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THE DEATH OF A MAXIM: IGNORANCE OF LAW IS NO EXCUSE (KILLED BY MONEY, GUNS AND A LITTLE SEX)

“Ignorance of the Law excuses no man; not that all men know the law, but because it’s an excuse every man will plead, and no man can tell how to refute him.”¹

MARK D. YOCHUM*

Ignorance of the law is no excuse² for crime except when the statute that criminalizes the behavior allows ignorance as an excuse.³ This maxim has played a fundamental role in the interpretive process of criminal law, determining the meaning of criminal statutes.⁴ Another fundamental principle is the belief in the legislature’s rationality. That is, the legislature speaks rationally through its choices, and therefore, any ambiguity may be construed as sensible. This notion colors all interpretive techniques from grammar to legislative history. However, the actual existence of the rational legislature is often belied by a history of errors, ellipses, and oddities produced by these bodies. Recognizing that the monolithic, legislative, rational writer is a myth, it is nonetheless theoretically beneficial because of its salutary

¹ John Selden (1584-1654).

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² “Ignorance of the law is no excuse” is taken from the latin phrases *ignorantia legis neminem excusat* or *ignorantia juris non excusat*.

³ For example the ancient crime of larceny has a legal knowledge mental state element. If the actor actually believes the property taken is his, that legal error vitiates the crimes. See *State v. Quisenberry*, 639 S.W.2d 579, 583 (Mo. 1982) (discussing defense of claim of right to negative mental element of crime of larceny); *State v. Guice*, 262 N.J. Super. 607, 615 (1993) (discussing statutory mistake of law defense); *Commonwealth v. Meinhart*, 173 Pa. Super. 495, 498-99 (1953) (discussing statutory interpretation of crime of larceny).

⁴ See *People v. McLaughlin*, 245 P.2d 1076, 1080 (Cal. Ct. App. 1952) (stating that “no doctrine is more universal or of more ancient lineage in the law than ignorance of the law excuses no one. That doctrine still strides the world.”); *People v. Marrero*, 69 N.Y.2d. 382, 384 (N.Y. 1987) (noting that “the starting point of our analysis is that . . . ignorance of the law is no excuse”).

effect in the minimization of judicial legislation. The maxim that ignorance of the law is no defense is also, in part, a product of the belief in legislative rationality: the law written by a rational legislature must be knowable.

Whether one is ignorant of the law is a question of one's mental state. The origin of crime relates to the philosophy of sin and natural law which have historically precluded claims of ignorance. As the story has been told, evil is fundamentally known. The classical criminal law range of mental states⁵ attempts to proscribe a world where the more evil minded should be more severely punished for a given act than the less evil minded doing the same act. Evil mindedness exists in degrees which range from acts of intention, recklessness, negligence and mindlessness.⁶ However, certain crimes are defined by the act only, and do not include a state of mind. This concept of evil is rendered latinate, in part, with the quaint notion of *mala in se* or *mala prohibita* crimes.⁷ When a crime is evil in itself, we are supposed to know so and, therefore, not do it. Our knowledge of the crime is inherent in our humanity, justice giving some slack to the insane, but not the stupid. We all know how to sin. Ignorance that murder is a crime is no excuse for the crime of murder.

When a crime is merely evil because Man has called it evil, there must be sufficient notice of the crime to be condemned in a civilized society. Sufficient notice can be established by constitutional imperatives, rendering a vague law less so, or mandating that the conduct must necessarily produce some level of feeling in the actor that his acts may be regulated. Who is worse or more deserving of punishment: a man in possession of an ille-

⁵ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4 (2d ed. 1986). Numerous mental states exist in the criminal law in varying degrees of severity. *Id.* For example, acts of intention, recklessness, and negligence. *Id.*; see also Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1986). The Model Penal Code, however, has reduced "nearly eighty miscellaneous culpability terms to five carefully defined levels": purposely, knowingly, recklessly, negligently and strict liability. *Id.*

⁶ For extended discussion of this issue, see *United States v. Cordoba-Hincapie*, 825 F.Supp. 485, 489 (E.D.N.Y. 1993) (discussing requirement of proof of *mens rea* as basis for criminal punishment).

⁷ See LAFAVE & SCOTT, *supra* note 5, at § 1.6 (stating *mala in se* crimes are wrong in themselves or inherently evil, while *mala prohibita* crimes are only wrong because legislature has prohibited them); see also *State v. Horton*, 139 N.C. 588, 588 (1905) (defining *malum in se* crimes as those which are "naturally evil as adjudged by the sense of a civilized community" and *malum prohibitum* crimes as those which are wrong only because statute says so).

gal automatic weapon but does not know the gun is illegal or automatic; a man who has an illegal automatic weapon but does not know that possession is illegal; a man who knows he has committed a crime by possessing the gun? The ancient practice of paring evil to match a punishment seems out of place and out of mind in modern crimes which seek ultimately to avoid certain behaviors or risks.⁸

The vagueness of criminal statutes creates additional problems. First, due process is not afforded a defendant charged with an unknown crime, thereby offending our collective sense of fairness and respect for law.⁹ Of course, determining what is sufficiently vague to qualify for relief on this ground is a subjective determination. Second, vague crimes are useless endeavors because of their inability to achieve deterrence.¹⁰ If the objective is to mold conduct, how can a criminal statute work if the putative criminal does not know the conduct is prohibited? The language of a statute may be vague, although the general subject matter may afford fair notice of regulation, or it may be precise in its prohibition, but no one would know that the conduct is subject to regulation. Finally, vague laws might be saved by writing or construing such laws to include knowledge of illegality of the conduct by the actor as an element of the crime. How can a

8 See DALE SEREST, *CONSCIENCE AND COMMAND* 70 (1994) (noting that individuals choose to do evil, believing that it is good); see also HERBERT LIONEL HART, *PUNISHMENT AND RESPONSIBILITY* 136 (1968) (discussing stupidity and evil).

9 See LAFAYE & SCOTT, *supra* note 4, at § 2.3. Originally at common law, there was no constitutionally based vagueness doctrine. *Id.* Courts simply refused to enforce laws which they considered to be too uncertain; vagueness was deemed to exist when "men of common intelligence. . . necessarily [had] to guess at its meaning and differ[ed] as to its application." *Id.* Today, however, the void-for-vagueness doctrine is deeply entrenched in 5th and 14th amendment due process principles. *Id.* "Undue vagueness in the statute will result in its being held unconstitutional, whether the uncertainty goes to the previous persons within the scope of the statute, the conduct which is forbidden, or the punishment which may be imposed." *Id.*

10 See *id.* at § 1.5. "The broad purposes of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable." *Id.* "Since criminal law is framed in terms of imposing punishment for bad conduct, rather than of granting rewards for good conduct, the emphasis is more on the prevention of the undesirable than on the encouragement of the desirable." *Id.*; see also FRANKLIN E. ZIMRING, *PERSPECTIVES ON DETERRENCE* 3 (1971).

The theory of simple deterrence is that threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened. Many individuals who are tempted by a particular form of threatened behavior will, according to this construct, refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat.

Id.

crime be vague if to be guilty of it you must know you have committed the crime?

The maxim that ignorance of law is no excuse justifiably achieved maxim status for several reasons. It is believed that rational enforcement and publication of law contribute to voluntary compliance which, therefore, leads to a more ordered society. Force of arms and coercion are unnecessary tools for the rational sovereign. Automatically crimes are rendered sensible because the regulation of conduct is rational or at least consistent with social mores and absent political treason, formal crimes seemed simpler. General explanations have been offered in support of the maxim.¹¹ Proponents have historically argued that the rule is necessary because proof of knowledge of legality would be difficult¹² and society must presume such knowledge for an ordered state.¹³ The rule encourages individuals to explore their obligations.¹⁴ Moreover, the maxim serves as an interpretive tool and drafting form: with the maxim, there is no need to be explicit that ignorance of law is not an excuse.¹⁵

11 See Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 689 (noting five defenses of maxim: administrative practicality; deterrence; fundamental belief that all men are presumed to know law; argument that such ignorance is inherently blameworthy; and failure to recognize maxim would undermine court's role); see also JOHN AUSTIN, LECTURES ON JURISPRUDENCE, LECTURE XXV 238-39 (R. Campbell ed. 1875) (arguing "that if ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable"); Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 36-37 (1957) (stating that differing types of criminal statutes require judicial application in order to properly distinguish between crimes); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 419 (1958) (emphasizing ignorance itself is blameworthy). But see GLANVILLE WILLIAMS, THE CRIMINAL LAW, THE GENERAL PART 289 (2d ed. 1961) (noting that proposition that every man is presumed to know law is now generally rejected as it is insufficient foundation for maxim).

12 See Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 646-48 (1941) (noting that pragmatic bases for doctrine lies in fact that, absent such presumption, administration of justice would be virtually impossible); see also LAFAVE & SCOTT, *supra* note 5, at § 5.1 (outlining arguments in favor of maxim). But see OLIVER WENDELL HOLMES, THE COMMON LAW 48 (Little, Brown, and Co. 1909) (1881) (discounting defense of doctrine by recommending remedy which would shift burden of proof of proving ignorance from court onto lawbreaker); Cass, *supra* note 11, at 689 (noting that defense premised on administration of justice argument was successfully attacked by Holmes and is no longer raised).

13 See HOLMES, *supra* note 12, at 48-51 (explaining why ignorance of law can be no excuse).

14 See Hart, Jr., *supra* note 11, at 401 (examining goals of criminal law).

15 See generally Hall, *supra*, note 11, at 14 (distinguishing mistake or ignorance of fact from ignorance of law; concluding that courts should determine if crimes can be excused due to ignorance of law). But see WILLIAMS, *supra* note 11, at 289 (stating that rule can cause hardship); Cass, *supra* note 10, at 689-99 (noting harshness of rule when ap-

Requiring proof of knowledge of illegality, especially in tax crimes, creates procedural difficulties. Prosecution becomes more difficult, but the extent of potential difficulty is debatable. The ridiculousness of a claim of ignorance and the wisdom of juries is frequently seen as sufficient protection against false claims of confusion or delusion.¹⁶ Nonetheless, claims of ignorance may create a hook for juries to acquit where there is confusion about complex areas of the law, dealing with taxes or money laundering, where ignorance of the law may be an excuse.¹⁷ Further, crimes requiring proof of such knowledge carry the implication that ignorance is to ones benefit.¹⁸

The current increase in laws in which knowledge of illegality is an element of the crime, is a product of both judicial and legislative sensitivity to perceived complexity and distrust of institutions. Further, careless draftsmanship has often created an opening for an interpretation which negates the maxim. Nonetheless the wide array of cases which now find ignorance of law as an excuse convey a feeling that the law is intrusive, complex, secretive, loophole-filled, and enforced by malevolent agencies with extra-legal axes to grind, such as the IRS, BATF, INS, or even the Department of Labor. Consequently, the maxim is no longer treated as an important interpretive device. In cases dealing chiefly with money, drugs and sex, the use of the old maxim took a back seat¹⁹ to the modern techniques of gram-

plied to lesser regulatory crimes not generally considered to be inherently immoral); Henry W. Seney, "When Empty Terrors Overawe"— *Our Criminal Law Defenses*, 19 WAYNE L. REV. 1359, 1364-76 (1973) (detailing reasons why maxim is appropriate).

¹⁶ See WILLIAMS, *supra* note 11, at 291.

If a normal adult fires at another at point-blank range, his defense that he did not intend to kill would be received with incredulity, and so would a defense that he did not know murder to be a crime. On the other hand, if he shoots another when hunting at dusk, his defense that he did not intend to kill a man might be believed.

Id.

¹⁷ See generally Dylan Lager Murray, *Plain English or Plain Confusing?*, 62 MO. L. REV. 345, 345-47 (1997) (noting existence of barriers to juror comprehension).

¹⁸ See HOLMES, *supra* note 12, at 48 (stating "the true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public Policy sacrifices the individual to the general good. . . 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 . . . and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."); WILLIAMS, *supra* note 11, at 290 (quoting belief that reason for rule was that in its absence, those who remained in perpetual ignorance would be rewarded).

¹⁹ See Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. §6982*, 6 TUL. ENVTL. L.J. 187, 191 (1993) (arguing that claim that ignorance of

marians and civil libertarians.²⁰ As a result, many new crimes allow ignorance of the law as an excuse.

*Cheek v. United States*²¹ represents the modern popularization of the notion that ignorance of law might excuse criminal conduct. In *Cheek*, the Supreme Court reaffirmed that subjective actual knowledge of illegality was an element of the crime of "willful" tax evasion²² pursuant to I.R.C. § 7201.²³ John Cheek argued that he sincerely believed that the tax laws permitted him to claim sixty dependency allowances, that wages were not income, and that the Sixteenth Amendment was unconstitutional.²⁴ The Seventh Circuit recognized that only objectively reasonable misunderstandings of the law serve to negate willfulness.²⁵ The trial court consequently withdrew from the jury's deliberation consideration of whether Cheek's actions were reasonable. The Supreme Court reversed the conviction, reaffirming that, in tax crimes, the word "willfully" means with actual subjective knowledge of the illegality of the conduct. Therefore,

law is no defense has become overshadowed by notion that criminal liability should be premised on blameworthy conduct); Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392-93 (1986) (noting that "the principle that ignorance of the law is no excuse, long thought to be basic to criminal law, is no longer appropriate when criminal law applies in surprising ways to otherwise ordinary behavior"). Compare *Hamling v. United States*, 418 U.S. 87, 119-24 (1974) (applying common law rule to criminal statute), and *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (interpreting ambiguous criminal environmental statute by applying maxim that ignorance of law is no excuse), with *Liparota v. United States*, 471 U.S. 419, 434 (1985) (discarding maxim in favor of more persuasive argument that criminal conduct must be premised on finding of culpability).

²⁰ See generally Roger Colivaux, *What is Law? A Search for Legal Meaning and Good Judging Under a Textualist Approach*, 72 IND. L.J. 1133, 1133 (1997) (noting various methods of statutory interpretation and focusing particularly on growing popularity of Justice Scalia's Textualist approach); Vitiello, *supra* note 19, at 190 (noting that significant number of commentators, courts and legislators strongly support belief that criminal sanctions should be reserved for culpable individuals).

²¹ 498 U.S. 192 (1991).

²² See *id.* at 205-206.

²³ I.R.C. § 7201 (1997) provides:

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 and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Id.

²⁴ See 498 U.S. at 194-95.

²⁵ See, e.g., *United States v. Buckner*, 830 F.2d 102, 123-24 (7th Cir. 1987) (noting that arguments challenging constitutionality of federal government's power to tax under Sixteenth Amendment are "tired arguments" not considered to be objectively reasonable); *Coleman v. CIR*, 791 F.2d 68, 70 (7th Cir. 1986) (noting that persons wages may be taxed and penalty applied since this has become frivolous argument).

testing the actor's beliefs for reasonableness improperly relieves the government of its burden to prove all elements of the crime.

Although *Cheek* was simply a restatement of old tax crime principles,²⁶ it was immediately treated as headline news.²⁷ In tax prosecutions, *Cheek* was raised to reexamine and unsettle notions of proof, such as admissibility of evidence used to bolster a defendant's claim of confusion²⁸ or use of the "ostrich" instruction²⁹ to infer knowledge of illegality when the defendant had purposely avoided it.³⁰ Moreover, the *Cheek* decision raised the question as to the mental state required to impose civil tax penalties which contained the word "willfully".³¹

Fundamentally *Cheek* presented nothing new, its conclusion was bound by a series of old precedents. The Court, in reviewing that history, reiterated that the construction of "willfully" was the product of the tax code structure and judicial fear of indiscriminate prosecutions of crimes produced by a complex and arcane statute.³² *Cheek* did not reconsider the status of the maxim that ignorance of law is no excuse, but scrutinized non-traditional crimes seeking to find reasons to avoid the implica-

26 See *United States v. Pomponio*, 429 U.S. 10, 11 (1976) (softening impact of old common law principle that ignorance of law is no excuse by requiring finding of evil motive for valid tax crime conviction). See generally *United States v. Bishop*, 412 U.S. 346, 360 (1973) (noting that willful means "evil intent" and is necessary element).

27 See Tony Mauro, 'Sincere' Tax Evaders May Skip Jail, USA TODAY, Jan. 9, 1991, at 1 (stating that Supreme Court's ruling in *Cheek* allows "sincere" tax evaders to escape jail time).

28 See, e.g., *United States v. Powell*, 936 F.2d 1056, 1063 (9th Cir. 1991) (attempting to use Supreme Court's holding in *Cheek* to undermine trial court's prohibition of evidence that might have enabled jury to understand sincerity of plaintiff's confusion regarding statute).

29 See LAFAVE & SCOTT, *supra* note 5, at § 10-04. The doctrine of willful blindness or deliberate ignorance exists in situations where "a person is aware of a high probability of the existence of a fact in question, and he deliberately fails to investigate in order to avoid confirmation of the fact." *Id.* Additionally, "an instruction to the jury in this regard is sometimes called the 'ostrich instruction.'" *Id.*

30 See *Mattingly v. United States*, 924 F.2d 785, 790-91 (8th Cir. 1991) (attempting to use *Cheek* to undermine jury charge of willful blindness by arguing that actual knowledge not "willful blindness" is required under § 6701). See generally J. Andrew Hoerner, "Cheeky" Defenses in *Vogue*, Says Bruton, 54 TAX NOTES 934, 934 (1992) (noting that Justice Department has enormous amount of cases pending as result of *Cheek* decision).

31 See *Williams v. United States*, 931 F.2d 805, 810 (11th Cir. 1991) (using *Cheek* to reexamine requisite mental state required for imposing civil tax penalty in statute containing "willfully"); see also Mark D. Yochum, *Cheek is Chic Ignorance of the Law Is an Excuse for Tax Crimes—A Fashion That Does Not Wear Well*, 31 DUQ. L. REV. 249, 252 (1993) (analyzing cases decided in wake of *Cheek* in which "willfully" and corresponding mental state were addressed).

32 See *Cheek v. United States*, 498 U.S. 192, 204-05 (1991) (examining case construing willfulness requirement in criminal provisions of Internal Revenue Code to require proof of knowledge of law).

tion of the maxim. The complexity, at least as perceived and articulated by judges, of crimes regulating finance and the movement of money, motivates interpretation of statutes in a fashion contrary to the maxim.

To make knowledge of illegality a crime, the legislatures have never used plain English to tell us that an anti-maxim mental state is required. Rather courts find this anti-maxim mental state where the statute includes the troublesome word "willfully". *Spies v. United States*³³ and *United States v. Murdock*³⁴ laid the foundation for the *Cheek* decision. In *Spies*, the defendant admitted that he had sufficient income to pay his income taxes and file a return, but did not do so.³⁵ He was subsequently convicted of the felony of willful income tax evasion.³⁶ The opinion suggests that he was a good man, though mentally ill when the tax return had to be filed.³⁷ The trial court denied *Spies*' requested instruction that "willful" within the statute required a more affirmative act than simple inactivity or failure to act.³⁸ Faced with tax code provisions containing the term "willfully," the Court unsuccessfully looked to legislative history.³⁹ The Court concluded that in the hierarchy of offenses, a felony must have a greater or more evil mental state than a misdemeanor.⁴⁰ "The question here is whether there is a distinction between the acts necessary to make out the felony and those which make out the misdemeanor. . . ." ⁴¹ On appeal the Supreme Court held that *Spies* had not been sufficiently evil and his evasion conviction was reversed.⁴²

The *Spies* distinction does not impel the conclusion that subjective knowledge of illegality is required, merely that there be some difference in the amount of evil displayed. *Spies* intones that the law is "complicated" and its purpose is not "to penalize frank difference of opinion or innocent errors made despite rea-

33 317 U.S. 492, 497-500 (1943) (discussing Court's interpretation of word "willfully").

34 290 U.S. 389, 395 (1933) (illustrating necessary belief to be guilty of "willfully" committing a crime).

35 See *Spies*, 317 U.S. at 493.

36 See *id.* at 492-93.

37 See *id.* at 493.

38 See *id.* at 494.

39 See *id.* at 495.

40 See *Spies*, 317 U.S. at 497-98.

41 See *id.* at 497.

42 See *id.* at 500.

sonable care.”⁴³ *Spies*, however, does not rest on the need for an affirmative act as opposed to simple neglect. The Court noted that “[m]ere voluntary and purposeful, as distinguished from accidental, omission . . . might meet the test of willfulness.”⁴⁴ The Court concluded that “willfulness” included some element of “evil motive” in light of the complexity of the statute and the structure of the Internal Revenue Code.⁴⁵

In *Murdock*,⁴⁶ the court reviewed the meaning of the term “willfully” in the ancient misdemeanor, the willful failure to supply information.⁴⁷ *Murdock* was called before a revenue agent and refused to answer, fearing self-incrimination.⁴⁸ He requested an instruction to the jury that if “his refusal to answer questions [was] given in good faith and based upon actual belief,” then his violation was not willful.⁴⁹ The trial court denied the instruction based on its interpretation that “willful” meant “voluntarily” and stated that in its opinion *Murdock* was guilty.⁵⁰

After noting that the word “often” means intentional rather than accidental, the Court stated that it “generally” means “bad purpose.”⁵¹ The Court cited several nineteenth century opinions enumerating various mental states including: “without justifi-

⁴³ See *id.* at 496.

⁴⁴ See *id.* at 497-98.

⁴⁵ Compare *Spies*, 317 U.S. at 498, with *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (finding that “willful” in the context of tax statute meant only voluntary intentional violation of known legal duty rather than finding of “evil motive”), and *United States v. Bishop*, 412 U.S. 346, 346 (1973) (stating that ‘willfully’ connotes voluntary, intentional violation of known legal duty and evil motive).

⁴⁶ 290 U.S. 389 (1933).

⁴⁷ See *id.* at 391-394.; see also 26 U.S.C. § 1265 (1926). “Any person required under this Act to pay any tax, . . . who willfully fails to pay such tax, make such return, keep such records, or supply such information, . . . shall . . . be guilty of a misdemeanor . . .”

⁴⁸ See *Murdock*, 290 U.S. at 393. *Murdock* refused to answer the questions of the revenue agent surrounding deductions taken on his 1927 and 1928 income tax returns for money paid to others out of fear of self-incrimination in possible future prosecutions under state statutes. *Id.* See generally 21 AM. JUR. 2D. *Criminal Law* § 937 (1981) (discussing failure to answer questions in fear of self incrimination).

⁴⁹ See *Murdock*, 290 U.S. at 393 (holding trial court erred in stating opinion that respondent was guilty beyond reasonable doubt).

⁵⁰ See *id.* The trial judge stated:

So far as the facts are concerned in this case, Gentlemen of the Jury, I want to instruct you that whatever the Court may say as to the facts, is only the Court's view. You are at liberty to entirely disregard it. The Court feels from the evidence in this case, that the government has sustained its burden and has proved that the defendant is guilty in manner and form as charged beyond a reasonable doubt.

Id.

⁵¹ See *id.* at 394 (quoting *Felton v. United States*, 96 U.S. 699 (1877) (stating that “willful “means not merely ‘voluntary’, ‘but with a bad purpose”)).

able excuse"; "stubbornly, obstinately, perversely"; "done without ground for believing it is lawful"; and "careless disregard [of] the right to so act."⁵² Clearly, this range included not just subjective knowledge of illegality but also that an actor must have reason to know of the criminality of his conduct. One may compare this later notion with the minimal requirements of due process or the rules against vague crimes. The Court distilled this morass to conclude that "willfully," embedded in a revenue act, meant "evil motive,"⁵³ and declared that "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability, should become a criminal."⁵⁴

Should one go back as far as England and Rome to find that ignorance of law is not an excuse for crime?⁵⁵ The Nineteenth Century code words "evil motive" reveal that knowledge of illegality is an element of the crime. The words "evil motive" were not part of the statutes but were derived by courts from the word "willfully". The American genesis of this occasional interpretation began with a series of cases dealing with the obstruction of the mail.

In *United States v. Barney*,⁵⁶ citizen Barney owned a livery stable. The mailman on horse stopped at Barney's place along the Susquehanna River.⁵⁷ Barney fed the horses, but the mailman did not pay for the feed.⁵⁸ Barney would not let the horses go and held the animals as a lien for payment.⁵⁹ Barney was charged with having "willfully obstructed the passage of the public mail."⁶⁰ The court concluded that Barney had no right to a

⁵² See *id.* at 394-95 (citations omitted).

⁵³ See *id.* at 395.

⁵⁴ *Murdock*, 290 U.S. at 396. See *Citron v. Citron*, 722 F.2d 14, 17 (2d Cir. 1983). Federal Wiretapping Statute containing willfully requires "a voluntary intentional violation and perhaps also a reckless disregard of, a knowledge of legal duty." *Id.*; see also *Malouche v. J.H. Management Co., Inc.*, 839 F.2d 1024, 1026 (4th Cir. 1988) (holding civil liability for alleged wiretapping requires proof of criminal "willfulness").

⁵⁵ The principle that ignorance of the law is not an excuse was originally derived from Roman law. See *Cass supra* note 11, at 685. "Roman law did not allow ignorance as a defense to actions under the *jus gentium*, the law derived from the common customs of the Italian tribes and thought to embody the basic rules of conduct any civilized person would deduce from proper reasoning." *Id.* Ignorance of the less common-sense *jus civile* was a defense to woman, males less than 25 years of age, soldiers, peasants, and persons of small intelligence. *Id.*

⁵⁶ 24 F. Cas. 1014, 1015 (D.C. D. Ma. 1810).

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ *Barney*, 24 F. Cas. at 1015.

lien on the horses and had to look to Congress for payment.⁶¹ Importantly, the court concluded the statute did not permit the defense of justification.⁶² That is, even though Barney may have actually believed his conduct was lawful, the statute prohibited intentional obstruction of the mail.⁶³

In *United States v. Hart*,⁶⁴ John Hart, constable of Philadelphia, pulled over a mail carrier for recklessly driving a mail stage. Hart was also charged with willful obstruction of the mail.⁶⁵ The court concluded Hart had a defense with the entire logic of the opinion set in a rhetorical question: "Suppose the officer had a warrant against a felon . . . in the stage, or that the driver should commit murder in the street . . .; could it be contended that the sanctity of the mail would extend to protect those persons against arrest because a temporary stoppage of the mail would be the consequence?"⁶⁶

What is the difference between these two cases? Their similarity may be that neither actor had knowledge of the illegality of his act. It may be, however, that one court was trying to create an affirmative defense of justification rather than explicating that which is an element of the offense.⁶⁷

In *United States v. Harvey*,⁶⁸ James Harvey, a Maryland constable, briefly detained a mail carrier to serve him with a warrant in an action in trespass. Harvey did not know that Congress had prohibited willful stoppage of the mail even when the detention was brief.⁶⁹ The matter came before Justice Taney.⁷⁰

⁶¹ See *id.* at 1015-16.

⁶² See *id.*

⁶³ See *id.* at 1016. The court notes that to so interpret "willfully" to add a defense would be an unwarranted assumption of legislative power. *Id.*

⁶⁴ 26 F. Cas. 193 (Cir. Ct. D. Pa. 1817).

⁶⁵ See *id.* at 194.

⁶⁶ See *id.* at 194-95.

⁶⁷ See, e.g., MODEL PENAL CODE § 3.03 (1974). (1) Which provides that "conduct is justifiable when it is required or authorized by . . . (a) the law governing the execution of legal process . . . or (e) any other provision of law imposing a public duty." *Id.* This defense is available if the actor "believes" he is justified. See generally LAFAYE & SCOTT, *supra* note 5, at § 5.5 (elaborating on justification defense as found in Model Penal Code § 3.03).

⁶⁸ *United States v. Harvey*, 26 F. Cas. 206, 207 (Cir. Ct. D. Ma. 1845) (finding warrant in civil action against mail carrier is no justification for officer obstructing passage of mail).

⁶⁹ See *id.* at 206.

⁷⁰ See *id.*; see also *United States v. Kirby*, 74 U.S. 482, 485 (1868) (explaining conflict between decisions in *Hart* and *Harvey*); *United States v. Sears*, 55 F. 268, 270 (1893) (attempting to explain *Harvey* justification).

Justice Taney noted the conflict between *Barney* and *Hart* and concluded that the *Barney* decision should be followed as the controlling law.⁷¹ The warrant was not considered a justification, and as Harvey purposefully caused a delay, he was guilty of the crime.⁷² Again, there is a distinction between the defense, the serving of civil process, and the defense of criminal process in *Hart*.⁷³

The preceding cases seem to provide the early foundation for the confusion surrounding the interpretation of the word "willfully" or the maxim in the early Nineteenth Century. These cases provide the background to a discussion of the seminal decision in *United States v. Three R.R. Cars*.⁷⁴ The discussion of Judge Hall in this opinion laid the foundation for the modern interpretation of "willfully".

In *Three R.R. Cars*, railroad cars full of flour, crossed into the United States from Canada.⁷⁵ The cars were sealed in Canada by the consul, allowing them to cross the border at Niagara without inspection.⁷⁶ Before the cars arrived at the American destination, the seals were broken and removed.⁷⁷ To "willfully break" such a seal was a felony⁷⁸ and a car with a broken seal was forfeit.⁷⁹ A special verdict found that the seals were removed by an employee without knowledge that the seals were present and without illegal purpose.⁸⁰

Judge Hall noted that "willfully" is a troublesome word⁸¹ and defined it as "[g]overned by will without yielding to reason; obstinate; perverse; inflexible; stubborn; refractory."⁸² The term "subjective knowledge of illegality" was not included in the definition. In the face of ambiguity, he noted that the intention of

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *Kirby*, 74 U.S. at 482 (holding statute applied to those who know acts performed will have effect to act with intention).

⁷⁴ 28 F.Cas. 144, 147 (N.D.N.Y. 1868) (stating it must be shown that defendant had both intention and knowledge to be found guilty).

⁷⁵ See *id.* at 145.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *Three R.R. Cars*, 28 F.Cas. at 145.

⁸⁰ See *id.*

⁸¹ See *id.* at 146.

⁸² See *Id.*

the legislature must govern.⁸³ However, when the suggestion was made that the legislature's intent should be reflected by the maxim that ignorance of the law is no excuse, he disagreed.⁸⁴ Judge Hall concluded that Congress could not have intended to classify this act as a felony when "committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper."⁸⁵ The court identified three modern factors to be considered in the anti-maxim interpretation of "willfully": whether the act or crime is a regulatory offense; the punishment is a felony; and if there is a plausible chance or actual existence of a subjective belief in rectitude.

Judge Hall recognized that his interpretation, that ignorance of law excused the crime, varied with Chief Justice Taney's view in *Harvey*⁸⁶ and concluded that Taney's opinion lacked weight because it was made in "the hurry of a circuit."⁸⁷ Judge Hall noted that *Harvey* must be wrong as Congress could not have intended to punish a public official "honestly endeavoring to do what he really believed to be his official duty."⁸⁸ Judge Hall argued "willfully" was sometimes inserted by Congress into statutes to prevent the injustice which might result from "strict application" of the maxim "in opposition to the real truth of the case."⁸⁹ The court in *Three R.R. Cars*, by interpreting "willfully" as requiring proof of knowledge of illegality,⁹⁰ was apparently confining that reading to what are pejoratively termed regulatory offenses, almost always dealing with money or taxes.⁹¹

⁸³ See *id.*

⁸⁴ See *Three R.R. Cars*, 28 F.Cas. at 146.

⁸⁵ See *id.*

⁸⁶ See *id.* at 146-47.

⁸⁷ See *id.* at 147.

⁸⁸ See *id.*

⁸⁹ See *Three R.R. Cars*, 28 F.Cas. at 147.

⁹⁰ See *Felton v. United States*, 96 U.S. 699, 701-04 (1877). In *Felton v. United States*, the Supreme Court reversed a judgment assessed for knowingly and willfully tampering with certain distillery apparatus because there was no proof defendant knew the apparatus was inadequate. *Id.* As to "willfully", he quoted the ancients that it meant "with a bad purpose" or "evil intent." *Id.*

⁹¹ See Stephen B. Chapman, *Are Obnoxious Wastes More Like Machine Guns or Hand Grenades?: Mens Rea Under the Resource Conservation and Recovery Act After Staples v. United States*, 43 U. KAN. L. REV. 1117, 1118 (1995). Regulatory or public offenses are offenses created when the legislatures incorporate a form of strict liability into criminal sanctions intended to enforce regulations enacted to promote the public good. *Id.* These crimes: regulate dangerous devises or products; heighten duties of those involved in industries affecting the public interest/welfare; and depend on no mental state but consist of only forbidden acts or omissions; see also *Staples v. United States*, 511 U.S.

The Supreme Court in the late Nineteenth Century reviewed a series of cases from the world of banking which were already the subject of federal regulation. In *Potter v. United States*,⁹² Potter, as an officer of the Maverick National Bank, certified a check for payment when there were insufficient funds on deposit for the drawer.⁹³ He was convicted of willfully violating banking laws which required that such funds to be present.⁹⁴ Potter apparently knew that the deposits were insufficient, but believed that the check would be covered by a loan or through daily deposits.⁹⁵ The trial court refused to hear this evidence, holding that the statute simply prohibited purposeful overdraft certification and that Potter's intentions were not relevant to the criminality of his conduct.⁹⁶

The Supreme Court reversed, interpreting "willfully" in a two step process.⁹⁷ The statute imposed a penalty on the willful violation of the banking laws and for certifying certain checks before the balances had cleared certain books.⁹⁸ "Willfully" appeared in the first part of the statute and not the second.⁹⁹ The Court, thinking of Congress as rational draftsmen, concluded that the difference must be of significance.¹⁰⁰ "Willfully" must

600, 628 (1994) (Stevens, J. dissenting) ("[P]ublic welfare crimes" exist which place upon corporations strict liability standard).

⁹² 155 U.S. 438 (1894).

⁹³ See *id.* at 441-42.

⁹⁴ See *id.* In *Potter*, Rev. St. § 5208 provided that it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. *Id.* at 439. Section 13 of 22 Stat. 166 provided that any "willful" violation of § 5208 was punishable as a misdemeanor. *Id.*

⁹⁵ See *id.* at 441-42.

⁹⁶ See *id.* at 444-47.

⁹⁷ See *Potter*, 155 U.S. at 443-48; see also *Ratzlaf v. United States*, 510 U.S. 135, 135-36 (1994) (holding "willfulness" requirement is read by courts to require both knowledge and specific intent).

⁹⁸ See *Potter*, 155 U.S. at 446.

⁹⁹ See *id.* at 446-48. In reaching its decision, the Court applied a grammarian technique of interpretation. *Id.* at 443-48. The Court stated:

while it is true that care must be taken not to weaken. . . statutes designed to protect depositors. . . against the wrong doing of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty, and in sincere belief that no wrong was being done, criminal offenses, and subjecting them to severe punishments.

Id. at 447.

¹⁰⁰ See *id.* at 445-46. See generally Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1177-78 (1995) (explaining *mens rea* as application of concept of evil mind, citing *Potter* as example in banking crimes arena).

mean something more than voluntarily; it must mean evil motive.¹⁰¹ Justice Field stated:

While it is true that care must be taken not to weaken . . . statutes designed to protect depositors . . . against the wrong doing of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty, and in sincere belief that no wrong was being done, criminal offenses, and subjecting them to severe punishments.¹⁰²

It may be noted, at least with respect to the concern for "severe punishments" that the offense in Potter was merely a misdemeanor. Nonetheless, since knowledge of illegality was an issue, the evidence of the origin of Potter's motive should have been admissible. His conviction was thus reversed.¹⁰³

The anti-maxim interpretation of the word "willfully" was minuscule, compared to the innumerable cases which followed maxim and interpreted "willfully" to mean simply an intentional act. In *American Surety Co. of N.Y. v. Sullivan*,¹⁰⁴ Judge Learned Hand reviewed the action of Sullivan, a sea captain, against a consul for willful neglect of his duties for failure to issue a visa. Through a legal confusion it appears that the consul did not issue the visa and was held liable for damages.¹⁰⁵ In affirming the award, Judge Learned Hand noted:

The word willful even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he supposes that he is breaking the law.¹⁰⁶

¹⁰¹ See *Potter*, 155 U.S. at 446.

¹⁰² See *id.* at 447.

¹⁰³ *Spurr v. United States*, 174 U.S. 728, 735 (1899) (Brown and McKenna, JJ., dissenting without an opinion). In *Spurr v. United States*, the Supreme Court reversed the conviction of a conscientious bank officer who before certifying checks regularly consulted with other officials at the bank, who in turn erroneously informed him that sufficient funds were on hand. *Id.* The Court cited with some approval the trial court's instruction that "[m]ere negligence or carelessness, unaccompanied by bad faith, would not render him guilty." *Id.* at 739. Second, the Court itself commented that "evil design may be presumed if the officer purposely keeps himself in ignorance . . . or is grossly indifferent to his duty . . ." *Id.* at 735.

¹⁰⁴ 7 F.2d 605 (2d Cir. 1925).

¹⁰⁵ See *id.* at 605-06 (holding word "willful" in criminal statutes means that person charged with duty knows what he is doing).

¹⁰⁶ *Id.* at 606. See *Grand Trunk R. Co. v. United States*, 229 F. 116, 119-20 (7th Cir. 1915) (holding that "willfully" has uniformly been held not to require evil intent, but only

If any common theme of value can be produced from these cases, it is that in finding an anti-maxim meaning for "willfully", courts at least proffer that their goal and result is simply finding what the legislative body intended to mean. Of course, one can view judicial protestations of this sort as a cover-up for legislation by the judiciary. One argument for a conventional interpretation of "willfully" is that the legislature knows the maxim that ignorance of law is not an excuse and consequently writes crimes believing that they will be so read.¹⁰⁷ The notion that a legislative body can produce or hold a singular intent when using a word so motile is even odd. Perhaps a stronger argument can be made that the legislature knows that "willfully" creates such a range of possibilities and in issuing such a word places the burden of interpretation on the judiciary.¹⁰⁸ The dynamic relationship between legislative abdication and judicial activism is supported in decisions where statutes are construed to save them.¹⁰⁹ This notion is portrayed when the courts deal with an act of racist violence.

In *Screws v. United States*,¹¹⁰ Sheriff Screws, who had beaten

that one should have purposely or intentionally failed to obey that statute, having knowledge of the facts); *People v. Foster*, 204 A.D. 295, 300 (N.Y. App. Div. 1923), *aff'd*, 236 N.Y. 610 (1923) (stating that "willfully" includes idea that act intentionally done with wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness).

107 Indeed, such a proposition is valid. Courts have defined several principles around which statutes are construed, and when the maxim is applicable. See e.g., *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 560 (1971). Regulatory offenses, as opposed to other crimes, are subject to excusal from application of maxim that ignorance of the law is no excuse).

108 See *United States v. Wells*, 117 S. Ct. 921, 936 (1997) (noting that late 1940's were "marked by spirit of cooperation between Congress and Federal Judiciary" during which Congress looked for courts to play important role in lawmaking process by filling gaps in statutory text); see also *Middlesex County Sewerage Authority v. National Clammers Assoc.*, 453 U.S. 1, 13-14 (1981) (asserting that legislatively created statute was interpreted by judiciary).

109 See *Screws v. United States*, 325 U.S. 91, 93 (1945) (stating that enforcing vague statute with unascertainable standard of guilt is similar to practice of Caligula; Roman emperor who published laws in such fine print and posted them in dark corner and then proceeded to construe statute such that vagueness issue averted).

110 325 U.S. 91, 93 (1945). Section 20 of the Criminal Code, Title 18 U.S.C. § 52 (1994) states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

Id.

a black prisoner to death, was convicted of willfully depriving a citizen of his rights by reason of his color. The Sheriff's defense was that the statute violated the due process clause of the Fourteenth Amendment for failing to have an "ascertainable standard of guilt."¹¹¹ Taking the position of *Screws* rhetorically, Justice Douglas wrote:

Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.¹¹²

Justice Douglas was concerned that if "willfulness" is simply purposeful, one could be guilty of the crime even though the citizen had rights yet to be determined.¹¹³ This vagueness problem was solved, in Justice Douglas' view, by interpreting "willfully" as requiring proof that the actor had a "specific intent to deprive a person of a federal right made definite by decision or other rule of law . . ."¹¹⁴ Justice Douglas added that "specific intent" meant not simply subjective knowledge of illegality, but also included acts done "in reckless disregard" of definitive rights.¹¹⁵

In order to reach the conclusion adopted by the plurality, Justice Douglas' analysis required many steps. First, Justice Douglas noted the legislative growth of the instant statute, in which the word "willfully" was added according to legislative history, made the statute "less severe."¹¹⁶ Next, Justice Douglas stated that the word "willful" is malleable in crimes interpreted

¹¹¹ *Screws*, 325 U.S. at 95.

¹¹² *Id.* at 96 (citations omitted).

¹¹³ *See id.* at 96-98.

¹¹⁴ *See id.* at 103. *Cf.* *United States v. Lanier*, 117 S. Ct. 1219, 1221-22 (1997). The Court reversed the Sixth Circuit Court of Appeals which had, in turn, reversed a conviction under 18 U.S.C. § 242 of a state judge who had assaulted women in his chambers. *Id.* The Sixth Circuit held improperly that the federal right infringed had to have been established previous to the act by a decision of the Supreme Court in a case with "fundamentally similar facts." *Id.* Justice Souter, writing for a unanimous court, held that vagueness concerns, the rule of lenity, or elementary due process, matters which to Souter are all of a piece, do not require such elevated notice. *Id.* "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear . . . that the defendant's conduct was criminal." *Id.* at 1221-22.

¹¹⁵ *Screws*, 325 U.S. at 105.

¹¹⁶ *See id.* at 100 (quoting 43 Cong. Rec., 60th Cong., 2d Sess., 3599).

“with evil motive.”¹¹⁷ However, Justice Douglas chose not to review the cases that decide whether “willfully” means simply intentional or with knowledge of illegality because it “would not prove helpful as each turns on its own peculiar facts.”¹¹⁸ What Justice Douglas is doing may be construed as writing law, not reading it.¹¹⁹ Thus, the statute was saved from unconstitutionality for vagueness because now by definition the actor can be punished only for acts against rights which are legally settled and were known or recklessly disregarded.¹²⁰ Since *Screws* had been convicted under instructions which interpreted “willfully” as simply purposeful, the plurality’s opinion was that the judgment should be reversed.¹²¹

Interpreting “willfully” beyond simple intent occasions the use of several techniques designed rhetorically to discern the intent of the rational legislature in using a word which is inherently ambiguous. Any interpretation beyond simple intent usually involves an acknowledgment of the competing maxim that ignorance of the law is no excuse. While legislative history will be commonly reviewed, that search is almost always fruitless except to reinforce ambiguity. Nonetheless, Congress must have meant something which supports the myth that the statute is written rationally and the words are not mere surplusage.

The structure of the statute itself offers a modern method of concluding that willfully carries the extra weight of requiring proof of knowledge of illegality. Additionally, there is the “fear of complexity” interpretation which reached a certain height in *Screws*, and that such a mental state will insulate citizens against prosecution for vague crimes by an unrestrained state.¹²²

¹¹⁷ See *id.* at 101 (holding that “knowingly” and “willfully” implies knowledge and determination with bad intent to do it (citing *Felton v. United States* 96 U.S. 699, 702 (1877))).

¹¹⁸ *Screws*, 325 U.S. at 101.

¹¹⁹ See *United States v. Lanier* 117 S. Ct. 1219, 1222 (1997). The Supreme Court criticized the Sixth Circuit’s view that *Screws* creates a common law crime. *Id.* Simply, “*Screws* narrowly construed a broadly worded act.” *Id.*

¹²⁰ *Screws*, 325 U.S. at 100.

¹²¹ See *id.* at 112-13. Justice Rutledge concurred. *Id.* at 113-34. Justice Rutledge was clear that his interpretation of willfully included recklessness in disregard of rights, a conclusion he would have come to even if willfully were not in the statute. *Id.* at 130 n.32.

¹²² See generally *Screws*, 325 U.S. at 102 (requiring that act is willful or purposeful relieves statute of objections that it punishes without warning offense of which accused is unaware).

The anti-maxim interpretation achieves the desire by the state in its criminal statutes to cause citizens to conform their conduct to the law. The fear is that conduct which is apparently legal, where the actor does not know that the conduct was regulated, might create surprise criminal liability. When the penalty is severe, "willfully" can take on the anti-maxim interpretation. Finally according to the rule of lenity, criminal statutes capable of multiple interpretations should be construed in favor of the criminal.

Cheek's re-examination of "willfully" in the federal tax crimes did not involve all of these techniques.¹²³ The court was bound by fifty years of precedent which included the argument that the tax law is complex. In a neighboring set of laws which deals with regulating currency transactions, a more full blown analysis has occurred.

Financial institutions are required to report to the Secretary of the Treasury cash transactions which exceed \$10,000.¹²⁴ The primary purpose of this statute is to aid in anti-drug law enforcement through monitoring large cash transactions in that illegal business. A by-product of this monitoring is that information might also be obtained to aid in tax collection because the use of cash is a common way to avoid taxes and escape detection. Congress was aware that transactions might be "structured" to avoid the \$10,000 level by breaking them up and included in the statute that "[n]o person shall for the purpose of evading the reporting requirements" structure a transaction.¹²⁵ A separate statute set out criminal enforcement of these strictures; a willful violation is punished by a substantial fine and up to five years of jail.¹²⁶

In *Ratzlaf v. United States*, the Supreme Court concluded that because "willfully" is contained in the statute, the crime is only committed if the actor structured a transaction knowing that structuring was unlawful.¹²⁷ In *Ratzlaf*, Waldemar Ratzlaf lost

¹²³ See generally *Cheek v. United States*, 498 U.S. 192, 192 (1991).

¹²⁴ See 31 U.S.C. § 5313 (1998) (setting forth reporting procedures for certain financial institutions); 31 CFR § 103.22 (1999) (establishing \$10,000 as dollar amount which triggers duty to report).

¹²⁵ 31 U.S.C. § 5324 (1998) (prohibiting structuring transactions to evade reporting requirements).

¹²⁶ 31 U.S.C. § 5322(a) (1998) (setting forth criminal penalties for willful violations of reporting requirements).

¹²⁷ See *Ratzlaf v. United States*, 510 U.S. at 135, 136-37 (1994).

\$160,000 at a Nevada casino and was given a week to pay.¹²⁸ He returned with a \$100,000 cash,¹²⁹ but a casino employee told Ratzlaf that such a payment would trigger the cash reporting requirements.¹³⁰ A casino limousine took Ratzlaf to various local banks where he purchased cashier's checks under \$10,000, which, in turn, were given to the casino.¹³¹ Ratzlaf, his wife, and the casino employee were all charged with willful structuring.¹³²

The trial court charged the jury that the government had to prove that Ratzlaf had knowledge of the reporting requirement and purposefully attempted to evade that requirement.¹³³ Ratzlaf argued that an element of the offense was that he must also know that structuring a transaction was illegal, an issue upon which the Circuit Courts of Appeals had split.¹³⁴

The leading decision had been *United States v. Scanio*,¹³⁵ in which the Court of Appeals had rejected the notion that knowledge of illegality was an element of the crime.¹³⁶ The court in *Scanio* distinguished this statute from prior statutes on currency reporting when transporting money which had required knowledge of illegality.¹³⁷ The court noted that the structuring crime was not an evasion of "an obscure reporting requirement,"¹³⁸ and held that enough evil was proven when the defendant knew of the reporting requirement and evaded it.¹³⁹ Moreover, the plain language of the statute was clear.¹⁴⁰

In *United States v. Aversa*,¹⁴¹ which consolidated several

¹²⁸ See *id.* at 137.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *Ratzlaf*, 510 U.S. at 137 n.2.

¹³³ See *id.* at 137-38.

¹³⁴ See *id.* at 138.

¹³⁵ 900 F.2d 485, 489 (2d Cir. 1990).

¹³⁶ See *id.* at 489.

¹³⁷ See *id.* at 489-92.; see also *United States v. Mancuso*, 420 F.2d 556, 559 (2d Cir. 1970) (explaining that when defendant has no knowledge of law's provisions then no useful purpose is served by prosecuting violators).

¹³⁸ *Scanio*, 900 F.2d at 490.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 489. If simply limiting *Cheek* to tax cases was insufficient rationale, courts noted that the currency reporting requirement and concomitant structuring violation did not have the requisite complexity "which often makes it difficult for the average citizen to know what the law requires." *Id.*; see also *United States v. Rogers*, 962 F.2d 342, 344 (4th Cir. 1992) (noting complexity of law not present in "straightforward currency reporting requirements" therefore eliminating exception to liability).

¹⁴¹ 984 F.2d 493 (1st Cir. 1993) (holding "willful" encompasses "knowingly" and

cases, the First Circuit had a different interpretation of the word "willfully". The court construed "willfully" in the structuring statute to require some measure of proof of knowledge of illegality.¹⁴² In one scenario, Donovan, president of a financial concern, deposited funds from a friend to be used for investment in a housing development.¹⁴³ No reports were filed and Donovan said he thought these deposits were exempted from the reporting requirements.¹⁴⁴ Another situation involved a man named Aversa, who with the help of friend, sought to avoid the reporting requirements by making several deposits under the reporting limit.¹⁴⁵ They did this to prevent Aversa's wife from discovering his money.¹⁴⁶ They claimed they knew of the reporting requirements but did not know that structuring was illegal.¹⁴⁷

The court in *Aversa* concluded that "willful" has many meanings and in this context it must mean more than intentional because the statute would have been read that way had "willful" not been included.¹⁴⁸ The court further concluded, however, that a complete *Cheek*-like reading of "willfully" is too broad because it would provide a defense for even unreasonable mistakes of law.¹⁴⁹ The court also noted that "willfully" must mean proof of a violation of a "known legal duty or the reckless disregard of the same."¹⁵⁰ Further, it must have the same meaning in all related currency crimes, that one may be found guilty if one knows "the law's requirements in a general sense, but recklessly or intentionally fails to investigate the legality of . . . proscribed activity."¹⁵¹

It should be noted that *Aversa* rejects the notion that its interpretation is driven by the decision in *Cheek*.¹⁵² Donovan's conviction was affirmed because he had been convicted under instruc-

"recklessly").

142 See *United States v. Daniel F. Aversa*, 984 F.2d 493, 498 (1st Cir. 1993) (requiring that government prove "violation of a known legal duty or the reckless disregard of the same").

143 See *id.* at 494.

144 See *id.*

145 See *id.* at 495.

146 See *id.*

147 See *Aversa*, 984 F.2d at 495.

148 See *id.* at 497, n.6.

149 See *id.* at 497.

150 *Id.* at 498.

151 *Id.* at 499.

152 See *Aversa*, 984 F.2d at 500-01.

tions that required a higher level of evil, that willfulness was "bad purpose" to disobey the law.¹⁵³ Aversa's guilty plea was permitted to be withdrawn because the trial court had charged the jury that knowledge of the illegality of structuring was not an element of the defense.¹⁵⁴

Chief Judge Breyer's concurrence in *Aversa* is worthy to note.¹⁵⁵ He joined the hybrid view of the principal opinion and would have decided differently, but for the weight of other circuits which had concluded that the *Cheek* decision had no place in currency regulation.¹⁵⁶

Both sets of laws are technical; . . . sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to unfair results of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally.¹⁵⁷

Chief Judge Breyer appears to agree with Justice Torruella who noted that, "[t]he legal duty at issue here . . . does not even approximate the general knowledge of the duty of taxpayers to file an income tax return."¹⁵⁸

This debate came to an end with the Supreme Court's five to four opinion in *Ratzlaf*.¹⁵⁹ It is Justice Ginsburg's opinion that "willful" carries a *Cheek* meaning and is based on the structure

¹⁵³ See *id.* at 501-02.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 502-03 (Breyer, C.J., concurring).

¹⁵⁶ See *id.*

¹⁵⁷ *Aversa*, 984 F.2d at 502.

¹⁵⁸ *Id.* at 507 (Torruella, J., dissenting). See *United States v. Speer*, 824 F. Supp. 111, 112 (W.D. Ky. 1993). In *United States v. Speer*, Billy Logan Speer moved money in \$9000 increments from six different banks in three different cities, but no evidence, however, was adduced as to why he structured the transactions, no drugs, no tax evasion, no prying soon-to-be-ex-wife. *Id.* The trial court adopted the rule of *Aversa* yet refused to instruct the jury that reckless disregard of the law was also culpable. *Id.* at 112 n.2, 115. The court noted that it is not "even a reasonable possibility that an average citizen" could know of the structuring crime. *Id.* at 114. In a remarkable example of different rules for different defendants, the "reckless" instruction seemed to be appropriate in Western Kentucky when applied to:

[s]ophisticated tax dodgers, drug dealers and other trained professionals [who] may well understand the inherent criminality of arranging transactions . . . To apply this law to this class of persons . . . is imminently fair [sic] The same cannot be said for the application of the statute to ordinary citizens.

Id. at 115.

¹⁵⁹ See *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that to sustain conviction for willful violation of antistructuring law, government must prove that defendant acted with knowledge that his conduct was illegal).

of the statute itself.¹⁶⁰ Structuring was forbidden by § 5313, but only criminalized if done willfully under § 5322.¹⁶¹ When the statute is so read, the maxim becomes an irrelevant incantation and is subsidiary to the myth of rationality. However, willfulness is interpreted this way by the Court to ensure that the defendant acted with an evil motive since “currency structuring is not inevitably nefarious.”¹⁶² Justice Ginsburg refused to consider legislative musings because “we do not resort to legislative history to cloud a statutory text that is clear.”¹⁶³ Lastly, Justice Ginsburg noted that the rule of lenity, that crimes construed in the face of ambiguity are in the criminal’s favor, would require this resolution.¹⁶⁴ Nonetheless, there is no middle ground here; for Ratzlaf to be convicted, it must be proven he knew that what he did was illegal.¹⁶⁵

The dissenters intoned that ignorance of the law is no excuse.¹⁶⁶ Justice Blackmun reviewed the majority’s decision which held that proof of knowledge of the reporting requirement is a predicate to conviction.¹⁶⁷ Justice Blackmun disagreed that the conduct was not nefarious.¹⁶⁸ After all “an individual convicted of structuring is, by definition, aware that cash transactions are regulated and he cannot seriously argue that he lacked notice of the law’s intrusion into the particular sphere of activity.”¹⁶⁹ Justice Blackmun argued that there is no complexity here, requiring a *Cheek*-like approach.¹⁷⁰ Further, the standard argument made by the dissenters in cases where knowledge of

160 See *id.* at 146-49 (noting that Congress criminalized only willful violation of statute, thus proof of defendant’s knowledge of his duty not to avoid transactions that trigger reporting, under the statute, is required for conviction).

161 31 U.S.C. § § 5313 (a) (1998) (delineating reporting requirements for certain currency transactions); 5322 (a) (1998) (outlining potential fines and prison terms for structuring).

162 *Ratzlaf*, 510 U.S. at 144.

163 See *id.* at 147-48.

164 See *id.* at 147-49.; see also *Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating “This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended”).

165 See *Ratzlaf*, 510 U.S. at 147.

166 See *id.* at 150 -52 (Blackmun, Thomas, O’Connor, JJ., Rehnquist, C.J., dissenting).

167 See *id.* at 150-57.

168 See *id.* at 154.

169 See *id.* at 155.

170 See *Ratzlaf*, 510 U.S. at 156.

illegality is made an element of crime, is that the legislature's purpose will be frustrated by the elevated proof requirement, thereby making prosecution more difficult.¹⁷¹

Congress when reading *Ratzlaf* was apparently shocked to learn what the Court had said that Congress had written.¹⁷² The Money Laundering Suppression Act of 1994¹⁷³ restructured the statute, codified in 31 U.S.C. § 5324, to follow the *Scanio* approach.¹⁷⁴ The committee report displays some petulance: "This amendment restores the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient *mens rea* for the offense."¹⁷⁵ This correction of the Court has in no way dampened enthusiasm for anti-maxim interpretations or, indeed, the use of *Ratzlaf* itself as precedent.

Ratzlaf, despite fear of complexity and a reference to the rule of lenity, is essentially a grammarian's decision. The two maxims of statutory interpretation clash, that the legislature is rational and that ignorance of law is not an excuse. Assuming legislative rationality, the Court concluded "willfully" must mean something more than the common rule of simple purpose when the statute has multiple mental state descriptions.¹⁷⁶ In *Aversa*, the court suggested that a *Cheek*-like interpretation of willfully in a criminal tax statute is appropriate because the statute, without any explicit *mens rea*, would nonetheless be interpreted to have some.¹⁷⁷ One could respond that Congress was simply supplying the *mens rea*, rather than allowing judicial wisdom to infer one. The latest in the line of cases about what criminal

¹⁷¹ See *id.* at 161-62.

¹⁷² See H.R. CONF. REP. NO. 103-652, at 439 (1994); H.R. REP. NO. 103-438, at 57 (1994).

¹⁷³ MONEY LAUNDERING SUPPRESSION ACT of 1994, PUB. L. NO. 103-325, 108 Stat. 2160. (Codified at 31 U.S.C. § 5324 (1998)).

¹⁷⁴ See *United States v. Scanio*, 900 F.2d 485, 491 (2nd Cir. 1990) (holding that criminal violation of § 5234 (3) may be established without proof of defendant's knowledge that structuring is unlawful); see also Joshua Glotzer, Note, *Ratzlaf Busts: Money Laundering Suppression Act of 1994 Overrules Ratzlaf v. United States*, 31 CAL. W. L. REV. 141, 162-63 (1994) (discussing that due process concerns might still make knowledge of illegality element of crime); Rachael Simonoff, *Ratzlaf v. United States: The Meaning of "Willful" and Demands of Due Process*, 28 COLUM J.L. & SOC. PROBS. 397, 399 (1995) (arguing that Supreme Court's interpretation in *Ratzlaf* is consistent and proper in view of notice and lenity requirements of due process).

¹⁷⁵ H.R. REP. NO. 103-438, at 57.

¹⁷⁶ See *Ratzlaf*, 510 U.S. at 136-37.

¹⁷⁷ See *United States v. Aversa*, 984 F.2d 493, 500 (1st Cir. 1993).

statutes must mean if a mental element word is not included is *Staples v. United States*.¹⁷⁸

In *Staples*, Harold Staples was convicted for the unlawful possession of an unregistered machine gun.¹⁷⁹ The criminal statute did not contain an explicit *mens rea*.¹⁸⁰ Staples owned an AR-15 assault rifle which is manufactured to prevent it from being an automatic weapon, that is, one that will fire continuously when the trigger is pulled.¹⁸¹ Staple's gun, however, had been modified to avoid these safeties, and when the trigger was pulled, the rifle fired repeatedly.¹⁸² Staples pled moral innocence, that his rifle had never fired automatically, only semi-automatically.¹⁸³ He argued that since he was ignorant of the fact that his gun was an automatic, he could not be convicted of violating 26 U.S.C. § 5861(d).¹⁸⁴ The district court disagreed and instructed the jury that the government need not prove Staples knew each detail of his weapon; "[i]t would be enough to prove he knows he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation."¹⁸⁵

The majority opinion written by Justice Thomas takes the well-trod path to find *mens rea*. Simply invoking the ordinary common law presumption that crimes have some *mens rea* leads the Court to the conclusion that some evilness of purpose is required.¹⁸⁶ The government, at first, argued that the statute was designed to be one which lacked *mens rea*, that it is a regulatory or public welfare offense which "do not require the defendant to know the facts that make his conduct illegal."¹⁸⁷

178 511 U.S. 600 (1994).

179 See *id.* at 614 (conviction under 26 U.S.C. § 5861(d)).

180 See 26 U.S.C. § 5861(d) (1994) provides:

[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . .

Id.

181 See *Staples*, 511 U.S. at 614.

182 See *id.* at 614-15.

183 See *id.* at 615.

184 See *id.*

185 See *id.* at 615.

186 See *Staples*, 511 U.S. at 625; see also *United States v. Gypsum Co.*, 438 U.S. 422, 438 (1978) (acknowledging requirement of *mens rea* as predicate to liability as fundamental precept of American common law); *Dennis v. United States*, 341 U.S. 494, 500 (1951) (noting importance of existence of *mens rea* to principles of criminal jurisprudence); *Women's Medical Profession Corp. v. Voinouich*, 911 F.Supp 1051, 1082 (S.D. Ohio 1995) (asserting courts adherence to principle that wrongdoing must be conscious to be evil).

187 *Staples*, 511 U.S. at 616.

The problem with strict liability offenses is the requirement of due process,¹⁸⁸ that one should know that he is in a situation where there is, according to Justice Thomas, "a probability of strict regulation."¹⁸⁹ This due process requirement is not subjective knowledge of illegality, but rather objective knowledge of the possibility of regulation.¹⁹⁰ A mid-ground is available here. The government should be required to prove that subjectively, the defendant knew or should have known, he was dealing with "some dangerous or deleterious substance."¹⁹¹ The concern was that a statute cannot be a public welfare offense, dispensing with *mens rea* altogether, when such a reading would result in a statute which would "criminalize a number of apparently innocent acts."¹⁹²

This concern framed what is essentially a political question: Is the ownership of guns such a dangerous condition that would allow the dispensation of *mens rea*? Justice Thomas concluded that while dangerous, gun possession is so "commonplace" that it does not alert individuals to the likelihood of regulation.¹⁹³ Fur-

188 See *United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993) (acknowledging due process problem inherent in strict liability offenses); *Levas & Levas v. Village of Anlioch, Ill.*, 684 F.2d 446, 455 (7th Cir. 1982) (noting possibility of due process violation in strict liability offenses).

189 *Staples*, 511 U.S. at 617.

190 See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (noting that "[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is great that anyone who is aware that he is in possession of them . . . must be presumed to be aware of the regulation"); see also Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence in the Criminal Law"*, 33 AM. CRIM. L. REV. 1, 25 (1995) (discussing varying opinions of *Staples* decision and purpose of Congress' requirements). See generally Stephen Satzberg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393, 414-46 (1983) (noting various interpretations of "knowledge" in criminal jurisprudence).

191 See *United States v. International Minerals & Chem. Corp.*, 402 U.S. at 617 n.3. Justice Thomas used "dangerous or deleterious substances" as a characterization of the prior strict liability cases to, in a sense, limit their further application. *Id.* Looking at crimes in currency or tax, clearly the item itself (large sums of income) is not dangerous, but it is difficult to say that a citizen would not be on notice that the transaction or item (currency or income) is not subject to governmental regulation. *Id.*; see also Pilcher, *supra* note 189, at 22. Awareness is necessary to justify holding an individual responsible for violation of a public welfare statute. *Id.*

192 See *United States v. International Minerals & Chem. Corp.*, 402 U.S. at 618 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)); see also *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976) (stating that violation of 22 U.S.C. § 1934, "willful" attempt at export of ammunition into Mexico required proof of actual knowledge of illegality because list of restricted exports included items not generally known to be regulated).

193 See *Staples v. United States*, 511 U.S. 600, 619-20 (1994) (rationalizing if Congress had intended to make outlaws of gun owners who were wholly ignorant of offending

ther, he asserted there is an "overlay of legal restriction on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge on the common experience that owning a gun is usually licit and blameless conduct."¹⁹⁴

Additionally, Justice Thomas noted the traditional view¹⁹⁵ that the possibility of harsh terms of imprisonment under this act impels a *mens rea* requirement of actual knowledge of the automatic character of the item possessed.¹⁹⁶ In fact, he offered this bit of dicta: "[w]e should not apply the public welfare offense rationale to interpret any statute defining a felony offense."¹⁹⁷ Justice Thomas also offered the rule of lenity as an additional explanation.¹⁹⁸

Upon reversal, Justice Ginsburg argued that the mental element inferred is simply factual knowledge, that the actor must have knowingly possessed "a weapon with all the characteristics that subject it to registration, but was unaware of the registration requirement, or thought the gun was registered . . ." ¹⁹⁹ The dissenters argued that guns are not sufficiently dangerous to provide a basis for a public welfare offense even under Justice Thomas' description of these crimes.²⁰⁰ They quarreled with the notion that an elevated penalty suggests an elevated *mens rea*,²⁰¹ and point out that in *United States v. Balint*,²⁰² a classic

characteristics of their weapons, it would have spoken more clearly); see also *Ostrosky v. State*, 704 P.2d 786, 789 (Alaska Ct. App. 1985) (noting that after reviewing unlicensed fishing prosecution, court concluded mistake of law defense is appropriate, but that such mistake must be reasonable).

¹⁹⁴ *Staples*, 511 U.S. at 621.

¹⁹⁵ See generally A.F. Brooke II, *When Ignorance of the Law Became an Excuse: Lambert and It's Progeny*, 19 AM. J. CRIM. L. 279, 285-87 (1992) (discussing history and future of *mens rea* requirement in criminal jurisprudence).

¹⁹⁶ See *Staples*, 511 U.S. at 622-24 (noting importance of *mens rea* when significant criminal liability is imposed).

¹⁹⁷ *Id.* at 624 (commenting that rule of leniency is additional reason why public welfare offense rationale should not be used in interpretation of criminal statutes).

¹⁹⁸ See *id.* at 625 n.17.

¹⁹⁹ *Id.* at 627 n.3 (Ginsburg, and O'Connor, JJ., concurring in judgment).

²⁰⁰ See *Staples*, 511 U.S. at 628-38 (Stevens, and Blackmun, JJ., dissenting); see also Chapman, *supra* note 91, at 1136 (stating requirements of *Staples* regulated item to be deleterious devise/product and that one would not be surprised to learn it regulated to adequately be classified as public welfare offense).

²⁰¹ See Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 477 (1989) (recognizing importance of *mens rea* requirement in defining culpability); see also Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729, 742 (1996) (acknowledging courts' hesitation to convict defendants without proof of adequate *mens rea* when penalties involve substantial imprisonment); Dean J. Spader, *Mega Trends in Criminal Justice Theory*, 13 AM. J. CRIM. L. 157, 167 (1986) (discussing importance of

regulatory offense case, the penalty was five years.²⁰³ Given the majority's conclusions, one wonders how Congress can write a strict liability offense because a statute purposely bereft of a mental state will have one added at a level higher than that required for an ordinary crime. It appears as if the Court will not resort to legislative history absent ambiguity, and even the word "willfully" is not sufficiently ambiguous by evidence of *Staples* or *Ratzlaf*. Perhaps legislatures should write in the statute that it is a strict liability offense which enables the courts to review the propriety of the stricture for constitutional limitations, such as vagueness or due process.

The dissenters also gave an extended analysis of the concern of "avoid[ing] punishing people for apparently 'innocent activity' . . ." ²⁰⁴ The Court concluded that proof of knowledge that an individual knowingly had a dangerous device was insufficient protection.²⁰⁵ Justice Stevens described innocent activity as that which is "without any consciousness of wrongdoing,"²⁰⁶ albeit without evil purpose, or knowledge of illegality.²⁰⁷ Given that tautology, the Court's description of the offense does not protect the truly innocent.

In crimes dealing with firearms, the use of the maxim, ignorance of the law is no excuse, is dying out. Title 18 U.S.C. § 922 (a) (1) (A) makes it unlawful to deal in firearms without a license.²⁰⁸ The crime's penalty provision is found in 18 U.S.C. § 924(a)(1) which provides a \$5000 fine or five years in jail for: "(A) knowingly [making] false statement under this chapter . . . ; (B)

mens rea in sentencing).

²⁰² 117 S. Ct. 47 (1996).

²⁰³ See *Staples*, 511 U.S. at 628-38 (noting classic regulatory offense did not require establishment of specific elevated mens rea (citing *United States v. Balint*, 258 U.S. 250 (1922))).

²⁰⁴ *Staples*, 510 U.S. at 636.

²⁰⁵ See *id.* (citing Ginsburg, J.) (noting lack of intent to add knowledge requirement to possession of weapon).

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See 18 U.S.C. § 922 (a) (1) (A) (1994). The statute provides:

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; . .

Id.

knowingly [violating a number of subsections of § 922]; . . . or (D) willfully violates any other provision of this chapter.”²⁰⁹

In a steady stream of Congressional ineptitude, subsection D was added to our gun control legislation by the Firearms Owners' Protection Act.²¹⁰ Prior to subsection D, Congress thought that the lack of a specific *mens rea* requirement under the Gun Control Act of 1968 could result “in severe penalties for unintentional missteps.”²¹¹ However, nowhere in the legislative history was there any acknowledgment that lack of knowledge of illegality as an element of the crime was a problem.

In *United States v. Obiechie*,²¹² Obiechie bought numerous Berettas in Illinois and smuggled them into Nigeria for a hefty profit.²¹³ He was convicted by the district court of willfully dealing in arms without a license. The court concluded that the statute proscribed simply intentional conduct, and did not include actions with knowledge of illegality.²¹⁴

After reviewing prior decisions²¹⁵ and legislative history, the

209 18 U.S.C. § 922 (a) (1) (a) (emphasis added).

210 See FIREARMS OWNER'S PROTECTION ACT, PUB. L. NO. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 922-926, 929, and 26 I.R.C. 5845 (1994)).

211 *Obiechie*, 38 F.3d at 312 (quoting *United States v. Collins*, 957 F.2d 72, 74-76 (2d Cir. 1992); see also Pilcher, *supra* note 190, at 25 (noting problems of *mens rea* in “innocent” firearm possession”).

212 38 F.3d 309 (7th Cir. 1994).

213 See *id.* at 310.

214 See *id.* at 310-12 (noting district court's decision to convict defendant primarily because of defendant's intent to commit criminal act).

215 See *United States v. Collins*, 957 F.2d 72, 73 (2d Cir. 1992). The court reviewed the conviction of the affable Mr. Collins who had made several gun sales to BATF agents in spite of his lack of a license to do so. *Id.* He removed the serial numbers from the guns and made sure it did not have his fingerprints. *Id.* The district court refused to charge the jury about the definition of the word willfully. *Id.* at 74. Collins pointed to a House report which criticized the Senate bill which was eventually passed. *Id.* The criticism was that “willfully” meant prosecutors would have to prove actual knowledge of illegality. *Id.* at 75. The Court of Appeals, however, noted that floor colloquies infer that the word's purpose was simply to avoid strict liability treatment and reread the House report to conclude willfully should be read as simply a “knowing and purposeful” act. *Id.* at 76; *United States v. Hern*, 926 F.2d 764, 764-67 (8th Cir. 1991). In *United States v. Hern*, the government agreed with Hern that proof of knowledge of illegality was part of the crime. *Id.* The court agreed with the consensus that proof of knowledge of illegality is part of the crime by stating that the legislative history was “consistent with that approach.” *Id.* at 767 n.6; see also *United States v. Palmiere*, 21 F.3d 1265, 1267-70 (3d Cir. 1994). In *United States v. Palmiere*, the court affirmed the conviction of an unlicensed gun dealer. *Id.* The district court had instructed the jury that knowledge of illegality need not be proven and that the actor need only be found to have acted voluntarily. *Id.* at 1270 n.4. The Third Circuit Court of Appeals noted that: “[t]his instruction alone would have been insufficient to convey the requirement of willfulness. . . .” *Id.* See generally *United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995). The court noted that the legislative history of the FOIA amendments demonstrate “that ‘willfully’ was intended to mean undertaken in violation of a known legal duty. . . .” *Id.* After *Ratzlaf* and *Obiechie*,

court of appeals concluded that they were unable to ascertain Congress' intent.²¹⁶ The court of appeals adopted *Ratzlaf's* view that willful can be interpreted without resorting to legislative history "through a review of its context . . . mindful of the complex provisions in which they are embedded."²¹⁷ Section 924 of the statute has four subsections, three of these subsections contain "knowingly" as the *mens rea* and only one includes the word "willfully."²¹⁸ Therefore, willfully must mean something different than knowingly. This result is also based on the traditional assumption that Congress knows what it is willfully doing.²¹⁹ However, what does knowingly mean? As the court of appeals noted, the prosecution must dither in response because there is no difference.²²⁰ The government argued that "'willfully' may require actual knowledge of the facts constituting the offense, whereas 'knowingly' would also include the 'ostrich' defendant who . . . consciously avoids those facts."²²¹ Citing *Cheek*, the court of appeals concluded that the only difference is a subjective knowledge of illegality, which must be proven in order to convict *Obiechie*.²²²

The decline in the usefulness of the maxim, in relation to automatic weapons, is the product of several forces. There is the specious devotion to plain meaning, grammar, or statutory struc-

the Court of Appeals again considered prosecution under 18 U.S.C. § 924 (a) (1) (D) (1994), for buying a gun while under an information. *Id.*; *United States v. Hayden*, 64 F.3d 126, 127 (3d Cir. 1995). The court held that *Ratzlaf* did not apply with its structural analysis but rather that the legislative history proved Congress' intent to have an anti-maxim interpretation. *Id.* at 130. Hayden's conviction was reversed because the trial court improperly refused evidence as to his low intelligence and reading level, evidence which was relevant to prove his lack of capacity to know the law. *Id.* at 133.

216 See *Obiechie*, 38 F.3d at 312-13 (noting courts differing conclusions reading same legislative history, therefore, implying Congress' ambiguous intentions).

217 *Id.* at 313 (quoting *United States v. Ratzlaf*, 510 U.S. 135, 141 (1994) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943))).

218 See 18 U.S.C. § 924 (1994).

219 See William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 681 (1990) (acknowledging traditional assumption that Congress knows canon of construction along with judicial interpretation of prior law and, therefore, knows what it is doing).

220 See *Obiechie*, 38 F.3d at 314-16; see also MODEL PENAL CODE § 2.02(8) (1985) (defining willfully as knowingly).

221 *Obiechie*, 38 F.3d at 314-16. See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1382-84 (1992) (setting forth reasons willful ignorance delineates state of mind between knowledge and recklessness).

222 See *Obiechie*, 38 F.3d at 314-16 (stating that knowledge of illegality be proven before determining criminal culpability); see also *United States v. Young*, 875 F. Supp. 350, 351 (W.D. Va. 1995) (finding that defendant intended violation of known legal duty necessary to satisfy "willful" element of offense).

ture coupled with apparent legislative carelessness. Simply, Congress did not mean anything by switching mental state adverbs in the gun statutes. "Knowingly" and "willfully" frequently, and logically, can mean the same thing.²²³

Part of this interpretation by courts could be reduced if there was true precision by the drafters. Perhaps, as the Twentieth Century closes, drafters will recognize the adverbial inconsistency and more directly draw the mental state they mean. Further, courts should consider that when interpreting statutes, sometimes the legislature is purposeful in its ambiguity.

Gun legislation presents an example of the political conflict which might provide purposeful legislative ambiguity, an ambiguity which wrecks any maxim of interpretation. Courts have disregarded the maxim in cases where the crimes were theoretically arcane or surprising. The courts' fears reflect and feed on the public perception of unfair governmental intrusion. Consequently, in the pro-gun lobby, one is likely to find hostility to the maxim that ignorance of law is no excuse.²²⁴

Congressional leaders writing gun control legislation are aware of this view. However, in a diverse body politic, gun control is frequently thought of as a good idea. Why not require crimes which involve guns to have been committed "willfully"? The advocates of control will read the word as simple purpose, while those opposed to control will find the protection of proof of knowledge of illegality. As a result, the usefulness of the maxim is slowly destroyed.²²⁵

²²³ See Michael L. Travers, *Mistake of Law In Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1323 (1995) (noting criminal statutes define "willfully" to mean "done knowingly").

²²⁴ See 131 CONG. REC. S9101-5 (daily ed. July 9, 1985). In the debates on the Federal Firearms Owners Protection Act, Cong. Wallop had David T. Hardy's Article from January 1980, entitled *Gun Laws and Gun Collector* placed in the record. That submission ends with the thumping paragraph:

I think this legislation is badly needed . . . to force the enforcing agency back toward real criminals and away from law-abiding gun owners . . . I am tired . . . of having citizens without criminal intent being charged with felonies, tired of having honest collectors' museum-grade firearms seized as if they were likely to be used in a crime, tired of agents who withhold firearms after their owners have been acquitted of all charges, tired of hearing that ignorance of the law is no excuse, when the law is so vague the directors of the enforcing agencies admit ignorance of its provisions.

Id.

²²⁵ See e.g., *United States v. Hopkins*, 53 F.3d 533, 533 (2d Cir. 1995). The court reviewed a Clean Water Act crime. *Id.* In the confusingly written crime, the defendant sought to have the *mens rea* word knowingly described as actual knowledge of illegality. *Id.* at 537. The court rejected *Staples* as a guide, concluding that this crime was a public

Fear of invasive government, unexpected regulation of licit conduct, bad drafting and concerns of knowledge of legality were involved in the exploration of the minimum necessary scienter requirements in *United States v. X-Citement Video, Inc.*²²⁶ The defendant company was caught selling pornographic films.²²⁷ Undercover investigations discovered that the actress was under eighteen and the marketers were indicted under the Protection of Children Against Sexual Exploitation Act of 1977.²²⁸ The question arose as to whether "knowingly" in the statute's provisions means: intentionally transports something that is child pornography, even without knowing it; intentionally transports pornography knowing it is pornography, but unaware that it is child pornography; or intentionally transporting pornography knowing it is child pornography.²²⁹ The court of appeals reviewed the statute and reversed the convictions because the

welfare offense. *Id.* As additional support, the court noted that Congress had removed willfully, supplanting the word with knowingly. *Id.* at 539. In the legislative history of this change, Congress intimated simply its intent to strengthen the crimes. *Id.* The court reviewing *Cheek, Ratzlaf* and *Murdock* could then say (as the maxim is dying): "One way of heightening criminal sanctions is to reduce the *mens rea* element of the prohibited acts, and a change from prohibiting 'willful' acts to prohibiting 'knowing' acts may be viewed such a reduction." *Id.* at 539.

²²⁶ 513 U.S. 64, 77-79 (1994) (setting forth scienter requirement to be satisfied before criminal culpability can be determined).

²²⁷ *See id.* at 66.

²²⁸ *See id.* at 66; *see also* 18 U.S.C. § 2252 (1988). The statute provides in part:

(a) Any person who—

(1) Knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) Knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

Shall be punished as provided in subsection (b) of this section.

Id.

²²⁹ *See X-Citement Video*, 513 U.S. at 68-69.

It would seem odd, to say the least, that Congress distinguished between someone who inadvertently dropped an item into the mail without realizing it, and someone who consciously placed the same item in the mail, but was nonetheless unconcerned about whether the person had any knowledge of the prohibited contents of the package.

Id.

statute did not require proof of knowledge of the minority of the child and, consequently, the crime was facially unconstitutional.²³⁰ The Supreme Court reversed and concluded that the statute should be read to include a requirement of such knowledge.²³¹

Chief Justice Rehnquist recognized the problem of simply parsing the statute.²³² The word “knowingly” is far distant from the clause concerning minors, blocked by comma, dash and the habitual statutory paragraphic overgrowth.²³³ Consequently, under “the most grammatical reading” all one needed to do was knowingly distribute, knowledge of content was immaterial.²³⁴ Chief Justice Rehnquist concluded this reading resulted in an absurdity, that Congress could not have intended to criminalize the mere mailing of a package if the actor did not know anything about its contents.²³⁵ In this situation, maxim confronts maxim. Plain meaning should be rendered, but laws cannot be absurd. Perhaps resolution of this debate would have been sufficient to resolve the case, but the Chief Justice moves on.

“Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes. The statutes allow us to include broadly applicable scienter requirements, even where the statutes by its terms does not contain them.”²³⁶ For example, in *Morissette v. United States*, the court concluded that 18 U.S.C. § 641 prohibits one from “knowingly convert[ing] . . . [a] thing of value of the United States.”²³⁷ The Court acknowledged *Staples* as well.²³⁸ According to Chief Justice Rehnquist, these cases stand for the

230 *See id.* at 67.

231 *See id.* at 78-79.

232 *See id.* at 69-70.

233 *See id.* at 68.

234 *See X-Citement Video*, 513 U.S. at 70.

235 *See id.* at 69. Congress did not intend the express courier to be penalized for delivering a box in which the shipper had declared the contents to be “film” as knowingly transporting the film. *Id.*

236 *See id.* at 70.

237 *Id.* (citing *Morissette*, 342 U.S. at 248, 248 n.2 (citing 18 U.S.C. § 641)). Compare *United States v. La Porta*, 46 F.3d 152, 158 (2d Cir. 1994). The court, in applying 18 U.S.C. § 1361, concluded that the crime of willfully injuring property of the United States, does not require in arson prosecution, knowledge that the property is the United States. *Id.*, with *United States v. Bangert*, 645 F.2d 1297, 1304 (8th Cir. 1981). Knowledge that property is United States owned is required for conviction. *Id.*

238 *See X-Citement Video*, 513 U.S. at 71 (citing *Staples v. United States*, 511 U.S. 600 (1994)).

proposition that "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct."²³⁹ Chief Justice Rehnquist rejected the notion that the offense described here is a public welfare offense.²⁴⁰ Rather than taking a middle ground, that the actor simply know that he was dealing in pornography, actual knowledge of child pornography is required.²⁴¹ If simple knowledge of pornography were required, one might argue that if a child is involved it could create a public welfare offense and be subject to regulation.²⁴² Instead, this crime is not such an offense because "[p]eople do not harbor settled expectations that the contents of magazines and film are generally subject to . . . regulation."²⁴³ Here, as in *Staples*, the level of the penalty was also seen as a reason for this elevated mental state.

Looking at the plain meaning of the statute leads to the conclusion that the statute was unconstitutional and, therefore, it should be read in a manner that will save it from nullity. Chief Justice Rehnquist reviewed the legislative history²⁴⁴ and concluded that "it can be summarized by saying that it persuasively indicates that Congress intended the term 'knowingly' apply to the requirement that the depiction be of sexually explicit conduct; it is a good deal less clear . . . that Congress intended that the requirement extend also to the age of the performers."²⁴⁵ The Chief Justice then decided to read the statute more grammatically and concluded that if the adverb "knowingly" modifies one element of a distant clause, it must modify the other.²⁴⁶

In his dissent, Justice Scalia railed against what he considered to be rewriting, not close reading.²⁴⁷ He said the language was

²³⁹ *X-Citement Video*, 513 U.S. at 72.

²⁴⁰ *See id.* at 71.

²⁴¹ *See United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 607-08 (5th Cir. 1991) (noting different approach dealing with crimes for improper storage of hazardous wastes, where for conviction, actor must know he had waste, but need not know regulation); *see also United States v. Laughlin*, 768 F. Supp. 957, 962 (N.D.N.Y. 1991) (ruling government is not required to prove defendants knowledge of violation of law).

²⁴² *See X-Citement Video*, 513 U.S. at 73. Justice Rehnquist rejected this argument noting that ". . .one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *Id.*

²⁴³ *Id.* at 71.

²⁴⁴ *See id.* at 73-78.

²⁴⁵ *Id.* at 77.

²⁴⁶ *See id.* at 77-78. Justice Stevens in his brief concurrence catches onto this approach. *Id.* at 79-80 (Stevens, J., concurring).

²⁴⁷ *See X-Citement Video*, 513 U.S. at 87-88. (Scalia, and Thomas, JJ., dissenting).

plain, that knowingly merely modified the verbs in the clause in which it is contained.²⁴⁸ “There is no doubt. There is no ambiguity. There is no possible ‘less natural’ but nonetheless permissible reading.”²⁴⁹ Justice Scalia disagreed with Justice Rehnquist’s analysis that mere knowledge that one deals in pornography is not enough to pass constitutional muster.²⁵⁰ In Justice Scalia’s view, the statute as written is unconstitutional.²⁵¹ Further, Justice Scalia believes that the conclusion does not give the Court the right to save the statute by rewriting its text.²⁵²

Cheek did not establish a constitutional requirement, but simply interpreted “willfully” in federal income tax felonies, suggesting that the interpretation of “willfully” was based on Congressional intent because the underlying statute was complex. *Cheek* does not say that complex crimes must have as an element knowledge of illegality. Indeed, *Cheek* should not be applied to crimes which do not contain the word “willfully”.

Staples might suggest that in the absence of *mens rea*, the courts’ inclination must be to read in an evil mental state. *X-Citement Video* confirms that scienter is the presumption when the conduct criminalized seems innocent, and there is complete subjective knowledge of possession of regulated material. It was noted in *Ratzlaf* that the structure of the statute is most informative when Congress uses a multiplicity of mental state words. If “willfully” is used for some items and “knowingly” or nothing is used for others, “willfully” must mean something different and something more. Even if knowledge of illegality becomes an element, there is a range of views as to whether that knowledge must be actual and subjective, as set forth in *Cheek* or one of “reckless disregard” or “purposeful avoidance.” The sheer weight of these cases and approaches have diminished the effect of the maxim.

State courts have been influenced by the decisions of these

248 See *id.* at 81-82 (stating that “the ninth circuit’s integration is in fact, and quite obviously, the only grammatical reading”).

249 *Id.* at 82 (noting that scienter only applies to first clause).

250 See *id.* at 83-84.

251 See *id.* at 86.

252 See *X-Citement Video*, 513 U.S. at 85-87. “The conclusion of unconstitutionality is of course no ground for going back to reinterpreting the statute, making it say something that it does not say, but that is constitutional.” *Id.*

federal cases. In *Iowa v. Azneer*,²⁵³ the Supreme Court of Iowa examined "willfully" in sanctions associated with the state's political contribution law.²⁵⁴ Azneer made contributions, but was reimbursed by his employer. Their behavior constituted the prohibited act of making a contribution in the name of another.²⁵⁵ The debate is the familiar one, does "willfully" in the penalty section mean with knowledge of a legal duty or simply intentionally? "Willfully" is a word of many meanings and the court resorted to an analysis grounded in the ancient *mala in se, mala prohibitum distinction*.

This distinction in dividing evil is not substantively different from the issue presented in *Staples* or *X-Citement Video*, that is, when is conduct sufficiently dangerous or outside the contemplation of ordinary individuals as licit or unregulated behavior. Courts have repeatedly used the policy concerns raised by principles of due process and vagueness as reasons to interpret criminal statutes contrary to the maxim. The border between the evil in itself and the government's definition of evil is not clear. When conduct nears that border, the courts feel they have license to interpret the crime in a fashion to protect the public, which they consider innocent. While much can be said for this laudatory objective, such an episodic technique does not provide real notice to the drafter on how the crime should be described. Can an act be prohibited so long and so publicly that it becomes wrong in itself? The classic elements of the *mala prohibitum* are: the mores of the community or moral attitudes do not inform that the conduct is forbidden; the offender is not socially dangerous; the offender reasonably thought the conduct was not criminal; and the conduct is not by nature immoral.²⁵⁶

The sense of what is moral or the actual mores of the community are not the subject of proof or explicit finding of the legislature, but is in the hands of the jurists. Further, an anti-maxim interpretation insulates the deluded or the furtive, not just those who reasonably thought the conduct was not criminal. Taken to *Cheek*, these marks of distinction do not mesh with the result.

²⁵³ 526 N.W.2d 298 (Iowa 1995).

²⁵⁴ See *id.* at 299.

²⁵⁵ See *id.*

²⁵⁶ See *id.* at 299-300 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW414-15 (2d. ed. 1986)).

After all, fifty years of income tax prosecutions for failure to report income from wages should have informed the community.

The court in *Azneer* concluded the crime was one of mere *mala prohibita* and "willfully" in that political contribution law meant "a voluntary and intentional violation of a known legal duty."²⁵⁷

It says:

Some stealth or surreptitiousness might be involved . . . [b]ut we cannot say that to do so is *malum in se* . . . The practice posed by the facts . . . may well not engender admiration. The legislature was obviously prompt to criminalize them. But the practice posed falls far short of qualifying as *malum in se*.²⁵⁸

The crime as written is not vague if "willfully" meant that the act was intentional. Due process would yet be served and the use of "willfully" produces an opportunity for judicial intrusion.²⁵⁹

As Justice Douglas suggested in *Screws*, perhaps a review of all cases dealing with "willfully" in a criminal context would not be profitable because they are so fact dependent.²⁶⁰ In fact, such a review would be impossible since the word is everywhere. Justice Douglas, even fifty years ago, could not have read all the cases involving the word "willfully." However, all one needs to do is watch over those cases which are the exception to the rule that ignorance of law is no excuse, an interpretation produced most easily, but not limited to, when "willfully" appears.

²⁵⁷ *Id.* at 300.

²⁵⁸ *Azneer*, 526 N.W.2d at 300.

²⁵⁹ See *People v. Weiss*, 479 N.W.2d 30, 31 (Mich. Ct. App. 1991). The court reviewed the dismissal of a misdemeanor charge under Michigan's Campaign Finance Act. *Id.* Section 41(1), M.C.L. 169.201 provided that "a person who knowingly violates" the Act is guilty. *Id.* (quoting Campaign Finance Act, MICH. COMP. LAWS § 169.201 et seq. (1991)). The prosecution was based upon Weiss' cash political contributions in excess of \$20.00. *Id.* at 32. The prosecution argued that all that need be proven is that "the defendant knew that he was making a contribution of more than \$20 in cash." *Id.* The defendant argued that he had to know that a cash contribution was illegal. *Id.* The court concluded that the statute was ambiguous, and that the construction proposed by the defendant was "plausible." *Id.* at 33. The statute defines "contribution" as a transfer "made for the purpose of influencing the nomination or election of a candidate." *Id.* (citing Campaign Finance Act, MICH. COMP. LAWS § 169.204 (1) (1991)). The court concluded that a "contribution" must be made knowingly, that is knowing that its purpose is to influence. *Id.* at 33. Consequently, knowingly in the criminal provision must mean more, namely knowledge of illegality. *Id.* at 33-34. The court, relying on *Cheek*, argued that "complex regulatory statutes often modify the traditional rule." *Id.* at 34.

²⁶⁰ See generally *Screws v. United States*, 325 U.S. 91, 93 (1945) (ruling that due process of law gives one right to be charged by jury and sentenced by court).

The study of law in the modern age is compartmentalized, even in the law of crime. Particularly, each area of federal and state concerns, like taxation, produces its own supplementary body of criminal law which is generally only explored by the practitioners in that technical area. In crimes of selective service²⁶¹, immigration²⁶², bankruptcy²⁶³ and others, both before and after *Cheek*, similar erosion in the effectiveness of the maxim in interpreting criminal statutes has taken place. When knowledge of illegality becomes an element of crime unconventional issues arise, such as proof of law, confusion, presumptions of knowledge or willful ignorance. These issues arise because such a rule is contrary to the maxim. Useful precedents exist outside of the subset of the law where related problems have been more fully explored. As to whether ignorance of law is not an excuse, one can find examples where ignorance of law is exculpatory in many cubby holes of iniquity and rarely prosecuted crimes.

In tax crimes the defense of ignorance of law could be replaced fairly with a reasonable legal delusion defense and, perhaps, a codified list of positions which are incapable of being reasonably believed. In tax crimes, the imposition of criminal penalties necessarily is preceded by an enormous series of administrative, close up opportunities to resolve any legal question. Individuals

²⁶¹ See *Graves v. United States*, 252 F.2d 878, 881 (9th Cir. 1958). Mr. Graves, a beekeeper, was drafted and asked for a postponement because of the honey harvest. *Id.* at 880. While a postponement was granted, the new date was also during harvest and he did not receive notice which was sent to his mother's home. *Id.* He was occupied with remote apiary concerns until the time had passed. *Id.* at 880-81. While recognizing the statute carried some criminal intent requirement, the court held that the culpable intent should be "bad purpose." *Id.* at 882 (quoting *Heikkinen v. United States*, 355 U.S. 273 (1958)); see also *Heikkinen v. United States*, 335 U.S. 273, 274 (1958). Heikkinen interpreted an immigration statute which penalized willful conduct. *Id.* at 274. Nonetheless, the Ninth Circuit Court of Appeals held the cases were similar enough to elevate the mental state. *Id.* at 274-80.

²⁶² See *Heikkinen v. United States*, 355 U.S. 273, 274 (1958). The Supreme Court reviewed the conviction of an alien under an order to be deported for "willfully fail[ing] . . . to depart from the United States" and "willfully fail[ing] . . . to make timely application in good faith for travel or other documents." *Id.* The Court concluded, out of rarefied air, that the word required "evidence, or an inference permissible under the statute, of a 'bad purpose' or '[non]justifiable excuse', or the like. . . ." *Id.* at 279.

²⁶³ See *In Re Toti*, 24 F.3d 806, 808 (6th Cir. 1994) (noting *Cheek*-like mental state may not be required for discharge actions). See generally *In Re Batie*, 995 F.2d 85, 89-90 (6th Cir. 1993) (disallowing complete discharge of indebtedness by equating recklessness with intent); *Collins v. United States*, 848 F.2d 740, 742 (6th Cir. 1988) (stating that one is responsible for willful failure to pay taxes if deliberate choice is made to voluntarily, consciously and intentionally pay other creditors rather than taxes).

who claim lack of knowledge of illegality when charged with a tax crime, either have purposely avoided competent counsel or have ignored their constant losses in civil process. Anyone who believes wages are not subject to the income tax ought to be subject, in turn, to being locked up in one institution or the other.

Tax crimes so structured could inspire individuals to learn the law, the incentive of the old maxim, and it would not create social injustice. Nonetheless, the line of cases from the Supreme Court and others, from the first tax crimes cases outward, worry about the twists of this tangled law trapping the common taxpayer. If old tax law is still thought to be incomprehensible, then modern crimes, set in complicated statutes as part of the now common scheme to put a cap on compliance of some new regulatory device designed for areas where the opportunity for civil litigation, administrative determination or permanent pronouncements of legal disputes are frequently reduced, must be found unknowable.

Even if the crime is vague, the court, believing or mouthing in the myth of legislative omnipotence and competence, is inclined to read the legislative criminal endeavor so as not to be unknowable or offend due process in any way. Thus, when finding that ignorance of law as a defense is plausible because of the truly hidden nature of the crime or from the legislature's deliberation or from the text itself, the courts will do so. The only crimes which there will be debate about are new crimes which deal with guns, sex, money, money laundering, automatic weapons, and video pornography.

The maxim that ignorance of the law is no excuse cannot prevail. As an interpretative device, it has been reduced to a starting point, at best, a faint predilection, almost to remind us of how criminal laws used to be. Over time, the maxim will not have vitality in newly decided cases. The maxim is trumped by any canon of new rigorous construction, the pressures of due process or even, the last resort, the medieval rule of lenity. The rule of lenity, itself, is a device so weak, only reached by the honest interpreter if the statute were ambiguous, a rule which previously lost to the old maxim. After all, how could a statute be ambiguous with respect to knowledge of illegality because ignorance of the law is no excuse?

Full recognition of the death of the maxim might be useful. At least, climax might stimulate a legislative awareness that there is a choice which can be made. Unless the crime is carefully written, there exists a good chance that courts or juries may grant freedom to individuals who ordinarily would not deserve it. Perhaps we would wish not to label as felons the timorous Spies, the innkeeper Barney, the Philadelphia policeman Hart, and the process server Harvey. However, what about the tax cheat Cheek, the murderous Screws, the over armed Staples, the death-dealing Obiechie or the smut merchants of X-Citement Video, Inc.? Should they be let go in answer to their new plea that, at root, they did not know what they did was wrong?