, 481 F.2d 976, 979 (3d Cir. 1973); *United States v. Parker*, 442 F.2d 779, 781 (D.C. Cir. 1971); *United States v. Von Roeder*, 435 F.2d 1004, 1010 (10th Cir. 1970); *Coleman v. United States*, 420 F.2d 616, 626 (D.C. Cir. 1969); *Bryant v. United States*, 417 F.2d 555, 558 (D.C. Cir. 1969). See also *Butler v. United States*, 387 F. Supp. 1375, 1379 (D.R.I. 1975) (habeas corpus proceeding); *Evans v. United States*, 386 F. Supp. 812, 814 (E.D. Pa. 1974).

The dissent in *Corson* considered the majority's sentencing remedy illegal because more than 120 days had passed since affirmance of the conviction and the court therefore had lost jurisdiction to modify the valid sentence on the most aggravated third count. 449 F.2d at 552-53 (Hastie, J., dissenting). Significantly, however, this assertion as to the validity of the third and more inclusive count is dependent upon acceptance of the discounted merger theory. See notes 138-40 *supra* & accompanying text.

168. As noted in *Williamson v. United States*, 265 F.2d 236 (5th Cir. 1959), a prisoner's presence is not mandated for a decision whether a sentence should be set aside if no fact issue is present, nor is it necessary if an invalid sentence on one count is vacated and another reinstated. But a prisoner's presence is essential whenever a sentence is set aside and the cause remanded for resentencing. *Id.* at 239.

obligated to impose a new sentence based upon a reconsideration of the case, rather than merely reinstating some part of the original sentence.¹⁶⁹ A majority of courts, however, continue to remedy defective sentencing by merely vacating invalid sentences and reinstating the proper one.¹⁷⁰

The General Sentence

A court may validly impose a general sentence upon conviction of several counts charging different offenses provided that the term of the sentence does not exceed the aggregate of maximum penalties under each count.¹⁷¹ For purposes of the Federal Bank Robbery Act, *Corson* endorsed a variation of this principle by proposing a general sentence not to exceed the maximum of the count carrying the greatest penalty.¹⁷² An appellate court will sustain such a sentence as long as the defendant was convicted properly under any valid

169. *Accord*, *United States v. Jasper*, 481 F.2d 976, 979 (3d Cir. 1973) (*Corson* approach of remanding for resentencing on the whole judgment and in presence of defendant is expressly accepted).

170. *See, e.g.*, *Goodman v. United States*, 511 F.2d 706 (5th Cir. 1975); *United States v. Pravato*, 505 F.2d 703, 705 (2d Cir. 1974); *United States v. Leyba*, 504 F.2d 441, 444 (10th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *United States v. Fleming*, 504 F.2d 1045, 1053-55 (7th Cir. 1974); *United States v. Vasquez*, 504 F.2d 555, 556 (5th Cir. 1974); *United States v. Cooper*, 504 F.2d 260, 263 (D.C. Cir. 1974); *United States v. Pietras*, 501 F.2d 182, 188 (8th Cir. 1974); *Garza v. United States*, 498 F.2d 1066, 1068 (5th Cir. 1974); *Sullivan v. United States*, 485 F.2d 1352, 1355 (5th Cir. 1973); *United States v. Mackey*, 474 F.2d 55, 57 (4th Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Shelton*, 465 F.2d 361, 363 (4th Cir. 1972); *United States v. Buck*, 449 F.2d 262, 271 (10th Cir. 1971); *United States v. Foster*, 440 F.2d 390, 393 (7th Cir. 1971); *Holland v. United States*, 384 F.2d 370, 371 (5th Cir. 1967); *United States v. Gardner*, 347 F.2d 405, 408 (7th Cir. 1965); *United States v. Machibroda*, 338 F.2d 947, 949 (6th Cir. 1964).

Prior to *Corson*, however, courts that remanded for resentencing merely vacated the erroneous sentences rather than asserting the infirmity of the entire sentence, and generally did so without requiring the defendant to be present. *See, e.g.*, *United States v. Parson*, 452 F.2d 1007, 1009 (9th Cir. 1971); *United States v. Parker*, 442 F.2d 779, 781 (D.C. Cir. 1971); *United States v. Foy*, 441 F.2d 398, 399 (5th Cir. 1971); *United States v. White*, 440 F.2d 978, 982 (5th Cir. 1971); *United States v. Von Roeder*, 435 F.2d 1004, 1010-11 (10th Cir. 1970); *Coleman v. United States*, 420 F.2d 616, 626 (D.C. Cir. 1969); *Bryant v. United States*, 417 F.2d 555, 558 (D.C. Cir. 1969).

171. 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* 416 (1969). *See, e.g.*, *Davis v. United States*, 269 F.2d 357, 363 (6th Cir. 1959); *Call v. United States*, 265 F.2d 167, 171 (4th Cir. 1959); *Hamilton v. United States*, 204 F.2d 927, 928 (4th Cir. 1953); *McDowell v. Swope*, 183 F.2d 856, 858 (9th Cir. 1950); *Reed v. United States*, 142 F.2d 435 (5th Cir. 1944); *Levine v. Hudspeth*, 127 F.2d 982, 984 (10th Cir. 1942).

172. *See, e.g.*, *Marshall v. United States*, 431 F.2d 355, 359 (7th Cir. 1970); *United States v. Fannon*, 403 F.2d 391, 394 (7th Cir. 1968); *Isaacs v. United States*, 301 F.2d 706, 733 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962); *United States v. Haith*, 297 F.2d 65, 68 (4th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962); *Ekberg v. United States*, 167 F.2d 380, 386 (1st Cir. 1948).

count that warrants judgment and sentence.¹⁷³

The general sentence has not been favored, however; courts prefer separate sentences on each count.¹⁷⁴ Some circuits have struck down¹⁷⁵ or specifically disapproved¹⁷⁶ general sentences. The predominant criticism of such a sentence is that a prisoner's right to specific punishment for specific transgressions is undermined by "inscrutable mystery" regarding the real sentence and thus his rehabilitation is impeded.¹⁷⁷ The type of general sentence approved in *Corson* appears less vulnerable to this objection, however, as its limitation to the maximum allowed by the most aggravated count does require reference to a specific offense.¹⁷⁸ Furthermore, because multiple convictions arising under the Act necessarily require the underlying offense of bank robbery, there is less likelihood of confusion regarding the precise crime for which defendant is being punished.¹⁷⁹

173. "[T]he presumption of law is that the court awarded sentence on the good count only." *Claassen v. United States*, 142 U.S. 140, 147 (1891). *Accord*, *Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *United States v. Sheehan*, 428 F.2d 67, 79 (8th Cir.), *cert. denied*, 400 U.S. 853 (1970); *United States v. Lewis*, 406 F.2d 486, 492 (7th Cir.), *cert. denied*, 394 U.S. 1013 (1969); *Reed v. United States*, 401 F.2d 756, 758 (8th Cir. 1968), *cert. denied*, 394 U.S. 1021 (1969); *Vautrot v. United States*, 144 F.2d 740, 741 (8th Cir. 1944).

174. *Ray v. United States*, 372 F.2d 80, 83 (9th Cir. 1967); *United States v. Haith*, 297 F.2d 65, 68 (4th Cir. 1961); *Davis v. United States*, 269 F.2d 357, 363 (6th Cir. 1959); *McDowell v. Swope*, 183 F.2d 856, 858 (9th Cir. 1950); *Reed v. United States*, 142 F.2d 435 (5th Cir. 1944); *Levine v. Hudspeth*, 127 F.2d 982, 984 (10th Cir. 1942).

175. *See, e.g.*, *United States v. Straite*, 425 F.2d 594, 596 (D.C. Cir. 1970); *Walker v. United States*, 342 F.2d 22, 27 (5th Cir. 1965); *Benson v. United States*, 332 F.2d 288 (5th Cir. 1964). *But cf.* *Stephen v. United States*, 426 F.2d 257, 258 (5th Cir. 1970), which suggests that pyramiding of sentences is permissible as long as the total does not exceed the maximum allowable on the most aggravated count. As this is effectively a general sentence, it is interesting to note that the Fifth Circuit purportedly has outlawed general sentences.

176. *See, e.g.*, *United States v. Yoppolo*, 435 F.2d 625, 627 (6th Cir. 1970); *Peoples v. United States*, 412 F.2d 5, 7 (8th Cir. 1969).

177. *Benson v. United States*, 332 F.2d 288, 291-92 (5th Cir. 1964). *Accord*, *United States v. Straite*, 425 F.2d 594, 596 (D.C. Cir. 1970). Both of these courts emphasized that this defect in the general sentence does not taint the underlying conviction and is not subject to collateral attack. The only relief available is correct sentencing. 332 F.2d at 292 n.10; 425 F.2d at 596 n.5.

178. The court in *Benson*, which outlawed the general sentence within the Fifth Circuit, was particularly concerned with a general sentence that was less than the aggregate of the maximums of all counts but greater than the allowable penalty under only one count. A *Corson* general sentence arguably is related more closely to a specific offense and therefore less "mysterious" to the defendant.

179. *See Hall v. United States*, 356 F.2d 424 (5th Cir. 1966), holding the *Benson* rule inapplicable to bank robbery cases. Analytical inconsistencies in *Hall* detract from its significance as a modification of *Benson*, however. The defendant was convicted of felonious entry and larceny and was given a general sentence of fifteen years. Reading *Prince* to mandate a

An additional criticism of the general sentence is that it may impede judicial efficiency on motions for post-conviction relief.¹⁸⁰ Remand for resentencing will be required whenever the most aggravated count is reversed¹⁸¹ and perhaps also when the sentencing judge may have been influenced by the multiplicity of offenses, some of which are later held erroneous.¹⁸² A possible solution for avoiding the resentencing problems is to impose a general sentence equal to the "minimum maximum"—the lowest maximum permitted on any of the counts. For example, if the defendant is convicted for entry (20 years), grand larceny (ten years), and assault with a dangerous weapon (25 years) the general sentence imposed would be ten years. Such a proposal is inadvisable, however, because it is violative of the legislative intent to impose a sentence commensurate with criminal culpability, and it would produce results as anomalous as does the discredited merger theory.¹⁸³

In the Third Circuit, which decided *Corson*, remanding for imposition of a general sentence with the defendant present is now the rule for correction of improperly cumulated consecutive or concurrent sentences,¹⁸⁴ in the Fifth¹⁸⁵ and Eighth¹⁸⁶ Circuits general sen-

merger of the offenses, the appellate court determined that a single crime had been proven upon which a valid single sentence had been imposed. The distinction between robbery and larceny relative to felonious entry, *see* notes 55-56 *supra* & accompanying text, was ignored and the merger theory was misapplied by the court's permitting the fifteen year sentence to stand despite the lesser maximum (ten years) of the completed offense provision.

The theory, illustrated in *Hall*, that the Act creates only one substantive crime with alternative means of commission has developed from an extension of the *Prince* merger language to the other sections of the statute, *see* notes 255-61 *infra* & accompanying text. Difficulty may arise in the application of this interpretation to cases of (e) [2] and [3] kidnapping and murder, however, because these offenses may be deemed conceptually distinct from the underlying bank robbery, *see* notes 69-71 *supra* & accompanying text.

180. *Benson v. United States*, 332 F.2d 288, 291 (5th Cir. 1964). The need to reexamine all counts if error is asserted and to order a resentencing if any court cannot stand, a problem stressed in *Benson*, is not applicable to *Corson* general sentences, which are restricted to the maximum allowable on the most aggravated count.

181. *See, e.g., United States v. Straite*, 425 F.2d 594, 596 (D.C. Cir. 1970); *United States v. Jones*, 397 F. Supp. 312, 315 (E.D.N.Y. 1975) (in a bank robbery case the general sentence often would be illegal as to all counts except the count under subsection (d)).

182. *See, e.g., United States v. Straite*, 425 F.2d 594, 596 (D.C. Cir. 1970); *Baber v. United States*, 324 F.2d 390, 394 (D.C. Cir. 1963); *Griffin v. United States*, 269 F.2d 903, 906 (4th Cir. 1959). This deficiency was not mentioned in *Benson*.

183. For example, if a defendant were convicted of entering with intent to commit both larceny and petit larceny he would receive only a one year general sentence. If the statute, however, had been drafted so that the lesser crime of entering did not carry a penalty equal to that of robbery and much longer than that of larceny, the application of the merger theory could be warranted.

184. *See, e.g., United States v. Jasper*, 481 F.2d 976, 979 (3d Cir. 1973); *United States v.*

tences have been permitted in bank robbery cases. A majority of circuits, however, have failed to adopt the *Corson* procedure.¹⁸⁷ Furthermore, courts that have endorsed the use of the general sentence in bank robbery cases have not treated a remand for resentencing as mandatory. For example, in *Gorman v. United States*,¹⁸⁸ the Second Circuit expressly endorsed *Corson* as a sensible way to resolve the dilemma, created by *Prince*, of avoiding the pyramiding of sentences while retaining final appealable convictions on all counts. Nevertheless, the court in *Gorman* refused to remand for resentencing because the judge's intent was absolutely clear.¹⁸⁹ In the circuits that maintain that multiple convictions are permissible, the *Gorman* approach is practical as well as valid, for the court there adopted a more flexible approach for curing defective sentences. Under *Gorman*, the invalid sentence simply is vacated and the valid one is reinstated if the judge's intent is clear and a remand would

Chapman, 448 F.2d 1381, 1388 (3d Cir. 1971), *cert. denied sub nom. Overton v. United States*, 405 U.S. 929 (1972); *Evans v. United States*, 386 F. Supp. 812, 813 (E.D. Pa. 1974). *But see United States v. Welty*, 468 F.2d 594 (3d Cir. 1972). The appellate court noted that prior to its decision in *Corson* they had ordered three of the four bank robbery sentences vacated, allowing the one under subsection (d) to stand as originally imposed. *Id.* at 595. The court found nothing in this order to be inconsistent with *Corson*. Presumably the court so declared because their focus was on the district court's decision to render an unattached concurrent sentence consecutive, rather than on the question of resentencing in open court. Still, a conflict with *Corson* and *Jasper* seems apparent. Although *Corson* dealt with consecutive sentences, its application has been extended to cases involving concurrent sentences as well. *See United States v. Jasper*, 481 F.2d 976 (3d Cir. 1973); *Evans v. United States*, 386 F. Supp. 812 (E.D. Pa. 1974).

185. *Hall v. United States*, 356 F.2d 424 (5th Cir. 1966).

186. *Johnson v. United States*, 495 F.2d 652 (8th Cir. 1974). The court reasoned that a single general sentence was proper because under the federal statute a consummated bank robbery could violate several sections of the Act but *Prince* precluded the imposition of separate sentences for each violation. *Johnson's* significance as authority for the general sentence approach is lessened, however, by its reliance on *Gerberding v. United States*, 471 F.2d 55 (8th Cir. 1973). The *Gerberding* court was unable to discern the trial judge's purpose in imposing more severe penalties on the lesser offenses. A further complication was the judge's death after the trial. Under these unusual circumstances the appellate court felt compelled to remand for imposition of a general sentence. The court expressly stated, however, that the remand should not be viewed as a departure from the judge's intent theory heretofore endorsed by the court.

187. *See Wright v. United States*, 519 F.2d 13, 18 (7th Cir. 1975). *But cf. Argo v. United States*, 473 F.2d 1315 (9th Cir.), *cert. denied*, 412 U.S. 906 (1973). *Argo* considered multiple convictions (as distinguished from multiple sentences, as in *Corson*) technically improper. The defendant had been convicted under subsections (a) and (d) and sentenced to 25 years, the maximum allowable under (d). Although this was in effect a *Corson*-type general sentence, equal to the maximum allowed on the most aggravated count, the court held there was no prejudicial error and did not remand for resentencing.

188. 456 F.2d 1258 (2d Cir. 1972).

189. *Id.* at 1259.

be needlessly time consuming and meaningless.¹⁹⁰ The difficulty with this approach is that it is not always valid to assume that a court, by imposing the maximum sentence on each count, intended the longest sentence to stand, for the judge's misperception of the permissibility of multiple sentences may have influenced the term imposed.

Conclusion

The merger theory, under which only the sentence on the most inclusive offense is retained, is inadequate under the Act because the lesser offense of entry may carry a greater penalty than the completed crime.¹⁹¹ Although the suspension of sentence with probation technically avoids cumulative sentencing without immunizing the defendant from punishment upon reversal of the sentence supporting conviction, it contravenes the spirit and purpose of the Probation Act and is unwarranted.¹⁹² Disregarding the adverse collateral consequences of multiple convictions,¹⁹³ the *Corson* general sentence, limited by the maximum allowed on any valid count, appears the most practical way at the district court level to preserve convictions for appeal without cumulating sentences. The disadvantages of the general sentence are lack of specificity¹⁹⁴ and time consuming resentencing upon reversal of one or more counts.¹⁹⁵ Yet, under the prevalent interpretation of *Prince* as prohibiting only multiple sentences and not multiple convictions, it seems to be the most practical implementation.

THE EFFECT OF CONCURRENT SENTENCING

Although not affirmatively advocating this procedure as a solution to the *Prince* dilemma, some courts¹⁹⁶ nevertheless have ap-

190. *Id.* at 1260.

191. See notes 143-45 *supra* & accompanying text.

192. See note 160 *supra*.

193. See notes 210-13 and note 238 *infra* & accompanying text.

194. See notes 177-79 *supra* & accompanying text.

195. See notes 180-82 *supra* & accompanying text.

196. See, e.g., *United States v. Spears*, 442 F.2d 424, 425 (4th Cir. 1971); *McMillen v. United States*, 386 F.2d 29, 37 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); *United States v. Jones*, 397 F. Supp. 312, 315-16 (E.D.N.Y. 1975). Other cases have reached the same result by vacating erroneous concurrent sentences subsequent to affirmation of convictions on appeal, but without explicit endorsement of this practice. See, e.g., *United States v. Stewart*, 513 F.2d 957, 960-61 (2d Cir. 1975); *United States v. Pravato*, 505 F.2d 703, 705 (2d Cir. 1974).

proved the imposition by the trial judge of multiple concurrent sentences. An appellate court can correct this technical error by vacating all but one sentence when the conviction becomes final after appeal.¹⁹⁷ Various rationales for this practice have been enunciated. It is a practical means for preserving a final appealable judgment on all convictions while at the same time insuring valid verdicts and the authority to sentence correctly on remand.¹⁹⁸ Moreover, the defendant is not harmed as long as the time to be served does not exceed the maximum allowable under the most aggravated count.¹⁹⁹ Courts also have justified multiple concurrent sentences by reading *Prince* narrowly to prohibit only multiple *consecutive* sentences.²⁰⁰

The concurrent sentence doctrine of appellate review, whereby a court may decline even to review²⁰¹ the separate counts of a multi-count indictment as long as some of the counts were valid,²⁰² may further affect the *Prince* mandate against cumulative sentences. Thus the formal defect of multiple sentences would not require vacation of the lesser sentences.²⁰³ Because the imposition of concurrent sentences is not reversible error,²⁰⁴ courts deeming the lesser

197. As observed in *Corson*, such a procedure necessitates a correction of *every* sentence and implicitly approves the original, conscious imposition of an improper sentence. 449 F.2d at 551 n.15.

198. *United States v. Spears*, 442 F.2d 424, 425 (4th Cir. 1971) (by implication); *United States v. Jones*, 397 F. Supp. 312, 315 (E.D.N.Y. 1975).

199. *McMillen v. United States*, 386 F.2d 29, 37 (1st Cir. 1967). *But see* discussion of collateral consequences of concurrent sentences notes 211-221 *infra* & accompanying text. A defendant thus would not be able to avoid serving any term of imprisonment because on appeal only the conviction supporting a prison sentence was reversed. The First Circuit, however, later held in *O'Clair v. United States*, 470 F.2d 1199 (1st Cir. 1972), *cert. denied*, 412 U.S. 921 (1973), that not only multiple convictions but also multiple sentences were disallowed under the statute. To reconcile these inconsistent decisions the court in *O'Clair* noted that in *McMillen* it merely had assumed the validity of multiple convictions. *Id.* at 1203 n.4. *See* notes 226-43 *infra* & accompanying text.

200. *McMillen v. United States*, 386 F.2d 29, 37 (1st Cir. 1967). *See also* *Campbell v. United States*, 269 F.2d 688, 692 (1st Cir. 1959). *But see* *United States v. Von Roeder*, 435 F.2d 1004, 1010-11 (10th Cir. 1970); *Coleman v. United States*, 420 F.2d 616, 626 (D.C. Cir. 1969); *United States v. Conway*, 415 F.2d 158, 166 (3d Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).

201. Compare discussion notes 196-200 *supra* & accompanying text regarding cases that ultimately vacated the erroneous cumulative sentences.

202. This practice was implicitly endorsed for bank robbery cases by the Supreme Court in *Green v. United States*, 365 U.S. 301, 305-06 (1961).

203. *Id.* *Cf.* *Sullivan v. United States*, 485 F.2d 1352, 1355 (5th Cir. 1973) (court chose to vacate erroneous sentence and leave effective valid sentence in mistaken reliance on *Green*).

204. *See, e.g., United States v. Romano*, 382 U.S. 136, 138 (1965); *Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943).

sentences harmless may refuse to upset them.²⁰⁵ Courts following this practice hold, in effect, that the defect resulting from the multiplicity is vitiated by the imposition of concurrent sentences.²⁰⁶ In applying the doctrine, some courts have stated emphatically that the judgment "will not be reversed,"²⁰⁷ while others have advised less assertively that it "may be affirmed."²⁰⁸

The Supreme Court in *Benton v. Maryland*, however, undermined the concurrent sentence doctrine.²⁰⁹ The Court held that the existence of a valid concurrent sentence did not constitute a jurisdictional bar to review of the conviction on one count, because the possibility of adverse collateral consequences provided the necessary elements of a justiciable case or controversy.²¹⁰ The possible consequences from multiple convictions included enhancement of sentence under habitual criminal statutes, impairment of chances for parole, and impeachment of character as a witness.²¹¹ Although

205. See, e.g., *Campbell v. United States*, 269 F.2d 688, 692 (1st Cir. 1959), *vacated on other grounds*, 365 U.S. 85 (1961).

206. See, e.g., *Ward v. United States*, 183 F.2d 270, 272 (10th Cir.), *cert. denied*, 340 U.S. 864 (1950).

207. *United States v. LePera*, 443 F.2d 810, 813 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). See also *Barenblatt v. United States*, 360 U.S. 109, 115 (1959) (*must be upheld* if any count is good); *Schutz v. United States*, 432 F.2d 25, 29 (10th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971) (if sentence does not exceed that which might be lawfully imposed upon any one valid count, judgment and sentence *remain in full force regardless* of disposition of other counts); *Glazerman v. United States*, 421 F.2d 547, 552 (10th Cir.), *cert. denied*, 398 U.S. 928 (1970) (judgment and sentence *will not be reversed* if sentence does not exceed that which may be lawfully imposed on valid counts).

208. *Roviaro v. United States*, 353 U.S. 53, 59 n.6 (1957) (may be affirmed if conviction on either count valid).

209. 395 U.S. 784 (1969). The rule has not, however, been abolished. *United States v. Holman*, 436 F.2d 863, 867 (9th Cir. 1970), *cert. denied*, 402 U.S. 913 (1971). For other cases applying the doctrine after *Benton* see *Morrison v. United States*, 491 F.2d 344, 347 (8th Cir. 1974); *United States v. Johnson*, 469 F.2d 973, 976 (5th Cir. 1972); *United States v. Hamilton*, 469 F.2d 880, 881 (9th Cir. 1972); *United States v. Crouch*, 442 F.2d 427, 427-28 (9th Cir.), *cert. denied*, 404 U.S. 959 (1971).

210. 395 U.S. at 790-91. *Accord*, *United States v. Von Roeder*, 435 F.2d 1004, 1010 (10th Cir. 1970), *vacated on other grounds, sub nom. Schreiner v. United States*, 404 U.S. 67 (1971), (justiciable case or controversy existed although time served was not affected; illegal sentence vacated with remand for resentencing on remaining count). See also Note, *The Federal Concurrent Sentence Doctrine*, 70 COLUM. L. REV. 1099, 1117 (1970) (concurrent sentence doctrine after *Benton* clearly abrogated as a mandatory device for automatic dismissal on jurisdictional grounds).

211. 395 U.S. at 790-91. See Cramer, *Concurrent Sentence Doctrine Limited*, 36 D.C. BAR J. 46 (1969) (adverse consequences include possibility that officials or other persons considering defendant's record in the future, whether for purposes of parole, employment, impeachment as witness, etc., may consider the two convictions as relating to separate criminal activities). See also Comment, 44 TEMP. L.Q. 385 (1971).

refusing to apply the concurrent sentence doctrine to bar review in this case, the Supreme Court failed to enunciate clearly the amount of prejudice that subsequent defendants must show to warrant this relief.²¹² The Court did note that collateral legal consequences are entailed in most convictions,²¹³ thus implying a marked restriction of the doctrine's applicability. It further acknowledged, however, that the doctrine *may* have continuing validity as a rule of judicial convenience allowing courts in certain circumstances, and as a matter of discretion,²¹⁴ to decide that it is not necessary to review the challenged convictions.²¹⁵ By admitting that situations may arise in which the adverse consequences are so remote that prejudice to the defendant is *de minimis*, the Court seemingly advocated a rule of judicial discretion for partial review.²¹⁶

Some courts have suggested that the impact of *Benton* is that the appellant must demonstrate some undesirable collateral consequences to avoid application of the doctrine,²¹⁷ or conversely, that

212. As the court in *United States v. McKenzie*, 414 F.2d 808 (3d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970), stated: "[T]he Court in *Benton* did not resolve the question of whether prejudice beyond that inherent in being convicted of two offenses and serving two sentences therefor, albeit concurrently, must be shown to obtain relief" *Id.* at 811.

213. 395 U.S. at 790.

214. *Id.* at 791.

215. *Id.* In the dissent, two Justices stressed that the rule *does* have continuing validity as an element of judicial discretion because it saves overworked courts from reviewing convictions that will have no significant adverse consequences for the appellant. *Id.* at 801-02 (Harlan & Stewart, J.J., dissenting). The dissent has a valid point; courts should not expend their time considering inconsequential problems. It may be difficult, however, for an appellant to prove convincingly that these multiple convictions, though not presently prejudicial, may be so in the future. Neither the majority nor the dissent expressed a view on whether collateral consequences (e.g., a recidivist sentence ten years later) may constitutionally be imposed because of a conviction that was denied review based on the concurrent sentence doctrine. This potential problem is an additional argument against using the doctrine.

216. In *United States v. Hines*, 256 F.2d 561 (2d Cir. 1958), decided prior to *Benton*, the court asserted that the Supreme Court had made it clear that the rule is not absolute but rather is a matter of discretion. The reason for review of concurrent counts in some cases was the court's suspicion that "the total sentences would be less if the convictions were shorn of the defective counts." *Id.* at 563. The *Hines* court also noted adverse effects on parole, the resultant social stigma, and the possibility that a longer sentence might have been imposed. *Id.* For a statement that this court was thus espousing a rule of judicial discretion for partial review of multi-count convictions in place of automatic dismissal, see Note, *Criminal Procedure—Appeal May Be Taken to One Count of Multi-Count Conviction Where Concurrent Sentences Have Been Imposed*, 107 U. PA. L. REV. 726, 729 (1959).

217. *United States v. Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970). See also *Morrison v. United States*, 491 F.2d 344, 347 (8th Cir. 1974) (collateral legal consequences that *might* result from the added convictions were remote); *Tarvestad v. United States*, 418 F.2d 1043, 1046 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (rule "still viable where prejudice does not patently appear and collateral legal consequences are remote.")

prejudice is presumed to exist unless the government clearly proves otherwise.²¹⁸ In view of the Court's declaration that collateral consequences attach to most convictions, the latter interpretation seems the more reasonable.²¹⁹ As those courts refusing to invoke the doctrine maintain, whenever multiple sentences are impermissible the error is not cured by the existence of concurrent sentences,²²⁰ although the potential prejudice to a defendant is less than with consecutive sentences it is not eliminated.²²¹

Courts have found sufficient prejudice to merit review of multiple concurrent sentences when there were such potential collateral consequences as enhancement of sentence under recidivist statutes,²²² impeachment of character as a witness,²²³ and impairment of opportunity for parole.²²⁴ Furthermore, courts have considered challenges

(citation omitted). *Cf.* *United States v. Holman*, 436 F.2d 863, 867 (9th Cir. 1970) (overwhelming evidence and extremely low sentence, not defendant's failure to demonstrate prejudice, were seemingly determinative).

218. *See* *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970) (doctrine *perhaps* may be applied whenever collateral consequences can be ruled out *definitely*, implying need for positive proof of no adverse effects); Note, *The Federal Concurrent Sentence Doctrine*, 70 COLUM. L. REV. 1099, 1117 (1970) (great probability that prejudice will result strongly suggests federal appellate courts should review all counts of conviction unless government can demonstrate affirmatively that no prejudice will occur).

219. *See* *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972) (after *Benton* it cannot be assumed that multiplicity of concurrent sentences will not have adverse consequences for appellant).

220. *See, e.g.,* *United States v. Mori*, 444 F.2d 240, 245 (5th Cir. 1971); *United States v. White*, 440 F.2d 978, 982 (5th Cir. 1971) (ordering vacation of sentence followed by remand for resentencing on one count). *Cf.* *Holland v. United States*, 384 F.2d 370, 371 (5th Cir. 1967) (merely vacated erroneous sentence).

221. *See, e.g.,* *Wright v. United States*, 519 F.2d 13, 19-20 (7th Cir.), *cert. denied*, 96 S. Ct. 285 (1975) (where *possibility* of undesirable consequences exists no longer obliged to follow rule and may consider challenges); *United States v. Fleming*, 504 F.2d 1045, 1053-55 (7th Cir. 1974) (illegal sentences *must* be vacated if appellant *may* be prejudiced); *United States v. Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972) (may review erroneous sentence where *possibility* of adverse consequences exists). Moreover, according to the court in *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970), "[t]he vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The conviction could then be subject to appellate review." *Id.* at 606, n.8.

222. *See, e.g.,* *United States v. McKenzie*, 414 F.2d 808, 811 (3d Cir. 1969) (possibility that appellant might some day be subject to habitual criminal statute constituted sufficient prejudice).

223. *United States v. Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

224. *See, e.g.,* *Clermont v. United States*, 432 F.2d 1215, 1217 (9th Cir. 1970); *Holland v. United States*, 384 F.2d 370, 371 (5th Cir. 1967); *United States v. Machibroda*, 338 F.2d 947, 949 (6th Cir. 1964); *United States v. Leather*, 271 F.2d 80, 85 (7th Cir. 1959); *Hibdon v. United States*, 204 F.2d 834, 839 (6th Cir. 1953). *But see* *Clark v. United States*, 267 F.2d 99,

to multiple sentences if, in the exercise of their discretion, they felt that the length of the sentences or verdicts on other counts was influenced by the evidence presented on the erroneous counts, or by the judge's view that the defendant was guilty of separately punishable offenses.²²⁵ Although the standard for judging the prejudicial effects of concurrent sentences is still unclear, *Benton* establishes that a court may not disregard the possibility of collateral consequences resulting from multiple convictions.

THE O'CLAIR DOCTRINE—DISALLOWANCE OF MULTIPLE CONVICTION AS WELL AS MULTIPLE SENTENCES

Adverse collateral consequences were also pivotal to the decision of the Court of Appeals for the First Circuit in *O'Clair v. United States*²²⁶ that a correct interpretation of the Act required expunging not only multiple sentences but also multiple convictions.²²⁷ Thus, in contrast to the *Corson* conclusion that only multiple sentences are forbidden,²²⁸ *O'Clair* mandated, in an apparent departure from prior bank robbery cases,²²⁹ that for the aggravated offense only one

102 (4th Cir. 1959) (eligibility for parole not affected; determined by length of term of imprisonment and not by number of sentences imposed). See also 18 U.S.C. § 4202 (1970) ("[a] Federal prisoner . . . may be released on parole after serving one third of such term or terms . . .").

225. See, e.g., *United States v. Rizzo*, 491 F.2d 1235, 1236 (2d Cir. 1974) (court remanded for reconsideration of sentence because conviction on both counts might have affected punishment set for each). But see *United States v. Marshall*, 427 F.2d 434, 438 (2d Cir. 1970) (court refused to remand for resentencing after vacation of convictions under § 2113(d) finding, as sentences imposed were well within maximum authorized, no evidence that sentences were influenced by guilty verdicts on more serious charge).

226. 470 F.2d 1199 (1st Cir. 1972), cert. denied, 412 U.S. 921 (1973).

227. *Id.* at 1204.

228. 449 F.2d 544, 551 (3d Cir. 1971).

229. As noted in *O'Clair*, 470 F.2d at 1202 n.2, prior cases appear to have assumed the validity of multiple convictions under subsections (a), (b), and (d) and thus did not decide directly the present issue. See also *United States v. Harvey*, 439 F.2d 142, 143 (3d Cir. 1971) (as separate crimes are created, court can convict on both counts); *Matlock v. United States*, 309 F. Supp. 398, 401 (W.D. Tenn. 1970) (offenses maintain their separate identity, therefore, multiple convictions are allowed). But see *Walters v. Harris*, 460 F.2d 988, 994 (4th Cir. 1972), a case dealing with violations of subsections (a) and (d). The court stated that the sections created one offense but referred only to the illegality of multiple sentences, holding that the defendant therefore was entitled to have one of his convictions vacated. It appears that the judge was simply imprecise in his language and was not anticipating the holding in *O'Clair* that multiple convictions are forbidden. Additionally, some courts have vacated both the entering sentence and conviction in implementation of the *Prince* rationale that the entering with intent offense merges into the completed robbery. See, e.g., *United States v. Parker*, 442 F.2d 779, 781 (D.C. Cir. 1971); *Coleman v. United States*, 420 F.2d 616, 626 (D.C. Cir. 1969); *Bryant v. United States*, 417 F.2d 555, 558 (D.C. Cir. 1969). Cf. *United States v. Buck*, 449

conviction would be permitted.²³⁰ The decision was grounded on a consideration not only of the probable collateral effects of multiple convictions but also of pertinent legislative history, the rule of lenity, and double jeopardy problems.²³¹

Although under the same evidence test Congress constitutionally could impose multiple punishments for some of the components of bank robbery,²³² the court in *O'Clair* examined the relevant committee report and found that Congress intended to create not separate offenses but "one offense—bank robbery—which was to receive one punishment, its severity determined by the nature of the accompanying aggravating circumstances."²³³ Thus the court reasoned that if Congress intended the aggravating incidents to affect only the sentence, it necessarily would follow that Congress did not intend the existence of such incidents to double the convictions.²³⁴ Moreover, because the statute is ambiguous, failing to establish clearly either a single offense with alternative means of commission²³⁵ or distinct crimes for which multiple punishments are allowed,²³⁶ the rule of lenity required adoption of the less severe approach.²³⁷

To further bolster its proposition that multiple convictions must be disallowed, the court noted the harmful collateral effects of convictions on a second count in the same indictment, including in-

F.2d 262, 271 (10th Cir. 1971) (vacation of sentence and conviction following puzzling conclusion that larceny merged into the entering offense).

230. 470 F.2d at 1204.

231. The *O'Clair* court also found support in the conclusion of the Court of Appeals for the Fifth Circuit in *Prince v. United States*, 230 F.2d 568 (5th Cir. 1956), that when one is charged with committing or attempting to commit an offense defined in subsections (a) or (b) and also with the aggravating offense as is defined in subsection (d), only one conviction will stand. 470 F.2d at 1201-02.

232. See notes 15-18 *supra* & accompanying text.

233. 470 F.2d at 1202. H.R. REP. No. 1461, 73d Cong., 2d Sess. 1 (1934). In support of the contention that the Act creates one offense, the then Attorney General in his letter incorporated into the report described the sections thus: "If (d) is committed the *penalty* is increased to"

234. 470 F.2d at 1202.

235. The court suggested that a statute prescribing more severe penalties for the offense described "if death results" or "if personal injury results" would evince the creation of a *single* offense. *Id.* Compare the explanation of the statute found in H.R. REP. No. 1461, 73d Cong., 2d Sess. 1 (1934) (If (d) committed, penalty is increased to . . .). This type of statute was criticized in Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209, 1230 (1972), which nonetheless praised the scheme of the Bank Robbery Act.

236. This was the approach taken in the Proposed Federal Criminal Code §§ 201(b), 1721, and 1612, Final Report of the National Commission on Reform of Federal Criminal Laws (1971).

237. For a discussion of this rule of statutory construction see notes 23-25 *supra* & accompanying text.

creased sentences under the habitual offender statutes, impeachment of character as a witness, and the "extra stigma imposed upon one's reputation."²³⁸ The double jeopardy problems inherent in dual convictions for one offense provided additional corroboration of the *O'Clair* interpretation, the court reasoning that if a state cannot constitutionally obtain two convictions for the same act at separate trials, it also cannot do so at the same trial.²³⁹

In declaring multiple convictions, as well as sentences, illegal, the court rejected the contention that convicting on all counts is justifiable because it insures an appealable judgment and prevents a miscarriage of justice.²⁴⁰ As the court noted, this argument fails to recognize that the double jeopardy clause does not bar reprosecution after reversal on appeal,²⁴¹ and that reversible error generally will infect both counts.²⁴² Acknowledging that using two counts might be more efficient than a retrial, the court nevertheless asserted affirmatively that "administrative convenience [could] not justify infringement of constitutional rights."²⁴³

238. 470 F.2d at 1203. See notes 210-13 *supra* & accompanying text. In *United States v. Borrelli*, 333 F. Supp. 369 (D. Conn. 1971), the court ultimately allowed multiple convictions to stand yet acknowledged "that the practical effect which flows from the two interpretations is not *de minimis* since under the 'merger of sentences' concept the convictions are allowed to stand and may affect a possible subsequent sentence under many habitual criminal statutes or may impair a prisoner's opportunities for pardon or parole." *Id.* at 370.

239. 470 F.2d at 1203. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717-19 (1969); *United States v. Benz*, 282 U.S. 304, 307-09 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873); *United States v. Sacco*, 367 F.2d 368, 369 (2d Cir. 1966).

The court in *O'Clair* was confronted with dictum in *Holiday v. Johnson*, 313 U.S. 342, 349 (1941), to the effect that the erroneous imposition of two sentences for a single offense does not equal double jeopardy. The Court of Appeals for the First Circuit interpreted this statement narrowly to mean only that a sentence invalid *under the statute* is not grounds for upsetting the underlying conviction via collateral attack. 470 F.2d at 1204 n.5. The court further noted that the Supreme Court's statement was accompanied by no explanation and that strong precedent both before and after, see cases cited note 131 *supra*, mandated a restricted reading of it.

240. 470 F.2d at 1203. Interestingly, *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967), expressed this exact concern, but, as observed in *O'Clair*, 470 F.2d at 1203 n.4, the court in *McMillen* assumed the very point at issue in *O'Clair*—the validity of multiple convictions.

241. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711 (1969):

At least since 1896 . . . it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. . . .

A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment *Id.* at 719-21 (citation omitted).

242. 470 F.2d at 1204.

243. *Id.*

Although only the Seventh Circuit²⁴⁴ appears to have expressly followed *O'Clair's* holding that principles of statutory construction, collateral consequences, and double jeopardy necessitate vacation of convictions for all but the greater inclusive offense,²⁴⁵ the Supreme Court in *United States v. Gaddis*²⁴⁶ apparently has endorsed the *O'Clair* approach for drafting indictments and charging the jury:²⁴⁷ in a multi-count indictment each count should be considered not separately but seriatim,²⁴⁸ thus resulting in only one conviction.

In contrast to the First and Seventh Circuits, most courts construe *Prince* as holding that multiple convictions, but not multiple sentences, may stand.²⁴⁹ Their imprecise and contradictory language indicates that these courts seemingly assumed the validity of multi-

244. *Wright v. United States*, 519 F.2d 13, 19 (7th Cir. 1975). As observed in *Wright* the issue of the illegality of the multiple convictions under the Bank Robbery Act appears not to have been determined by any of the Courts of Appeals until *O'Clair*. *Wright* incorrectly interpreted *Heflin v. United States*, 358 U.S. 415 (1959), however, as having decided *sub silentio* the question of multiple convictions because the court in *Heflin* concurred with the petitioner's claim that he could not lawfully receive multiple convictions under subsections (c) and (d) of the Act. *Id.* at 19. This holding is not determinative of the present situation because (c) and (d) are separate, mutually exclusive offenses that cannot be committed by the same person, whereas (a), (b), and (d) are merely different ways of committing the same offense of bank robbery. In following *O'Clair*, *Wright* also considered the double jeopardy problems and adverse collateral effects presented by more than one conviction. In addition to adopting the *O'Clair* rationale for construing the statute as outlawing multiple convictions, *Wright* also proposed the same method for convicting under a permissible multi-count indictment. 519 F.2d at 19-20.

245. *Butler v. United States*, 387 F. Supp. 1375 (D.R.I. 1975) (habeas corpus proceeding), appears to have expanded *O'Clair*: "Multiple convictions and sentences for but one offense of armed bank robbery constitute plain error of constitutional proportions." *Id.* at 1379. The decision further departed from *O'Clair* by ordering an *open* court resentencing in addition to vacating the sentences and conviction to insure that the court's serious misperception that the defendant stood guilty of separate, independently serious crimes did not influence its sentence determination. *Id.*

246. 96 S. Ct. 1023 (1976).

247. *Id.* at 1025-27.

248. 470 F.2d at 1204. Thus the jury first should consider the more serious count; if all elements of the offense are proven it must convict on this count only. The jury will be permitted to consider the lesser count only when it does not find sufficient evidence to convict on the greater. *Wright v. United States*, 519 F.2d 13, 20 (7th Cir. 1975) and *Butler v. United States*, 387 F. Supp. 1375, 1378 (D.R.I. 1975) have expressly adopted this approach as well. In *Butler* the court noted that the error of considering the counts separately and not seriatim does not require a new trial nor subvert the jury's verdict as to the most serious offense. *Id.* at 1379.

249. See, e.g., *Gorman v. United States*, 456 F.2d 1258, 1259 (2d Cir. 1972), describing as "meritless" the claim that multiple convictions were improper. Notably, however, if it is absolutely clear Congress did not intend for a defendant to be found guilty under both sections (i.e. the mutually exclusive section (c) and another *supra* section of the Act) courts do vacate convictions as well as sentences. See notes 88-108 *supra* & accompanying text.

ple convictions without even considering the distinction between multiple conviction and sentences.²⁵⁰ The post-*Prince* cases that allow multiple convictions rely upon one of two basic premises: the Act creates separate offenses for which but one penalty may be imposed, or the Act defines a single offense with aggravated gradations for which punishment usually is imposed on the most aggravated. No difference has resulted in applying either of these interpretations. It would appear, however, that although the first properly can result in multiple convictions accompanied by only one sentence, the second can support only a single sentence *and* conviction.

Those courts maintaining that the Act defines separate offenses that may carry but one penalty²⁵¹ have manifested greater precision in their language by specifying that a merger for sentencing purposes only and not a merger of offenses occurs²⁵² because the subsections "retain their own identities" and are "separate and distinct offenses however closely related."²⁵³ These courts further assert that *Prince* did not prohibit convicting the defendant of multiple offenses as charged in the indictment.²⁵⁴ In contrast, the majority of cases conclude that *Prince* merely precluded multiple sentences after declaring that the various subsections of the Act created a gradation of different maximum punishments for a single offense—stealing property from a federally-insured institution.²⁵⁵ Yet it would appear

250. See, e.g., *United States v. Oliver*, 523 F.2d 253, 260 (2d Cir. 1975) (court merely vacated multiple sentences); *Jones v. United States*, 396 F.2d 66, 69 (8th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969) (only sentences vacated); *United States v. Tarricone*, 242 F.2d 555, 558 (2d Cir. 1957) (after expressly asserting that *conviction* under subsection (a) became merged into *conviction* under (d), court held that merely sentences must be set aside); *Kitts v. United States*, 243 F.2d 883, 884 (8th Cir. 1957) (upon multiple convictions under various subsections only one sentence may be imposed). Additionally, courts generally use the term "merger of offenses" without specifying whether a merger for purposes of sentencing only is meant. Their subsequent action, however, in vacating not the conviction but only the sentence implies that this is the meaning assigned. See, e.g., *United States v. Munn*, 507 F.2d 563, 569 (10th Cir. 1974).

251. See, e.g., *United States v. Gardner*, 347 F.2d 405, 408 (7th Cir. 1965).

252. See, e.g., *Moore v. United States*, 454 F.2d 286, 287 (6th Cir. 1972); *United States v. Fried*, 436 F.2d 784, 787 (6th Cir. 1971); *United States v. Conway*, 415 F.2d 158, 166 (3d Cir. 1969), *cert. denied*, 397 U.S. 994 (1970); *United States v. McKenzie*, 414 F.2d 808, 811 (3d Cir. 1969); *Bayless v. United States*, 347 F.2d 354, 356 (9th Cir. 1965); *United States v. Poindexter*, 293 F.2d 329, 332 (6th Cir. 1961), *cert. denied*, 368 U.S. 961 (1961); *United States v. Trumbly*, 286 F.2d 918, 920 (7th Cir. 1961).

253. *Matlock v. United States*, 309 F. Supp. 398, 401 (W.D. Tenn. 1970).

254. *Id.* But see the discussion of *O'Clair*, notes 226-48 *supra* & accompanying text.

255. See *Goodman v. United States*, 511 F.2d 706, 707 (5th Cir. 1975); *United States v. Grant*, 510 F.2d 137, 139 (5th Cir. 1975); *United States v. Gaddis*, 506 F.2d 352, 354 (5th Cir.

that if subsections (a), (b), and (d) merge into one substantive crime for which only one sentence can be imposed,²⁵⁶ multiple convictions under these sections should be disallowed. The court in *United States v. White*²⁵⁷ discounted this contention, however, asserting that because these subsections, unlike subsection (c), do not contemplate different individuals performing mutually exclusive roles, "[m]ultiple convictions rendered [under them] against a single defendant . . . are not inherently inconsistent, either factually or legally, although cumulative penalties as a matter of statutory construction are impermissible."²⁵⁸ *White's* predication of multiple convictions on a distinction of subsection (c) is invalid. That one person cannot be convicted of offenses "contemplat[ing] separate individuals performing entirely different roles"²⁵⁹ does not establish conversely that merely because one person could enter a bank with the requisite intent, consummate the robbery, and also commit assault with a dangerous weapon, he should receive three separate convictions for each of these steps in the single transaction of bank robbery. The court's argument is weakened further by the fundamental contradiction of first asserting that the subsections create "lesser or

1975). See also *Sullivan v. United States*, 485 F.2d 1352, 1353 (5th Cir. 1973) (Act "create[s] but a single offense, with various degrees of aggravation permitting sentences of increasing severity"); *United States v. White*, 440 F.2d 978, 982 (5th Cir. 1971) ("subsections . . . simply describe lesser or more aggravated forms of the same basic offense—stealing from a federally-insured institution"); *Eakes v. United States*, 391 F.2d 287, 288 (5th Cir. 1968) ("subsections create different maximum punishments for a single offense depending on whether aggravating circumstances exist"). The Government conceded in *Green v. United States*, 365 U.S. 301, 305 (1961), that the count charging a violation of (d) did not charge a separate offense. The Supreme Court explained incorrectly, however, that "[t]his is not a case where sentence was passed on two counts stating alternative means of committing one offense; rather, the third count involved additional characteristics which made the offense an aggravated one" *Id.* at 306.

256. See, e.g., *United States v. Tomaiolo*, 249 F.2d 683, 696 (2d Cir. 1957). In *United States v. Fleming*, 504 F.2d 1045, 1052-53 (7th Cir. 1974), the court stated incorrectly that *each* of the circuits had concluded that Congress intended subsection (b) to merge into (a) and (a) into (d) when the elements of a (d) violation are present so that there is only one offense and may be only one sentence. Several courts have rejected the merger language in *Prince*, see notes 55-56, 143-45 *supra* & accompanying text, to avoid the anomalous result of a lesser punishment for the *completed* crime. Conflict exists as to whether the "single offense rule" extends to section (e) as well. See notes 62-71 *supra* & accompanying text. Those circuits that consider (e) a distinct offense hold it may support a separate sentence and conviction as well.

257. 440 F.2d 978 (5th Cir. 1971).

258. *Id.* at 982.

259. *Id.* The rationale for disallowing multiple *convictions* as well as sentences for subsection (c) and the other subsections appears to be their incompatibility rather than their separateness, as evinced in the legislative intent to cover *different* individuals doing entirely different things.

more aggravated forms of the same basic *offense*'²⁶⁰ and then declaring that the defendant was "merely convicted separately of overlapping *offenses*."²⁶¹

Moreover, those courts, as in *White*, that retained multiple convictions while vacating the accompanying sentences,²⁶² failed to provide properly appealable convictions; because no sentences were imposed the dangling convictions were not final.²⁶³ A possible solution would be to apply the *Corson* general sentence to insure appealable multiple convictions for the single offense of bank robbery. This appears undesirable, however, in view of the double jeopardy implications, the rule of lenity, and the high probability of adverse collateral consequences. The preferable approach, therefore, is that espoused in *O'Clair* and *Gaddis*, of indicting and sentencing so as to obtain only one sentence and one conviction.²⁶⁴

THE FUTURE OF THE ACT

As evinced in the conflicting interpretations of the Federal Bank Robbery Statute, in the prevalent imposition under the Act of incorrect sentences, and in the differing modes for disposing of such illegal sentences, the present criminal code is difficult to apply consistently. The proposed Criminal Justice Reform Act of 1975²⁶⁵ is designed to replace the contradictory and chaotic criminal laws with a systematic and comprehensive penal policy.²⁶⁶ Offenses consisting of basically the same type of conduct have been consolidated to

260. *Id.* (emphasis supplied).

261. *Id.* (emphasis supplied).

262. See, e.g., *United States v. Vasquez*, 504 F.2d 555, 556 (5th Cir. 1974); *United States v. Pietras*, 501 F.2d 182, 187-88 (8th Cir.), *cert. denied*, 95 S. Ct. 660 (1974); *Garza v. United States*, 498 F.2d 1066, 1068 (5th Cir. 1974); *United States v. Parson*, 452 F.2d 1007, 1009 (9th Cir. 1971); *United States v. Foy*, 441 F.2d 398, 399 (5th Cir. 1971).

263. But see *United States v. Stewart*, 523 F.2d 1263, 1264 (2d Cir. 1975), stating that "[i]n order to preserve for appeal convictions for violations of subsections (a) and (d) . . . this court has deemed it proper for the district court to enter simultaneous judgments of conviction under both of these subsections," which implies that by simply imposing the multiple convictions they are preserved for appeal. The court does not note that simultaneous sentences under (a) and (d), whether concurrent or consecutive, are invalid. Cf. *United States v. Stevens*, 521 F.2d 334, 337 (6th Cir. 1975) (technically incorrect and admittedly untidy disposition accepted as vindication of legislative intent).

264. See notes 287-97 *infra* & accompanying text.

265. S. 1, 94th Cong., 1st Sess. (1975).

266. S. REP. NO. 94-00, 94th Cong., 1st Sess. 6 (1975). Basic features of the act include integration of all felonies, elimination of obsolete or unusable sections, definition of recurrent terms in order to avoid inconsistent and confusing constructions, and simple and uniform drafting of offenses. *Id.* at 6-7.

promote greater uniformity.²⁶⁷ One means of achieving this standardization is by separating the basis for federal jurisdiction from the elements of the offense; for example, defining the crime of robbery per se, adding that the federal government may prosecute if a federally-insured bank is robbed.²⁶⁸ Another significant reform is the adoption of restricted ancillary jurisdiction, allowing prosecution of particular common law offenses²⁶⁹ perpetrated by the defendant in the course of committing the federal offense.²⁷⁰ Under this approach one could, for example, obtain separate convictions under separate sections for murder,²⁷¹ assault,²⁷² kidnapping,²⁷³ robbery,²⁷⁴ and

267. *Id.* at 7.

268. *Id.* at 28-29. As maintained in Brown & Schwartz, *New Federal Criminal Code Is Submitted*, 56 A.B.A.J. 844, 845 (1970): "Nothing has so distorted federal criminal law as the habit of defining federal crimes in such a way as to make jurisdictional requirements appear to be penologically significant elements of the offense." *Id.* at 845. In further explaining the development of federal auxiliary jurisdictions, the authors state: "Each new statute, although dealing with the same misconduct, would incorporate an additional jurisdictional base. Statutes passed at different times would carry different penalties for the same misconduct" *Id.* at 846. Under the revised code, however, all offenses are defined in terms of the substantive misbehavior. *Id.*

269. As explicated in S. REP. NO. 94-00, 94th Cong., 1st Sess. at 31 n.15 (1975): "The characterization 'common-law offenses' is here used simply as a convenient means of reference to those offenses against persons or property that are usually considered *malum in se*."

270. As observed in Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209 (1972), this ancillary or piggyback provision has precedent in the Federal Bank Robbery Act, under which the penalty of twenty years for a "basic" bank robbery may be increased up to 25 years if assault occurs in the course of the bank robbery or up to life imprisonment if death or kidnapping occurs. *Id.* at 1214-16. For descriptions of the expansive general auxiliary jurisdiction as promulgated in the Commission Report see Brown & Schwartz, *New Federal Criminal Code Is Submitted*, 56 A.B.A.J. 844 (1970); McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663.

271. S. REP. NO. 94-00, 94th Cong., 1st Sess. § 1601 (1975). An offense under this section is graded as a Class A felony, carrying a possible death sentence. *Id.* at 548.

272. *Id.* at §§ 1611-18. The offenses included in the assault section are maiming (§ 1611), aggravated battery (§ 1612), battery (§ 1613), menacing (§ 1614), terrorizing (§ 1615), communicating a threat (§ 1616), and reckless endangerment (§ 1617). These sections focus principally on the nature of the actual injury caused or threatened rather than on the defendant's intent. Maiming, for example, is a Class C felony (up to 15 years in prison), reflecting the view that crippling injuries resulting from intentional misuse of physical force deserve severe punishment, *id.* at 558, whereas aggravated battery represents a Class D felony (up to seven years). *Id.* at 559.

273. *Id.* at § 1621. An offense under this section is a Class A felony (up to life imprisonment) if the offender does not voluntarily release the victim alive and in a safe place prior to trial; the offense is a Class C felony (up to 15 years in prison) in any other case. *Id.* at 583.

274. *Id.* at § 1721. An offense under this section is a Class C felony (up to 15 years in prison). "Although less than the penalty under [the existing Bank Robbery Statute], the provisions of the proposed Code relating to the use of a dangerous weapon in the course of an offense (section 1823) and affording ancillary jurisdiction over violent felonies (e.g., murder

theft²⁷⁵ committed during the course of a bank robbery. To illustrate: if a criminal robs a bank, assaults a teller, kidnaps the bank president, and kills a security guard during the robbery, in most circuits under the existing statute four convictions but only one sentence would be allowed²⁷⁶—a maximum penalty of life imprisonment.²⁷⁷ The proposed act similarly would permit multiple convictions²⁷⁸ and a maximum sentence of life imprisonment.²⁷⁹ If a defendant were to rob a bank and assault two tellers with a dangerous weapon, under the present statute he generally would receive three convictions and a punishment of no more than twenty-five years,²⁸⁰ yet under the proposed act he well could receive five convictions²⁸¹ but a maximum sentence of only thirty years, for although consecutive sentences may be imposed,²⁸² their length may not exceed the

(section 1601) and maiming (section 1611)) will permit aggregate penalties to be imposed in appropriate circumstances." *Id.* at 641.

275. *Id.* at § 1731. An offense under this section is graded according to the amount taken (over \$100,000, Class C; \$500 to \$100,000, Class D) except in the case of certain items that are always Class D felonies. Whereas a Class C felony can receive a penalty of up to fifteen years, a Class D carries a maximum penalty of up to seven years. *Id.* at 688.

276. Those courts applying the concurrent sentence doctrine would allow concurrent sentences on the other counts to stand as well as long as one sentence was imposed validly. Under the *O'Clair* approach, however, only one conviction would stand.

277. 18 U.S.C. § 2113(e) (1970). See note 2 *supra*.

278. It appears that convictions would be allowed for the robbery, the assault, the kidnapping and the murder, as well as possible additional convictions for carrying a dangerous weapon and reckless endangerment.

279. S. REP. NO. 94-00, 94th Cong., 1st Sess. § 2304 at 926 (1975). No punishment may run consecutively with a life sentence—the longest term authorized. *Id.*

280. Most likely the three convictions would be for entering with intent to commit a felony under (a), robbery under (a), and assault under (d). Notably, the proposed act does contain a criminal entry statute (§ 1712), but unlike the Bank Robbery Act it does not cover entry into a building during business hours, which is deemed consensual and thus not a crime. Such an entry under the proposed act might be punishable as an attempt to commit the intended offense (§ 1001) but would not be a completed offense in itself. S. REP. NO. 94-00, 94th Cong., 1st Sess., § 1712 at 625 (1975).

281. Theoretically, these convictions could be: one for robbery, one each for the assaults, and one each for using a dangerous weapon in the course of the crimes (§ 1823). Furthermore, although the prison terms added to the punishments for the underlying felonies under section 1823 (not less than one year or more than ten) are somewhat below those provided under the present code, 18 U.S.C. § 924(c) (1970), under the proposed code the offender also is likely to be subject to a separable punishment under section 1617 for any actual endangerment of life caused. See S. REP. NO. 94-00, 94th Cong., 1st Sess. at 831-34.

282. Although under the proposed law separate convictions and sentences may be imposed under the various sections, section 2301 provides that multiple terms will run *concurrently* if imposed at the same time unless the court orders otherwise. S. REP. NO. 94-00, 94th Cong., 1st Sess., § 2301 at 918-20 (1975). Consecutive sentences may *not* be imposed if, for example, the offenses are for a parent offense and a lesser included offense, or a violation of a general prohibition and a specific prohibition encompassed within it. In determining whether sen-

term authorized for the class of offenses²⁸³ one grade higher than the most serious of which the offender had been found guilty.²⁸⁴ Apparently, therefore, the code generally will produce similar if not harsher sentences for bank robbers and a greater number of convictions with the resultant collateral consequences.²⁸⁵ Although passage of some form of the criminal justice reform act appears likely, an interim method for obviating the sentencing problems prevalent under the present statute will be proposed.

ALTERNATIVE SOLUTIONS

Although the imposition of a general sentence may solve some of the problems inherent in bank robbery cases decided under the *Prince* rationale, a better solution would be for the Government to charge the defendant, in a one-count indictment, with the highest offense warranted by the facts of the case. The Government then may rely on Rule 31(c)²⁸⁶ of the Federal Rules of Criminal Procedure to secure a conviction on a lesser included offense should the evi-

tences are to run consecutively the court must consider the need for just punishment, deterrent effect, rehabilitation, and the nature of both the offense and the offender.

283. Under S.1 there are nine classes of offenses including five felony classes with authorized terms of imprisonment ranging from three years to life. The terms set forth (i.e., Class D up to seven years, Class C up to 15 years, Class B up to 30 years) are the maximum periods authorized and are only to be imposed under the most egregious of circumstances. S. REP. NO. 94-00, 94th Cong., 1st Sess., § 2301 at 918 (1975).

284. *Id.* § 2304 at 925-26 (1975). In the example, bank robbery is a Class C felony with a maximum penalty of 15 years, the two assaults (unless maiming results) and the use of a dangerous weapon are Class D felonies with possible penalties of up to seven years each. Rather than multiplying seven years by the number of Class D convictions and adding 15 years for the Class C felony, for a possible total of 43 years, this section provides that the maximum available sentence would be that authorized for a Class B felony—30 years. This approach is praised in Brown & Schwartz, *Sentencing Under the Draft Federal Code*, 56 A.B.A.J. 935, 937-40 (1970) and Carraway, *Sentencing Reform in Multiple Offense Cases: Judicial and Legislative Avenues*, 7 CONN. L. REV. 257, 282-86 (1974).

285. See notes 210-13 and note 238 *supra* and accompanying text. In designating as "harsher" the approach taken by the National Commission on Reform of Federal Criminal Law, the court in *O'Clair* apparently considered not only the possibly longer term of imprisonment but also the greater number of convictions. The designation of offenses referred to in *O'Clair* was followed closely in the proposed act except for the addition of a three year felony and a six month misdemeanor. S. REP. NO. 94-00, 94th Cong., 1st Sess., § 2301 at 918 (1975). The provision that multiple consecutive sentences shall be treated as a single sentence for purposes of establishing parole eligibility has obviated somewhat one of the adverse effects of multiple convictions. *Id.* § 2304 at 924.

286. "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." FED. R. CRIM. P. 31 (c).

dence adduced at trial prove insufficient to support a conviction on the offense charged.²⁸⁷

A one-count indictment, however, presupposes that the lesser offense for which the defendant also may be convicted under the Act and for which the jury should be given appropriate instructions²⁸⁸ is a lesser included offense of the greater offense charged. Unfortunately, the phrase "necessarily included offense," as used in Rule 31(c), has not been defined comprehensively by any federal court.²⁸⁹ Most courts, confronted with the question of the scope of "necessarily included offenses,"²⁹⁰ have adopted a restrictive definition requiring that for a lesser offense to be necessarily included, it must be impossible to commit the greater offense without also commit-

287. The doctrine permitting the jury to find the defendant guilty of a lesser offense necessarily included in the one charged "developed at common law to aid the prosecution in cases where the proof failed to show some element of the crime charged." 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE*, § 515 at 372 (1969). The First Circuit implicitly supports this one-count indictment procedure. See *O'Clair v. United States*, 470 F.2d 1199, 1204 (1st Cir. 1972). See note 299 *infra*.

288. "There is no doubt but that defendant is entitled to an instruction about the lesser offense as a matter of right if the evidence would permit the jury to find him guilty of that offense." 2 C. WRIGHT, *supra* note 287, § 498 at 337.

289. 8A J. MOORE, *FEDERAL PRACTICE* ¶ 31.03[2], at 31-11 (2d ed. 1975). Moore finds three basic variants of the necessarily included offense. The first arises when it is impossible to commit the greater without also committing the lesser offense (i.e., robbery and larceny) and may be called necessarily included as a matter of law. *Id.* at 31-12. The second occurs when the lesser offense is "presumptively necessarily included within the offense charged in the indictment." *Id.* Entry with intent to commit a felony and robbery provides an example of this type. The greater offense of bank robbery presumptively includes the lesser offense of entering the bank with felonious intent, but the evidence adduced at trial may show that the defendant formed his intent to commit robbery *after* he entered the bank. The third variant of the necessarily included offense arises when the various offenses "do not share the same elements of proof, but [their] relationship in a particular case might justify a defense request for a lesser-offense instruction." *Id.* The example given by Moore is that of burglary-larceny. A conviction for burglary requires a finding of an intent on the defendant's part to commit an offense within the premises entered; although the intended offense in the majority of cases is larceny, it need not be. *Id.* at 31-13. The closest analogy to this variant of necessarily included offenses under the Bank Robbery Act would be aggravated assault under (d) and killing under (e), assuming *arguendo* that (d) requires the use of a dangerous weapon. A dangerous weapon is usually used in a killing or kidnapping under (e), but it need not be.

290. There is a distinction between "necessarily included offense" and "lesser included offense," although the two phrases are used interchangeably by the courts. *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir. 1969). "The former denotes a relationship which always exists between the two offense categories, such as larceny and robbery, regardless of the facts of a particular case. The latter depends upon particular facts." *Id.* at 1157 n.3, quoting from 8A J. MOORE, *FEDERAL PRACTICE* ¶ 31.03 (2d ed. 1965). *Olais-Castro* stated that Rule 31(c) was recognized as including both types of offenses, but failed to cite any authority to support this proposition. 416 F.2d at 1157.

ting the lesser.²⁹¹ One defect in this strict interpretation is that it would preclude the jury from finding a defendant guilty of entering a bank with intent to commit a felony upon an indictment charging only robbery of the bank. Because a bank robber possibly may formulate the requisite felonious intent after entering the bank, the entry provision of (a) cannot be considered, under such a harsh interpretation, a lesser included offense of robbery. Additionally, in those circuits holding that subsection (d) requires the use of a dangerous weapon, (d) could not be considered a lesser included offense of (e) inasmuch as both killing and kidnapping may be committed without such weapons.

Increasing dissatisfaction with this limited interpretation of lesser included offenses has culminated in efforts to weaken its stringent requirements. The American Law Institute²⁹² and, more recently,

291. See, e.g., *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969) (lesser included offense is one necessarily established by proof of the greater offense); *Olais-Castro v. United States*, 416 F.2d 1155 (9th Cir. 1969) (lesser offense must be such that it is impossible to commit the greater without first committing the lesser). See generally *Johnson, Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357 (1970); *Kirchheimer, The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949). This definition of necessarily included offenses is also the one successfully propounded by the Government at the trial court level, and later rejected by the appellate court, in *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The Government blocked jury instructions to the effect that the defendant, charged with first degree burglary, could be found guilty of the lesser included offense of unlawful entry. It argued that for an offense to be included necessarily in another, "its theoretical elements all must be identically reflected in the theoretical elements of the greater." *Id.* at 316. Because burglary could be committed in certain circumstances by means of a lawful entry, the Government urged that unlawful entry could not be considered a lesser included offense thereof. *Id.*

A California District Court of Appeals, in *People v. Whitlow*, 113 Cal. App. 2d 804, 249 P.2d 35 (1952), summarized very clearly this interpretation of lesser included offenses:

[B]efore a lesser offense can be said to constitute a necessary part of a greater offense, all the legal ingredients of the corpus delicti of the lesser offense must be included in the elements of the greater offense. It therefore follows that if an element necessary to establish the corpus delicti of the lesser offense is irrelevant to the proof of the greater offense, the lesser cannot be held to be a necessarily included offense.

Id. at ___, 249 P.2d at 37. It is clear error, under such a definition of necessarily included offenses, to state that the offense of assaulting and putting lives in jeopardy by the use of a dangerous weapon (subsection (d)) necessarily includes the offense of entering a bank with felonious intent (subsection (a)), as did the court in *United States v. Nelson*, 160 F. Supp. 881, 882 (D.N.H. 1955).

292. The American Law Institute has defined an offense as included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

the District of Columbia Circuit²⁹³ have adopted a definition of lesser included offense that does not require a mechanical comparison of the elements of the two offenses to determine if one is necessarily included in the other. The District of Columbia Court of Appeals has concluded that merely because one crime possibly could be committed without necessarily committing the lesser crime, such a possibility should not prevent application of the doctrine as long as the proof adduced at trial established the commission of the lesser, as well as the greater, offense.²⁹⁴ Furthermore, to find that one offense necessarily is included in the other, the two must be so related that proof of the lesser almost always is presented upon proof of the greater.²⁹⁵

Use of this definition would allow a lesser included offense instruction to be given for any offense charged under the Bank Robbery Statute (with the exception of subsection (c)) because it solves the problems presented by those subsections of the Act that usually, but not invariably, are included in the "higher" offense. Similarly, that portion of the Model Penal Code that defines an offense as included when "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission,"²⁹⁶ also can be employed in bank robbery cases to justify instructions on lesser included offenses. Under this broad definition of lesser included offenses, all offenses defined in section 2113 (with the exception of (c)) would be considered lesser included offenses of subsection (e), the most aggravated offense defined in the Act.

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Model Penal Code § 1.07(4) (Proposed Official Draft, 1962). The National Commission on Reform of Federal Criminal Laws, in defining lesser included offenses, adopted this wording of the American Law Institute. Final Report of the National Commission on Reform of Federal Criminal Laws, § 703 at 59 (1971).

293. See *United States v. Whitaker*, 447 F.2d 314, 318-19 (D.C. Cir. 1971); *Fuller v. United States*, 407 F.2d 1199, 1227-29 (D.C. Cir. 1969).

294. *United States v. Whitaker*, 447 F.2d 314, 318-19 (D.C. Cir. 1971). The court observed that Supreme Court language on the subject of lesser included offenses "speaks both of 'the crime charged' and 'the evidence.'" *Id.* at 319. "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense." *Id.* at 317, quoting from *Berra v. United States*, 351 U.S. 131, 134 (1956).

295. *Id.* at 319.

296. Model Penal Code § 1.07(4)(c) (Proposed Official Draft, 1962).

The charging of the defendant in a one-count indictment, with its concomitant instructing of the jury as to lesser included offenses, requires that the charge in the indictment give the defendant fair notice that he may be called on to defend against all lesser included offenses.²⁹⁷ Thus the question remains whether a defendant charged with kidnapping to avoid apprehension, for example, is adequately notified that he may have to defend against a possible charge of jeopardizing lives with a dangerous weapon or of entering a bank with felonious intent. The answer to this question probably always will be affirmative; yet the niggling doubt that occasionally may arise suggests that an alternative method of charging the defendant would be the multi-count indictment, thus obviating any possibility that the defendant will not be apprised of all charges he may have to defend against.

*O'Clair*²⁹⁸ advocated the multi-count approach. To avoid multiple convictions whenever a defendant is charged under such a multi-count indictment,²⁹⁹ that court suggested that the trial judge instruct the jury to consider first the most serious offense charged. If it finds the defendant guilty of such offense, it should convict on that offense alone; a response to the lesser offense charged is unnecessary.³⁰⁰ Should the jury find the defendant innocent of the greater offense, it should acquit him thereof and make a finding as to his guilt on the lesser offense charged.³⁰¹

This method of instructing the jury necessitates arrangement of the offenses delineated in the Act in descending order of gravity. As

297. *United States v. Whitaker*, 447 F.2d 314, 320 (D.C. Cir. 1971).

298. 470 F.2d 1199 (1st Cir. 1972).

299. *O'Clair* made clear that its holding did not prevent the filing of a multi-count indictment, though it indicated that a one-count indictment would be "adequate for purposes of clarity and notice to the defendant" *Id.* at 1204. The court relied on Fifth Circuit practice, as illustrated by *Prince v. United States*, 230 F.2d 568, 571 (5th Cir. 1956), *rev'd*, 352 U.S. 322 (1957), as supportive of this proposition. *Prince*, however, does not raise the issue of the sufficiency of a one-count indictment.

300. *O'Clair v. United States*, 470 F.2d 1199, 1204 (1st Cir. 1972). The generally accepted rule, providing that in multi-count cases the jury should return a separate verdict as to each count in order to avoid retrial as to all counts should error be found requiring reversal as to one count, *id.* at 1204, is a technical violation of *Prince*. Each separate count on which the defendant is found guilty requires a sentence in order to impart finality to the judgment, *see United States v. Corson*, 449 F.2d 544, 549 (3d Cir. 1971), and separate sentences, even probated ones, would be disallowed under a strict interpretation of *Prince*. *Id.* at 549-50.

301. 470 F.2d at 1204. The District of Columbia Circuit endorsed this procedure in *Fuller v. United States*, 407 F.2d 1199, 1227 (D.C. Cir. 1969) (en banc) (unrelated to bank robbery). It is the same procedure the Supreme Court recently espoused in *United States v. Gaddis*, 96 S. Ct. 1023, 1027 (1976), for situations involving subsection (c) of the Act.

the crimes of killing and kidnapping in the course of the robbery unquestionably are the most aggravated, the jury should consider them first. Although a split of authority exists as to whether subsection (e) defines more than one offense,³⁰² it is suggested that if the indictment charges a violation of subsection (e), the jury first should determine whether the defendant is guilty of type [3] killing or kidnapping. If the jury finds him so guilty, it should return a verdict on that count alone.³⁰³ If the jury acquits the defendant of type [3] killing or kidnapping, it then should consider type [2] and then type [1] killing or kidnapping. If the jury acquits the defendant of all subsection (e) charges, it should consider the remaining offenses in the following order: aggravated robbery (d); robbery (a); larceny (b); and receiving and possessing (c). Although subsection (c) and the other subsections of the Act are "mutually exclusive,"³⁰⁴ (c) may be considered the least "aggravated" of the offenses under this proposed method of instructing the jury; because no danger exists that a defendant will be convicted for both robbing and receiving, (c) need be treated no differently than the other subsections. It is submitted that such instructions will remedy most of the problems encountered under the Act³⁰⁵ by thus insuring consistency and uniformity in the sentencing and indicting of accused bank robbers.

302. See notes 60-71 *supra* & accompanying text.

303. See notes 106-08 *supra* & accompanying text. That the defendant is guilty of type [1] or [2] killing or kidnapping as well would be treated no differently than when there are multiple victims under any other subsection of the Act.

304. See notes 88-92 *supra* & accompanying text.

305. If, under these proposed instructions, a defendant should claim he is entitled to a verdict on *every* count charged, utilization of the prevailing "untidy" approach of allowing multiple convictions with a sentence imposed on but one of the convictions, see notes 249-58 *supra* & accompanying text, might be required.