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State of the Law as Evidence for the Jury, The

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Although this portion of the *Worthey* decision may have only slight practical effect, the court must be commended for its recognition that the existence of a defect is not an issue in a breach of warranty case.[28] This position is consistent with the warranty sections of the Uniform Commercial Code.[29] Nowhere does the Code suggest that proof of a specific defect should be required. Only a few courts have even considered such a requirement. The *Worthey* decision should help to erase all semblance of the requirement from Missouri warranty law.

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THE STATE OF THE LAW AS EVIDENCE FOR THE JURY

United States v. Garber[1]

Dorothy Garber was indicted under the income tax evasion statute[2] for willfully and knowingly attempting to evade income taxes for three separate years. Ms. Garber was convicted by a jury for failing to report income for one of those years. The money in question was from payments the tax-

28. *But see* RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section, adopted by Missouri in Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969), imposes strict liability in tort on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property." A plaintiff under § 402A may prove the existence of a defect by inference from circumstantial evidence. Winters v. Sears, Roebuck & Co., 554 S.W.2d 565 (Mo. App., St. L. 1977) (relying on *Williams*). *Winters* further held that "common experience tells us that some accidents do not ordinarily occur in the absence of a defect and in those situations the inference that a product is defective is permissible." *Id.* at 570. This appears to be similar to the tort concept of *res ipsa loquitur*. It differs little from *Jacobson*'s requirement of a "defect."

29. U.C.C. §§ 2-312 to -318.

1. 607 F.2d 92 (5th Cir. 1979).

2. I.R.C. § 7201 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 $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

payer had received for her blood plasma, which contained an extremely rare antibody used in the production of a blood-group-typing serum. Ms. Garber did not report the bulk of the payments received, although she did report a $200.00 per week salary she received in connection with her services to the purchasing labs.[3]

At trial in the United States District Court for the Southern District of Florida the defense took the position that the payments were not taxable, and, alternatively, if they were taxable that Ms. Garber had not willfully attempted to evade taxes, and thus was not criminally liable for failure to report the income.[4] The defense produced as an expert witness, a certified public accountant and former revenue agent, who testified *in camera* to his conclusion that the payments were not taxable. The federal district court refused, however, to allow the witness or the government's counter expert witness to testify before the jury, finding that the issue of taxability was a matter of law for the court to decide. The defense argued that the expert's testimony would be relevant to illustrate to the jury that the taxability of the payments was an undecided issue, which in turn would be relevant to the element of willfulness. The trial court rejected this contention because it found that Ms. Garber had in fact not relied on (or even been aware of) the view expressed by the expert witness in preparing her tax returns.[5] The court distinguished cases where the taxpayer relied in good faith on the advice of a third party in preparing his return.[6]

The United States Court of Appeals for the Fifth Circuit reversed the conviction and remanded the case for a new trial. The appellate court held that it was error for the trial judge to have excluded the testimony of the defendant's expert witness as to the taxability of the payments received.[7] The court reasoned that the testimony would have been relevant to the issue of willfulness, because in situations where the nature of the obligation imposed by law is unresolved, it is more likely that a defendant is unaware of or is mistaken about his legal obligation.[8]

As a general rule courts have excluded testimony or other evidence

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3. 607 F.2d at 94. Ms. Garber received at least $70,000 for the sale of her plasma in each of the tax years in question.

4. *See* text accompanying notes 21-25 *infra*.

5. 607 F.2d at 96. Ms. Garber claimed to have based her opinion that the payments were not taxable on discussions with friends and relatives, not on professional advice.

6. *See, e.g.*, Bursten v. United States, 395 F.2d 976, 981 (5th Cir. 1968); United States v. Bengimina, 499 F.2d 117, 120 (8th Cir. 1974); United States v. Dowell, 446 F.2d 145, 148 (10th Cir.), *cert. denied*, 404 U.S. 984 (1971).

7. 607 F.2d at 97. The appellate court held that the exclusion of the testimony coupled with the refusal to give the instructions requested by the defendant warranted a reversal. This Casenote will discuss only the court's ruling on the expert testimony.

8. *Id.* at 98.

pertaining to matters of law.[9] Instruction of the jury on the law is the province of the court, and when a decision is required on an issue of law, the decision is made by the judge—distinct from the jury as trier of fact. This principal is so fundamental as to be axiomatic.[10] The trial judge in *Garber* considered the testimony of the two experts *in camera* before deciding as a matter of law that the payments were taxable,[11] but did not allow the jury to hear the testimony.[12]

The *Garber* court had no directly applicable precedent which would allow an expert to testify on the state of the law,[13] but based its decision on the broad language of Federal Rules of Evidence 702.[14] The court directed that the testimony could be used on remand not to convince the jury that the payments to the defendant were nontaxable, but rather to illustrate that even qualified tax "experts" believed the payments were nontaxable. This evidence could then be used by the jury to decide whether the state of mind required—willfulness—was proved beyond a reasonable doubt.[15] While such a use of the expert testimony would not call upon a jury to decide a question of law, it could create other problems.

Federal Rules of Evidence 702 provides a broadly stated standard for

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9. Richard T. Green Co. v. City of Chelsea, 149 F.2d 927, 930 n.5 (1st Cir.) (whether dock rigging real or personal property), *cert. denied*, 326 U.S. 741 (1945); Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974) (meaning of tax statute), *cert. denied*, 419 U.S. 1123 (1975); Allen v. Union R.R., 162 F. Supp. 635, 637 (W.D. Pa. 1958) (meaning of safety regulation); St. Louis v. Kisling, 318 S.W.2d 221, 225 (Mo. 1958) (effect of regulation on utility easement); Urban Renewal Agency v. Bethke, 420 S.W.2d 803, 806 (Tex. Civ. App. 1967) (construction of zoning law). *See generally* 9 J. WIGMORE, EVIDENCE § 2549 (3d ed. 1940).

10. *See* 9 J. WIGMORE, *supra* note 9, § 2549.

11. 607 F.2d at 96.

12. *Id.*

13. One area in which there is a history of the use of expert testimony on the law is where the case involves an issue of foreign law. Often courts have allowed such testimony to be heard by the jury as a basis for a decision of fact as to the law of a foreign country. *See* Chicago Pneumatic Tool Co. v. Ziegler, 151 F.2d 784, 793 (3d Cir. 1945); Albert v. Brownell, 219 F.2d 602, 605 (9th Cir. 1955). *See generally* 9 J. WIGMORE, *supra* note 9, § 2558. The federal courts began treating foreign law as a question of law for the court after changes in the rules of procedure for the federal courts. FED. R. CIV. P. 44.1; FED. R. CRIM. P. 26.1. *See, e.g.*, United States v. McClain, 593 F.2d 658, 669-70 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979); Alosio v. Iranian Shipping Lines, S.A., 426 F. Supp. 687, 689 (S.D.N.Y. 1976), *aff'd*, 573 F.2d 1287 (2d Cir. 1977).

14. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

15. 607 F.2d at 94.

the use of expert testimony. The criterion to be used in determining whether expert testimony is appropriate is whether the information "will assist the trier of fact to understand the evidence or to determine a fact in issue."[16] This criterion gives a trial judge considerable discretion in regulating the use of experts as well as in limiting the subject matter of their testimony. In addition, the United States Supreme Court and the courts of appeals have stated they are reluctant to reverse a trial court's decision to allow or to prohibit expert testimony.[17] The usual standard for determining whether the trial court has abused its discretion *vis-à-vis* expert testimony is whether the action was "manifestly erroneous."[18] The broad standard established by Federal Rules of Evidence 702 for the use of expert testimony and the standard of review taken together tend to allow trial courts great discretion in the use of expert testimony.

Three general criteria which have been used in deciding whether or not a trial court should allow expert testimony are: (1) whether the subject matter is one for which expert testimony is appropriate; (2) whether the probative value of the testimony is greater than its prejudicial effects; (3) whether the witness is qualified to testify on the subject matter.[19] In *Garber* there was no challenge to the witness' qualifications, so the third criterion does not come into play. The first and the second criteria, on the other hand, are germane to an analysis of *Garber*. Discussion of those aspects of *Garber* which relate to the first criterion will also relate to the question of whether the evidence was relevant. The second criterion is the same as Federal Rules of Evidence 403, and discussion of those aspects of the case is with reference to that rule.[20]

"Willfulness" is given a variety of meanings in criminal statutes.[21] As

16. FED. R. EVID. 702.

17. *E.g.*, Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); Nielson v. Armstrong Rubber Co., 570 F.2d 272, 276-77 (8th Cir. 1978); Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1374 (8th Cir. 1977); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). Cases reversing the trial court's decision include: United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977); Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856, 858 (8th Cir. 1975). *See generally* Gibbons, *Rules 701-706: Opinions and Expert Testimony*, 57 CHI. B. REC. 224, 225-27 (1976).

18. Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) (not error to exclude naval architect's testimony in relation to safety); Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1374 (8th Cir. 1977) (not error to admit testimony by expert on railroad car design).

19. United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973).

20. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

21. The construction given is often influenced by the context in which the

used in the criminal tax evasion statutes, willfulness requires that a defendant intend to evade or defeat his income tax,[22] and does not include acts which are done negligently or done because of a misunderstanding of the law.[23] In other words, willfulness "is characterized by a specific intent to conceal, in contrast to a genuine misunderstanding of the law's requirements or a good faith belief that certain income is not taxable."[24] Because of this definition of willfulness, a good faith mistaken belief by the taxpayer as to his obligation to pay will provide a defense.[25] It follows that if the taxability of an item is not a settled matter, there is an increased likelihood that a taxpayer would be ignorant of or mistaken about his obligation to pay tax on the item. This reasoning provides the basis for the appellate court's decision in *Garber* that the subject matter was one for which expert testimony was appropriate.

The court of appeals in *Garber* stated that the refusal to allow the jury to hear the defendant's expert deprived the defendant of evidence "showing her state of mind to be reasonable."[26] This statement could be interpreted to be adding a requirement of reasonableness to the lack of willfulness defense raised by the defendant. Previous decisions, however, have not required that a defendant's belief that items were nontaxable be reasonable in order to constitute a defense.[27] In *Gaunt v. United States*,[28] for example, the United States Court of Appeals for the First Circuit approved an instruction of willfulness *vis-à-vis* tax evasion which stated that

word "willfulness" is used. Spies v. United States, 317 U.S. 492, 497 (1943). A few of the meanings given "willfulness" are: acting with a bad purpose, United States v. Murdock, 290 U.S. 389, 395-96 (1933) (tax evasion); acting with reckless disregard for whether an act is unlawful, United States v. Budzanoski, 462 F.2d 443, 452 (3d Cir.) (falsifying financial records of union), *cert. denied*, 409 U.S. 949 (1972); and acting with intent to engage in the conduct, Powell v. United States, 112 F.2d 764, 767 (4th Cir. 1940) (failure by railroad to observe tariffs).

22. Davis v. United States, 226 F.2d 331, 334 (6th Cir. 1955); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949); United States v. Swanson, 509 F.2d 1205, 1210 (8th Cir. 1975); Sansone v. United States, 334 F.2d 287, 292 (8th Cir. 1964), *aff'd*, 380 U.S. 343 (1965).

23. United States v. Murdock, 290 U.S. 389, 396 (1933); United States v. Ruffin, 575 F.2d 346, 354-55 (2d Cir. 1978); United States v. Vitiello, 363 F.2d 240, 242 (3d Cir. 1966); Mann v. United States, 319 F.2d 404, 409 (5th Cir. 1963).

24. United States v. Peterson, 338 F.2d 595, 598 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965).

25. United States v. Murdock, 290 U.S. 389, 396 (1933); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949); United States v. Peterson, 338 F.2d 595, 598 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965).

26. 607 F.2d at 99.

27. *E.g.*, United States v. Vitiello, 363 F.2d 240, 242 (3d Cir. 1966) (evidence supported willfulness—reversed because instruction allowed conviction for carelessness); Mann v. United States, 319 F.2d 404, 409 (5th Cir. 1963) (reversed because instruction allowed conviction for negligence).

28. 184 F.2d 284 (1st Cir. 1950).

"[i]t is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent."[29]

Certainly when a tax authority agrees with the taxpayer's assessment of the taxability of an item, the taxpayer's *conclusion* is inferentially more reasonable than it would be if no recognized authority for the taxpayer's position existed.[30] Accordingly, if there is a requirement of reasonableness, the testimony of an expert who agrees with the defendant's position goes a long way toward proving the reasonableness of the position. But if there is not a requirement that the defendant's mistake or misconception of taxability be reasonable to negate willfulness,[31] the probative value of expert testimony on taxability is decreased. *Any* good faith belief should negate the element of willfulness, because the benchmark is a subjective one.[32] Even so, the expert testimony would have some relevance because if it is established that an expert could believe items nontaxable, it is somewhat more likely that an average person could make the same mistake. While it would not be *necessary* that the defendant's state of mind be reasonable to maintain the mistake defense, evidence which establishes that a mistaken belief is reasonable would be relevant to the probability of an individual holding that belief.

Additional support for admission of the expert's testimony is found in the fact that courts have stated that a greater leeway should be allowed in the introduction of evidence as to the element of willfulness.[33] The reason

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29. *Id.* at 291 n.4.

30. One dissenting judge in *Garber* believed that the similarity between a taxpayer's conclusion and that of an expert does not establish the reasonableness of the taxpayer's conclusion. It is certainly conceivable that the rationale underlying the taxpayer's conclusion may be totally illogical and unreasonable, even though the conclusion is the same as an expert's. 607 F.2d at 113-14 (Tjoflat, J., dissenting).

31. In addressing the question of whether a mistake of law must be reasonable to constitute a defense, the drafters of the Model Penal Code stated:

> [A requirement of reasonableness is] . . . unexceptionable in the case of an offense which can be committed negligently. What justification can there be, however, for requiring that ignorance or mistake be reasonable if the crime or element of the crime involved requires acting purposely or knowingly for its commission? [Requirements of reasonableness] . . . are not and they cannot be applied with generality to crimes in which the ignorance or mistake is relevant to the existence of an essential element of purpose or knowledge.

MODEL PENAL CODE § 2.04, Comment 1 (Tent. Draft No. 4, 1955).

32. *See* text accompanying notes 27-29 *supra*. *See also* United States v. Ruffin, 575 F.2d 346, 354 (2d Cir. 1978) (gross negligence will not support a conviction for income tax evasion under I.R.C. § 7201).

33. *E.g.*, United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969)' (transcript of defendant's conversation with third party admitted over hearsay objection to illustrate state of mind); Petersen v. United States, 268 F.2d 87, 89

given for this position is that an element as subjective as willfulness is extremely difficult to prove.[34] Also, allowing the defendant additional latitude in the introduction of evidence on his willfulness corresponds to protection of the rights of criminal defendants, because it provides the defendant a better opportunity to illustrate his good faith mistake as to taxability.

In *Garber* the state of the law was arguably an appropriate topic for expert testimony. The evidence given was on subject matter to which the average person could not competently testify, and, in the circumstances of the case, the testimony was relevant to the issue of willfulness.[35] The fact that the expert's opinion would be relevant is not, however, necessarily sufficient to warrant admission of the testimony. The *Garber* court did not discuss the application of Federal Rules of Evidence 403 to the expert's testimony.[36] One problem is that it requires several logical steps to connect testimony that the payments were nontaxable to the issue of willfulness.[37] It is questionable whether the average juror would take the appropriate steps. In addition, the extra time which may be taken at trial to qualify the expert, elicit his testimony, rebut the expert's testimony, impeach the expert, and then rehabilitate him probably outweighs the probative value of the evidence. Finally, allowing a witness to testify that payments were not taxable would be directly contrary to the judge's instruction to the jury and could encourage the jury to disregard the instruction and acquit the defendant on an improper basis.[38] It would be possible to give a limiting instruc-

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(10th Cir. 1959) (use of several character witnesses to bolster lack of willfulness defense); Miller v. United States, 120 F.2d 968, 970 (10th Cir. 1941) (admitted evidence of conversation with third parties to bolster lack of intent to defraud in mail fraud case). One dissenting opinion in *Garber* distinguished the above cases because the evidence in each involved direct reflections of the defendant's state of mind. 607 F.2d at 106 (Ainsworth, J., dissenting).

34. Black v. United States, 309 F.2d 331, 337 (8th Cir. 1962); Hoyer v. United States, 223 F.2d 134, 139 (8th Cir. 1955); United States v. Mathews, 335 F. Supp. 157, 161-62 (W.D. Pa. 1971), *appeal dismissed*, 462 F.2d 182 (3d Cir. 1972).

35. The evidence meets the standard established by the Federal Rules of Evidence for relevancy. It makes the existence of willfulness "less probable than it would be without the evidence." FED. R. EVID. 401.

36. *See* note 21 *supra*.

37. Two possible connecting routes between the testimony and the defendant's willfulness would be as follows: (1) an expert believed the items nontaxable, therefore it is reasonable to think they were nontaxable and it is more likely the defendant thought they were nontaxable; and (2) an expert believed the items nontaxable, therefore the taxability of the items was not clearly established by the law and it is more likely the defendant believed the items nontaxable. It is not clear from reading the *Garber* opinion which, if either, of these logical connections the court makes between the testimony and the defendant's willfulness.

38. 607 F.2d at 114-15 (Tjoflat, J., dissenting).

tion, but it would likely be ineffective. Under Federal Rules of Evidence 403, the evidence arguably should have been excluded.

There is an alternative approach the *Garber* court could have followed. The *Garber* court relied on *United States v. Critzer*[39] and *James v. United States*[40] to support its conclusion that the defendant's expert should have been heard. *Critzer* involved a prosecution for failure to report income from a business located on an Indian reservation. The tax question was exceptionally complex, involving interpretation of a statute relating to reservation property. The Bureau of Indian Affairs had advised the defendant that the income was tax exempt. The United States Court of Appeals for the Fourth Circuit held that the "defendant's actual intent . . . [was] irrelevant" because as a matter of law the "requisite intent to evade and defeat income taxes . . . [was] missing."[41] *James* involved tax evasion in relation to embezzled funds. Fifteen years earlier the Supreme Court had held embezzled funds to be nontaxable.[42] At the time James filed the returns in question the earlier case had not been overruled, although a subsequent decision had undermined the viability of the case.[43] Although *James* established that embezzled funds were taxable, the defendant's conviction was reversed by the Court because the state of the law at the time the returns were filed would not have indicated the funds were taxable.[44] Thus, both *Critzer* and *James* parallel the line of cases which holds that defendants may not be convicted when the law in the area does not give adequate notice of what conduct is proscribed or required.[45] Those cases turn on the notion that due process requires sufficient specificity of the law to provide the average person with guidelines for conduct, whether or not the individual is in fact aware of the law.[46] Although neither *Critzer* nor *James* was explicitly based on a due process analysis, the opinions im-

39. 498 F.2d 1160 (4th Cir. 1974).

40. 366 U.S. 213 (1961).

41. 498 F.2d at 1162.

42. Commissioner v. Wilcox, 327 U.S. 404, 409 (1946) (overruled in James v. United States, 366 U.S. 213 (1961)).

43. In Rutkin v. United States, 343 U.S. 130 (1952), the Court held extorted funds to be taxable, but distinguished the case from *Wilcox*. In the period between *Rutkin* and *James*, there were some commentators who considered *Wilcox* effectively overruled. *See, e.g.*, Note, *Taxation of Misappropriated Property: The Decline and Incomplete Fall of* Wilcox, 62 YALE L.J. 662, 665-66 (1953).

44. 366 U.S. at 221-22.

45. *E.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Bouie v. City of Columbia, 378 U.S. 347, 352-53 (1964); Wright v. Georgia, 373 U.S. 284, 293 (1963); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

46. *See* Note, *supra* note 45. An adequate notice challenge typically will be aimed at a statute which is so vague as to deny due process; if the challenge is successful, the statute will be declared void. *See, e.g.*, Papachristou v. City of Jack-

plicitly adopted the reasoning behind the inadequate notice cases. One cannot "willfully" violate a law unless there is adequate notice of the proscribed conduct, either through specificity of the law or the reprehensible nature of the conduct. Whether based on due process or lack of willfulness as a matter of law, holdings such as *Critzer* and *James* do not provide authority for introducing evidence of the law's unsettled or vague state to the jury for determination of the willfulness issue.[47] They do, however, provide an alternative basis on which *Garber* could have been decided. The court in *Garber* emphasized the state of the law and set out the basis for reversing and dismissing the case on the same grounds as *Critzer* and *James*, but it chose instead to remand the case for a new trial in which the state of the law will be evidence relevant to the defendant's willfulness.[48] Even though the court stated that a criminal prosecution "is an inappropriate vehicle for pioneering interpretations of tax law,"[49] its decision to

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sonville, 405 U.S. 156, 162 (1972) (vagrancy statute); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (state wage and hour statute).

In other instances courts have been called upon to determine whether a judicial interpretation of a statute was such that a defendant had adequate notice. *E.g.*, Bouie v. City of Columbia, 378 U.S. 347, 352-53 (1964) (interpretation of trespass statute); United States v. Lopez, 521 F.2d 437, 441 (2d Cir.) (interpretation of "harboring" with respect to illegal aliens), *cert. denied*, 423 U.S. 995 (1975); United States v. Wasserman, 504 F.2d 1012, 1015 (5th Cir. 1974) (interpretation of obscenity). In *Bouie*, the Court reversed a conviction for criminal trespass which relied on an interpretation which could not have been reasonably foreseen at the time the alleged trespass occurred. Though the defendants in *Bouie* were denied due process by being prosecuted under the judicial interpretation which occurred after their arrest, there was nothing about the interpretation which would prevent its application to subsequent defendants. In this respect the case is consistent with *Critzer* and *James*.

The *Bouie* Court noted that the acts of the defendants were not improper or immoral (*malum in se*), only illegal (*malum prohibitum*). 378 U.S. at 362. Courts have considered the *malum prohibitum/malum in se* distinction determinative in handling challenges based on lack of notice in criminal law. *Compare* Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) (unforeseeable interpretation of traffic violation as an "arrest") *with* United States *ex rel.* Almeida v. Rundle, 383 F.2d 421, 425-26 (3d Cir.) (denying habeas corpus to defendant convicted under interpretation of felony murder made for first time in case before the court), *cert. denied*, 393 U.S. 863 (1968). *See generally* Fruend, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 540 (1951).

47. Both dissenting opinions point this out. 607 F.2d at 105 n.6 (Ainsworth, J., dissenting); *id.* at 112 (Tjoflat, J., dissenting).

48. In his dissenting opinion, Judge Tjoflat pointed out that the court had laid the groundwork for a reversal due to the district court's failure to dismiss under FED. R. CRIM. P. 12(b)(2) for insufficiency of the indictment. 607 F.2d at 111 (Tjoflat, J., dissenting).

49. 607 F.2d at 100. The appellate court did not determine whether the payments were taxable.

remand made such an interpretation by the trial court necessary.

The decision in *Garber* seems unwarranted on two grounds. First, the usual means for handling criminal cases where the law is vague or unsettled is to decide as a matter of law whether the state of the law is clear enough to support a criminal indictment.[50] Although the court emphasized this factor and relied on *Critzer* and *James*, it based its decision on other grounds, *i.e.*, that the trial court erred in refusing to hear the defendant's expert witness. Second, having decided not to dismiss the case under a *Critzer* analysis, the court ruled evidence admissible which was of minimal probative value and presented problems of undue delay and potential confusion of the jury.

Garber may have a significant effect depending on the limits courts place on it. The opinion could be used to justify use of expert testimony or other evidence on the state of the law any time a mistake of law would negate the mental state necessary for conviction of an offense. If *Garber* is limited to its facts, expert testimony on the law will be allowed only in prosecutions under the criminal tax evasion statutes when the taxability of the item is a novel question. In any situation Federal Rules of Evidence 403 would frequently indicate the evidence should be excluded.

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50. *See* notes 45 & 46 and accompanying text *supra*.