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> Lord Coke is quoted as saying that reason is the life of the law. Charles Dickens, in Oliver Twist, had one of his characters say that the law is an ass. It may be that there are those in this day and time who would think it absurd for an appellate court to hold a trial court in error for failing to charge the jury that it might find a defendant not guilty of an offense which he did not deny having committed. Yet such is the law and reason is the life of the law.[1]

I. Introduction

On October 29, 1993, Charles Parker, Jr. entered a Payless Shoe Store in Fort Worth, Texas.[2] Curiously, Parker did not browse through the racks of discounted shoes; he had something else on his mind.[3] The store's cash register contained $136 – money that Parker found and stuffed into his pocket.[4] Over the following two weeks, Parker helped himself to cash in five other store robberies and, including the Payless heist, stole a total of $459.[5]

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1. United States v. Skinner, 437 F.2d 164, 166 (5th Cir. 1971).

2. *See* United States v. Parker, 104 F.3d 72, 73 & n.1 (5th Cir.) (en banc) (DeMoss, J., dissenting) (listing October 29, 1993 as day that Parker made Payless Shoe Store his first robbery victim in string of six), *cert. denied*, 117 S. Ct. 1720 (1997).

3. *See id.* (DeMoss, J., dissenting) (noting that Parker robbed Payless Shoe Store).

4. *See id.* at 73 n.1 (DeMoss, J., dissenting) (noting that Parker stole $136 from Payless Shoe Store).

5. *See id.* at 73 & n.1 (DeMoss, J., dissenting) (listing six business establishments that Parker robbed, including dollar amount stolen, name of store clerk, and date). The date, location, and cash taken in each robbery are as follows: Oct. 29, 1993, Payless Shoe Store, $136.00; Nov. 4, 1993, Chevron Station, $27.00; Nov. 5, 1993, Chief Auto Parts Store, $40.00; Nov. 5, 1993, Fina Station, $50.00; Nov. 6, 1993, Diamond Shamrock Service Station, $97.00; Nov. 11, 1993, Edwards Drug Store, $109.00. *Id.* at 73 n.1 (DeMoss, J., dissenting). The total sum that Parker stole amounted to $459.00. *See id.* (DeMoss, J., dissenting) (providing individual amounts).

Parker's six thefts were less than legendary; they were garden variety robberies that occur each day in every city.[6] Unlike other petty criminals, however, Parker was not prosecuted for robbery under state law.[7] Instead, on January 11, 1994,[8] a grand jury summoned the resources and power of the federal government and indicted Parker on six counts of violating a federal statute – the Hobbs Act.[9]

At Parker's two-day trial, federal Judge John McBryde instructed the jury that the Hobbs Act[10] is a federal criminal statute consisting of two elements: (1) the commission of a typical robbery or extortion and (2) a resulting effect

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6. *Id.* at 73 n.1 (DeMoss, J., dissenting) (describing Parker's robberies as routine). Judge DeMoss expressed frustration that the federal prosecutor charged Parker in federal court with such routine crimes. *See id.* (DeMoss, J., dissenting) (calling robberies "typical"). Judge DeMoss stated, "The robberies involved in this case were typical garden variety robberies which occur routinely in cities, towns, and villages across this land and are customarily dealt with by the local police departments and the state's prosecutorial offices." *Id.* (DeMoss, J., dissenting).

7. *See id.* (DeMoss, J., dissenting) (noting that state and local authorities generally handle similar petty crimes).

8. Supplemental Brief of Appellant on Rehearing En Banc at 1, United States v. Parker, 104 F.3d 72 (5th Cir. 1997) (No. 94-10557).

9. Hobbs Act, 18 U.S.C. § 1951 (1994). The grand jury also indicted Parker on two counts of using and carrying a firearm during a crime of violence in connection with two of the six robberies. United States v. Parker, 73 F.3d 48, 50 (5th Cir. 1996), *reinstated in part en banc*, 104 F.3d 72 (5th Cir.), *cert. denied*, 117 S. Ct. 1720 (1997). Parker's father testified at trial that he had found a toy pistol in his son's trousers after his son's arrest. *Id.* at 53-54. Parker's attorney presented the "toy gun theory" in his opening argument and claimed that the lone eyewitness to one of the robberies would testify that the weapon Parker used "could have been a toy gun." *Id.* Parker's attorney forgot to ask the witness whether the apparent weapon could have been a toy. *Id.* Realizing his omission after he closed his case in chief, Parker's attorney moved to reopen his case in chief so that he could recall the witness. *Id.* at 53. The trial judge denied the motion. *Id.* On appeal, the appellate court determined that the trial court was in error for not having reopened the case so that Parker's attorney could ask the critical question. *Id.* at 54. The appellate court reversed the two firearm convictions and remanded the case to the trial court. *Id.* at 54 n.3.

10. 18 U.S.C. § 1951. The Hobbs Act states in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both.
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> (b) As used in this section –
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> . . . .
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> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id.; *see also infra* note 45 (providing full text of Hobbs Act).

on interstate commerce.[11] The Government proved the first necessary element to the jury's satisfaction, but its theory of the second element was more attenuated: Parker's targeted stores routinely deposited their proceeds in Texas banks each week; those banks in turn wired the stores' deposits to accounts with banks located in other states.[12] By stealing money from Fort Worth stores, the Government argued, Parker prevented the stores from transferring funds to banks outside of Texas; thus, the insignificant robberies "affected interstate commerce."[13] The jury returned a guilty verdict for five counts of federal Hobbs Act violations, and Parker received a sentence of 430 months – almost 36 years in federal prison – for stealing $459.[14]

Parker appealed his conviction.[15] He claimed that the United States Constitution's Fifth and Sixth Amendments establish that the criminal jury alone may determine whether a defendant is ultimately guilty of a crime.[16] Parker argued that Judge McBryde had impermissibly removed the Hobbs Act's interstate commerce element from the jury by instructing that the jury

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11. *See* Supplemental Brief for the United States on Rehearing En Banc at 3, *Parker* (No. 94-10557) (discussing court's instructions). The court actually instructed the jury that there were three elements, but the first two – "that the defendant obtained or took property of another or in the presence of another" and "that the defendant took that property against the person's will, by means of actual or threatened force, violence, or fear" – collapse into the single robbery element. *See id.* (providing text of instructions).

12. *See Parker*, 104 F.3d at 73-74 (DeMoss, J., dissenting) (providing jury instructions that allowed guilty verdict only if Government proved businesses deposited their proceeds with Texas bank that routinely transferred funds for deposit in bank in another state). The jury returned a guilty verdict. *Id.* at 72.

13. *See id.* (DeMoss, J., dissenting) (providing that jury must find Parker guilty if Government proved businesses deposited their proceeds with Texas bank that routinely transferred funds for deposit in bank in another state).

14. *Id.* at 73 & n.2 (DeMoss, J., dissenting) (indicating that jury found Parker guilty on all counts and judge sentenced Parker to serve 430 months). Parker's sentence was not solely for the Hobbs Act violations. *See id.* (DeMoss, J., dissenting). The trial judge sentenced Parker to serve 130 months – more than 10 years – for his Hobbs Act violations and 300 months – exactly 25 years – for use of a firearm during the robberies. *Id.* (DeMoss, J., dissenting). The appellate court reversed the firearm convictions and remanded them for retrial. *See supra* note 9 (detailing appeal and procedural posture of firearm-related convictions).

15. *See Parker*, 104 F.3d at 72-73 (discussing appeal).

16. *See id.* at 74 (DeMoss, J., dissenting) (providing Parker's argument). Parker's written objections read as follows:

> The finding by the court that certain facts establish the interstate commerce nexus deprives the defendant of due process, and the right to trial by jury. Counsel recognizes Fifth Circuit law allows this procedure under the theory the interstate commerce element is jurisdictional. However, counsel believes current Fifth Circuit law to be in conflict with the logic of Supreme Court precedent.

Id. (DeMoss, J., dissenting).

was merely to decide whether the robbed stores routinely made deposits that were wired to banks in other states.[17] The judge summarily instructed the jury that those facts, if true, would prove the effect on interstate commerce necessary for a Hobbs Act conviction.[18]

A Fifth Circuit panel, citing the recent Supreme Court opinion in *United States v. Gaudin*,[19] agreed with Parker that the instructions were improper.[20] Although the instructions correctly asked the jury to determine factual questions concerning the interstate bank transfers, the judge erroneously required the jury automatically to find an effect on interstate commerce once those factual allegations were deemed true.[21] Sitting en banc, however, the Fifth

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17. *See id.* at 73-74 (DeMoss, J., dissenting). The court instructed the jury on the interstate commerce element as follows:

> It does not matter whether the defendant knew that his conduct would interfere with interstate commerce. Interstate commerce means commerce or travel between one state, territory, or possession of the United States and another state, territory, or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation, and communication.
>
> If you believe beyond a reasonable doubt the government's evidence regarding the handling of cash proceeds from the Payless Shoe Store referred to in Count 1 of the indictment, that is, that monies obtained from the operations of such store were routinely wired or electronically transferred from the State of Texas for deposit in a bank in another state, then you are instructed that the interstate commerce element, which I have just referred to as the third element of the offense charged by Count 1 of the indictment, has been satisfied.

Supplemental Brief for the United States on Rehearing En Banc at 3-4, United States v. Parker, 104 F.3d 72 (5th Cir. 1997) (No. 94-10557); *see Parker*, 104 F.3d at 73-74 (DeMoss, J., dissenting) (analyzing second portion of instruction).

18. *See* Parker, 104 F.3d at 73-74 (DeMoss, J., dissenting) (providing instruction). The judge found that the facts, if true, were sufficient to show that the defendant affected interstate commerce: "If you believe beyond a reasonable doubt the government's evidence . . . then you are instructed that the interstate commerce element . . . has been satisfied." *Id.* (DeMoss, J., dissenting). The jury merely found that the facts were true. *See id.* (DeMoss, J., dissenting) (analyzing instructions). No application of fact to law was required. *See id.* (DeMoss, J., dissenting) (same).

19. 515 U.S. 506 (1995); *see also infra* notes 223-43 and accompanying text (discussing *Gaudin*).

20. *See* United States v. Parker, 73 F.3d 48, 50-53 (5th Cir. 1996) (discussing appeal), *vacated in part en banc*, 104 F.3d 72 (5th Cir.), *cert. denied*, 117 S. Ct. 1720 (1997). The panel opinion recognized the "syllogistic neatness" of the Supreme Court's opinion in *Gaudin*, decided after Parker's trial: "[E]very element of an offense charged must be proven to the satisfaction of the jury beyond a reasonable doubt; 'materiality' is an element of the offense charged under § 1001; therefore, the jury, not the Court, must decide the issue of materiality." *Id.* at 52 (quoting United States v. Gaudin, 515 U.S. 506, 524 (1995) (Rehnquist, C.J., concurring)). The panel opinion took the *Gaudin* syllogism out of the § 1001 context and applied it to the Hobbs Act's interstate commerce element. *Id.*; *see infra* notes 223-42 and accompanying text (discussing *Gaudin*).

21. *See Parker*, 73 F.3d at 52 (applying *Gaudin* syllogism).

Circuit reversed and announced without explanation that the jury instructions were not erroneous.[22] Thus, Parker's conviction stands on a jury instruction that denied the jury the power to decide whether his robberies did indeed "affect interstate commerce" so as to justify his Hobbs Act conviction.[23]

Parker's story is not unique. Congress increasingly includes in federal criminal statutes the element that Parker's judge removed from the jury's control – the defendant's effect on interstate commerce;[24] moreover, these federal criminal statutes are proliferating.[25] As the number of statutes grows and jury instructions on the interstate commerce elements of those crimes continue to remove elements from the jury, courts will undermine the right to jury trial more frequently.[26]

Parker's story does not raise concerns about only the Constitution's Fifth and Sixth Amendment protections; it also presents an issue about Congress's power to enact federal crimes.[27] As a matter of constitutional law, to make simple robbery a federal crime, Congress had to include the affecting inter-

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22. *See Parker*, 104 F.3d at 73 (finding "no *Gaudin*-type error"). The en banc court did not specifically address Parker's claim that the instruction permitted the jury to find only the penultimate facts, not the ultimate fact of an effect on interstate commerce. *See id.* at 73-74 (DeMoss, J., dissenting) (providing jury instructions and interpretation thereof). The relevant portion of the en banc decision consists of one sentence: "Having reviewed the record and the briefs and arguments of the parties, we have determined that the trial court committed no *Gaudin*-type error." *Id.* at 73. The en banc majority's unsatisfying opinion provided no other reasoning. *See id.* at 75 (DeMoss, J., dissenting). There were two dissents. *See id.* at 72. Judge DeMoss's dissent explicitly highlighted the majority's lack of reasoning and future guidance. *See id.* at 75 (DeMoss, J., dissenting) (expressing view that en banc majority "ducked its obligation to give guidance to judges and practitioners as to developing legal issues"). DeMoss voiced his concern that the majority delivered its one-sentence opinion "without so much as one citation to any case or any elaborations of what reasoning they used to arrive at this conclusion." *Id.* (DeMoss, J., dissenting). DeMoss further suggested:

> A determination that "the trial court committed no *Gaudin*-type error," which is the heart of the majority's opinion, gives no indication to the Bench and bar of this Circuit (i) as to what "a *Gaudin*-type error" is nor (ii) how elements of a crime which involve mixed questions of fact and law should be submitted after the Supreme Court's decision in *Gaudin*.

Id. (DeMoss, J., dissenting). The second dissent was as hollow as the majority opinion. *Compare id.* (DeMoss, J., dissenting) *with id.* at 72 (following similar reasoning). Further adding to the confusion, all three original panelists joined the majority en banc, and the author of the panel opinion also authored the en banc opinion. *Compare id.* at 72 *with Parker*, 73 F.3d at 50, *vacated in part en banc*, 104 F.3d 72 (listing same judges).

23. *See infra* Part V (analyzing *Parker* decision).

24. *See infra* Part III.C (discussing incentive for jurisdictional element).

25. *See infra* Part III.A (discussing federalization of crime).

26. *See infra* notes 89-168 and accompanying text (discussing effect of federalization of crime and jury instructions that remove element from jury).

27. *See infra* Part III.B (discussing constitutional constraints on Congress's power).

state commerce element in its definition of the crime.[28] Indeed, without proof that Parker's $459 robbery spree affected interstate commerce, Congress would be without jurisdiction to impose any federal sanctions on him for that conduct.[29] The limitation on Congress's power thus presents another compelling constitutional reason to ensure that judges properly make and administer interstate commerce jury instructions in federal prosecutions.[30]

This Note suggests that jury instructions on the "affecting interstate commerce" element of federal crimes often violate defendants' rights to jury trials by effectively removing that jurisdictional element from the jury, thus permitting judges to usurp the jury's constitutional role.[31] The Note explores this premise by analyzing the Hobbs Act,[32] a federal criminal statute that

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28. *See infra* Part III.C (discussing jurisdictional element).

29. *See* United States v. Lopez, 514 U.S. 549, 560-62 (1995); *see also infra* Part III.B (discussing constitutional constraints).

30. *See* United States v. Spriggs, 102 F.3d 1245, 1260 (D.C. Cir. 1996) (offering requirement that defendant affected interstate commerce as example of "jurisdictional element"), *cert. denied*, 118 S. Ct. 97 (1997). Elements are facts that the prosecution must prove in order to sustain a conviction. *See* Commonwealth v. Burke, 457 N.E.2d 622, 624 (Mass. 1983) (analyzing prosecutor's burden). Jurisdictional elements differ from substantive elements because Congress includes the former in criminal statutes to ensure that, in every prosecuted case, application of the statute to the defendant's activity falls within the jurisdiction of Congress under the Constitution. *See Lopez*, 514 U.S. at 561 (describing jurisdictional element as one that ensures on case-by-case basis that defendant's activity falls within power of Congress to censure his conduct). Substantive elements are the elements that define the scope of the prohibited criminal activity. *See infra* notes 48-56 and accompanying text (discussing Hobbs Act's substantive elements). Jurisdictional elements define the circumstances under which activity satisfying the substantive elements is deemed illegal under the statute in question. *See infra* notes 65-88 and accompanying text (discussing Hobbs Act's jurisdictional elements). For example, if a statute prohibited running a traffic light on an Indian reservation, the reservation requirement would be jurisdictional whereas the elements comprising the act of running a traffic light would be substantive. *See* United States v. Feola, 420 U.S. 671, 690 n.24 (1975) (describing example of running traffic light on Indian reservation and categorizing "Indian reservation" requirement as jurisdictional element). Labeling a requirement "jurisdictional" does not strip the requirement of its full importance as an element of the offense that Congress intended to define and to punish. *See id.* at 676 n.9 (analyzing effect of jurisdictional element on prosecutor's burdens). "Indeed, a requirement is sufficient to confer jurisdiction on the federal courts for what otherwise are state crimes precisely because it implicates factors that are . . . appropriate subject[s] for federal concern." *Id.* Affecting interstate commerce is such a factor. *See infra* notes 65-88 and accompanying text (describing interstate commerce elements). For purposes of this Note, the term "jurisdictional element," when used to define an element of a crime, refers to the requirement often included within federal criminal statutes that the defendant's actions affected interstate commerce.

31. *See infra* Part V (describing effect of jury instruction).

32. *See infra* notes 48-56, 65-130 and accompanying text (describing Hobbs Act's elements and instructions). The author recognizes that his choice of statutes simplifies the analysis considerably in that the Supreme Court has previously recognized that the jurisdictional element of proving an effect on interstate commerce is an essential element of the Hobbs Act. *See* Stirone v. United States, 361 U.S. 212, 218 (1960) (analyzing Hobbs Act elements); *see also*

contains both a substantive and a jurisdictional element. Part II.A identifies both Hobbs Act elements,[33] and Part II.B categorizes the instructions that courts typically use in defining the jurisdictional element for the jury.[34] Several distinct areas of law provide necessary background to assist in understanding the extent and significance of the constitutional deprivations at issue. The first legal issue, described in Part III, is the federalization-of-crime phenomenon.[35] An ever-increasing subset of criminal activity, traditionally prohibited under state law, now faces proscriptions under concurrent federal law.[36] Part III.A traces the modern federalization trend from its traditional roots forward.[37] This Note, in Part III.B, introduces an important repercussion of Congress expanding its criminal reach, that the federalization of crime stretches Congress's authority, possibly beyond constitutional limits.[38] The Part identifies the source of congressional criminal authority[39] and defines the limits of that authority.[40] Part III.C explains why uncertainty concerning the scope of Congress's authority gives Congress incentive to include jurisdictional elements in criminal statutes.[41] Part IV refocuses the discussion on the defendant's rights to jury trial.[42] Part IV also examines the guarantees of the Fifth and Sixth Amendments to the Constitution with an emphasis on the jury's role in determining the ultimate question of guilt in the criminal trial.[43]

United States v. Wells, 117 S. Ct. 921, 924-25 (1997) (finding that *Gaudin* does not apply if element that court removes from jury is not element of crime). Although the analysis holds true in criminal prosecutions under any statute, especially one in which the jurisdictional element of affecting interstate commerce is at issue, proof that the interstate commerce element is an essential element of the crime must first be proffered. *See infra* text accompanying note 237 (providing syllogism).

33. *See infra* notes 45-88 and accompanying text (discussing Hobbs Act elements).

34. *See infra* notes 89-130 and accompanying text (discussing Hobbs Act instructions).

35. *See infra* notes 131-213 and accompanying text (describing federalization of crime phenomenon).

36. *See infra* notes 131-68 and accompanying text (describing federalization of crime trend).

37. *See infra* notes 131-68 and accompanying text (describing history of state and federal criminal prohibitions).

38. *See infra* notes 169-201 and accompanying text (describing effect of federalization of crime trend).

39. *See infra* notes 169-86 and accompanying text (identifying source of Congress's power).

40. *See infra* notes 187-201 and accompanying text (describing constitutional limits on Congress's authority).

41. *See infra* notes 202-13 and accompanying text (describing incentive to include jurisdictional element).

42. *See infra* notes 214-42 and accompanying text (analyzing Fifth and Sixth Amendments).

43. *See infra* notes 214-42 and accompanying text (discussing Fifth and Sixth Amendments).

In Part V, history converges on the present. The Note revisits the Fifth Circuit's en banc handling of the *Parker* case and its affirmance of a jury instruction that reserved the determination of a jurisdictional element for the trial judge, notwithstanding the fact that the Constitution requires that the *jury* acquit the defendant unless it *alone* finds every element, including the jurisdictional element, satisfied beyond a reasonable doubt.[44]

II. The Hobbs Act

A. Elements

The Hobbs Act prohibits acts of extortion and robbery that in any way or degree obstruct, delay, or affect interstate commerce or its instrumentalities.[45] The Hobbs Act also reaches attempts and conspiracies that similarly disturb commerce or its instrumentalities.[46] Persons convicted of violating the federal

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44. *See infra* notes 243-67 and accompanying text (discussing *Parker*).

45. Hobbs Act, 18 U.S.C. § 1951 (1994); *see* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 715 (1995) (describing Hobbs Act's reach). The entire text of the Hobbs Act follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
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> (b) As used in this section –
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> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
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> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
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> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 1951.

46. *See* 18 U.S.C. § 1951; *see also* United States v. Stillo, 57 F.3d 553, 558 (7th Cir. 1995) (describing prosecution on conspiracy to extort theory); United States v. Dunn, 758 F.2d 30, 37-39 (1st Cir. 1985) (describing prosecution for conspiracy and attempt to extort); Merritt, *supra* note 45, at 715 (discussing reach of Hobbs Act).

statute face a maximum penalty of a substantial fine plus twenty years imprisonment.[47]

Congress included two essential elements in the definition of a Hobbs Act crime.[48] First, the defendant must commit robbery or extortion.[49] Second, the defendant's activity must in any way or degree obstruct, delay, or affect interstate commerce.[50] The first element encompasses the substantive criminal aspect of the crime, whereas the second element defines the jurisdictional limits.[51] Both elements are proven only by reference to specific conduct.[52]

The Hobbs Act explicitly defines the substantive element of robbery or extortion.[53] Robbery, under the Act, involves theft of property from a person

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47. *See* 18 U.S.C. § 1951(a). As originally adopted, the Hobbs Act capped at $10,000 the fine that courts may impose on violators. Hobbs Act, ch. 645, § 1951(a), 62 Stat. 683, 793 (1948) (current version at 18 U.S.C. § 1951(a) (1994)). The amended version removed the maximum. 18 U.S.C. § 1951(a).

48. *See* Stirone v. United States, 361 U.S. 212, 218 (1960) (defining elements). *Stirone* involved the prosecution of a defendant who had affected interstate commerce by extortion. *See id.* (presenting facts). The Supreme Court determined:

> [T]here are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference.

Id. Stirone did not involve robbery. *See id.* (discussing elements). If the Government had alleged that Stirone had robbed instead of extorted from his victim, then the two essential elements would have been interference with commerce and robbery. *See* 18 U.S.C. § 1951(a) (providing elements).

49. *See* 18 U.S.C. § 1951(a) (defining Hobbs Act crime); *see also infra* notes 53-56 and accompanying text (describing substantive elements); *Stirone*, 361 U.S. at 218 (finding extortion to be essential element of Hobbs Act violation); United States v. Billups, 692 F.2d 320, 330-31 (4th Cir. 1982) (describing elements). In *Billups*, the Fourth Circuit noted that robbery and extortion are not necessarily mutually exclusive. *Id.* at 331.

50. *See* 18 U.S.C. § 1951(a) (defining Hobbs Act crime); *infra* notes 65-88 and accompanying text (describing jurisdictional element); *see also Stirone*, 361 U.S. at 218 (determining that interference with commerce is essential element of Hobbs Act that trial court must charge to jury).

51. *See* Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1630 (1992) (acknowledging that both elements of Hobbs Act are extremely broad); *see also supra* note 30 (defining types of elements); *infra* Part III.C (describing reasons for including jurisdictional element).

52. *See* United States v. Hyde, 448 F.2d 815, 835-37 (5th Cir. 1971) (analyzing facts alleged to determine if they demonstrate conduct sufficient to satisfy interstate commerce element).

53. *See* United States v. Culbert, 435 U.S. 371, 377-78 & n.8 (1978) (describing statutory definitions and refusing to read "racketeering" into statute as essential element of crime); *see also* 18 U.S.C. § 1951(b) (establishing definitions); Whitaker, *supra* note 51, at 1630 (analyzing definitions). In *Culbert*, the Supreme Court concluded that Congress carefully chose explicit

by use of force or threats and without the victim's consent.[54] Extortion includes any wrongful taking of property from another by consent if the consent is induced by use of force or threats.[55] Both definitions mirror the common law.[56]

Congress passed the Hobbs Act in response to the Supreme Court's restrictive interpretation of the Act's predecessor statute:[57] the Anti-Racketeering Act of 1934.[58] Congress intended to broaden the Anti-Racketeering Act and to overrule legislatively the Court's restrictive interpretation.[59] Since

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definitions in order to preclude court interpretations that might narrow the scope of the Act. *See Culbert*, 435 U.S. at 378 (quoting 91 CONG. REC. 11,904 (1945) (statement of Rep. Hancock)).

54. *See* Hobbs Act, 18 U.S.C. § 1951(b)(1) (1994) (defining robbery).

55. *See* 18 U.S.C. § 1951(b)(2) (defining extortion).

56. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 8.11-.12 (2d ed. 1986) (defining robbery and extortion at common law); *see also* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 889-90 (1988) (analyzing Hobbs Act through common law and thirteenth-century extortion statutes). The common law elements of robbery include: 1) larceny, 2) that the property is taken from the person or presence of another, and 3) that the taking is accomplished by means of force or putting in fear. LAFAVE, *supra*, § 8.11. The common law definition of extortion is the "corrupt taking of a fee by a public officer, under color of his office, where no fee is due, or not so large a fee is due, or the fee is not yet due." *Id.* § 8.12.

57. *See* United States v. Rosa, 560 F.2d 149, 153 & n.3 (3d Cir. 1977) (calling enactment Congress's response to restrictive reading of Anti-Racketeering Act); *see also Culbert*, 435 U.S. at 376 (finding no racketeering element in Hobbs Act even though statute enacted to correct deficiency in Anti-Racketeering Act); United States v. Enmons, 410 U.S. 396, 401-04 (1973) (same); Charles F.C. Ruff, *Federal Prosecution of Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1174-75 (1977). The Hobbs Act's legislative history confirms that Congress passed the statute in response to a restrictive Supreme Court interpretation of the Anti-Racketeering Act. *See* 91 CONG. REC. 11,900 (1945) (statement of Rep. Bulwinkle) (discussing intent of statute). Chairman of the House Committee on Labor, Rep. Bulwinkle said, "[T]his bill is made necessary by the amazing decision of the Supreme Court in the case of the United States against Teamster's Union 807 [United States v. Local 807, International Brotherhood of Teamsters, 315 U.S. 521 (1942)], 3 years ago. That decision practically nullified the antiracketeering bill of 1934." *Id.*

58. Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (1934) (amended 1948).

59. *See* United States v. Culbert, 435 U.S. 371, 376 (1978) (stating justification for Hobbs Act's passage); *Enmons*, 410 U.S. at 401-04 (same); *Rosa*, 560 F.2d at 153 & n.3 (same); *see also* 91 CONG. REC. 11,900 (1945) (statement of Rep. Bulwinkle) (same). Rep. Bulwinkle added: "We think a mistake was made by the Supreme Court, we are attempting to correct it through enacting a new law which will accurately and definitely reflect the attitude of the Congress, the general public and the honest, law-abiding members of labor unions." *Id.* The Congressman referred to the Supreme Court's decision in *Teamsters*. *See id.* (referring explicitly to *Teamsters* decision). In *Teamsters*, the issue was whether the Anti-Racketeering Act exempted union members from prosecution. *Teamsters*, 315 U.S. at 527-28. The Government proffered evidence tending to show that Teamsters officials had conspired to use violence and threats in order to extort money from out-of-state drivers entering New York to make deliveries. *Id.* at 525-26. The Teamsters stopped truckers at the state border and demanded

the Hobbs Act's passage, courts have allowed evidence of Congress's initial expansive purpose to justify interpreting the statute to its broadest extent.[60]

Every state prohibits both robbery[61] and extortion[62] under its own crimi-

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money to "assist" with the drivers' deliveries. *Id.* at 526. The Supreme Court determined that the payoff amounted to wages received from a bona-fide employer. *Id.* at 535. Pointing to language within the Anti-Racketeering Act, the Court held that the act exempted the use of force to acquire a wage and reversed the Teamsters officials' convictions. *Id.* at 531.

60. *See* Stirone v. United States, 361 U.S. 212, 215 (1960) (finding that Congress intended to use all of its constitutional power); *see also* United States v. Mattson, 671 F.2d 1020, 1023 (7th Cir. 1982) (stating that Hobbs Act "is to be given an expansive construction"); United States v. Caci, 401 F.2d 664, 668 (2d Cir. 1968) (finding that legislative history of Hobbs Act supports broad reading). *But see* Steven C. Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the* Quid Pro Quo *Standard in Extortion Cases Involving Public Officials*, 31 TULSA L.J. 781, 784 (1996) (asserting that courts gain little guidance from Hobbs Act legislative debates concerning breadth of "under the color of official right" language in statute). The Second Circuit's analysis in *Caci* provides a clear example of the difficulty courts have interpreting Congressional intent. *See Caci*, 401 F.2d at 668 (analyzing Congressional intent). The court acknowledged that labor advocates believed that the bill unfairly targeted organized labor. *See id.* (citing 91 CONG. REC. 11,848 (1945) (statements of Rep. Lane); 91 CONG. REC. 11,901 (1945) (statements of Rep. Celler)). The court then recognized the arguments that the Hobbs Act was to apply to all individuals and groups, *see id.* (citing 91 CONG. REC. 11,844 (1945) (statements of Reps. Robsion and Michener); 91 CONG. REC. 11,904 (1945) (statements of Rep. Gwynne); 91 CONG. REC. 11,905 (1945) (statements of Rep. Robsion)), and that state laws traditionally prohibited robbery and extortion, *see id.* (citing 91 CONG. REC. 11,910 (1945) (statements of Reps. Springer and Robsion)). The foregoing would seem to indicate merely that Congress intended to close the labor loophole without specifically targeting labor unions, not that Congress intended an extremely broad reading of the Hobbs Act. *See supra* notes 57-59 (discussing Congress's intent and Court's response). However, the *Caci* court concluded: "[T]he legislative history clearly indicate[d] that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce." *Caci*, 401 F.2d at 668.

61. *See* ALA. CODE §§ 13A-8-40 to -43 (1994) (prohibiting robbery); ALASKA STAT. §§ 11.41.500-.510 (Michie 1996) (same); ARIZ. REV. STAT. ANN. §§ 13-1902 to -1904 (West 1989) (same); ARK. CODE ANN. §§ 5-12-101 to -103 (Michie 1997) (same); CAL. PENAL CODE §§ 211-215 (West 1988 & Supp. 1998) (same); COLO. REV. STAT. ANN. §§ 18-4-301 to -304 (West 1997) (same); CONN. GEN. STAT. ANN. §§ 53a-133 to -136a (West 1994 & Supp. 1997) (same); DEL. CODE ANN. tit. 11, §§ 831-832 (1995 & Supp. 1997) (same); FLA. STAT. ANN. §§ 812.13-.135 (West 1994) (same); GA. CODE ANN. §§ 16-8-40 to -41 (1996) (same); HAW. REV. STAT. §§ 708-840 to -842 (1993) (same); IDAHO CODE §§ 18-6501 to -6503 (1997) (same); 720 ILL. COMP. STAT. ANN. 5/18-1 to -5 (West 1993 & Supp. 1997) (same); IND. CODE ANN. §§ 35-42-5-1 to -2 (Michie 1994) (same); IOWA CODE ANN. §§ 711.1-.3 (West 1993) (same); KAN. STAT. ANN. §§ 21-3426 to -3427 (1995) (same); KY. REV. STAT. ANN. §§ 515.010-.030 (Michie 1990) (same); LA. REV. STAT. ANN. §§ 14:65 to :65.1 (West 1997) (same); ME. REV. STAT. ANN. tit. 17-A, § 651 (West 1983) (same); MD. ANN. CODE art. 27, §§ 486-489 (1996) (same); MASS. GEN. LAWS ANN. ch. 265, §§ 17, 19 (West 1990 & Supp. 1997) (same); MICH. COMP. LAWS ANN. §§ 750.529-.531 (West 1991) (same); MINN. STAT. ANN. §§ 609.24-.245 (West 1987 & Supp. 1997) (same); MISS. CODE ANN. §§ 97-3-73 to -81 (1994) (same); MO. ANN. STAT. §§ 569.020-.030 (West 1979 & Supp. 1998) (same); MONT. CODE ANN. § 45-5-401 (1997) (same); NEB. REV. STAT. § 28-324 (1995) (same); NEV. REV. STAT. § 200.380 (1997) (same); N.H. REV. STAT. ANN. § 636:1 (1996) (same); N.J. STAT. ANN. §§ 2C:15-1 to -2 (West 1995) (same); N.M. STAT. ANN.

nal laws.[63] Thus, the broad language that Congress used when defining Hobbs

§ 30-16-2 (Michie 1994) (same); N.Y. PENAL LAW §§ 160.00-.15 (McKinney 1988 & Supp. 1998) (same); N.C. GEN. STAT. §§ 14-87 to -89.1 (1993) (same); N.D. CENT. CODE § 12.1-22-01 (1997) (same); OHIO REV. CODE ANN. §§ 2911.01-.02 (Banks-Baldwin 1997) (same); OKLA. STAT. ANN. tit. 21, §§ 791-801 (West 1983 & Supp. 1998) (same); OR. REV. STAT. §§ 164.395-.415 (1995) (same); 18 PA. CONS. STAT. ANN. § 3701 (West 1983) (same); R.I. GEN. LAWS §§ 11-39-1 to -2 (1994) (same); S.C. CODE ANN. §§ 16-11-325 to -330 (Law Co-op. Supp. 1997) (same); S.D. CODIFIED LAWS §§ 22-30-1 to -7 (Michie 1988) (same); TENN. CODE ANN. §§ 39-13-401 to -404 (1997) (same); TEX. PENAL CODE ANN. §§ 29.01-.03 (West 1994) (same); UTAH CODE ANN. §§ 76-6-301 to -302 (1995 & Supp. 1997) (same); VT. STAT. ANN. tit. 13, § 608 (1974 & Supp. 1997) (same); VA. CODE ANN. §§ 18.2-58 to -58.1 (Michie 1996) (same); WASH. REV. CODE ANN. §§ 9A.56.190-.210 (West 1988) (same); W. VA. CODE § 61-2-12 (1997) (same); WIS. STAT. ANN. § 943.32 (West 1996 & Supp. 1997) (same); WYO. STAT. ANN. § 6-2-401 (Michie 1997) (same).

62. *See* ALA. CODE § 13A-8-13 (1994) (prohibiting extortion); ALASKA STAT. § 11.41.520 (Michie 1996) (same); ARIZ. REV. STAT. ANN. § 13-1804 (West 1989) (same); ARK. CODE ANN. §§ 5-36-102 to -103 (Michie 1997) (prohibiting extortion under consolidated theft statute); CAL. PENAL CODE §§ 518-527 (West 1988 & Supp. 1998) (prohibiting extortion); COLO. REV. STAT. ANN. § 18-3-207 (West 1997) (same); CONN. GEN. STAT. ANN. §§ 53a-119, 53a-121 to -125b (West 1994 & Supp. 1997) (prohibiting extortion under larceny statute); DEL. CODE ANN. tit. 11, § 846 (1995) (prohibiting extortion); FLA. STAT. ANN. § 839.11 (West Supp. 1998) (prohibiting extortion by state officer); GA. CODE ANN. § 16-8-16 (1996) (prohibiting extortion); HAW. REV. STAT. §§ 707-764 to -767 (1993) (same); IDAHO CODE §§ 18-2401 to -2410 (1997) (prohibiting extortion under consolidated theft statute); 721 ILL. COMP. STAT. ANN. 5/16-1 to -15 (West 1993 & Supp. 1997) (same); IND. CODE ANN. § 35-45-2-1 (Michie Supp. 1997) (prohibiting extortion under intimidation statute); IOWA CODE ANN. § 711.4 (West 1993) (prohibiting extortion); KAN. STAT. ANN. § 21-4401 (1995) (prohibiting extortion under racketeering statute); KY. REV. STAT. ANN. § 514.080 (Michie Supp. 1996) (prohibiting extortion); LA. REV. STAT. ANN. § 14:66 (West 1997) (same); ME. REV. STAT. ANN. tit. 17-A, § 355 (West 1983) (same); MD. ANN. CODE art. 27, §§ 561-563 (1996 & Supp. 1997) (same); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990) (same); MICH. COMP. LAWS ANN. §§ 750.213-.214 (West 1991) (same); MINN. STAT. ANN. §§ 609.27-.275 (West 1987) (prohibiting extortion under coercion statute); MISS. CODE ANN. § 97-3-82 (1994) (prohibiting extortion); MO. ANN. STAT. §§ 570.010-.070 (West 1979 & Supp. 1998) (prohibiting extortion under stealing statute); MONT. CODE ANN. § 45-6-301 (1997) (prohibiting extortion under theft statute); NEB. REV. STAT. § 28-513 (1995) (prohibiting extortion); NEV. REV. STAT. § 197.170 (1997) (same); N.H. REV. STAT. ANN. §§ 637:1 to :5 (1996) (prohibiting under consolidated theft statute); N.J. STAT. ANN. §§ 2C:20-2, -5 (West 1995 & Supp. 1997) (same); N.M. STAT. ANN. § 30-16-9 (Michie 1994) (prohibiting extortion); N.Y. PENAL LAW § 155.05 (McKinney 1988) (prohibiting extortion under larceny statute); N.C. GEN. STAT. § 14-118.4 (1993) (prohibiting extortion); N.D. CENT. CODE §§ 12.1-23-01 to -10 (1997) (prohibiting extortion under consolidated theft statute); OHIO REV. CODE ANN. §§ 2905.11-.12 (Banks-Baldwin 1997) (prohibiting extortion and coercion); OKLA. STAT. ANN. tit. 21, §§ 1481-1487 (West 1983 & Supp. 1998) (prohibiting extortion); OR. REV. STAT. §§ 164.015-.067, .075 (1995) (prohibiting extortion under consolidated theft statute); 18 PA. CONS. STAT. ANN. § 3923 (West 1983) (same); R.I. GEN. LAWS § 11-42-4 (1994) (prohibiting threats against and extortion from public officials); S.C. CODE ANN. § 16-17-640 (Law Co-op. 1985) (prohibiting blackmail); S.D. CODIFIED LAWS §§ 22-30A-1, -4, -15, -17, -18 (Michie 1988 & Supp. 1997) (prohibiting extortion under consolidated theft statute); TENN. CODE ANN. § 39-14-112 (1997) (prohibiting extortion); TEX. PENAL CODE ANN. §§ 31.02-.03 (West 1994 & Supp. 1998) (prohibiting extortion under consolidated theft statute); UTAH CODE ANN. §§ 76-6-401 to -406 (1995)

Act offenses, coupled with the expansive interpretation courts have given it, has resulted in a broad system of concurrent jurisdiction between state and federal authorities – a system that places those committing robbery and extortion in simultaneous violation of state and federal laws.[64]

The Hobbs Act's second element requires that the defendant's extortion or robbery obstruct, delay, or affect interstate commerce.[65] Congress intended the element to track the Commerce Clause's language and, therefore, to allow the Hobbs Act to reach any extortion and robbery that "affected interstate commerce" as the Constitution defines that term.[66] Courts have favored a

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(same); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1997) (prohibiting extortion); VA. CODE ANN. § 18.2-470 (Michie 1996) (same); WASH. REV. CODE ANN. §§ 9A.56.110-.130 (West 1988) (same); W. VA. CODE § 61-2-13 (1997) (same); WIS. STAT. ANN. §§ 943.30 to .31 (West 1996) (prohibiting extortion as threat to injure or to accuse of crime); WYO. STAT. ANN. § 6-2-402 (Michie 1997) (prohibiting extortion under blackmail statute).

63. *See* United States v. Culbert, 435 U.S. 371, 379-80 (1978) (discussing concurrent jurisdiction of Hobbs Act). The *Culbert* Court suggested that Congress believed that the states had not effectively prosecuted robbery and extortion. *Id.* at 380 (quoting 91 CONG. REC. 11,911 (1945) (statements of Rep. Jennings)).

64. *See* Whitaker, *supra* note 51, at 1626 (noting that Hobbs Act's broad jurisdictional trigger may allow courts to apply Act to purely local behavior). The dual sovereignty was not lost on many of Congress's state's rights advocates during Congressional debates on the Hobbs Act. *See* 91 CONG. REC. 11,903 (1945) (statement of Rep. Welch) (arguing for bill's rejection). Rep. Welch argued:

> Every State, city, and county in the United States has ample State and local laws to meet this situation [prosecuting robbery and extortion]. It is difficult to understand why Members of Congress, whose entire records as national legislators have been based upon the principle of State's rights, now stand up here and attempt to fasten upon the Federal Government the responsibility of enforcing local law in every city, village, and hamlet in the Nation. This is not a Federal Government function. I would be ashamed to stand here on the floor of Congress and admit that I represented such a district.

Id.

65. *See* Stirone v. United States, 361 U.S. 212, 218 (1960) (defining elements of Hobbs Act crime).

66. *See* 91 CONG. REC. 11,900 (1945) (statement of Rep. Jennings) (discussing purpose of Hobbs Act). Jennings stated: "[T]his bill is designed to protect trade and commerce against interference by violence, threat, coercion, or intimidation. It is brought before the Congress under and pursuant to the commerce clause of the Federal Constitution which gives Congress the power to regulate commerce among the States." *Id.* Rep. Hancock, one of the Hobbs Act's chief sponsors, said the bill had a single purpose: "It is the function of Congress to regulate interstate commerce, and it is the duty of Congress to protect interstate commerce. That is the object of this bill, and there is not any other." 91 CONG. REC. 11,900 (1945) (statement of Rep. Hancock). Congress's jurisdiction over the Hobbs Act's subject matter is, in fact, based on its Commerce Clause authority. *See* United States v. Alexander, 850 F.2d 1500, 1503 (11th Cir. 1988) (calling interstate commerce element "jurisdictional prerequisite"); United States v. Varlack, 225 F.2d 665, 670 (2d Cir. 1955) (analyzing sufficiency of indictment charging obstruction of commerce alone rather than interstate or foreign commerce); *see also* Nick v.

broad interpretation of the jurisdictional element.[67] In fact, few defendants have successfully defended against Hobbs Act prosecutions by arguing that the alleged activity had no effect on interstate commerce.[68] Indeed, courts have decided that *any* effect on interstate commerce satisfies the Hobbs Act, even if that effect is slight,[69] de minimis,[70] or even only potential.[71] Moreover,

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United States, 122 F.2d 660, 668 (8th Cir. 1941) (addressing predecessor act). In *Nick*, the petitioner sought to attack the validity of the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (1934) (amended 1948), the Hobbs Act's predecessor, on Tenth Amendment grounds. *Nick*, 122 F.2d at 667. The petitioner in *Nick* claimed that the Anti-Racketeering Act improperly asserted jurisdiction over activity previously prohibited under state law. *Id.* at 668. The court agreed that state law prohibited extortion and robbery, but found that, to the extent that the activity came within the Commerce Clause, the Tenth Amendment would not prohibit concurrent federal prohibition. *Id.* "The Act is an exercise of police power but it is based upon the protection of interstate commerce." *Id.* The *Varlack* court echoed *Nick*'s conclusion while specifically considering the Hobbs Act: "There can be no doubt that congressional jurisdiction to enact this statute is bottomed upon the powers conferred upon the national legislature by the Interstate and Foreign Commerce Clause of the Constitution, Art. 1, § 8, cl. 3." *Varlack*, 225 F.2d at 669-70.

67. *See Stirone*, 361 U.S. at 215 (finding that Congress intended full application of Commerce Clause authority); United States v. Alexander, 850 F.2d 1500, 1503 (11th Cir. 1988) (stating that "[t]he government's burden under this requirement is not great"); United States v. Hyde, 448 F.2d 815, 836 (5th Cir. 1971) (rejecting contention that impact on interstate commerce must be substantial); United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969) (finding that broad interpretation routinely upheld (citing United States v. Amabile, 395 F.2d 47 (7th Cir. 1968); Battaglia v. United States, 383 F.2d 303 (9th Cir. 1967); Hulahan v. United States, 214 F.2d 441, 445 (8th Cir. 1954); United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956))). In *Stirone*, the Court considered the broad language that Congress included in the Hobbs Act. *Stirone*, 361 U.S. at 215. "The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" *Id.* at 215 (quoting 18 U.S.C. § 1951(a) (1994)). Courts analyzing the jurisdictional basis have routinely upheld the Hobbs Act against constitutional attacks. *See* United States v. Williams, 621 F.2d 123, 125 (5th Cir. 1980) (recognizing that courts have sustained Hobbs Act against constitutional attacks); *see also* United States v. Postma, 242 F.2d 488, 493 (2d Cir. 1957) (affirming constitutionality of Hobbs Act). *See generally* United States v. Varlack, 225 F.2d 665, 669 (2d Cir. 1955) (upholding Hobbs Act against Tenth Amendment attack).

68. *See* Whitaker, *supra* note 51, at 1630 (analyzing effect of broad jurisdictional element). Whitaker suggests that the Hobbs Act's jurisdictional element is too broad to argue successfully against it in defense. *See id.* "Consequently, defendants charged under the Hobbs Act are rarely acquitted on jurisdictional grounds. Instead, defense arguments must concentrate on the substantive elements of the crime." *Id.* Full application of the Fifth and Sixth Amendments' right to jury trial would likely change the legal dynamic because juries may be more likely to acquit based on their own determination of what interstate commerce really entails. *See* United States v. Bongiorno, 106 F.3d 1027, 1031 (1st Cir. 1997) (recognizing that court and jury have different definitions of interstate commerce). In *Bongiorno*, the First Circuit recognized that "[t]he term 'commerce' in the Commerce Clause context is a term of art, and the Court consistently has interpreted it to include transactions that might strike lay persons as 'noncommercial.'" *Id.*

69. *See* United States v. Culbert, 435 U.S. 371, 373 (1978) (finding effect "in any way or degree" to be enough); *see also* United States v. Rabbitt, 583 F.2d 1014, 1023 (8th Cir. 1978)

although depleting the assets of an entity involved in interstate commerce is deemed sufficient to satisfy the element,[72] the effect on commerce need not be adverse.[73]

The amphibious nature of the interstate commerce element has perhaps exacerbated the relaxation of the element's legal proof requirements.[74] The

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(affirming conviction of extortionist whose victim paid $5,000 from personal accounts).

70. *See* United States v. Debs, 949 F.2d 199, 202 (6th Cir. 1991) (allowing de minimis effect); *see also* United States v. DiCarlantonio, 870 F.2d 1058, 1060 (6th Cir. 1989) (same); United States v. Alexander, 850 F.2d 1500, 1503 (11th Cir. 1988) (same); United States v. Conn, 769 F.2d 420, 424 (7th Cir. 1985) (allowing de minimis effect if not "speculative or attenuated"); United States v. Billups, 692 F.2d 320, 331 n.7 (4th Cir. 1982) (finding sufficient effect from $4000 actual value of extortion and $10,000 potential); United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980) (allowing de minimis effect); United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980) (noting that "minimal effect on interstate commerce will sustain jurisdiction under the statute").

71. *See* United States v. Stillo, 57 F.3d 553, 558 (7th Cir. 1995) (finding that agreement to accept bribe had potential to affect interstate commerce even though bribe never paid); United States v. Morgano, 39 F.3d 1358, 1371 (7th Cir. 1994) (finding "potential" enough because Hobbs Act reaches Congress's full constitutional power); United States v. Peete, 919 F.2d 1168, 1174-75 (6th Cir. 1990) (finding that "realistic probability" of effect would suffice); United States v. Buffey, 899 F.2d 1402, 1404 (4th Cir. 1990) (requiring reasonably probable effect); United States v. Staszcuk, 517 F.2d 53, 60 (7th Cir. 1975) (finding requirement satisfied even if "no actual effect on commerce").

72. *See* United States v. Collins, 40 F.3d 95, 99-100 (5th Cir. 1994) (analyzing sufficiency of depletion of assets theory); *see also* United States v. Jackson, 748 F.2d 1535, 1537 (11th Cir. 1984) (defining depletion of assets theory). The *Jackson* court defined the depletion of assets theory as follows: "Under that theory, 'commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods.'" *Id.* (quoting United States v. Elders, 569 F.2d 1020, 1025 (7th Cir. 1978)); *see also* United States v. Zeigler, 19 F.3d 486, 489-90 (10th Cir. 1994) ("The minimal effect on commerce may be established by evidence of a mere depletion of assets of a firm engaged in interstate commerce."). The depletion of assets theory is widely accepted. *See* United States v. Blakey, 607 F.2d 779, 783-84 (7th Cir. 1979) (noting that depletion of assets theory is well-established in precedent); *see also* United States v. Morgano, 39 F.3d 1358, 1371-72 (7th Cir. 1994) (analyzing sufficiency of depletion of assets theory); United States v. DiCarlantonio, 870 F.2d 1058, 1060 (6th Cir. 1989) (applying depletion of assets theory); United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980) (rejecting contention that depletion of assets theory is insufficient); United States v. Biondo, 483 F.2d 635, 640 (8th Cir. 1973) (calling acceptability of depletion of assets theory "well settled").

73. *See* United States v. Bailey, 990 F.2d 119, 126 (4th Cir. 1993) (rejecting appellant's claim that effect must be adverse to commerce). In *Bailey*, the appellant pointed to language in prior cases that mentioned that the effect on interstate commerce must be adverse. *Id.* at 125. The court acknowledged that *United States v. De Parias*, 805 F.2d 1447, 1450 (11th Cir. 1986) and *United States v. Buffey*, 899 F.2d 1402, 1403 (4th Cir. 1990) described the interstate commerce effect as "adverse," but rejected appellant's claim after finding that the language in both cited cases was merely dicta and therefore not binding. *Bailey*, 990 F.2d at 125.

74. *See supra* notes 66-73 and accompanying text (describing legal proof requirements).

interstate commerce element does not fit easily into well-defined evidence categories.[75] Courts have struggled to determine whether the element presents a question of law, a question of fact, or a mixed question of fact and law.[76] Determining the proper category is essential to the ultimate question of who must decide whether the element is satisfied; ordinarily, juries determine facts, and judges determine law.[77]

The importance of the "affecting interstate commerce" element goes beyond mere formalism; the element defines the very limits of the statute's jurisdictional parameters.[78] The interstate commerce element does not depend upon the culpability of the defendant;[79] rather, the element reflects constitu-

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75. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 183 (Boston, Little, Brown & Co. 1898) (noting that classification of evidence into categories is necessary). Thayer introduces two categories – questions of law and questions of fact – into which courts must place elements. *See id.* (defining categories). The affecting interstate commerce element appears to be a mix of fact and law. *See infra* notes 78-88 and accompanying text (analyzing jurisdictional element). For an excellent illustration of the confusion the interstate commerce element raises, compare *United States v. Hyde*, 448 F.2d 815, 839-43 (5th Cir. 1971) (finding that every court agrees that interstate commerce element is one for judge to determine) with *id.* at 850-63 (Rives, J., dissenting) (challenging majority's categorization).

76. *See Hyde*, 448 F.2d at 850-63 (Rives, J., dissenting) (addressing whether interstate commerce element may be reserved for judge as question of law or must be charged to jury as question of fact or mixed question of fact and law).

77. *See infra* notes 81-88 and accompanying text (describing role of jury and judge as concerning fact and law). The command often is translated into the Latin phrase that Sir Edward Coke employed: "*Ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores.*" *See, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 81(f) (16th ed., Boston, Little, Brown & Co. 1899); THAYER, *supra* note 75, at 183; JAMES BRADLEY THAYER, A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW 135 (2d ed. 1900); and GEORGE WORTHINGTON, AN INQUIRY INTO THE POWER OF JURIES TO DECIDE INCIDENTALLY ON QUESTIONS OF LAW §§ 129, 132 (Philadelphia, J.S. Littell 1840). Incidentally, Lord Coke is recognized as "the greatest jurist of the seventeenth century." Brian P. Levack, *Possession, Witchcraft, and the Law in Jacobean England*, 52 WASH. & LEE L. REV. 1613, 1613 (1995).

78. *See supra* notes 65-66 and accompanying text (defining interstate commerce element and tracing its origins to Commerce Clause).

79. *See* United States v. Pappadopoulos, 64 F.3d 522, 527-28 (9th Cir. 1995) (questioning decision to prosecute arson defendant in federal court when defendant could have been prosecuted in state court). In *Pappadopoulos*, the defendant was convicted of setting fire to a home "*used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.*" *Id.* at 524. The only link the home had to interstate commerce was that it received natural gas for its heat through interstate means. *Id.* at 525, 528. The court found that the defendant violated the substantive aspects of the statute, but determined that the interstate commerce connection was insufficient. *Id.* at 528. Reversing the defendant's conviction, the court did not state that the defendant had not committed arson, but that prosecutors chose the wrong jurisdiction in which to bring their charges:

tional interpretation of the Commerce Clause as applied to the facts of individual cases.[80] Although questions involving constitutional interpretation are ordinarily questions of law for the court and not the jury to decide,[81] Congress deliberately chose to make the requirement that the defendant affect interstate commerce an essential element of a Hobbs Act violation.[82] Proving the necessary effect on interstate commerce requires evidence that proffered historical facts are true.[83] Deciding such questions of fact is the jury's job alone.[84]

The problem thus reveals itself: the requirement that the defendant affected interstate commerce involves questions both of law and of fact;[85] the

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> This is a simple state arson crime. It should have been tried in state court. But the question goes beyond federalism concerns – it involves our jurisdiction. Where the sole source of the interstate commerce connection is the receipt by a private home of natural gas from a company that receives some of that gas from an out-of-state source, federal jurisdictional requirements have not been met.

Id. The interstate commerce element produces similar results within the Hobbs Act context. *See* Hobbs Act, 18 U.S.C. § 1951 (1994) (providing interstate commerce element in addition to substantive elements). *But see* United States v. Hyde, 448 F.2d 815, 855 (5th Cir. 1971) (Rives, J., dissenting) (asserting that determination of guilt hinges on effect on interstate commerce).

80. *See Hyde*, 448 F.2d at 839 & n.34 (stating that "this is a jurisdictional element for which the court has a great responsibility"). The *Hyde* court advised trial courts to proceed cautiously as they instruct juries on the Hobbs Act's interstate commerce element "because interference with interstate commerce is the element of the conduct here that enabled Congress to declare that common law extortion can be a federal crime." *Id.* at 839 n.34.

81. *See* J.C. WELLS, A TREATISE ON QUESTIONS OF LAW AND FACT, INSTRUCTIONS TO JURIES AND BILLS OF EXCEPTIONS § 64 (New ed., Des Moines, Mills 1879) (noting that court properly determines constitutional issues); *see also* United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996) (same).

82. *See* 18 U.S.C. § 1951(a) (defining crime).

83. *See Hyde*, 448 F.2d at 839 n.34 (claiming that jurisdictional element in Hobbs Act requires jury's determination of facts). The *Hyde* majority agreed with the dissent that "[a]t the evidentiary stage of the trial there is nothing unique about the commerce issue as a 'jurisdictional element.'" *Id.* The opinion continues: "It is for the jury to determine whether the facts have been proved, that is, *whether they believe the evidence* with respect to the factual elements of the indictment as explained in the charge." *Id.* at 839, 841; *see also* United States v. Robinson, 119 F.3d 1205, 1212 & n.4 (5th Cir. 1997) (finding that interstate commerce element "is in fact a substantive element of the crime"), *cert. denied*, 118 S. Ct. 1104 (1998). Of course, if the jurisdictional element is treated similarly to the substantive elements, one would expect the instructions on both to be similar; if the instructions for the substantive element allow the jury to apply law to fact, then the instructions for the jurisdictional element should as well. *Compare Hyde*, 448 F.2d at 839, 841 & n.34 (asserting that element is not unique) *with Hyde*, 448 F.2d at 839 n.34 (asserting jury is to determine whether facts are proved).

84. *See* United States v. Gaudin, 515 U.S. 506, 511-12 (1995) (finding that facts are properly reserved for juries to determine); *see infra* notes 214-22 and accompanying text (discussing right to jury trial).

85. *Compare supra* note 76 and accompanying text (discussing *Hyde* dissent's finding

element does not purely belong to just one or the other category.[86] Courts have recognized a third category for such elements – mixed questions of fact and law.[87] The Supreme Court has recently held that the jury alone must determine questions falling into the "mixed" category.[88]

B. Interstate Commerce Instructions

Jury instructions define the substantive law under which jury members are to make their determinations of purely factual questions and of mixed questions of fact and law.[89] Instructions also allocate the responsibilities that the judge and jury have in determining a defendant's guilt or innocence.[90] Courts must correctly allocate such responsibilities because an error that removes from the jury its duty to decide every element is an error of constitutional magnitude.[91]

The United States Circuit Courts of Appeals disagree as to how a court should instruct a jury concerning the Hobbs Act's interstate commerce element.[92] Courts, however, are in unanimous agreement on one critical point: every court that has considered the merits has rejected the Hobbs Act defen-

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of legal components in affecting interstate commerce element) *with supra* note 79 and accompanying text (discussing *Pappadopoulos*'s finding of factual components in affecting interstate commerce element).

86. *See* THAYER, *supra* note 75, at 249-50 (defining mixed questions of fact and law); *see also Keys*, 103 F.3d at 761 (defining mixed questions of fact and law). The *Keys* court stated: "A mixed question of law and fact occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule." *Id.*

87. *See* THAYER, *supra* note 75, at 249-50 (defining mixed questions of facts and law); *see also Gaudin*, 515 U.S. at 512 (defining questions requiring "application-of-legal-standard-to-fact" as mixed questions of law and fact).

88. *See Gaudin*, 515 U.S. at 512 (stating "the application-of-legal-standard-to-fact sort of question . . . , commonly called a 'mixed question of law and fact,' has typically been resolved by juries" (citing THAYER, *supra* note 75, at 249-250)).

Curiously, Thayer rejected the suggestion that there was even a need for the "mixed questions of law and fact" category. *See* THAYER, *supra* note 75, at 249. He classified mixed questions as ones of fact for the jury to decide. *Id.* at 250.

89. *See* United States v. Hill, 417 F.2d 279, 281 (5th Cir. 1969) (describing purpose of jury instructions).

90. *See id.* (defining goals of appropriate jury instructions).

91. *See infra* notes 214-22 and accompanying text (concluding that defendant's constitutional right to jury trial requires jury determination that prosecution proved every element beyond reasonable doubt).

92. *Compare supra* text accompanying note 102 (describing category I instruction), *with* text accompanying note 113 (presenting category II instruction), *and* text accompanying note 120 (presenting category III instruction), *and* text accompanying note 128 (describing category IV instruction).

dant's argument that the trial court's jury instruction improperly allowed the *judge* to decide whether the prosecution satisfied the interstate commerce element.[93] Notably, courts have also rejected every contrary appeal – that a

93. *See* United States v. Hebert, 131 F.3d 514, 521 (5th Cir. 1997) (finding *Parker* foreclosed appeal charging *Gaudin*-type error); United States v. Miles, 122 F.3d 235, 239-40 (5th Cir. 1997) (per curiam) (same); United States v. Castleberry, 116 F.3d 1384, 1389 (11th Cir.) (extending *Gaudin* to interstate commerce element, but determining that defendant was "simply wrong in arguing that the jury in his case did not decide each element of his Hobbs Act convictions"), *cert. denied*, 118 S. Ct. 341 (1997); United States v. Parker, 104 F.3d 72, 73 (5th Cir.) (en banc) ("Having reviewed the record and the briefs and arguments of the parties, we have determined that the trial court committed no *Gaudin*-type error."), *cert. denied*, 117 S. Ct. 1720 (1997); United States v. O'Malley, 796 F.2d 891, 897-98 (7th Cir. 1986) ("The instruction informed the jury that it must find interstate commerce was affected if it determined that the victims' businesses purchased goods in interstate commerce . . . . this jury instruction was proper."); United States v. Curcio, 759 F.2d 237, 242 (2d Cir. 1985) ("The district court must determine whether the evidence adduced is sufficient as a matter of law to fulfill the jurisdictional requirement of the statute."); United States v. Calder, 641 F.2d 76, 78 (2d Cir. 1981) ("It was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce; it was for the jury to determine whether the alleged conduct had in fact occurred."); United States v. Cerilli, 603 F.2d 415, 424 n.11 (3d Cir. 1979) ("The district judge's ruling as a matter of law that commerce was affected if the requisite facts were found by the jury is entirely proper."); United States v. Summers, 598 F.2d 450, 455-57 (5th Cir. 1979) ("[District Judge] properly informed the jury that its sole role as trier of fact was to determine whether they believed the government's evidence in this respect beyond a reasonable doubt."); United States v. Hooper, 575 F.2d 496, 497-98 (5th Cir. 1978) ("This approach is used rather than telling the jury in general terms what it means to affect commerce and allowing the jury to determine whether the facts meet this criterion, because this is a jurisdictional element for which the court has a great responsibility."); United States v. Kuta, 518 F.2d 947, 951-52 & n.6 (7th Cir. 1975) ("The defendant's argument fails to draw the distinction between factual determinations which the jury must make, and the legal impact of those determinations which the trial court is competent to evaluate."); United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971) ("The charge was correct; 'it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction.'" (quoting Hulahan v. United States, 214 F.2d 441, 446 (8th Cir. 1954)); United States v. Hyde, 448 F.2d 815, 839-42 & nn.34-37 (5th Cir. 1971) ("All of the Hobbs Act cases agree that the court should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce."); United States v. Green, 246 F.2d 155, 160-61 (7th Cir. 1957) ("It was clearly the function of the court to determine whether interstate commerce was affected and whether the court had jurisdiction under the Act."); United States v. Lowe, 234 F.2d 919, 922-23 (3d Cir. 1956) (considering charge that instructed jury, "if believed by you beyond a reasonable doubt [they] satisfy the necessary federal jurisdictional element of interstate commerce under the law under which this indictment is drawn"); United States v. Varlack, 225 F.2d 665, 670-72 (2d Cir. 1955) ("[A]s a matter of law, the jurisdictional elements were present and the only questions left open were whether the acts of the defendants constituted [substantive elements]."); Hulahan v. United States, 214 F.2d 441, 445-46 (8th Cir. 1954) ("We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction."); United States v. Compagna, 146

Hobbs Act instruction impermissibly allowed the *jury* to determine whether the prosecution satisfied the interstate commerce element.[94]

A comprehensive survey of the rejected appeals reveals four distinct categories of interstate commerce instructions.[95] The relevant difference between the categories is the degree of responsibility that the instructions allot to the jury.[96] The first category of instruction is extreme and therefore is rarely utilized.[97] The instruction completely removes the interstate commerce element from the jury's consideration.[98] Courts employing such instructions justify their decision on the grounds that the interstate commerce element pertains only to the jurisdiction of the court and is therefore purely a question of law for the judge.[99]

In *United States v. Compagna*,[100] the United States Court of Appeals for the Second Circuit considered such an instruction.[101] The court of appeals

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F.2d 524, 527 (2d Cir. 1944) ("[T]he business was interstate as a matter of law, and the question should not have been submitted to the jury."); Nick v. United States, 122 F.2d 660, 673 (8th Cir. 1941) ("It is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference."). The cases cited are limited to those in which the defendant raised the precise issue discussed in this Note. Additionally, one court did not provide the trial court's instruction, but found that "[t]he question of whether a defendant's acts satisfy the jurisdictional predicate of the Hobbs Act is one of law." United States v. Buffey, 899 F.2d 1402, 1407 (4th Cir. 1990). Moreover, two other opinions are relevant because they provide the trial court's instruction, but the defendants did not object on the grounds analyzed in this Note. United States v. Battaglia, 394 F.2d 304, 312 (7th Cir. 1968); United States v. Kramer, 355 F.2d 891, 899-900 (7th Cir. 1966) ("[T]he charge in this case was not so inadequate that the jury could not determine the question fairly.").

94. United States v. Box, 50 F.3d 345, 353-54 (5th Cir. 1995) (rejecting appeal and finding that instruction included implicit determination that allegations contained in indictment, if true, would satisfy jurisdictional element); United States v. Jarrett, 705 F.2d 198, 203-04 (7th Cir. 1983) (rejecting appeal on findings that there was no prejudice to defendant and instruction not objected to at trial, but not reaching issue of whether error occurred).

95. *See infra* text accompanying notes 102, 113, 120, 128 (providing four categories of instructions).

96. *See infra* text accompanying notes 102, 113, 120, 128 (providing four categories of instructions).

97. *See infra* notes 102-04 and accompanying text (concluding that category I instruction directs verdict against defendant).

98. *See infra* text accompanying note 102 (describing category I instruction).

99. *See infra* notes 101-02 and accompanying text (describing justification for category I instruction); *see also* United States v. Gollin, 166 F.2d 123, 125-26 (3d Cir. 1947) (evaluating category I instruction and reversing as partially directed verdict). *Gollin* did not involve a prosecution under the Hobbs Act, but provided the common argument for withholding the jurisdictional interstate commerce element from the jury. *See id.* at 126 (explaining apparent rationale for category I instruction).

100. 146 F.2d 524 (2d Cir. 1944).

101. *See* United States v. Compagna, 146 F.2d 524, 527 (2d Cir. 1944) (analyzing category

determined that the evidence presented at trial was sufficient *as a matter of law* to satisfy the interstate commerce element and asserted that the jury need not have any role in finding that the prosecution met its burden.[102] Although later courts have cited *Compagna* favorably,[103] none has issued an instruction that has so explicitly directed a verdict on the interstate commerce element.[104]

Instructions in the second category allot little more responsibility to the jury.[105] The instruction allows the jury merely to determine the truth of the facts proffered by Government witnesses on the interstate commerce element.[106] Courts employing such instructions tell jury members that if the

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I instruction). In *Compagna*, one issue was whether the interstate commerce element of the Anti-Racketeering Act was assignable to the judge for his determination or whether the jury alone carried the responsibility of finding every element satisfied before a conviction could obtain. *Id.* at 525, 527. The defendant conspired to extort money from moving picture exhibitors. *Id.* at 526. He organized a union among the industry and threatened strikes and violence unless the exhibitors paid him handsomely. *Id.* In one decade, the defendant illegally raised more than $1,100,000 from his victims. *Id.* The unanimous majority determined as a "matter of law" that interstate commere was affected. *Id.* The court further determined that the jury should not have any role in determining whether interstate commerce was affected and the element met. *Id.* at 527. Unfortunately, the court of appeals did not reprint the instruction. *See id.*

102. *Id.* (stating that conspiracy was "interstate as a matter of law"). The *Compagna* court did not explicitly reveal if it was directly addressing whether the satisfaction of the interstate commerce element was a question for the judge or jury; thus, the opinion might reflect merely a determination that the evidence was sufficient to support the verdict. *See id.* Nonetheless, the opinion's author, Judge Learned Hand, continued beyond a finding of mere sufficiency to a pronouncement that "the question should not have been submitted to the jury." *Id.*

103. *See* Hulahan v. United States, 214 F.2d 441, 446 (8th Cir. 1954) (citing *Compagna* favorably).

104. *But cf. Gollin*, 166 F.2d at 125 (evaluating category I instruction within another similar statute and reversing as partially directed verdict). In *Gollin*, the trial judge delivered the following instruction, in relevant part:

> You are instructed that the Congress has provided that it is a criminal offense for anyone to steal goods from a motor truck while in interstate or foreign commerce. Under this state of facts you are instructed that as a matter of law the truck was moving in interstate commerce at the time it is contended by the government that the beer was stolen therefrom. That is a matter of law. The facts are not disputed and that constitutes the jurisdiction of this court and is a matter for the court to determine and not a matter for the jury to determine.

Id. Thus, the trial court directed the jury that it had no role in finding the jurisdictional element. *See id.* (providing instruction). The *Gollin* court found that the jurisdictional determination required a factual determination made by the jury, *see id.* at 126-27, yet the trial court removed even the factual questions from the jury's consideration. *Id.* at 126. The court reversed the defendant's conviction. *Id.* at 127.

105. *Compare supra* text accompanying note 102 (describing category I instruction) *with infra* text accompanying note 113 (presenting category II instruction).

106. *See supra* note 17 (providing text of *Parker* jury charge). Additionally, category II instructions diverge into two distinct subgroups: those that enumerate the facts alleged by the

Government's bare facts are true concerning the interstate commerce element, then the Government has necessarily satisfied the element.[107] The judge makes the determination as a matter of law that the prosecution has met its burden and forbids the jury from applying facts to law.[108]

In *United States v. Calder*,[109] the Second Circuit considered an instruction within this category.[110] Joseph Calder and a friend were tried in the

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Government and those that merely refer to the general subject matter of evidence the Government alleges. *See* United States v. Hyde, 448 F.2d 815, 842-43 (5th Cir. 1971) (approving category IIA and IIB instructions and deferring choice to judge's discretion); *see also* United States v. Sweet, 548 F.2d 198, 202-03 (7th Cir. 1977) (recognizing difference while contrasting *Hyde* instruction with instruction given in prosecution under 18 U.S.C. § 844(i) (malicious destruction by explosion of property used in interstate commerce)). For examples of instructions that specifically enumerate the evidence the Government alleges, see *United States v. Hebert*, 131 F.3d 514, 521 (5th Cir. 1997) (providing instruction that enumerates specific facts Government alleged that prove interstate commerce, if true, as matter of law); *United States v. Miles*, 122 F.3d 235, 239-40 (5th Cir. 1997) (per curiam) (same); *United States v. Parker*, 104 F.3d 72, 73 (5th Cir.) (en banc) (same), *cert. denied*, 117 S. Ct. 1720 (1997); *United States v. O'Malley*, 796 F.2d 891, 897-98 (7th Cir. 1986) (same); *United States v. Calder*, 641 F.2d 76, 78 (2d Cir. 1981) (same); *United States v. Cerilli*, 603 F.2d 415, 424 n.11 (3d Cir. 1979) (same); *United States v. Lowe*, 234 F.2d 919, 922-23 (3d Cir. 1956) (same); *Hulahan v. United States*, 214 F.2d 441, 446 (8th Cir. 1954) (same); *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941) (same). For examples of instructions that generally restate the subject matter of the Government's evidence, see *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir.) (providing instruction that restates general subject matter of evidence that must prove interstate commerce effect, if true), *cert. denied*, 118 S. Ct. 341 (1997); *United States v. Summers*, 598 F.2d 450, 457 (5th Cir. 1979) (same); *United States v. Hooper*, 575 F.2d 496, 497 (5th Cir. 1978) (same); *United States v. Kuta*, 518 F.2d 947, 951-52 (7th Cir. 1975) (same); *United States v. Augello*, 451 F.2d 1167, 1170 (2d Cir. 1971) (same); *United States v. Hyde*, 448 F.2d 815, 839 & n.34 (5th Cir. 1971) (same); *United States v. Green*, 246 F.2d 155, 160-61 (7th Cir. 1957) (same); *United States v. Varlack*, 225 F.2d 665, 672 (2d Cir. 1955) (same).

107. *See infra* text accompanying note 113 (providing text of instruction); *see also supra* note 17 (providing text of *Parker* instruction).

108. *See infra* text accompanying note 113 (providing text of instruction); *see also supra* note 17 (providing text of *Parker* instruction).

109. 641 F.2d 76 (2d Cir. 1981)

110. *See* United States v. Calder, 641 F.2d 76, 78 (2d Cir. 1981) (providing text of instruction). In *Calder*, the court considered an instruction that allowed the jury merely to determine whether the penultimate facts were true and reserved the ultimate determination for the judge. *See id.* at 78 (providing text of instruction). The defendant, accompanied by a friend, extorted $300 weekly from two midtown Manhattan bars. *Id.* at 77. His activities lasting over a year, the defendant extorted a total of approximately $15,000. *Id.* Following an FBI sting operation, the defendant was arrested, tried under the Hobbs Act, and convicted. *Id.* at 77-78. Calder appealed from his conviction on grounds that the evidence was insufficient to show a sufficient effect on interstate commerce and that the jury instructions erroneously removed the interstate commerce element from the jury. *Id.* at 78. The Government introduced evidence that the bars routinely purchased goods in interstate commerce, and the court, relying on the depletion of assets theory, found that the evidence, if true, easily established an interstate commerce nexus. *Id.* The trial

United States District Court for the Eastern District of New York for extorting $300 per week from two Manhattan bars.[111] The prosecution alleged that the defendant affected interstate commerce because the defendant depleted assets that the bars otherwise would have used to purchase goods through interstate commerce.[112] The trial judge subsequently instructed the jury that if it found "beyond a reasonable doubt that the goods were purchased for [the bars] in interstate or foreign commerce and that money or property was obtained from them by extortion, then, as a matter of law, interstate or foreign commerce was affected."[113] Calder appealed his conviction on the grounds that the judge's instruction impermissibly relieved the jury from deciding whether the Government had satisfied the interstate commerce element.[114] The Second Circuit rejected the appeal based upon the court's assertion that the interstate commerce element was a question of law for the court to decide because the element involved a jurisdictional question.[115]

Instructions in the third category differ from those in the second in one important respect: Courts employing instructions in the second category *require* the jury to find an effect on interstate commerce if it believes the factual allegations, whereas instructions in the third category explicitly inform the jury that the evidence would be *sufficient* to satisfy the element if the evidence were true.[116] Instructions in the third category allot more responsibility to the jury than do those in the second category, but still do not grant the jury full responsibility for finding that the Government satisfied its burden of proof.[117]

In *United States v. Kramer*,[118] the Court of Appeals for the Seventh Circuit upheld an instruction of this type.[119] At the close of evidence, the trial

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judge had instructed the jury that if it found "beyond a reasonable doubt that the goods were purchased for [the bars] in interstate or foreign commerce, and that money of property was obtained from them by extortion then, as a matter of law, interstate commerce was affected." *Id.* The court upheld the instruction, finding that "it was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce; it was for the jury to determine whether the alleged conduct had in fact occurred." *Id.*

111. *Id.* at 77.

112. *Id.* at 78.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Compare infra* text accompanying note 120 (providing example of category III instruction) *with supra* text accompanying note 113 (providing example of category II instruction).

117. *See infra* text accompanying note 120 (providing example of category III instruction).

118. 355 F.2d 891 (7th Cir. 1966).

119. *See* United States v. Kramer, 355 F.2d 891, 899-900 (7th Cir. 1966) (analyzing instructions). In *Kramer*, the court considered the sufficiency of an instruction that enumerated

court outlined the testimony of the Government witness and instructed the jury that if it believed the Government's evidence, then it "*may* find that the government has established the requisite element of effect on interstate commerce under the Hobbs Act."[120] On appeal, the defendant claimed that the trial court's instruction did not adequately define interstate commerce for the jury, but did not object to the instruction's division of responsibility between the judge and jury.[121] Thus, the instruction remains untested.

Instructions in the fourth category properly grant to the jury full responsibility for determining whether the prosecution has satisfied the interstate commerce element. Courts employing instructions in the fourth category inform the jury that a conviction under the Hobbs Act requires that the defendant's actions affect interstate commerce.[122] The judge may define interstate commerce, but may not comment on the evidence alleged.[123] The jury must therefore determine whether the facts are true *and* determine whether the facts are sufficient to prove the requisite effect on interstate commerce.[124]

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certain facts and instructed the jury that it could find from those facts, if true, that interstate commerce had been affected. *Id.* The defendant, a labor union organizer, had extorted money from a sub-contractor. *Id.* at 894. The sub-contractor had been awarded a contract, but needed union employees to work the job, or he would lose the contract. *Id.* The defendant, who was in charge of dispatching workers to union jobs, demanded $1,000 for his services. *Id.* at 895. Motivated by fear that he would lose his contract if he could not find workers, the sub-contractor agreed to pay the fee. *Id.* The defendant was later charged under the Hobbs Act. *Id.* at 896. On appeal, the defendant argued that the trial judge's instruction impermissibly prejudiced his defense. *Id.* at 900. The instruction read as follows:

> If you believe the testimony of the government witnesses with reference to where the various materials came from which were supplied to the Illinois Bell job and with reference to the use to which the building upon which the work was to be performed would be put, and if you find that the defendants' activities as shown by the government's testimony did delay, obstruct and affect interstate commerce in any way or degree – because that language is used in the statute – then you may find that the government has established the requisite element of effect on interstate commerce under the Hobbs Act.

Id. at 899-900. The court upheld the instruction, although it noted with some disapproval that the charge defined interstate commerce by implication rather than with specific reference to the explicit definition Congress provided within the statute itself. *See id.* at 900 ("The charge defines interstate commerce by implication. Although a more precise definition in the words of the statute is to be preferred, . . . the charge in this case was not so inadequate that the jury could not determine the question fairly.")

120. *Id.* at 899-900.

121. *Id.* at 900.

122. *See infra* text accompanying note 128 (discussing example of category IV instruction).

123. *See infra* text accompanying note 128 (same).

124. *See infra* text accompanying note 128 (same).

In *United States v. Jarrett*,[125] the Seventh Circuit considered an instruction in the fourth category.[126] A federal jury convicted Ronald Jarrett of robbing an Illinois jewelry store of at least $2000 worth of merchandise in violation of the Hobbs Act.[127] The trial judge properly instructed the jury as to the legal definition of affecting interstate commerce and further explained that the jury would have to decide that Jarrett's robbery had affected interstate commerce before it could convict Jarrett.[128] On appeal, however, Jarrett complained that the jury's role is merely to make raw findings of fact and that the trial judge's instruction "improperly delegated to the jury" the interstate commerce element.[129] Remarking that Jarrett had failed to object to the instruction at trial, the Seventh Circuit rejected the appeal.[130]

III. Federalization of Crime

A. Increasing Numbers

Traditionally, the federal government has played a limited role in criminal law enforcement.[131] Enforcement historically has been a matter primarily local in nature, an understanding dating back to the original colonists.[132] Indeed, the concept of limited federal involvement, and its political directives, dominated policy throughout the first century of this country's history.[133]

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125. 705 F.2d 198 (7th Cir. 1983).

126. *See* United States v. Jarrett, 705 F.2d 198, 203-04 (7th Cir. 1983) (providing jury instruction and analysis); *cf.* United States v. Battaglia, 394 F.2d 304, 312 (7th Cir. 1968) (considering category IV jury charge objected to on other grounds). In *Jarrett*, the court considered a jury instruction that broadly defined interstate commerce and then left to the jury both the purely factual questions and the issues requiring application of those facts to the legal standard. *Jarrett*, 705 F.2d at 203-04. The defendant claimed, somewhat antithetically, that the trial court erred in instructing the jury that it may apply the facts to the law. *Id.* at 203. Although it noted the existence of precedence for the proposition that the court may determine jurisdictional elements, the court rejected the defendant's appeal. *Id.* at 204.

127. *Jarrett*, 705 F.2d at 201.

128. *Id.* at 203.

129. *Id.*

130. *Id.* at 204.

131. *See* Senator Joseph. R. Biden, Jr., Setting the Stage for the Nineties -- Our Mutual Obligation, Address to Judicial Conference to the Third Circuit, *in* 140 CONG. REC. S6100 (daily ed. May 19, 1994) (statement of Sen. Biden) (outlining federal government's historical role in criminal law); *see also* United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that states historically are sovereign in areas of criminal law enforcement and education).

132. *See* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 789-90 (1996) (discussing history of criminal law).

133. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995) (discussing history of criminal law). Brickey suggests that the founding fathers never envisioned a national police power. *Id.* The limited

Early political thinkers argued for a limited federal presence, largely because they believed that crime's impact was generally limited to the immediate geographic locale.[134] The expected benefits of criminal punishment were thought to be similarly limited, adding further justification for restricting the federal authority's control.[135]

The first federal crime bill[136] was a modest one.[137] The statute established federal prohibitions against a small set of activities that affected purely federal interests.[138] It reached crimes related to the federal judicial process,[139] violence against foreign diplomats,[140] piracy within the jurisdiction of the United States,[141] counterfeiting of United States certificates or securities,[142] and treason against the United States.[143] The bill also reached crimes arguably not exclusively related to purely federal interests – murder, manslaughter, mayhem, and larceny – but restricted its scope to reach such crimes only when

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criminal jurisdiction that Congress reluctantly invoked was concurrent with state jurisdiction. *Id.* Congress often included provisions within criminal statutes that granted to states not merely concurrent jurisdiction, but also primary jurisdiction over federally defined crimes. *See* Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 548-54 (1925) (discussing history of criminal law); *see also* Biden, *supra* note 131 (discussing history of federal criminal jurisdiction).

134. *See* Ashdown, *supra* note 132, at 789-90 (discussing impact of crime); *see also* Brickey, *supra* note 133, at 1138 (same). The content of local criminal laws in early America was and continues to be an "expression of local mores and concerns." *See id.* at 1138-39 (discussing history of criminal law); *see also* Ashdown, *supra* note 132, at 789 (same).

135. *See* Ashdown, *supra* note 132, at 789-90 (analyzing origins of limited federal criminal jurisdiction).

136. Crimes Act of 1790, ch. 9, 1 Stat. 112 (1790) (repealed).

137. *See* Ashdown, *supra* note 132, at 790 & n.5 (analyzing Crimes Act).

138. *See* Biden, *supra* note 131 ("Early on, the Congress prohibited and punished only those acts directly related to the functions of the Federal Government or occurring on United States Territory – acts which could not be covered by the criminal laws of the States."); *see also* Ashdown, *supra* note 132, at 790 & n.5 (discussing early federal criminal litigation); Brickey, *supra* note 133, at 1138 (same).

139. Crimes Act of 1790, ch. 9, §§ 15, 18, 21-23, 1 Stat. at 115-17; *see* Biden, *supra* note 131 (describing Crimes Act's reach); David P. Currie, *The Constitution In Congress: Substantive Issues In The First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 833 & n.342 (1994) (same).

140. Crimes Act of 1790, ch. 9, § 28, 1 Stat. at 118; *see* Biden, *supra* note 131 (describing Crimes Act's reach); Currie, *supra* note 139, at 832-33 & n.341 (same).

141. Crimes Act of 1790, ch. 9, §§ 8-13, 1 Stat. at 113-15; *see* Biden, *supra* note 131 (describing Crimes Act's reach); Currie, *supra* note 139, at 831 & n.332 (same).

142. Crimes Act of 1790, ch. 9, § 14, 1 Stat. at 115; *see* Biden, *supra* note 131 (describing Crimes Act's reach); Currie, *supra* note 139, at 832 & n.336 (same).

143. Crimes Act of 1790, ch. 9, §§ 1-2, 1 Stat. at 112; *see* Biden, *supra* note 131 (describing Crimes Act's reach); Currie, *supra* note 139, at 829 & n.320 (same).

they took place in a geographic area exclusively within the jurisdiction of the federal government.[144] Later federal enactments increased the scope of federal criminal prohibitions, but the reach of those statutes remained severely limited.[145]

During the Civil War era, the federal criminal code remained a thin collection of cautious statutory provisions of limited scope.[146] In 1890, however, Congress reversed its traditional policy of limited federal intrusion into criminal law by passing the Sherman Anti-Trust Act.[147] Passage of the Sherman Act gave credence to a new theory: that states required federal assistance in some areas of criminal law enforcement and that the need justified the federal government's expansion.[148] After the Sherman Act, federal criminal statutes expanded rapidly in number and scope.[149] Today, there are more than three thousand federal criminal provisions.[150]

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144. Crimes Act of 1790, ch. 9, §§ 3, 7, 13, 16, 17, 1 Stat. at 113, 115-16; *see* Biden, *supra* note 131 (describing Crimes Act's reach); Currie, *supra* note 139, at 830 & n.342 (same).

145. *See* Brickey, *supra* note 133, at 1139 (discussing history of federalism of crime phenomenon); *see also* Biden, *supra* note 131 (same).

146. *See* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 981 & n.11 (1995) (acknowledging that only small number of federal offenses existed prior to Civil War). Beale recognizes that Pre-Civil War federal statutes principally focused on: "(1) acts threatening the existence of the federal government (e.g., treason); (2) misconduct of federal officers (e.g., bribery); (3) interference with the operation of the federal courts (e.g., perjury); and (4) interference with other governmental programs (e.g., theft of government property and revenue fraud)." *Id.* The specific offenses did not overlap with offenses subject to state prosecution. *Id.*

147. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)). Congress targeted monopolies, the "'commercial monsters' that required the 'iron hand of the [federal] law' to be 'heavily' laid on in order to protect the 'boasted liberty of the citizen.'" Ashdown, *supra* note 132, at 791 & n.9 (quoting 20 CONG. REC. 1457 (1889)). *But see* Biden, *supra* note 131 (discussing motivation for federalizing crime). Sen. Biden stated: "The driving force behind the expansion of Federal jurisdiction was the perception of the Congress that State courts were not able or, in some cases, not willing to protect Federal rights – in that instance, the civil rights – of the recently freed African-American slaves." *Id.*

148. *See* Ashdown, *supra* note 132, at 790 & n.5 (discussing motivation behind Sherman Anti-Trust Act (quoting 20 CONG. REC. 1457 (1889)).

149. *See* Ashdown, *supra* note 132, at 791 (discussing history of criminal law). Ashdown writes of the Sherman Act's passage: "The tiger was loose." *Id.*

150. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992). Though Judge Miner published his figure in 1992, later authors have noted that Congress has enacted many new offenses since Miner's article. *See* Beale, *supra* note 146, at 980 & n.10 (1995) (providing analysis of federalization of crime phenomenon); Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 762 & n.3 (1996) (supporting 3000 as estimate of federal criminal provisions).

Federal criminal statutes have proliferated, especially in recent decades.[151] Public demand for increased protection from criminal activity has fueled much of the growth.[152] Legislating crime at the federal level has become a highly politicized issue.[153] Voter concern provides Washington lawmakers with incentive to beat their drums and promise that Congress will accelerate the legislative assault on crime.[154] The 1994 and 1996 congres-

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151. *See* Beale, *supra* note 146, at 979 (discussing history of federal criminal jurisdiction); *see also* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278-82 (1995) (tracing historical evolution and expansion of federal criminal jurisdiction and linking proliferation of federal police powers to post-Civil War growth in interstate commerce that created national problems and demanded national solutions). The advent of the omnibus crime bill concept increased the pace of crime's federalization. *See* Brickey, *supra* note 133, at 1144 (discussing history of criminal law). Brickey notes that the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.), in final form, targeted "community policing, prisons, crime prevention, drug courts, violence against women, the death penalty, mandatory minimum sentences, firearms, criminal aliens, rural crime, and marketing scams directed at senior citizens." Brickey, *supra* note 133, at 1144 & n.60. Congress has enacted several other omnibus bills including the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976; the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922; and the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

152. *See Americans are Optimistic for Themselves, Not the Nation; Survey Finds Many Lament Social and Moral Decline*, BALTIMORE SUN, Jan. 17, 1997, at 5A (citing Pew Research Center survey finding that 61% of Americans think crime is increasing in severity); *Abortion Report*, American Political Network, Feb. 3, 1997, *available in* Westlaw Library, APN-AB file (citing Harris poll finding that crime and violence is top issue Americans would like government to address).

153. *See* Ashdown, *supra* note 132, at 794 (discussing federalization of crime phenomenon and motivations behind trend). Ashdown notes that the modern media also fuels the federalization process and creates a self-propelling fear of crime. *Id.*

154. *See* J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1151-52 (1994) (discussing motivation of Congress in federalizing crime). Wilkinson suggests that Congressmen may vote for or sponsor a new federal criminal law as a signal to local voters that their Congressman is looking out for their interests. *Id.*; *see also* Aaron Epstein, *Using U.S. Laws Is Just Tough Talk*, ARIZ. REPUBLIC, Jan. 29, 1994, at A1 (reporting on trend, at least since early 1980s, of Presidents and members of Congress to call for increased federal role in crime prevention). Epstein writes of Congress: "Like politicians everywhere, they don't want to be labeled soft on crime." *Id.* In his first State of the Union Address since beginning his second term as President, Bill Clinton called for:

> [A] full-scale assault on juvenile crime, with [federal] legislation that declares war on gangs, with new prosecutors and tougher penalties; extends the Brady bill so violent teen criminals will not be able to buy handguns; requires child-safety locks on handguns to prevent unauthorized use; and helps to keep our schools open after

sional elections provide compelling examples.[155] In 1994, Republicans used their "Contract with America" (Contract) promises to take control of both houses of Congress.[156] In relevant part, the Contract promised a vote on a federal "anti-crime package that would include limits on death penalty appeals and more money for prisons and law enforcement" within the first one-hundred days after Republicans took office.[157] Electors gladly offered their supporting votes.[158] By the 1996 election, however, Democrats had turned the issue around.[159] Looking for a symbol of Republican weakness on crime, they highlighted the GOP's efforts to block Clinton-sponsored crime legislation[160] and subsequently recaptured some of the ground lost in 1994.[161] Today's political environment requires candidates to establish strong anticrime images.[162] The candidate who fails to project the image, fails equally at the polls.[163]

> hours, on weekends, and in the summer, so our young people will have someplace to go and something to say yes to.

William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 33 WEEKLY COMP. PRES. DOC. 136, 141 (Feb. 10, 1997) (President William J. Clinton). The President also called for passage of a victim's rights amendment and "the largest anti-drug effort ever." *Id.*

155. *See* Ashdown, *supra* note 132, at 794 (calling it "virtually inconceivable today to imagine a political position that did not include a 'get tough on crime' stance").

156. *See* Rich Smith & Kriste Goad, *Sundquist's Grass-roots Win: Bredesen Promises Cooperation*, NASHVILLE BANNER, Nov. 9, 1994, at A11 (reporting Republicans' gaining control of both houses of Congress); *see also The Power Shift*, SAN JOSE MERCURY NEWS, Nov. 10, 1994, at A1 (same).

157. *See* David Espo, *Election '94: GOP Plans Quick Action on Issues in Contract*, COURIER-J. (Louisville, Ky.), Nov. 10, 1994, at 4A (reprinting Republican Contract with America).

158. *See* Smith & Goad, *supra* note 156, at A11 (reporting grassroots-level Republican sweep in major Tennessee elections and Republican victories in other major elections nationwide); *see also The Power Shift*, *supra* note 156, at A1 (reporting widespread Republican victories).

159. *See* Graeme Zielinski, *Will Democrats Hit GOP on Crime Votes: Fiery Rhetoric Defends Clinton*, CHI. TRIB., July 1, 1996, at 1 (discussing Democrats' strategy on crime issues). Democrats used the "Contract's" failures as a symbol of Republican weakness on crime. *Id.*

160. *See id.* (discussing Democrats' strategy on crime issues). Democratic candidate for Congress Clem Balanoff said Republican efforts to undermine congressional crime legislation made it easier for "maniacs, cop-killers and terrorists." *Id.* Another Democratic candidate, Susan Hynes, described Republican crime efforts as "unconscionable." *See id.* ("Every member of the 103rd and 104th Congress who voted against the crime bill or tried to gut it will have to answer in November.").

161. *See* Phillip Trounstine, SAN JOSE MERCURY NEWS, Nov. 6, 1996, at 2EL (discussing Democrats' 1996 victories).

162. *See* Ashdown, *supra* note 132, at 794 (discussing virtually required tough-on-crime message).

163. *See id.* (discussing virtually required tough-on-crime message).

Congressional chest-thumping is effective, but the effect produced is not what the public intended.[164] New federal criminal statutes rarely add to the overall sum of criminal prohibitions; they tend merely to target activity that state law already prohibits.[165] In so doing, the new provisions have the sole effect of extending the federal government's jurisdiction to cover crimes federal prosecutors previously could not target.[166] This effect has prompted calls of concern from alarmed constitutional scholars.[167] This Note's next subpart considers an important question fundamental to the continued federalization of crime: whether Congress has the constitutional authority to target criminal activity on such a grand scale.[168]

B. Constitutional Constraints

Ours is a federal government of constitutionally enumerated powers,[169]

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164. *See Trust in Government Survey*, Princeton Survey Research Associates, Jan. 1, 1996, *available in* Westlaw Library, POLL file (finding that crime is many Americans' top priority, but also finding that most believe congressional efforts to curb crime have either had no effect or have worsened problem). The telephone opinion poll found that nearly 60% of Americans think crime should be the top priority for Congress. *See id.* However, the same poll found that nearly 90% of Americans believe Washington's efforts have "made things worse" or "not had much effect either way." *Id.* The results do not vary significantly within any particular subpopulation. *See id.* (providing results by subgroup). Several other surveys have found similar results. *See, e.g.*, *CBS News Poll*, CBS News, Feb. 4, 1997, *available in* Westlaw Library, POLL file (finding crime as public's major priority); *Harris Poll*, Louis Harris and Associates, Feb. 3, 1997, *available in* Westlaw Library, POLL file (same); *Gallup/C.N.N./U.S.A. Today Poll*, Gallup Organization, Jan. 1, 1997, *available in* Westlaw Library, POLL file (same); *ABC News Poll*, ABC News, Jan. 20, 1997, *available in* Westlaw Library, POLL file (same); *CBS News/New York Times Poll*, CBS News/New York Times, Jan. 19, 1997, *available in* Westlaw Library, POLL file (same) *People & the Press Pre-Election Survey*, Princeton Survey Research Associates, Oct. 4, 1996, *available in* Westlaw Library, POLL file (finding most Americans believe crime will get worse or not change even after Congress acts).

165. *See* Beale, *supra* note 151, at 1282 (discussing federalization of crime); *see also* Ervin, *supra* note 149, at 762 (discussing concurrent jurisdiction).

166. *See* Beale, *supra* note 151, at 1282 (discussing effect of new federal laws). Examples of federal statutes that extend criminal jurisdiction over activities already prohibited by states include, but are not limited to, statutes prohibiting engaging in prostitution, dealing in stolen motor vehicles, selling liquor, running lotteries, selling or possessing narcotics, kidnapping, fleeing interstate, transporting stolen property, and committing robbery and extortion. *See* Ashdown, *supra* note 132, at 791-92 (listing statutes establishing concurrent jurisdiction).

167. Beale, *supra* note 151, at 1282 (noting concern over Constitution's limits).

168. *See infra* Part III.B (analyzing problems).

169. *See* United States v. Lopez, 514 U.S. 549, 552 (1995) (describing constitutional system of government); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-07 (1819) (recognizing that parties will forever question extent of powers granted). The enumerated powers are provided in Article I, Section 8 of the Constitution. U.S. CONST., art. I, § 8; *see* JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 3.1 (5th ed. 1995) (describing system of government as one of enumerated powers).

granted to the central authority by the citizenry.[170] Those powers that the people do not place within the jurisdiction of the federal government, the Constitution reserves for the states.[171] These maxims are universally avowed.[172]

The constitutional structure creates a system that is necessarily one of dual sovereignty; the Constitution's implied principle of federalism polices the balance between the two sovereigns based on subject matter.[173] The concept of federalism is controversial and often misunderstood.[174] At its core, however, federalism is a seductively simple expression of the distribution of legislative jurisdiction in the United States: What the Constitution delegates to the federal government to do, it may do.[175] What the Constitution fails to

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170. *See McCulloch*, 17 U.S. (4 Wheat.) at 403-07 ("The government proceeds directly from the people."); William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1173 (1996) (discussing concept of American government).

171. *See* NOWAK & ROTUNDA, *supra* note 169, § 3.1 & n.10 (discussing federalism); *see also* U.S. CONST. amend. X (providing exact constitutional text). The Tenth Amendment has a checkered jurisprudential past that is beyond the scope of this Note. *See* NOWAK & ROTUNDA, *supra* note 169, § 3.1 (discussing Tenth Amendment jurisprudence). Most recently, courts have adopted the interpretation that the Amendment is a mere "truism" that dictates that Congress may not act without constitutional authority. United States v. Darby, 312 U.S. 100, 123-24 (1941).

172. *See McCulloch*, 17 U.S. (4 Wheat.) at 405 ("The government is acknowledged by all to be one of enumerated powers."); *see also* New York v. United States, 505 U.S. 144, 155 (1992) (stating that "no one disputes the proposition"). Equally universal, given the current state of constitutional jurisprudence, is the common refrain that Congress's power is broad enough to sweep almost any action within its jurisdiction. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. Rev. 125, 127 (1995) (analyzing expansion of Commerce Clause authority).

173. *See* Bassler, *supra* note 170, at 1173-74 (discussing federalism in context of dual sovereignty).

174. *See id.* at 1174 (acknowledging that "a precise definition of federalism has never been clear"). The theory and practice of federalism has been the subject of controversy since the beginning of the republic. *Id.* Bassler claims that federalism is by its very nature paradoxical. *Id.* Alexis de Tocqueville also considered the confusion in his writings on American government. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 167 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1994) (1848) (discussing American government). De Tocqueville wrote:

> I scarcely ever met with a plain American citizen who could not distinguish with surprising facility the obligations created by the laws of Congress from those created by the laws of his own state, and who, after having discriminated between the matters which come under the cognizance of the Union and those which the local legislature is competent to regulate, could not point out the exact limit of the separate jurisdictions of the Federal courts and the tribunals of the state.

Id. Justice Kennedy has suggested that federalism confuses because "federalism was the unique contribution of the Framers to political science and political theory." *See* United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (discussing origins of federalism).

175. William Van Alstyne, *Federalism, Congress, The States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 770.

delegate to the federal authority is reserved for the states.[176] In a political environment that increasingly urges lawmakers to federalize crime,[177] federalism poses a challenging question:[178] Does the Constitution allow Congress to claim jurisdiction over the general subject matter of crime?[179]

The plain answer to the question is no: Congress does not enjoy a plenary police power to prohibit crime *as crime*.[180] Authority to regulate crime does not appear in Congress's list of enumerated powers.[181] The Constitution reserves police powers for the states.[182] Although Congress does not have authority to legislate against crime per se, it may assert jurisdiction over subject matters specifically enumerated in the Constitution and then expand that jurisdictional base to cover criminal matters pertaining to the enumerated power.[183] In a sense, then, the practical answer to the question is

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176. *Id.*; *see also* THE FEDERALIST NO. 45 (James Madison) (stating that "the powers delegated by the ... Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (Boston, Little, Brown & Co. 1833) ("Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.").

177. *See supra* Part III.A (discussing federalization of crime phenomenon).

178. *See infra* notes 185-201 and accompanying text (discussing Commerce Clause jurisprudence as confused).

179. *See* United States v. Lopez, 514 U.S. 549, 561 & n.3 (1995) (discussing limited powers of federal government in context of crime).

180. *See* Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) (discussing federalism structure).

181. *See* U.S. CONST. art. I, § 8 (providing list of enumerated powers).

182. *See* Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)) ("States possess primary authority for defining and enforcing the criminal law."); *see also* United States v. Salerno, 481 U.S. 739, 759 n.4 (1987) (Marshall, J., dissenting) (finding that crime is primarily matter of state concern). Justice Marshall wrote:

> Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law.

Id. The Constitution, however, is not the affirmative source of state police power. Van Alstyne, *supra* note 175, at 770 & n.5. The constitutions of individual states grant police power to each State. *Id.*

183. *See Screws*, 325 U.S. at 109 (plurality opinion) (discussing phenomenon as matter of empirical fact). The *Screws* plurality wrote: "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." *Id.* The Court recognized Congress's power to legislate outside of its explicitly enumerated power in *United States v. Wrightwood Dairy Co.* *See* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (analyzing scope of federal

yes: Congress does have jurisdiction over criminal activity to the extent that the criminal activity affects an enumerated power.[184]

The broadest grant of constitutional authority to Congress is the Commerce Clause.[185] The Clause explicitly grants Congress power to regulate foreign commerce, interstate commerce, and commerce with Indian Tribes.[186] Despite the Clause's broad reach, however, courts have consistently insisted that Congress's jurisdiction is limited.[187] In *United States v. Lopez*,[188] the Supreme Court reaffirmed that suggestion and struck down a federal criminal law as beyond Congress's power under the Commerce Clause.[189] The issue in *Lopez* was whether a federal statute prohibiting possession of a handgun in a school zone was constitutional.[190] The appellant was Alfonso Lopez, a

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jurisdiction). The *Wrightwood Dairy* Court noted that federal jurisdiction extended to allow Congress to regulate interstate commerce and also to reach "those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.*

184. *See Lopez*, 514 U.S. at 552-62 (analyzing history of enumerated power). *Lopez* concluded that Congress's targeted subject matter did not affect an enumerated power in the first place and, therefore, federal statutes could not reach it. *Id.* at 567-68.

185. *See* New York v. United States, 505 U.S. 144, 157 (1992) (discussing history of Commerce Clause interpretation).

186. U.S. CONST. art. I, § 8, cl. 3. The text of the Clause provides that Congress has authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* The Necessary and Proper Clause, *id.* at art. I, § 8, cl. 18, combines with the Commerce Clause to expand the commerce power even further. *See* Legal Tender Cases, 110 U.S. 421, 449-50 (1884) (discussing rational basis test); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-21 (1819) (same).

187. *See* NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937) (noting that clause's scope "must be considered in the light of our dual system of government"). The *Jones & Laughlin Steel* Court determined that the Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.*; *see also* Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (noting that Congress's jurisdiction extends only to activity that "exerts a substantial economic effect on interstate commerce"); United States v. Darby, 312 U.S. 100, 119-20 (1941) (indicating that Congress's jurisdiction reaches only activity having "substantial effect" on interstate commerce).

188. 514 U.S. 549 (1995).

189. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down Gun-Free School Zones Act as unconstitutional). In *Lopez*, the Court considered whether the Gun-Free School Zones Act is constitutional. *Id.* The plaintiff, a twelfth-grade high school student who possessed a gun on school grounds was convicted under federal law and challenged the statute on constitutional grounds. *See id.* at 551-52 (discussing facts of case). After a careful assessment of the Commerce Clause's historical interpretations, the Court determined that the gun law was invalid as beyond the scope of Congress's authority under the Commerce Clause. *See id.* at 552-68.

190. *Id.* at 552.

twelfth-grade student who had been convicted of violating the Gun-Free School Zones Act of 1990[191] by carrying onto school property a concealed .38 caliber handgun and five cartridges.[192] Lopez argued that Congress did not have jurisdiction to reach his firearm possession.[193] The Court determined that the statute was constitutional only if the conduct underlying the statute fit into one of three categories:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress'[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[194]

The Gun-Free School Zone Act clearly did not seek to regulate the channels of commerce or its instrumentalities, so the Court focused its discussion on whether the firearm possession statute regulated activity that substantially affected interstate commerce.[195] The Court found that the statute related neither to commerce nor to any sort of economic enterprise.[196] Thus, the statute could not stand.[197]

Lopez immediately threw long-established Commerce Clause jurisprudence into disarray.[198] The Court admits as much itself.[199] Although *Lopez*

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191. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994).

192. *Lopez*, 514 U.S. at 551.

193. *Id.* at 552.

194. *Id.* at 558-59 (internal citations removed).

195. *See id.* at 559 (analyzing statute).

196. *Id.* at 559-61.

197. *Id.* at 561.

198. *See infra* note 205 and accompanying text (describing interpretation of *Lopez* in lower courts). At least twenty-five sections of the criminal code define their scope using the term "affecting commerce." *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting) (providing figures). Justice Breyer, in dissent, voiced concern over whether *Lopez* alters the meaning of the jurisdictional elements contained in those criminal sections. *Id.* (Breyer, J., dissenting). Justice Breyer further noted the effect that the *Lopez* decision had on the state of the law:

> More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard*, 317 U.S., at 127-128, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress'[s] ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

does not explicitly overrule any prior opinions, the result achieved in *Lopez*, striking down a federal statute on jurisdictional grounds, altered the de facto interpretation of the Commerce Clause – that the Clause was virtually limitless.[200] The majority's response: Constitutional law is confusing by nature.[201]

C. Incentive for a Jurisdictional Element

Lopez's immediate effect was to thrust Commerce Clause jurisprudence into disarray, but over the long-term, *Lopez* provides Congress with a formula for future stability.[202] The decision offers a means whereby Congress can ensure that future statutes do not suffer the same fate that the Gun-Free School Zones Act faced.[203] In *Lopez*, the Court acknowledged that the firearm possession law did not contain a jurisdictional element, that is, an element that would ensure that in every future prosecution, the Government would have to prove that the defendant's illegal activity affected interstate commerce.[204] Subsequently, courts have interpreted *Lopez* as providing a second holding: Statutes containing an interstate commerce element are definitively within Congress's interstate commerce jurisdiction and, therefore, are not subject to claims that they are unconstitutionally broad.[205] The assertion makes logical

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Id. at 530-31 (Breyer, J., dissenting).

199. *Id.* at 556 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.").

200. *See id.* (analyzing effect of upholding statute). The majority contends that prior cases have "taken long steps down [the] road, giving great deference to congressional action," such that these prior cases nearly converted "congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. Although the de facto precedent from the broad language of the Court's prior opinions "has suggested the possibility of additional expansion," the Court refused to proceed any further. *Id.* at 567.

201. *See id.* at 566-67 (finding that "[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation").

202. *See infra* notes 205-08 and accompanying text (indicating that *Lopez* may provide Congress with simple means to ensure its statutes are not unconstitutionally broad).

203. *See Lopez*, 514 U.S. at 561-62 (alternative holding) (finding that Gun-Free School Zones Act did not contain jurisdictional element).

204. *Id.* at 561 (stating that gun statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). The Court determined that the jurisdictional element would have limited the statute's reach "to a discrete set of firearm possessions that [would] additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

205. *See supra* note 30 (defining jurisdictional element and its effect). The *Lopez* Court held that the gun law was unconstitutionally broad. *Lopez*, 514 U.S. at 551. The Court stated that a jurisdictional element would necessarily have confined the statute to its jurisdictional limits, *id.* at 562; therefore, later courts have asserted that the inclusion of the jurisdictional

sense.[206] If Congress were to enact two laws, one prohibiting a specified activity whenever it occurs and another prohibiting the same activity only when it affects interstate commerce, then the second prohibition would, by definition, be within Congress's jurisdiction, whereas the first would not necessarily be legitimate because the government could potentially use it to prosecute someone whose activity did not affect interstate commerce.[207] Whether or not the Court intended that reading of the *Lopez* opinion, Congress has understood the Court to have sent a message that future criminal statutes should include a jurisdictional element.[208]

If *Lopez* is indeed read to provide incentive for Congress to include jurisdictional elements in criminal statutes, then the jury instruction is all the more critical.[209] The instruction on the interstate commerce element determines whether the judge or the jury ultimately decides whether the element is satisfied.[210] If Congress's incentive is to include the element more frequently,[211] and if the Fifth and Sixth Amendments require that the jury must ultimately decide whether the issue is satisfied,[212] then *Lopez* provides incen-

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element necessarily renders a federal statute constitutional as within the power of Congress. *See* United States v. Chesney, 86 F.3d 564, 568 (6th Cir. 1996) (finding inclusion of jurisdictional element distinguishes *Lopez* and renders statute constitutional under 18 U.S.C. § 922(g)(1) (firearm possession)), *cert. denied*, 117 S. Ct. 2470 (1997); *see also* United States v. DiSanto, 86 F.3d 1238, 1245 (1st Cir. 1996) (finding inclusion of jurisdictional element distinguishes *Lopez* and renders statute constitutional under 18 U.S.C. 844(i) (arson)), *cert. denied*, 117 S. Ct. 1109 (1997); United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996) (finding inclusion of jurisdictional element distinguishes *Lopez* and renders statute constitutional under 18 U.S.C. § 922(g)(1) (firearm possession)); United States v. Diaz-Martinez, 71 F.3d 946, 953 (1st Cir. 1995) (finding inclusion of jurisdictional element distinguishes *Lopez* and renders statute constitutional under 18 U.S.C. § 922(k) (firearm possession)).

206. *See supra* note 205 (discussing logic of alternative holding); *see also supra* note 30 (describing effect of jurisdictional element).

207. *See Lopez*, 514 U.S. at 561-62 (discussing same effect under firearm possession statute); *see also* note 30 (defining jurisdictional element).

208. *See* Kathleen Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 839 (1996) (suggesting that Congress should "view *Lopez* as a warning shot across the bow"). Brickey wonders, in light of *Lopez*, whether Congress will become much more cautious in deciding whether to federalize a particular crime in the future or will simply include a jurisdictional element. *Id.* She answers her own question: "Congress is an institution that is all too eager to look tough on crime, so the politics of crime control make it highly unlikely that Congress will become a model of restraint." *Id.*

209. *See supra* notes 89-91, *infra* notes 233-38, and accompanying text (noting that instructions define respective roles of judge and jury).

210. *See supra* notes 89-91, *infra* notes 233-38, and accompanying text (describing jurisdictional elements).

211. *See supra* Part III.C (discussing incentive for Congress to include jurisdictional element in federal criminal statutes).

212. *See infra* Part IV (discussing Fifth and Sixth Amendment guarantees to jury trial).

tive for Congress to push down crucial questions of jurisdiction – questions of constitutional magnitude – to the trial level and mandates that the jury answer them on a case-by-case basis.[213] The incredible constitutional effect of that incentive is to force judges to decide either to allow juries to interpret the constitution from inside the jury box or to strip defendants of their constitutional right to a jury trial.

IV. The Fifth and Sixth Amendment Rights to Jury Trial

The Fifth Amendment to the United States Constitution ensures that no person shall be deprived of his liberties without due process of law.[214] The due process requirement, within the context of a criminal trial, requires the prosecution to prove every element of the offense charged.[215] The amendment grants the criminal defendant a fundamental right[216] to an acquittal, unless the proper factfinder finds that the prosecution carried its burden of proving every element beyond a reasonable doubt.[217]

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213. *See infra* note 216-17 and accompanying text (discussing jury's role in determining truth of every element charged).

214. U.S. CONST. amend. V. The relevant text of the amendment reads: "No person shall be deprived of life, liberty, or property, without due process of law." *See also* United States v. Gaudin, 515 U.S. 506, 509-10 (1995) (discussing Fifth Amendment's mandate).

215. *See* Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) (concluding that prosecution has constitutional duty to prove every element of crime beyond reasonable doubt); *see also* Patterson v. New York, 432 U.S. 197, 210-11 (1977) (declining to extend Fifth Amendment guarantees to require proof of nonexistence of affirmative defenses); Leland v. Oregon, 343 U.S. 790, 795 (1952) (noting that burden rests with prosecution throughout entire trial).

216. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (analyzing due process requirement in criminal trial context). Justice Harlan noted that the use of the "beyond a reasonable doubt" standard is as much a result of policy concern as it is of constitutional delineation. *Id* at 370 (Harlan, J., concurring). Harlan pointed to the fact that the trial system sometimes results in erroneous convictions of innocent defendants and acquittals of guilty ones. *Id.* at 370-71 (Harlan, J., concurring). Applying the "beyond a reasonable doubt" standard to every element of the crime charged reflects the value judgment society makes after assessing "the comparative social disutility of each" erroneous outcome. *Id.* at 371 (Harlan, J., concurring). In a criminal case, "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

217. *Id.* at 361-64 (holding "explicitly . . . that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). That the Due Process Clause requires the "beyond a reasonable doubt" standard is not a new proposition; the Supreme Court has long determined that the standard is constitutionally required. *Id.* at 362. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (requiring "beyond a reasonable doubt" standard); Holland v. United States, 348 U.S. 121, 138 (1954) (same); *Leland*, 343 U.S. at 795 (same); Brinegar v. United States, 338 U.S. 160, 174 (1949) (same); Wilson v. United States, 232 U.S. 563, 569-70 (1914) (same); Holt v. United States, 218 U.S. 245, 253 (1910) (same); Davis v.

In *Sullivan v. Louisiana*,[218] the Supreme Court found that the Fifth Amendment's due process guarantee is necessarily interrelated with the trial guarantees of the Constitution and the Sixth Amendment.[219] The Constitution mandates that criminal trials be trials by jury.[220] The Sixth Amendment to the Constitution also guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."[221] Read together, the Fifth and Sixth Amendments provide criminal defendants with the right to an acquittal, unless the jury finds that the prosecution carried its burden of proving every element beyond a reasonable doubt.[222]

In *United States v. Gaudin*, the United States Supreme Court reaffirmed the proposition that the constitutional protections of due process and jury trial extend to every element of the crime charged.[223] In *Gaudin*, the petitioner, Michael Gaudin, had been convicted of making material false statements in

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United States, 160 U.S. 469, 488 (1895) (same); Miles v. United States, 103 U.S. 304, 312 (1881) (same).

218. 508 U.S. 275 (1993).

219. *See Sullivan*, 508 U.S. at 278 (analyzing Fifth and Sixth Amendments' relationship). In *Sullivan*, the petitioner appealed his first-degree felony murder conviction on the theory that the trial judge improperly instructed the jury on the reasonable doubt standard, depriving him of the standard's protections. *Id.* at 277. The Supreme Court of Louisiana found the instruction erroneous, but also found the error harmless beyond a reasonable doubt. *Id.* The *Sullivan* Court found violations of the interrelated Fifth Amendment guarantee of due process and the Sixth Amendment right to jury trial whenever the jury merely returns a verdict of *probably* guilty and leaves the judge to determine whether the defendant is ultimately guilty beyond a reasonable doubt. *Id.* at 278. The *Sullivan* Court acknowledged that some constitutional errors may be harmless "if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 279 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The proper test is normally "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error," but the Court found that the test is not applicable when a jury does not return a verdict based on the "beyond a reasonable doubt" standard in the first place. *Id.* at 279-80. Thus, the "question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280.

220. U.S. CONST. art. III, § 2, cl. 3. The relevant text reads: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury." *Id.*

221. U.S. CONST. amend VI. The Sixth Amendment was not necessary to require jury trials in criminal cases. *See* United States v. Wood, 299 U.S. 123, 126 (1936). The right to jury trial is one of the few individual rights enumerated in the Constitution. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994) (discussing right to jury trial). The right to jury trial is the only guarantee appearing in both the Constitution's text and the Bill of Rights. *Id.*

222. United States v. Gaudin, 515 U.S. 506, 510 (1995) (discussing right to jury trial); *Sullivan*, 508 U.S. at 277-78 (same).

223. *See Gaudin*, 515 U.S. at 511 (analyzing Fifth and Sixth Amendment right to jury trial).

a matter within the jurisdiction of a federal agency.[224] Gaudin argued that his conviction was unconstitutional because the trial judge had erred in removing from the jury the element of materiality.[225]

Gaudin was an entrepreneur dealing in real estate during the 1980s.[226] He purchased rental housing, renovated it, and sold it to friends and relatives.[227] Gaudin arranged for loans ensured by the Federal Housing Administration, a federal agency.[228] The purchaser, after acquiring the loan, then resold the property to Gaudin at a small profit.[229] Gaudin assumed the loan, but defaulted on his obligations.[230] Gaudin allegedly violated the criminal statute by making misrepresentations on the loan applications.[231] Although the parties stipulated that materiality is an element of the crime charged,[232] the trial court instructed the jury that satisfaction of the element was a matter of law for the court to decide.[233] On the basis of the judge's instructions, the jury found Gaudin guilty.[234] In its analysis of Gaudin's appeal,[235] the Supreme

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224. *See id.* at 507; 18 U.S.C. § 1001 (1994) (providing text of statute at issue in *Gaudin*). The relevant text of the statute is as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more then $10,000 or imprisoned not more than five years, or both.

Id.

225. *See Gaudin*, 515 U.S. at 507.

226. *See id.* at 507-08.

227. *Id.* The majority opinion called the purchasers "strawbuyers." *Id.* at 508.

228. *Id.*

229. *Id.*

230. *Id.* Gaudin actually defaulted on 29 of the mortgage loans. *Id.*

231. *Id.* The federal grand jury indicted Gaudin under § 1001 for "knowingly inflating the appraised value of the mortgaged property." *Id.* The indictment further alleged that Gaudin wrote on his applications that the strawbuyer was to pay some closing costs, but, in reality, Gaudin paid them all. *Id.*

232. *Id.* at 509.

233. *Id.* at 508. The judge instructed the jury as follows: "The issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements." *Id.*

234. *Id.* at 509.

235. *See id.* at 511-22 (discussing appeal). The Government raised three arguments. *Id.* at 511. First, the Government argued that materiality is a legal question and that although several previous Court opinions had held all elements must be charged to the jury, legal questions were excepted. *Id.* The Government suggested that the Court split the elements into their legal and factual components and charge the jury only on the latter. *Id.* at 511-12. Second,

Court presented the following compact syllogism as a restatement of the Fifth and Sixth Amendments' mandate:[236]

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all* the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.[237]

The Court determined that the trial judge's instructions removed materiality from jury determination and violated Gaudin's rights under the Fifth and Sixth Amendments.[238]

Gaudin's legacy will likely be its expansive view of the right to jury trial.[239] Relying on the simple syllogism, the Court extended the right to jury trial to encompass *all* elements of the crime under which the defendant is charged, including elements involving mixed questions of fact and law.[240] Prior to *Gaudin,* courts were unsure whether to charge juries on mixed questions of fact and law;[241] *Gaudin* decisively answers the question in the affirmative.[242]

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the Government argued that history served as precedent for excepting materiality from the general rule that all elements must be charged to the jury. *Id.* at 515. Third, the Government argued that *stare decisis* required the Court to follow its previous cases holding that pertinency was a question of law for the court. *Id.* at 519. In reverse order, the Court responded by rejecting prior cases that supported a historical exception for materiality and classifying materiality as a mixed question of fact and law that must be charged to the jury. *Id.* at 519-23.

236. *See id.* at 524 (Rehnquist, C.J., concurring) (highlighting "certain syllogistic neatness" of majority's opinion). The Court did not consider whether materiality was an element of the offense. *Id.* Currently, the federal circuit courts are split on the matter. *Compare* United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (describing materiality as element of § 1001 offense) *with* United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir. 1984) (following circuit precedent holding that materiality is not element of § 1001 offense). At trial, however, both the Government and the defendant stipulated that materiality was an element. *Gaudin,* 515 U.S. at 509.

237. *Gaudin,* 515 U.S. at 511 (emphasis added).

238. *Id.* at 522-23. Justice Scalia wrote the Court's unanimous opinion. *See id.* at 507. Chief Justice Rehnquist, joined by Justices O'Conner and Breyer, filed the concurring opinion. *See id.* at 523 (Rehnquist, C.J., concurring) (providing concurrence).

239. *See* Old Chief v. United States, 117 S. Ct. 644, 659 (1997) (O'Conner, J., dissenting) (finding that *Gaudin*'s right to jury trial is so important that it prevents defendant even from conceding elements).

240. *See Gaudin,* 515 U.S. at 512 (interpreting right to jury trial).

241. *See supra* Part II.B (describing differences between effects of various jury instructions).

242. *See* United States v. Uchimura, 125 F.3d 1282, 1284 (9th Cir. 1997) (interpreting *Gaudin* to require courts to instruct jury on mixed questions of fact and law for filing a false tax return under 26 U.S.C. § 7206(1) (1994)); *see also* United States v. DeFries, 129 F.3d 1293, 1311 n.11 (D.C. Cir. 1997) (interpreting *Gaudin* to require courts to instruct jury on mixed questions of fact and law for RICO claim under 18 U.S.C. § 1962(c) (1994)); United States v.

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Jury instructions on the "affecting interstate commerce" element of federal crimes often violate defendants' rights to jury trial.[243] By effectively removing the jurisdictional element of federal crimes from the jury, such instructions allow judges to invade the jury's constitutional domain.[244] Within the context of the Hobbs Act, especially, a considerable body of case law has developed that uniformly rejects defendants' appeals to the contrary.[245] In *Gaudin*, the Supreme Court finally gave defendants the ammunition needed to overcome this substantial precedent.[246] *Gaudin* expressly mandated that the jury must find *every* element of *every* crime before a conviction could obtain.[247]

In *Parker*, for the first time since *Gaudin*, a federal court of appeals considered instructions that a trial judge delivered to a jury on the Hobbs Act's "affecting interstate commerce" element.[248] Consistent with prior precedent, the trial judge had instructed the jury that its role in considering the interstate commerce element was limited to finding the predicate facts, upon which the judge himself would conclude that interstate commerce had been affected as a matter of law.[249] The judge had decided that the facts alleged, once proved true, were sufficient to establish an effect on interstate commerce and had therefore sentenced Parker to nearly 36 years in prison.[250]

DiRico, 78 F.3d 732, 736 (1st Cir. 1996) (interpreting *Gaudin* to require courts to instruct jury on mixed questions of fact and law for filing false tax return under 26 U.S.C. § 7206(1) (1994)); Fecht v. Price Co., 70 F.3d 1078, 1080 (9th Cir. 1995) (interpreting *Gaudin* to require courts to instruct jury on mixed questions of fact and law for civil securities fraud under 15 U.S.C. § 78j (1994)), *cert. denied*, 116 S. Ct. 1422 (1996).

243. *See supra* Part II.B (discussing four types of jury instructions typically given in Hobbs Act prosecutions).

244. *See supra* note 238 and accompanying text (discussing effect of unconstitutional instructions on defendants' constitutional right to jury trial).

245. *See supra* note 93 and accompanying text (providing exhaustive list of pre-*Gaudin* authority finding that Hobbs Act's jurisdictional element is reserved for judge as matter of law).

246. *See supra* notes 236-37 and accompanying text (discussing *Gaudin* and its expansive, yet simplistic, syllogism).

247. *See supra* notes 235-42 and accompanying text (discussing *Gaudin* and providing syllogism).

248. *See* United States v. Parker, 73 F.3d 48, 50-53 (5th Cir. 1996) (providing assessment of Parker's appeal), *vacated in part en banc*, 104 F.3d 72 (5th Cir.), *cert. denied*, 117 S. Ct. 1720 (1997).

249. *See id.* at 50-53 (discussing trial judge's instructions); *see also supra* note 94 and accompanying text (providing exhaustive list of preceding authority).

250. *See* United States v. Parker, 104 F.3d 72, 73-74 (5th Cir.) (en banc) (assessing effect of instructions), *cert. denied*, 117 S. Ct. 1720 (1997).

On appeal, Parker cited *Gaudin* as decisive on the issue.[251] The *Gaudin* Court had concluded that the jury must determine whether a defendant is ultimately guilty of every element of the crime charged.[252] The *Parker* court simply applied *Gaudin* and properly found that the trial judge's instructions were erroneous.[253] After appeals from both parties, however, the United States Court of Appeals for the Fifth Circuit agreed to hear the case en banc.[254]

Parker's rights were not the only ones at stake in the en banc decision.[255] The constitutional right to jury trial that he sought to protect – ostensibly a foundation of our criminal justice system – is increasingly denied defendants.[256] Congress is expanding its criminal jurisdiction and has a continuing incentive to include in its new statutes the same element addressed in *Parker* – that the defendant affected interstate commerce.[257] As the interstate commerce element becomes more pervasive in the federal criminal code, more federal defendants face the same type of instructions upon which Parker appealed.[258]

As a case of first impression, *Parker* was the ideal setting within which the Fifth Circuit should have definitively struck down unconstitutional jury instructions and restored the right to jury trial for federal defendants.[259] The court, instead, offered an unreasoned and unsupported opinion providing "no indication whatsoever to the Bench and bar" as to how *Gaudin* will apply in the future or whether it will apply at all.[260] The court's opinion appears in one sentence: "Having reviewed the record and the briefs and arguments of the

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251. *See* Supplement to Initial Brief of Appellant at 1, United States v. Parker, 73 F.3d 48 (5th Cir. 1996) (No. 94-10557) (discussing basis of appeal), *vacated en banc*, 104 F.3d 72 (5th Cir. 1997).

252. United States v. Gaudin, 515 U.S. 506, 511 (1995).

253. *See Parker*, 73 F.3d at 50-53 (applying *Gaudin*).

254. *See* United States v. Parker, 80 F.3d 1042, 1042 (5th Cir. 1996) (granting rehearing en banc).

255. *See Parker*, 73 F.3d at 50-53 (discussing trial judge's instruction); *see also supra* note 93 and accompanying text (providing list of preceding cases).

256. *See id.* (same).

257. *See supra* Part III (demonstrating that Congress is expanding jurisdiction and has incentive to include jurisdictional element).

258. *See supra* note 93 (demonstrating that courts are unwilling to reverse trial judge's jury interstate commerce jury instruction on grounds that instruction directed verdict against defendant).

259. *Compare supra* note 242 (assessing *Gaudin*'s impact on lower courts in non-Hobbs Act cases) *with supra* notes 19-21 (providing potential impact of *Gaudin* on *Parker*).

260. *See Parker*, 104 F.3d at 75 (DeMoss, J., dissenting) (asserting that majority en banc is without reason or citation), *cert. denied*, 117 S. Ct. 1720 (1997).

parties, we have determined that the trial court committed no *Gaudin*-type error."[261]

Parker himself may not be a legendary criminal, but his petty $459 crime spree has spawned new precedent that bridges the gap between former Hobbs Act cases and *Gaudin*.[262] Prior cases authorized courts to remove the interstate commerce element from jury determinations, yet *Gaudin* requires that the jury determine every element of every crime.[263] The effect on interstate commerce is an element of the Hobbs Act, and thus *Gaudin* should require that the jury determine whether the Government has proven the effect on interstate commerce.[264] Inexplicably, the *Parker* court rebuffed *Gaudin*'s mandate and denied Parker his fundamental right.[265] Having stolen *Parker*'s right, the court offers only unanswered questions in return.[266] The Fifth Circuit leaves unexplained the future of *Gaudin*.[267]

VI. Conclusion

Prior to *Gaudin*, courts disagreed about whether to charge juries on the interstate commerce element of federal criminal statutes.[268] *Gaudin*'s syllogism should have solved the split: all elements must be charged to the jury,[269] interstate commerce is an element of the federal crime, thus, the interstate commerce element must be charged to the jury.[270] However, the Fifth Circuit in *Parker* refused to address the issue.[271] As a result, the *Parker* decision now leaves the right to jury trial in serious peril.[272] Unfortunately, as the first to consider interstate commerce jury instructions after *Gaudin*, the *Parker* decision carries authority that promises to haunt an increasing number of

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261. *Id.* at 73.

262. *See id.* at 75 (DeMoss, J., dissenting) (calling Parker's robbery garden variety).

263. *Compare supra* note 93 (analyzing pre-*Gaudin* opinions) *with supra* note 237 and accompanying text (providing *Gaudin* syllogism).

264. *See generally supra* note 237 and accompanying text (providing *Gaudin* syllogism).

265. *See supra* note 216 and accompanying text (discussing fundamental right to jury trial).

266. *Parker*, 104 F.3d at 75 (DeMoss, J., dissenting).

267. *Id.* at 75 (DeMoss, J., dissenting).

268. *See supra* text accompanying notes 102, 113, 120, 128 (providing four categories of instructions).

269. *See supra* note 237 and accompanying text (providing *Gaudin* syllogism).

270. *See supra* note 16 and accompanying text (providing Parker's argument on appeal).

271. *See* United States v. Parker, 104 F.3d 72, 75 (5th Cir.) (en banc) (DeMoss, J., dissenting) (identifying majority opinion's weakness), *cert. denied*, 117 S. Ct. 1720 (1997).

272. *See supra* Part IV (discussing right to jury trial).

federal criminal defendants as they seek their constitutional right to trial by jury.[273]

Notwithstanding *Parker* and its progeny, there is still hope. Lest we forget: Before the Supreme Court granted certiorari in *Gaudin*, every appellate court to consider the issue except the Ninth Circuit agreed that the essential element of materiality was a question of law for the judge.[274] The Supreme Court went against the trend.[275] What remains to be seen is how many defendants like Parker will lose their constitutionally protected right to jury trial before the Hobbs Act instruction is also corrected.

273. *See* United States v. Hebert, 131 F.3d 514, 521 (5th Cir. 1997) (finding *Parker* foreclosed appeal charging *Gaudin*-type error); United States v. Miles, 122 F.3d 235, 239-40 (5th Cir. 1997) (per curiam) (same). *But see* United States v. Castleberry, 116 F.3d 1384, 1387 (11th Cir.) (extending *Gaudin* to interstate commerce element, but determining that defendant was "simply wrong in arguing that the jury in his case did not decide each element of his Hobbs Act convictions"), *cert. denied*, 118 S. Ct. 341 (1997).

274. *See* United States v. Gaudin, 515 U.S. 506, 527 (1995) (citing United States v. Gaudin, 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting) (collecting cases)).

275. *See id.* (acknowledging departure of Supreme Court opinion from settled law).

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