NONPAYMENT OF TAXES: WHEN IGNORANCE OF THE LAW IS AN EXCUSE

by

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INTRODUCTION

"Ignorance of the law is no excuse" is a well-known saying regarding criminal law.1 Yet the 1991 Supreme Court decision of Cheek v. United States2 held that a defendant's ignorance of the federal tax laws is an excuse to the crime of nonpayment of income taxes. This paper reviews the history of the defense of ignorance of the law in tax crimes, discusses the philosophical ramifications of this defense, and examines the extent to which the Supreme Court's allowance of this defense is appropriate.

Ignorance of the Law in General

The general common law principle that ignorance of the law is no defense to criminal prosecution has been regarded as being deeply rooted in the American legal system.3 This principle has been applied many times by both the United States Supreme Court4 and state courts.5 It has been called "a cornerstone in the edifice of criminal law."6 Yet the proposition that ignorance of the law is no excuse is not precisely correct. Instead, the proposition is subject to numerous exceptions and qualifications.7 A more accurate rule is that ignorance of the law is a defense to a

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1 LaFAVE & SCOTT, CRIMINAL LAW, § 5.1, at 406 (2d ed. 1986); 1 P. Robinson, CRIMINAL LAW DEFENSES, § 62(d) (1984).
5 Atkins v. State, 95 Tenn. 474, 32 S.W. 391 (1895); Debeardelaben v. State, 99 Tenn. 649, 42 S.W. 684 (1897); Hickman v. State, 64 Tex. Crim. 161, 141 S.W. 973 (1911); Crain v. State, 69 Tex. Crim. 55, 153 S.W. 155 (1913); People v. O'Brien, 95 Cal. 171, 31 P. 45 (1892); State v. McBryer, 98 N.C. 619, 2 S.E. 755 (1887); Jones v. State, 32 Tex. Crim. 533, 25 S.W. 124 (1894); State v. Mainey, 65 Ind. 404 (1879).
7 LaFAVE & SCOTT, supra note 1, at 406 (citing J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW, ch. 11 (2d ed. 1960)).
crime if and only if it negates an element of that crime.\textsuperscript{8} Since, for most crimes, knowledge of the illegality of one’s actions is not an element, it is generally true that ignorance or mistake of the law does not negate an element of liability, and therefore is not a defense. Thus, it can be maintained as a general, though non-absolute, rule that ignorance or mistake as to the criminal law is no defense.\textsuperscript{9}

As applied to incorrect understanding of the law, the terms “ignorance” and “mistake” have sometimes been used interchangeably, and sometimes coupled together as “ignorance or mistake.”\textsuperscript{10} As the courts have both the right and responsibility to interpret the law, the court’s interpretation is deemed to be correct. Accordingly, a mistake of law may be considered an interpretation of the law which differs from that of the courts. Ignorance of the law is more appropriately thought of as a nonawareness of any interpretation of the law. Nevertheless, despite the possible conceptual distinction between mistake and ignorance of the law, courts have not recognized a significant distinction in the treatment of the two.\textsuperscript{11}

Professors LaFave and Scott, in their criminal law hornbook, have advanced four arguments as justifications for the policy of not allowing ignorance as a defense.\textsuperscript{12} One argument is that everyone is presumed to know the law.\textsuperscript{13} This reason, of course, begs the question: Just why is that presumption of universal knowledge justified? As LaFave and Scott have stated, “No person can really ‘know’ all the statutory and case law defining criminal conduct.”\textsuperscript{14} Moreover, even if there is a presumption that everyone knows the law, the proposition that ignorance of the law is no excuse could not be inferred so long as a defendant is permitted to bring evidence to rebut that presumption.

LaFave and Scott’s second reason why ignorance of the law is no excuse is that allowing this excuse would entail difficult inquiries as to whether a given defendant were in fact ignorant of the law.\textsuperscript{15} If only reasonable ignorance of the law were regarded as an excuse, a further inquiry into whether a particular defendant’s ignorance were reasonable would be required.\textsuperscript{16} Thus, not permitting ignorance of the law as an excuse simplifies criminal proceedings. Yet this reason, too, begs a question: Is it justifiable to regard those ignorant of the law as guilty simply in order

\textsuperscript{8} Id. at 406. See also Model Penal Code § 2.04(1)(a) (Proposed Official Draft 1962); United States v. One Buick Coach Auto., 34 F.2d 318 (N.D. Ind. 1929).
\textsuperscript{9} LAFAVE & SCOTT, supra note 1, at 413-15.
\textsuperscript{10} State v. Arminson, 25 Minn. 29, 38 (1878); Dotson v. State, 62 Ala. 141, 144 (1878).
\textsuperscript{11} Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35, 36 (1939). But see Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75 (1908), which argues that the two terms denote distinctly different kinds of misunderstandings of the law.
\textsuperscript{12} LAFAVE & SCOTT, supra note 1, at 413-15.
\textsuperscript{14} LAFAVE & SCOTT, supra note 1, at 413.
\textsuperscript{15} J. AUSTIN, supra note 13, at 498-99. See also People v. O’Brien, 96 Cal. 171, 31 P. 45 (1892).
\textsuperscript{16} LAFAVE & SCOTT, supra note 1, at 414.
to streamline criminal proceedings? Could not a similar argument be used to also exclude traditional defenses such as insanity, mistake of fact, self-defense, and necessity?

LaFave and Scott’s third argument is that convicting defendants who are ignorant of the law serves to educate the public about the law. This is evidently based upon a utilitarian argument that public education is worth more than the welfare of a particular criminal defendant.\footnote{Hall & Seligman, Mistake of Law and Mens Rea, 8 U. Chi. L. Rev. 641, 647 (1941).} Their fourth argument is that defendants ought to be judged by an objective standard of law — what the law actually is — rather than a subjective standard — what those defendants believe the law to be.\footnote{Id. at 651.} Yet in terms of public policy justifications, these reasons are just as unsatisfying as the previous ones, begging the same questions. Perhaps the most persuasive justification for the rule was given by Justice Holmes, who combined LaFave and Scott’s utilitarian justification with the common sense rationale that not allowing ignorance of the law as an excuse encourages people to be knowledgeable about the law, whereas allowing such an excuse encourages ignorance.\footnote{O.W. Holmes, supra note 3, at 48: It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.}\

Not allowing ignorance or mistake of law as an excuse seems to impose a rather harsh penalty for ignorance.\footnote{Hart, The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401 (1958).} This harshness is most manifest in regulatory crimes involving conduct that is not inherently immoral.\footnote{Cass, Ignorance of the Law: A Maxim Reexamined, 17 Wm. & Mary L. Rev. 671, 689-99 (1976); Fletcher, The Individualization of Excusing Conditions, 47 S. Cal. L. Rev. 1269, 1295-99 (1974); Seney, When Empty Terrors Overawe — Our Criminal Law Defenses (Part Two), 19 Wayne L. Rev. 1359, 1364-76 (1973); Ryu & Silving, Error Juris: A Comparative Study, 24 U. Chi. L. Rev. 421, 467 (1971); Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1060 (1958).} Nevertheless, this harshness has been somewhat mitigated by the Constitution’s requirement of definiteness. A criminal statute must give fair notice to a person of ordinary intelligence, or else it is void for vagueness.\footnote{See United States v. Harris, 347 U.S. 612, 617 (1953); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974).} Indeed, a number of decisions have held that ignorance or mistake is a defense where the defendant reasonably believed his conduct was neither immoral nor illegal.\footnote{Liparota v. United States, 417 U.S. 419 (1985); United States v. Simpson, 561 F.2d 53 (7th Cir. 1977); United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976); Lambert v. California, 355 U.S. 225 (1957).} Although these decisions rejected the doctrine that ignorance of the law is no excuse, they adhered to the broader doctrine that ignorance or mistake of law is an excuse when it negates an element of
the crime. These decisions simply held that knowledge of illegality was an element of the particular crimes involved, and that this element was negated by ignorance of the law.

**Ignorance of the Law in Tax Crimes: Murdock**

The Supreme Court has specifically rejected the principle that ignorance of the law is no excuse in the particular area of tax crimes. The justifications given for rejecting this defense are considerably weaker with regard to the Internal Revenue Code statutes and regulations, which are of such number and complexity that it is often quite difficult for the average citizen to be familiar with his legal obligations under it.24

The seminal Supreme Court decision involving a tax crime in which ignorance of the law was raised as a defense was in the 1933 case of *United States v. Murdock*.25 The defendant, Murdock, was called before a federal revenue agent for questioning. Murdock invoked his Fifth Amendment privilege against self-incrimination and refused to answer such questions as who was the payee of certain sums deducted by him. He was then prosecuted for violating Section 114(a) of the Revenue Act of 1926. This statute imposed misdemeanor liability upon any person who “willfully” failed to pay any amount, make any return, keep any records, or supply any information required for tax purposes.26 Murdock's invoking of the Fifth Amendment privilege was improper, since his fear of incrimination was based upon possible prosecution under state statutes rather than under federal law.27

Murdock's defense was that, although the privilege against self-incrimination did not apply, his belief was that it did apply. Accordingly, he was not guilty of “willfully” failing to supply the information to the revenue agent. Murdock requested that the jury be instructed that they should consider whether his stated reasons for refusing to answer the questions were made “in good faith and based upon his actual belief” in determining the willfulness of his conduct.28 The trial court disallowed the instruction, and Murdock was convicted. The Seventh Circuit

25 290 U.S. 389 (1933).
26 Section 114(a) of the Revenue Act of 1926 is identical to section 146(a) of the Revenue Act of 1928, the statute that was in effect when Murdock reached the Supreme Court. This statute is also equivalent to § 7203 of the Internal Revenue Code, a section that was applied in Check v. United States.
27 290 U.S. at 391, 393. The Supreme Court had decided this on a previous ruling in this case, United States v. Murdock, 284 U.S. 141, 148-49. The Court justified this conclusion by means of the U.S. Constitution’s supremacy clause making federal laws superior to state laws. U.S. Const. art. VI, § 2. Accordingly, investigations for federal purposes may not be prevented by matters depending upon state law. Moreover, the English rule against compulsory self-incrimination, on which the Fifth Amendment privilege is historically based, does not protect witnesses against disclosing acts that violate other countries’ laws. King of the Two Sicilies v. Wilcox, 61 Eng. Rep. 116, 121, 1 S1M (n.S.) 301, 313 (1851); Queen v. Boyes, 121 Eng. Rep. 730, 738, 1 B&S 311, 330 (1861).
28 290 U.S. at 393.
Court of Appeals reversed the judgment on the grounds that the requested instruction should have been allowed. Upon certiorari, the critical issue before the Supreme Court was whether the word “willfully” in the statute would permit Murdock’s ignorance of the inapplicability of the Fifth Amendment privilege as a defense. The word “willfully” is used in seven tax crime statutes, and its definition lies at the crux of all the decisions regarding ignorance of tax law from Murdock through Cheek.

The Murdock Court noted that the word “willfully” often applies to an act which is “intentional, or knowing, or voluntary, as distinguished from accidental.” However, in criminal statutes, the Court listed six different expressions which are or had been used synonymously with “willfully”:

1. “with a bad purpose”
2. “without justifiable excuse”
3. “stubbornly, obstinately, perversely”
4. “without ground for believing it is lawful”
5. “marked by careless disregard whether or not one has the right to so act”
6. with an element of “evil motive.”

After giving these six definitions, the Court subsequently added a synonymous expression of its own:
7. with “bad faith.”

It is not clear whether all these definitions are equivalent. Definitions 2 and 5, which include the words “justifiable” and “careless disregard,” seem to impose a reasonable person standard. According to these definitions, a willful criminal act is an act accompanied by a mental state that falls short of what is expected of the reasonable person. Definition 3 seems to impose a somewhat more lenient standard than the reasonable person standard. Under this definition, a criminal defendant is liable only if his act is performed stubbornly, obstinately, or perversely, rather than merely unreasonably, negligently, or carelessly. Definition 4 seems to impose perhaps the most lenient standard of all: Under it, a defendant is liable only if his act is done “without ground for believing it is lawful” — presumably, without any

29 260 U.S. at 394.
33 Wales v. Miner, 89 Ind. 118, 127 (1883); Lynch v. Commonwealth, 109 S.E. 427 (1921); Claus v. Chicago Great W. Ry., 136 Iowa 7, 111 N.W. 15 (1907); State v. Harwell, 129 N.C. 550, 40 S.E. 48 (1901).
34 Roby v. Newton, 121 Ga. 679, 49 S.E. 694 (1905).
ground. Definition 4 would thus allow even an implausible or unreasonable mistaken belief as an excuse.

Definitions 1, 6, and 7, referring to “bad purpose,” “evil motive,” and “bad faith” seem to be the most vague; what precisely could these terms mean? Do these expressions mean simply that a defendant must possess an intent to violate the law? Or do they mean an intent to violate a malum in se law — a law prescribed by general ethical principles? Could they mean an intent to violate the law in a particularly egregious manner? Or do they mean an intent to violate some general ethical principle in a manner not specifically prohibited by law? There is no logically compelling answer.

Thus, the definitions provided by the Court regarding the crucial term “willfully” leave much ambiguity, both because of the multiplicity of the definitions and because some of the definitions use words which are themselves ambiguous.

The Murdock Court tried to clarify matters by explaining that the precise meaning of “willfully” may be afforded from the context in which it is used. The Court then gave two arguments for upholding the Seventh Circuit’s decision in favor of Murdock:

First, the Court stated that “Congress did not intend that a person, by reason of a bona fide misunderstanding . . . as to his duty . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct.” Accordingly, the word “willfully” was inserted by Congress into the statutes for the purpose of allowing bona fide ignorance of the law as an excuse. Murdock was entitled to have the jury consider the question of whether his ignorance of the law was bona fide; an affirmative answer would result in acquittal.

Second, the applicability of the Fifth Amendment to Murdock’s situation — the matter of law on which Murdock was mistaken — was decided by the Supreme Court only after Murdock had acted upon that mistake in refusing to answer the revenue agent’s questions. Not until after Murdock had refused to answer the questions had it been definitely settled by the Supreme Court that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. Not until Murdock had committed the act for which he was prosecuted had it been decided that this act violated the law. Therefore, Murdock’s ignorance of the law may have been not only bona fide but also reasonable. As a result, Murdock was entitled to have the jury consider the issue

38 See State v. Horton, 139 N.C. 588, 589, 51 S.E. 945, 946 (1905): “An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act malum prohibitum is wrong only because made so by statute.” Id.

39 290 U.S. at 395. See also United States v. Sioux City Stock Yards Co., 162 F. 556, 562 (C.C.N.D. Iowa 1908).

40 290 U.S. at 396.

41 See supra note 27.
of evil motive which was submitted to it; the absence of evil motive would result in acquittal.\textsuperscript{42}

Although the Court attempted to resolve the ambiguity inherent in its original definitions of the term "willfully," by supplying these two arguments rather than one simple holding, the Court left some ambiguity of its own. The first argument implied that bona fide ignorance of tax law is an excuse. The second argument implied that reasonable ignorance of the law is an excuse. One can ask an important question concerning the necessity for the second argument: Did the Court view it as being necessary in producing its decision for Murdock where the first argument alone was insufficient? Or was the second argument merely supplementary, with the first argument being sufficient in itself to yield a decision for Murdock? If the second argument was necessary, then a correct statement of the holding in Murdock\textsuperscript{42} is that bona fide ignorance of the tax law is an excuse if that ignorance is reasonable. If the second argument was merely supplementary, then the Murdock holding is that ignorance of the law is an excuse regardless of whether it is reasonable. Unfortunately, the Murdock Court left this vital question unanswered. This question remained unanswered until the Court's 1991 Cheek decision, fifty-eight years after Murdock.

\textit{Between Murdock and Cheek}

Following Murdock, subsequent Supreme Court decisions gave further definitions of "willfully" as used in the tax statutes. However, until Cheek, none of these decisions involved a taxpayer's claim of ignorance of the law as an excuse. In its 1943 decision of United States v. Spies, responding to a taxpayer's claimed excuse of "psychological disturbance,"\textsuperscript{43} the Court went beyond the "evil motive" definition used in Murdock (definition 6) and defined "willfully" as "evil motive and want of justification in view of all the financial circumstances of the taxpayer."\textsuperscript{44} Spies further suggested that this willfulness constitutes a more culpable state of mind than mere negligence, as willful failure to pay tax is punishable more severely than negligent disregard of the tax laws.\textsuperscript{45}

\textsuperscript{42} 290 U.S. at 396. Note that a re-questioning of Murdock after the earlier Murdock decision, coupled with a second refusal of Murdock to testify, would have nullified this second argument.
\textsuperscript{43} 317 U.S. 492, 493 (1943).
\textsuperscript{44} Id. at 498. In Spies, the Court further suggested that the term "willfully" when employed in a felony statute (such as Internal Revenue Code §§ 7201 and 7202) is defined somewhat differently than when employed in a misdemeanor statute (such as § 7203). For a misdemeanor, "passive neglect" may constitute willful behavior, but willful violation of a felony may require a "positive attempt." Such affirmative willful behaviors might include keeping a double set of books, or making false entries or alterations. \textit{Id.} at 499. The tenuous language of the opinion in advancing this felony-misdemeanor distinction made it unlikely that the Court intended this to be regarded as a definitive holding. Indeed, thirty years later, the Court announced that this felony-misdemeanor distinction did not exist. See infra note 50.
\textsuperscript{45} Id. at 497. Professor Yochum has argued that taxpayers should indeed be subject to a negligence standard:

In the United States, individuals know they have income tax obligations; if confusion exists, competent advice should be sought. If they fail to seek that advice because of stupidity or a \textit{sub rosa} belief that they will learn they have to pay, full criminal sanctions should be able to be brought against them.
The 1965 case of Sansone v. United States involved a taxpayer’s claimed defense of financial difficulties.\(^4\) The Court in this case defined “willfully” as “with knowledge that the taxpayer should have reported more income than he did.”\(^4\) In 1973, in United States v. Bishop, a taxpayer claimed he failed to check his tax returns for accuracy, resulting in an assertion of double deductions.\(^4\) Here, the Court defined “willfully” as connoting “a voluntary, intentional violation of a known legal duty.”\(^4\)

The Bishop Court underscored the need for allowing ignorance as a defense in tax crimes due to the complexity of the tax statutes:

This longstanding interpretation of the purpose of the recurring word “willfully” promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. . . . The Court’s consistent interpretation of the word “willfully” to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.\(^5\)

The Bishop Court further claimed that its definition of “willfully” in terms of “a voluntary, intentional violation of a known legal duty” was equivalent to the Murdock definition of “bad faith or evil intent,” as well as to the definitions used in Spies and Sansone.\(^5\)

Yet the equivalence of the Murdock and Bishop definitions was called into question three years after Bishop in the case of United States v. Pomponio.\(^5\) In

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\(^5\) Id. at 353.
\(^7\) Id. at 360. See also James v. United States, 366 U.S. 213, 221 (1961); McCarthy v. United States, 394 U.S. 459, 471 (1969).
\(^8\) 412 U.S. at 361. Another important point expressed in Bishop was that the term “willfully” had an identical meaning in tax felony statutes such as § 7201 as in tax misdemeanor statutes such as § 7203. Id. at 356. According to Bishop, the Sansone decision firmly resolved a question posed by Spies, which had suggested that the level of intent required for tax misdemeanors might be lower than that required for tax felonies, and Berra v. United States, 351 U.S. 131 (1956), which had implied that this was not so. According to Bishop, “the simultaneous requirement that [both a felony and a misdemeanor] violation be committed “willfully” is strong evidence that Congress used the word “willfully” to describe a constant rather than a variable in the tax penalty formula.” 412 U.S. at 360, especially n. 8. See also supra note 44.
\(^9\) 412 U.S. at 360 (quoting Murdock, 290 U.S. at 398). 
Pomponio, several defendants were charged with willfully filing false tax returns in violation of Internal Revenue Code Section 7206. The Pomponio trial court instructed the jury that, under the Bishop standard, the defendants should be convicted if they intentionally violated what they knew to be the law. The Pomponio trial court further instructed the jury that a defendant’s good motive was not a defense. With those instructions the trial court implied that the “evil motive” test from Murdock and the “voluntary, intentional violation of a known legal duty” test from Bishop were not the same. The effect was a rejection of the older Murdock standard in favor of the more modern Bishop test. Based upon those instructions, the jury convicted the defendants. Upon appeal, the court of appeals reversed the convictions on the basis of Murdock. The Supreme Court in Pomponio then reversed the court of appeals and reinstated the convictions.

According to the Supreme Court, the term “willfully” does not require proof of any motive other than an intentional violation of a known legal duty. The Supreme Court concluded that after the trial court instructed the jury on willfulness, any additional instruction on good faith was unnecessary. Thus, in Pomponio, the Supreme Court effectively ruled that the ambiguous Murdock “bad purpose” or “evil motive” test was superfluous, having been merged into the more explicit and more modern Bishop test of “a voluntary, intentional violation of a known legal duty.” The multiple ambiguous Murdock definitions were dead, replaced by the simpler and more precise Bishop standard.

Cheek v. United States: Judicial History

Following Pomponio’s firm endorsement of the Bishop definition of “willfully,” Cheek v. United States re-examined the question originally considered in Murdock — the extent to which the term “willfully” operates to excuse an act committed in ignorance of the law. John L. Cheek, a pilot for American Airlines, was charged with willfully attempting to evade income taxes and willfully failing to file a federal income tax return for the years 1980, 1981, and 1983 through 1986 in violation of Sections 7201 and 7203 of the Internal Revenue Code. Section 7201 imposes felony liability for any person “who willfully attempts . . . to evade or defeat any tax.”

53 Specifically, the defendants were charged with reporting taxable corporate dividends as nontaxable loans, and with reporting corporate losses not deductible on an individual tax return as deductible partnership losses. The defendants’ asserted defense was that they believed the transactions to have been correctly reported. Thus, the defense was one of mistake of fact. Id. at 10-11.


55 429 U.S. at 13.

56 26 U.S.C. § 7201 (1988). This section states, more completely, “Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .” A similar felony provision using the same “willfully” standard is the following section, 7202. Under § 7202, “Any person required . . . to collect, account for, and pay over any tax . . . who willfully fails to collect or truthfully account for and pay over such tax shall . . . be guilty of a felony. . . .”
Section 7203 imposes misdemeanor liability for any person required to make an income tax return who "willfully fails" to do so.\textsuperscript{57} At trial in federal district court, Cheek admitted that he had not filed personal income tax returns during the years in question.

He claimed, inter alia, two major beliefs: First, the income tax statutes did not apply to him, since they imposed tax liability only on income or profit, but not on wages. Second, the income tax statutes were unconstitutional. Cheek claimed to have acted on the advice of a group of attorneys that held seminars claiming that the federal income tax laws were invalid. One such attorney had written Cheek a letter stating the Sixteenth Amendment did not authorize a tax on wages and salaries, but only on gain or profit. Therefore, according to Cheek, he sincerely believed that he was not required to pay income taxes, and so could not be considered as "willfully" violating the tax laws.\textsuperscript{58}

Again, the unanswered question of \textit{Murdock} was posed: Is ignorance of the tax law always an excuse, or is it an excuse only if it is reasonable? The district court advised the jury that "[a]n objectively reasonable good faith misunderstanding of the law negates willfulness" and would thus constitute a valid defense for Cheek.\textsuperscript{59} The district court added, however, that a person's opinion that wages are not income or that the tax laws are unconstitutional does not constitute such a good faith misunderstanding of the law.\textsuperscript{60} In response to a government request for further clarification, the court instructed the jury that "an honest but unreasonable belief [that one is complying with the law] is not a defense . . . and does not negate willfulness."\textsuperscript{61}

Based upon these and other instructions, the jury found Cheek guilty of both willful attempt to evade taxes and willful failure to file income tax returns. Nevertheless, some members of the jury issued notes to the judge complaining "against the narrow and hard expression under the constraints of the law."\textsuperscript{62} One of the notes stated, "I know the gentleman is guilty of a crime. However, I honestly believe that he believed so deeply in his cause and truly does not believe that he is breaking the law."\textsuperscript{63} Thus, at least some members of the jury believed that

\textsuperscript{57} 26 U.S.C. § 7203 (1988). This section states, more completely:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . .


\textsuperscript{59} Jury Instruction No. 32. United States v. Cheek, 882 F.2d 1263, 1265 (7th Cir. 1989). \textit{See also} 111 S. Ct. at 608.

\textsuperscript{60} 882 F.2d at 1266.

\textsuperscript{61} \textit{Id}.

\textsuperscript{62} \textit{Id}. at 1267.

\textsuperscript{63} \textit{Id}.
Cheek was sincere in what he professed, but felt they had to convict him, since the court had instructed them that what he professed was not reasonable.

Upon appeal by Cheek, the United States Court of Appeals for the Seventh Circuit affirmed the convictions. The circuit court agreed with the district court that ignorance of the tax laws was a defense to willfulness only if this ignorance was objectively reasonable. The circuit court based its decision upon prior Seventh Circuit cases that “emphatically adhered” to the objectively reasonable standard.

The circuit court further stated that the trial court properly supplemented the jury instruction regarding the objectively reasonable standard with the additional statement that the beliefs that wages are not income or that the tax laws are unconstitutional are not objectively reasonable. The objectively reasonable standard is not complete without clarification of what constitutes reasonable. In a footnote, the circuit court listed a set of beliefs, which are “stock arguments of the tax protest movement” that “have not been, nor ever will be, considered ‘objectively reasonable’”:

1. the belief that the Sixteenth Amendment to the Constitution was improperly ratified and therefore never came into being;
2. the belief that the Sixteenth Amendment is unconstitutional generally;
3. the belief that the income tax violates the Takings Clause of the Fifth Amendment;
4. the belief that the tax laws are unconstitutional;
5. the belief that wages are not income and therefore not subject to the federal income tax laws;
6. the belief that filing a tax return violates the privilege against self-incrimination; and
7. the belief that Federal Reserve Notes do not constitute cash or income.

Although acknowledging Cheek’s claim that every other circuit had adhered to a subjective standard of reasonableness, the Seventh Circuit Court applied an objective standard and upheld Cheek’s conviction. Under that objective standard,

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64 Id.
65 Id. See United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987); United States v. Davenport, 824 F.2d 1511, 1517-18 (7th Cir. 1987); United States v. Bressler, 772 F.2d 287, 290 (7th Cir. 1985), cert denied, 474 U.S. 1082 (1986); United States v. Moore, 627 F.2d 830, 833 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981). But see United States v. Dack, 747 F.2d 1172, 1175 (7th Cir. 1984).
66 United States v. Cheek, 882 F.2d 1263, 1268 (7th Cir. 1989).
67 Id. at 1268, 1269 n.2. See also Miller v. United States, 868 F.2d 236, 239-41 (7th Cir. 1989); United States v. Dube, 820 F.2d 886, 891 (7th Cir. 1987); Coleman v. Commissioner, 791 F.2d 68, 70-71 (7th Cir. 1986). In its footnote in Cheek, the Seventh Circuit Court of Appeals added, “We have no doubt that this list will increase with time.”
an honest though unreasonable misunderstanding of the law was no defense to willfulness.68

Recognizing this conflict between the Seventh Circuit and other circuits, the United States Supreme Court granted certiorari. With a five-justice plurality, the Court reversed Cheek's convictions, holding that the willfulness required for a violation of 26 U.S.C. Sections 7201 and 7203 was negated by a misinterpretation of those provisions even when that misinterpretation was unreasonable. Accordingly, Cheek's first belief that he was not required to pay taxes under the tax statutes was a defense to the crime of tax evasion. The Court further held that Cheek's second belief, that the tax statutes were unconstitutional, did not negate willfulness and was not a defense to tax evasion. Thus, in the Court's view, an unreasonable misinterpretation of the tax statutes was an excuse, while a misinterpretation of the Constitution was not.

Justice White wrote the Court opinion, joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Whereas the plurality found that only the first of Cheek's two beliefs was a defense, Justice Scalia wrote a concurrence claiming that both of Cheek's beliefs were defenses. Justice Blackmun, joined by Justice Marshall, wrote a dissent claiming that neither belief was a defense. Justice Souter did not participate in the Cheek decision. Interestingly, the anti-defendant dissent in Cheek was written by two who are generally regarded as among the Court's more liberal members. Scalia, although regarded as one of the Court's more conservative members, wrote a concurrence claiming that the plurality was not sufficiently pro-defendant.69

White's Plurality Opinion: The Delicate Distinction

Justice White's opinion reiterated the general principle that ignorance of the law is no excuse, stating that this rule is based upon the notion that the law is definite and knowable, and upon the presumption that every person knows the law. Nevertheless, according to White, the complexity of the tax laws has made it extremely difficult for the average citizen to be familiar with his legal obligations under it. Accordingly, Congress "softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses."70 This specific intent is embodied in the word "willfully"

68 882 F.2d at 1267. See United States v. Whiteside, 810 F.2d 1306,1310 (5th Cir. 1987); United States v. Burton, 737 F.2d 439 (5th Cir. 1984); United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986); United States v. Phillips, 775 F.2d 262, 264 (10th Cir. 1985); United States v. Aitken, 755 F.2d 188, 191 (1st Cir. 1985); United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983); United States v. Ingredient Technology Corp., 698 F.2d 88, 97 (2d Cir. 1983), cert. denied, 462 U.S. 1131 (1983); Cooley v. United States, 501 F.2d 1249, 1253 n. 4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975); Yarbrough v. United States, 230 F.2d 56, 61 (4th Cir. 1956), cert. denied, 351 U.S. 969 (1956); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949).
employed in the Internal Revenue Code.

Justice White's notion of specific intent to violate the law is not to be confused with the common law concept of specific intent. The term "specific intent," as most commonly used, designates a special felonious intent — *animus furandi* — which is required above and beyond the intent to do the set of bodily motions that constitute a particular criminal act. For example, the common law crime of larceny requires the act of a trespassory taking and carrying away of the property of another. In order for liability for larceny to exist, there must be shown, in addition to the intent to take and carry away the property, the specific intent to permanently deprive the owner of that property, as opposed to merely borrow it wrongfully.71

At common law, certain crimes, such as larceny and embezzlement,72 require specific intent; others, such as murder73 and battery,74 do not. Although specific intent must be proven in order for one to be judged guilty of larceny or embezzlement, one can be found guilty of murder or battery by bringing about a criminal result recklessly rather than intentionally.

Moreover, for a common law specific intent crime, a defendant's knowledge of the act's status as being unlawful is irrelevant. The specific intent necessary for liability for a specific intent crime is the specific intent to achieve the criminal result, rather than specific intent to violate the law. As a practical matter, a specific intent crime at common law is one in which ignorance of factual circumstances, even unreasonable ignorance, is a defense, since the element of specific intent would thus be negated. Yet ignorance of the law, regardless of how reasonable, is not a defense, it does not negate the specific intent to achieve the criminal result.75

Justice White's claim was that 26 U.S.C. sections 7201 and 7203, through the use of the word "willfully," made specific intent to violate the law an element of the statutory crimes of tax evasion and failure to file a tax return. For these crimes, White argued, the specific intent necessary for liability is the specific intent to violate law, and not merely (as in a specific intent crime at common law) the specific intent to perform what the law considers a criminal act. White's claim was that for these tax offenses, the word "willfully" meant that ignorance of the criminality of one's acts — i.e., ignorance of the law — is a valid defense.76

71 LAFAVE & SCOTT, supra note 1, at 224, 721-22; Perkins, supra note 11, at 45-47. See also State v. Huber, 356 N.W.2d 468 (S.D. 1984); State v. Ryan, 12 Nev. 401 (1877).

72 LAFAVE & SCOTT, supra note 1, at 738. See also Lindgren v. United States, 260 F. 772 (9th Cir. 1919); People v. Lapique, 120 Cal. 25, 52 P. 40 (1898); Eatman v. State, 48 Fla. 21, 37 So. 576 (1904); Taylor v. Commonwealth, 119 Ky. 731, 75 S.W. 244 (1903).

73 LAFAVE & SCOTT, supra note 1, at 617-20.

74 Id. at 687.

75 Id. at 407-10. See also State v. Ebbeler, 283 Mo. 57, 222 S.W. 396 (1920); United States v. Short, 16 C.M.R. 11 (1954).

76 Professor LaFave has noticed that confusion involving the concept of specific intent and the related concept of general intent is common. LAFAVE & SCOTT, supra note 1, at 408. The Model Penal Code has
In explaining the precise meaning of “willfully,” White mentioned the original Murdock definition, but then rejected it in favor of the Bishop/Pomponio definition. “Taken together, Bishop and Pomponio conclusively establish that the standard for the statutory willfulness requirement is the ‘voluntary, intentional violation of a known legal duty.’”

According to this definition, willfulness is negated when one violates a legal duty he does not know about. In that case, there is no “voluntary, intentional violation of a known legal duty.” This is true even when one’s lack of knowledge is unreasonable. In White’s words:

In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

Justice White found a problem not only with the “objectively reasonable” test in general, but also with the trial court’s characterizing of certain particular beliefs as not being objectively reasonable. According to White, the question of whether a defendant knew about a particular legal duty is a question of fact to be decided by the jury. This is the critical question under the subjective “known legal duty” test used in the Bishop/Pomponio definition of willfulness. But when the “objectively reasonable” test is combined with a legal judgment that certain beliefs are inherently unreasonable, there is nothing left for the jury to decide. In White’s opinion, “forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment’s jury trial provision.”

Yet the Court has traditionally interpreted statutes so as to avoid whenever possible raising serious constitutional questions. Therefore, the subjective test of Bishop and Pomponio was the preferred one. Moreover, according to White’s opinion, the trial court erred in instructing the jury that Cheek’s asserted beliefs (that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code) should not be considered in determining whether Cheek had acted willfully.

abandoned these concepts. MODEL PENAL CODE § 2.02 commentary at 231 n.3 (1985). See also Hall & Seligman, supra note 17, at 642 n.54.

77 111 S. Ct. at 610.

78 Id. at 611


81 111 S. Ct. at 611.

82 Id. at 613.
White’s argument on this point appears to be somewhat incomplete. A Sixth Amendment problem is not presented by an objectively reasonable standard alone. A problem arises only when an objectively reasonable standard is combined with an irrefutable presumption that certain beliefs can never be considered objectively reasonable. Accordingly, why not simply use an objectively reasonable standard, while at the same time permit a judicial inquiry into whether certain beliefs are objectively reasonable?

A possible answer is that an inquiry into whether certain beliefs are objectively reasonable is contrary to the spirit of the First Amendment. Court decisions based upon the First Amendment have given individuals wide latitude in believing and propagating unpopular ideas. Parallels to Cheek may be found in First Amendment cases on defamation and freedom of religion.

In defamation cases, although provably false statements of fact have been held actionable, opinions have been protected. As the Court stated in the famous case of Gertz v. Robert Welch, Inc.:

Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

In freedom of religion cases, courts have traditionally shied away from inquiring into the reasonableness of a person’s beliefs. Freedom of thought, unlike freedom to act, is regarded as an absolute. This absolute right would be threatened by an inquiry into the truth of one’s beliefs.  


85 United States v. Ballard, 322 U.S. 78 (1944). In Ballard, defendant was prosecuted for mail fraud where he solicited money on the representation that he was a divine messenger and had the divine power to heal incurable diseases. The Court held that although the jury could question the defendant’s sincerity in believing the ideas he espoused, the First Amendment barred submitting to the jury the question of whether these ideas were true. Id. at 88.


87 Although an inquiry into the truth of one’s religious beliefs is prohibited, an inquiry into the sincerity of one’s beliefs seems to be permissible. See Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829, 833, (1989) (which, in interpreting a state statute mandating that unemployment compensation claimants be available for work seven days a week, required an exception for those who believe in a religiously-mandated day of rest and whose sincerity is not questioned); Gillette v. United States, 401 U.S. 437, 454 (1971);
It would be inappropriate to regard the *Cheek* case as overly analogous to freedom of religion and defamation cases. *Cheek* concerned not the defendant's right to hold his particular beliefs, but his right to act upon those beliefs and withhold income taxes. Moreover, Cheek's claim that the Internal Revenue Code did not require him to pay taxes was fundamentally different from the constitutionally-protected personal opinions regarding a Supreme Being and derogatory opinions regarding human beings. Unlike such matters of debateable opinion, Cheek's claim had already been properly adjudicated by the courts as false. The courts are regarded as the authoritative interpreters of legal statutes under Article III of the Constitution. It therefore seems absurd to subsume Cheek's claim that he was not legally required to pay taxes within the protective umbrella of the *Gertz* doctrine that under the First Amendment there is no such thing as a false idea. Our recognition of the courts as the interpreters of statutes renders inapplicable the statement from *Gertz*, “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” It would be an extreme interpretation of *Gertz* to prohibit us from recognizing the falsity of such statements as “two plus two equals five” or “the earth is flat.” Similarly, *Gertz* does not prevent us from recognizing that Cheek's claim, “the Internal Revenue Code does not require income taxes on wages,” is false. Courts under their Article III power may determine certain legal ideas to be false, just as logical and scientific methods may determine certain mathematical or empirical ideas to be false.

Thus, it is not contrary to the First Amendment to label Cheek's claim as clearly false. Nevertheless, under the force of *Gertz*, it does seem contrary to the spirit of the First Amendment to label Cheek's claim as being objectively unreasonable. Cheek's claim, like religious claims, should not be decided by a jury. Acts may properly be labelled as unreasonable, and juries can determine which acts are in conformity with a reasonable person standard. Yet, since freedom of thought is absolute, it would be improper to label an idea as not conforming to the reasonable person standard. Unlike an act, an idea cannot properly be labelled as unreasonable, even if it can be adjudicated as false under a court's Article III power. A jury might indeed properly decide that a particular act is not one that a reasonable person would commit. Yet it would not be proper for a jury to decide that a particular belief is not one that a reasonable person would believe, however false that idea may be.

The absolute nature of freedom of thought under the First Amendment thus completes White's point. Squeezed between the First and Sixth Amendments, the objectively reasonable standard for willfulness in violation of the tax statutes, like any objectively reasonable standard regarding personal belief, must give way to a subjective standard. Under this subjective standard, a defendant's belief that he was
not required to file a tax return and pay income taxes under the tax statutes is a valid excuse.

Justice White specifically acknowledged that the more unreasonable a defendant’s asserted beliefs are, the more likely the jury will consider them to be nothing more than simple disagreement with the tax statutes of which he was amply aware. But mere disagreement is no defense; one must obey the law, even if he disagrees with it.\textsuperscript{88} The subjective standard allows for a safety net to prevent the misuse of the defense of ignorance or mistake.

White further posited a rather delicate distinction between one’s belief that a statute does not apply to his situation and a belief that the statute is unconstitutional. According to White, the term “willfully” in the tax statutes excuses nonpayment of taxes based upon Cheek’s first belief, that the statutes do not impose a tax on his wages. However, it does not excuse nonpayment of taxes based upon his second belief, that these statutes are unconstitutional. A taxpayer who violates a statute because he believes it to be unconstitutional commits a willful violation of the law.\textsuperscript{89} A taxpayer having such a belief has two legal options. He could pay the tax imposed by the statute, file for a refund, and, if denied, take his case to court.\textsuperscript{90} Alternately, he could refrain from paying the tax, challenge the tax in tax court,\textsuperscript{91} and, if unsuccessful, appeal to a higher court.\textsuperscript{92} Cheek did neither; he waited until he was criminally prosecuted before making his claim. Therefore, the Supreme Court held that the trial court acted properly in instructing the jury not to consider Cheek’s claims that the tax laws were unconstitutional.\textsuperscript{93} This delicate distinction was rejected by both Justice Scalia’s concurrence and Justice Blackmun’s dissent.

\textit{Scalia’s Concurrence: The Quest for Consistency}

Justice Scalia concurred with White’s opinion that the “willfully” requirement of Internal Revenue Code Sections 7201 and 7203 imposes criminal liability for the “voluntary, intentional violation of a known legal duty” as delineated by the \textit{Bishop/Pomponio} standard. He also agreed with White’s opinion that a defendant’s subjective belief that the tax statutes did not apply to him negated this “voluntary, intentional violation of a known legal duty.” Scalia claimed, however, that in order to negate liability, this subjective belief can rest not only upon the defendant’s interpretation of the tax statutes, but also upon his interpretation of the Constitution. In Scalia’s words, “[i]t is quite impossible to say that a statute which one believes unconstitutional represents a known legal duty.”\textsuperscript{94} Scalia thus rejected White’s

\textsuperscript{89} Id. In rejecting Cheek’s claim, Justice White’s opinion states that “the Murdock-Pomponio line of cases does not support such a position.” White’s reference to the Murdock-Pomponio line ignored Pomponio’s rejection of Murdock’s definition of willfulness.
\textsuperscript{93} 111 S. Ct. at 613.
\textsuperscript{94} Id. at 614 (Scalia, J., concurring).
delicate distinction, claiming that both of Cheek's two beliefs were valid defenses.

In interpreting the term "willfully," Scalia claimed that one possible definition would render the relevant tax offenses into specific intent crimes under the common law definition of specific intent, where violation of the law willfully "refers to consciousness of the act but not to consciousness that the act is unlawful." For such an act, ignorance of the law would never be an excuse. An alternative definition, according to Scalia, is that violation of the law willfully "refers to a consciousness of both the act and its illegality." This definition is more in line with White's opinion. But even according to this latter definition, any consciousness of an act's illegality must include not only a consciousness that the act is prohibited by some legal text, but also a consciousness that this text is binding. In Justice Scalia's view, it would be too complex an interpretation of the single word "willfully" to excuse one who violates a statute based upon a belief that the statute means something other than what it says, but not to excuse one who violates the statute based upon a belief that this statute is not valid law.

Scalia cited Marbury v. Madison, the famous 1803 Supreme Court decision in which Chief Justice John Marshall asserted the invalidity of laws that contradict the United States Constitution. In Scalia's view, if a person's subjectively honest belief in his lack of a legal duty is what is necessary to negate willfulness, then this willfulness is negated by a defendant's belief that the statute violates the Constitution no less than by his belief that the statute is inapplicable to him. Scalia therefore rejected the plurality's distinction between misinterpretation of the statutory laws and misinterpretation of laws other than statutes. He claimed that this distinction works a revolution in past practice, imposing criminal penalties on taxpayers who do not comply with Treasury Regulations that are in their view contrary to the Internal Revenue Code, Treasury Rulings that are in their view contrary to the regulations, and even IRS auditor pronouncements that are in their view contrary to Treasury Rulings.

Scalia's problem with the plurality opinion was not simply one of jurisprudential theory; he raised a public policy consideration as well. He claimed that the civil penalties imposed by the Internal Revenue Code for good faith mistakes provide sufficient incentive for taxpayers to interpret the law properly and comply with it. In Scalia's view, adding criminal penalties for misinterpreting the

96 See supra note 73 and accompanying text.
97 111 S. Ct. at 614.
98 5 U.S. (1 Cranch) 137, 176-80 (1803).
99 111 S. Ct. at 614.
complex federal tax system "is a startling innovation indeed."\(^{101}\)

Scalia's concurrence therefore seems to have strong appeal in terms of both theory and practical policy. The tax statutes are not only complex, but they also undergo frequent changes, and could more appropriately be classified, unlike criminal law statutes based upon common law, as *malum prohibitum* rather than *malum in se*.\(^2\) Further, a violation of the tax statutes is generally met with civil penalties and interest. It seems unnecessarily harsh for a taxpayer who has violated a tax statute out of ignorance or misunderstanding to be faced with criminal penalties in addition to his civil penalties. The *Cheek* plurality recognized that the tax statutes' inclusion of the word "willful" meant that a taxpayer who violates a statute out of such ignorance or misunderstanding ought not face criminal penalties, no matter how unreasonable that ignorance or misunderstanding would seem. Provided that the ignorance or misunderstanding is genuine and not feigned, civil penalties and interest are sufficient. Scalia argued for consistency. In his view, a taxpayer who underestimates his tax liability because of a misinterpretation of the Constitution is no more culpable than a taxpayer who underestimates his liability because of a misinterpretation of the Internal Revenue Code. Justice White's distinction between the two seems unjustified.

White's distinction may even be considered perverse: A taxpayer who has taken the effort of studying the tax statutes and come to the conclusion that they are unconstitutional is guilty of a willful violation when he fails to comply with those statutes. Yet a taxpayer who, through his own laziness, has kept himself ignorant of those statutes is not regarded as a willful violator. It seems most unfair to excuse one who is lazily ignorant of the law while punishing one who assiduously studies the law and makes a considered determination that it is unconstitutional. To excuse utter ignorance while punishing conscientious misinterpretation seems absurd.

Nevertheless, as White pointed out,\(^{103}\) one who knowingly violates a statute because he believes it to be unconstitutional has a responsibility to formally assert his belief as an excuse for his violation. If he knows he is violating the law but believes he has a legitimate reason for doing so, it seems appropriate to hold him responsible to come forth with that reason rather than hide his violation in the hope that it will not be discovered, holding his rationale in reserve in the event his violation is discovered. On the other hand, one who violates a statute because of ignorance or misinterpretation has no basis for realizing that he is making a statutory violation. This person cannot be held responsible for coming forth with the reasons for his ignorance or misinterpretation, as he has no way of knowing there is any need for him to do so.

\(^{101}\) 111 S. Ct. at 614.
\(^{102}\) See *supra* note 37.
\(^{103}\) See *supra* notes 87-90 and accompanying text.
Thus, there is nothing at all revolutionary about the Cheek plurality’s implication that criminal penalties would be imposed upon taxpayers who do not comply with Treasury Regulations that they feel are contrary to the Internal Revenue Code should these taxpayers fail to properly state their claim. White’s delicate distinction thus makes good sense.

Moreover, there is a fundamental difference between violating a law that one incorrectly interprets and violating a law that one mistakenly believes is unconstitutional. This is based upon a fundamental difference between congressional statutes and the Constitution. Clearly, it is every United States citizen’s duty to try to comply with the provisions of the United States Code, with the advice of counsel if necessary. Yet it is questionable whether it is the citizen’s role to determine the validity of congressional statutes under the United States Constitution. Traditionally, this role of judicial review is reserved for the courts.

It is ironic that the case where the Supreme Court first asserted this role of judicial review—Marbury v. Madison—was cited by Scalia as the justification for giving the power of constitutional review to citizens in general. As Chief Justice Marshall said in Marbury:

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. . . . [I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts. . . . Why otherwise does it direct the judges to take an oath to support it?105

Hence, an important difference exists: Judges and other public officials are bound by oath to support the Constitution; other individuals have merely the obligations of citizenship to obey the laws of the United States in general. Every citizen must obey the statutes of the United States when these statutes are the law. While it is true that, in the words of Marbury, “a law repugnant to the constitution is void,” a statute does not cease to be the law merely when an argument can be made for its unconstitutionality. Rather, a statute ceases to be the law when a federal court has declared it unconstitutional under its power of judicial review. In defense of the majority position, it does seem reasonable to regard a citizen who intentionally violates a statute that he believes to be unconstitutional to have violated that statute willfully, while at the same time not to apply the willful state of mind to a citizen’s intentional violation of a misinterpreted statute.

Blackmun’s Dissent: The Quest for Common Sense

Justice Blackmun’s dissent, unlike Justice White’s opinion and Justice

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104 See supra note 96 and accompanying text.
105 5 U.S. (1 Cranch) 137, 179-80 (1803).
106 Id. at 180.
Scalia's concurrence, tried to eschew legal niceties in favor of common sense. Blackmun rejected White's argument that Cheek should be acquitted because the complexity of the tax laws defeats the general rule that ignorance of the law is no excuse. Cheek's situation did not involve the complexity of the tax laws, but rather "the income tax law in its most elementary and basic aspect: Is a wage earner a taxpayer and are wages income?"^{107}

Justice Blackmun rejected Cheek's argument as being simply incredible. Blackmun stated that

it is incomprehensible to me how, in this day, ... any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he receives for his labor is not income, irrespective of a cult that says otherwise and advises the gullible to resist income tax collections. One might note in passing that this particular taxpayer, after all, was a licensed pilot for one of our major commercial airlines; he presumably was a person of at least minimum intellectual competence.^{108}

Blackmun accused the Court of encouraging taxpayers "to cling to frivolous views of the law in the hope of convincing a jury of their sincerity."^{109}

Unlike the opinions of White and Scalia, Blackmun's dissent adhered to the common law concept of specific intent. In Blackmun's view, tax evasion is a specific intent crime, and if a defendant had the specific intent to do the act of nonpayment of taxes, he possessed the requisite mental state for that crime — just as one's specific intent to steal the property of another would make him guilty of larceny.^{110} Blackmun's common sense viewpoint strikes a responsive chord in anyone who finds Cheek's claims preposterous and exasperating. Yet in not allowing ignorance of the law as an excuse, Blackmun implicitly did away with the Bishop/Pomponio willfulness standard as "a voluntary, intentional violation of a known legal duty." Blackmun further usurped the jury's role as factfinder in declaring Cheek's beliefs insincere.^{111}

Justice Blackmun also ignored the relative ease with which the prosecution could meet its burden of persuading the jury that a defendant's misinterpretation of

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^{107} 111 S. Ct. at 614 (Blackmun, J., dissenting).
^{108} Id. at 615.
^{109} Id.
^{110} See supra note 71.
^{111} Justice Blackmun, towards the end of his dissent, admitted that, as the district court stated, an objectively reasonable misunderstanding of the law constitutes a defense, adding that "petitioner should be grateful for this further protection, rather than be opposed to it." 111 S. Ct. at 615. The implication of Blackmun's statement is that, in his opinion, the law would more appropriately be one of strict liability, where even an objectively reasonable misunderstanding would not be a defense.
the law was not genuine, even under the subjective standard. As White said in the plurality opinion, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden in proving knowledge." When a defendant asserts beliefs as unconventional as those of Cheek, the prosecution's burden in proving knowledge for such a case is not great at all.

Finally, Blackmun's dissent ignored an important point mentioned in Scalia's concurrence—the existence of civil penalties for failing to file a tax return and pay taxes. These civil penalties would be imposed upon even the most sincere taxpayer who underpays his taxes as a result of misunderstanding the law. Cheek's behavior indicates that these civil penalties will certainly not deter all taxpayers from violating the tax laws. Yet a taxpayer who is not deterred by these civil penalties and who is as sincere and determined as Cheek evidently was is unlikely to be deterred by the addition of criminal penalties as well.

It would seem that to the extent that civil penalties provide a deterrent to misinterpreting the tax laws, criminal penalties are unnecessary. And to the extent that civil penalties are not sufficient deterrents, criminal penalties are similarly insufficient. Criminal penalties in a situation similar to Cheek thus appear to serve no useful purpose.

CONCLUSION

The Cheek holding, that ignorance or mistake of the law is an excuse in tax crimes, answers the question left unanswered by Murdock. A misinterpretation of the tax law is an excuse, even if not objectively reasonable. In order to constitute an excuse, a misinterpretation must be sincere, and not merely a disagreement of what the law should be. This holding is consistent with the "voluntary, intentional violation of a known legal duty" standard employed in Bishop and Pomponio.

Also, in accordance with this Bishop/Pomponio standard, no excuse is permitted for a belief that the law is unconstitutional. A statute that one correctly interprets but believes to be invalid is still a known legal duty until the courts specifically invalidate it. Marbury v. Madison put the power of judicial review in the hands of the courts, not those of individual citizens.

While the Cheek holding may seem somewhat strange, it is mandated by the Court's tradition of interpreting the term "willfully" in the tax statutes. A different result would be appropriate only if Congress were to remove the term "willfully"

112 111 S. Ct. at 612. See supra text accompanying note 85.
113 See supra note 68.
from the Internal Revenue Code. Without such a legislative change, the Cheek holding appears to be the final word on the matter.

Professor Yochum\textsuperscript{114} has vehemently argued against the allowance of ignorance as an excuse in tax crimes. He wrote, "The greatest threat to voluntary compliance comes when no public disdain is heaped upon the violator . . . People who fail to consider their tax obligations are felons and deserve the disrespect of us all."\textsuperscript{115} Cheek did consider his tax obligations, and came to the studied conclusion that he had none. Cheek's beliefs were clearly eccentric. Yet in fighting for his beliefs in the courts, he paid dearly in terms of personal inconvenience and legal fees. Ultimately, he was still required to pay his taxes, together with civil penalties and interest. In a case such as his, criminal penalties would be both unnecessary and useless. Moreover, whether or not criminal penalties are imposed on one such as Cheek, societal calumny serves no beneficial purpose in this kind of situation, and indeed, seems motivated by a cruel intolerance for those with different views.

\textsuperscript{114} See supra notes 6 & 45.

\textsuperscript{115} Yochum, supra note 6, at 235.