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Cheek Is Chic. Ignorance of the Law Is an Excuse for Tax Crimes—A Fashion That Does Not Wear Well

Mark D. Yochum*

In these pages, brief years ago, I undertook a general review and modest criticism of a corner of the federal criminal tax law. The title,¹ in a sense, told all. Ignorance of the law provides no defense in ordinary criminal prosecutions. For most significant federal tax crimes, however, knowledge of the illegality of the conduct is an element of the offense. The word *willfully* in these statutes had been interpreted consistently by the Supreme Court (albeit unartfully) as the “violation of a known legal duty.”² Consequently, tax evaders with the most outrageous delusions concerning the state of their obligations such as “wages are not income” are permitted to offer this not-quite-madness in their defense.

In spite of the Supreme Court’s consistent interpretation of the word and the numerous applications of this rule of subjective knowledge of illegality by several circuits, the Seventh Circuit, for a decade, had offered an aberrant view.³ In that circuit, the courts had instructed juries that only those beliefs of the defendant which were objectively reasonable might be considered as a defense to the

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1. Mark D. Yochum, *Ignorance of the Law Is No Excuse for Tax Crimes*, 27 Duquesne L Rev 221 (1989)(Yochum, “Ignorance”).

2. *United States v Pomponio*, 429 US 10, 12 (1976) (Per Curiam). *Pomponio* is at the end, pre-*Cheek*, of a thirty year examination of this problem beginning with *United States v Murdock*, 290 US 389 (1933) and *Spies v United States*, 317 US 492 (1943).

3. See *United States v Moore*, 627 F2d 830 (7th Cir 1980), cert denied in 450 US 916 (1981).

willfulness requirement. The Supreme Court struck down this lone circuit's view in *Cheek v United States*.⁴

The purpose of this brief revisit to the principles which attend allowing ignorance of the law as an excuse is to illustrate a dismaying trend toward fresh confusion. Although *Cheek* simply reiterates prior law and adds nothing new (except in a discreet, quaint twist on the Constitution), the decision has become popular.⁵ This popularity, where all *Cheek* is chic, has led to a revival of consideration of longstanding procedures and instructions in tax prosecutions which had developed as corollary rules to the proposition that proof of the actor's knowledge of illegality is an element of the crime.

John Cheek is no madman. He does not rave, live in the deep woods, or carry a shotgun to pepper revenueurs. He is a soft-spoken pilot for a major airline. Cheek did not pay tax, implementing standard arguments and techniques of the tax protest movement. He filed W-4 forms which claimed up to 60 allowances. He fought civil tax assessments and lost. He argued that wages were not income and that the Sixteenth Amendment does not authorize the income tax. He lost civil cases. He persisted and was prosecuted for willful evasion.⁶

Cheek was told by lawyers, the Service, and the courts in his own civil cases that his views were wrong. The Service's insistent perennial forms and instructions called plainly for a tax on his wages. He knew that the overwhelming mass of his fellow citizens thought he was wrong; he knew we voluntarily complied. One might pause and consider whether such a Cheek-like mental state itself is worthy of the imposition of some criminal liability. Holmes suggested that ignorance of the law is not an excuse for crimes because the law-giver has decided that men must "know and obey."⁷ This decision is justified because "justice to the individual is rightly outweighed" by societal consideration.⁸ No one can challenge the fairness of the imposition of some penalty for such "igno-

4. US , 111 SCt 604 (1991) ("*Cheek*").

5. J. Andrew Hoerner, '*Cheeky*' Defenses in Vogue, Says Bruton, 54 Tax Notes 934 (February 24, 1992)(*Cheek* creating large volume of cases for Justice Department); Tax Notes 1061 (December 2, 1991)(Justice Department finding *Cheek* is being applied too broadly).

6. IRC § 7201 (1986) provides that he "who willfully attempts in any manner to evade or defeat any tax" is guilty of a felony. (Citations to the Internal Revenue Code shall be IRC §).

7. Oliver W. Holmes, Jr., *The Common Law* 48 (1881).

8. Holmes, *The Common Law* 48.

rance;" however, as tax crimes require proof of knowledge of the law, this kind of stupidity results in acquittal.

Cheek told the jury that he thought he owed nothing because he had attended seminars for twelve years held by the anti-tax movement. He said some of these speakers were lawyers. He studied on his own and he really, sincerely, in "good faith," believed that wages were not income and that the income tax was unconstitutional.

The jury sent several notes to the judge during its deliberations. The jury wrote that a verdict could not be reached because the group was split as to whether Cheek "honestly & [sic] reasonably believed that he was not required to pay income taxes."⁹ The judge's response was direct and incorrect. In the Seventh Circuit's style, he instructed that an unreasonable belief is not a defense for it does not negate the willfulness requirement. The beliefs that wages are not income and that the tax laws are unconstitutional are unreasonable. A persistent unreasonable refusal to acknowledge the law is not a misunderstanding which vitiates the proof of the willfulness.

After this additional guidance, the jury rapidly found Cheek completely guilty. A few of the jurors complained to the trial judge that the law was "narrow and hard."¹⁰ Another note from this sensitive jury painted an heroic picture of the winsome Cheek: "I know the *gentleman* is guilty of a crime. However, I honestly believe *he believed so deeply in his cause* that he has risked everything . . . and truly does not believe he is breaking the law."¹¹

The Seventh Circuit affirmed Cheek's convictions based upon these instructions, relying on long-standing precedent in the Circuit which had required objective reasonableness in beliefs held by defendants to negate willfulness.¹² The Circuit's opinion in *Cheek* on his direct appeal does not expound further on the rationale for

9. 111 S Ct at 608 (cited in note 4).

10. *United States v Cheek*, 882 F2d 1263, 1267 (7th Cir 1989) ("*Cheek I*").

11. *Cheek I*, 882 F2d at 1267 (cited in note 10)(Emphasis in the original). This view of heroic civil disobedience resulting in acquittal is at odds with the proper consequence of an illegal act to protest against a law, jail or fine. The speech aspects of the disobedience, the affirmation and publication of belief in the law's wrong, are effectuated by public trial and punishment. See *United States v Kellogg*, 955 F2d 1244 (9th Cir 1992). Kellogg aided in the preparation of false returns, a violation of IRC § 7206(2), "to show America . . . what's wrong with this tax system." *Kellogg*, 955 F2d at 1246. Jail resulted for Kellogg as motive or sincerity of a protest is irrelevant as long as knowledge of illegality is proven. *Id* at 1247.

12. See *United States v Buckner*, 830 F2d 102 (7th Cir 1987); *United States v Moore*, 627 F2d 830 (7th Cir 1980).

its deviance. That rationale was the product of some tortured reasoning concerning the general rule of the unavailability of mistake of law defenses. The Seventh Circuit had for a decade simply not recognized that subjective, actual knowledge of the law was an element of tax crimes such as *Cheek's*.

The history of the Supreme Court in interpreting the word *willfully* in tax crimes is not an artful tapestry woven with foresight. As Justice White notes in delivering the opinion in *Cheek*, the Court's original interpretation of the word, in the 1930's, was born of its belief that due to the complexity of the revenue laws, Congress must have intended that *willfully* meant more than a purposeful act but also implied knowledge of illegality. Of course, not a scintilla of legislative history is extant as proof of that concern. Congress, presumably knowing the Court's view, however, has failed to modify these criminal statutes while altering or adding to them on other topics.¹³ Confusion persisted through the mid-seventies as to whether there was even an additional and separate element of the offenses besides knowledge of illegality, namely, an *evil* intent. This confusion was produced by the Court itself.¹⁴ Finally, after several trips to the highest level, the word was given a settled reading to all but the Seventh Circuit; *willfully* is the "intentional violation of a known legal duty."¹⁵

The natural consequence of this interpretation of the statute is that an irrational belief sincerely held put before a sympathetic jury results in acquittal. This author had expressed a wistful hope that the Court in *Cheek* would recognize that no longer is the tax statute an arcane regulatory device but rather that it is well-understood in its fundamental obligations. Consequently, *willfully* should simply refer to the act itself, purposefully not paying tax. If prosecutions involved complex rules or dicey facts, the ordinary principles with respect to vagueness should provide enough protection for defendants to satisfy justice. Short of throwing out knowledge of illegality as an element of these crimes, statutory modifications could reduce the confusion, the waste of time, and the opportunity for disrespect to our system. A statute might limit, as the Seventh Circuit tried by judicial fiat, claims of ignorance to

13. The argument that Congress adopts judicial construction of statutes silently when reenacting them is weak. See discussion of *James* at notes 69-90 and accompanying text.

14. See *United States v Bishop*, 412 US 346, 360 (1973)(Suggesting that *willfully* means evil motive).

15. *Pomponio*, 429 US at 12 (cited in note 2).

reasonable confusions. A codified reliance on competent counsel defense may also serve as an appropriate compromise. Hope for a judicial resolution was admittedly idle; the ethic of *stare decisis* would lead the Court to defer to the Congress for any change and to reverse the Seventh Circuit in *Cheek*.

In *Cheek*, the Supreme Court reaffirmed the notion that even irrational beliefs held in good faith with respect to the obligations of the Internal Revenue Code vitiated the willfulness requirement of tax crimes. The "willfully" statutes require for conviction proof of the defendant's actual knowledge of illegality. Testing the reasonableness of an erroneous belief which a taxpayer holds which, in turn, precludes him from knowing the law as it is improperly relieves the government of its burden to prove all the elements of a crime.

The Court erroneously suggests that to preclude the jury from considering irrational beliefs would raise Sixth Amendment considerations. For this notion, the opinion cites cases such as *Sandstrom v Montana*.¹⁶ *Sandstrom* stands for the proposition that an element of the crime cannot be proven by presumption. The Court couples this idea with the principle that statutes should be interpreted to avoid raising constitutional questions. Of course, the only reason this constitutional tension arises is because the Court had concluded that knowledge of the law is an element of the crime. There is no suggestion in *Cheek* or anywhere that tax crimes (or any crime) must have, to pass constitutional muster, knowledge of the law as an element of the offense. The traditional limitation on the scope of crimes is embodied in the notion of vagueness or due process. After all, ignorance of the law is no excuse.

With respect to Cheek's constitutional delusions, that the Code is invalid, the Court splits a previously unseen hair. The Court opines that the history of the knowledge requirement in tax felonies was born of the fear of prosecution resulting from the complexity of the Code. Constitutional objections to the tax, consequently, are of a "different order," and belief of constitutionality is not an element of the crime.¹⁷ Rational or irrational beliefs about the unconstitutionality of the federal tax are newly and happily irrelevant under *Cheek*. The Seventh Circuit had held that such beliefs were unreasonable and were properly excluded from consideration, but not because belief of constitutionality was not an ele-

16. 442 US 510 (1979).

17. *Cheek*, 111 S Ct at 612 (cited in note 4).

ment of the crime. As Justice Scalia notes in his concurrence, puzzling over this distinction:

I find it impossible to understand how one can derive from the lonesome word 'willfully' the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity . . . does not.¹⁸

The consequence is that Cheek may be retried. His delusion about the Constitution will go unmentioned. If the jury believes that he believes (as the first jury certainly did) that wages are not income, he will be set free.¹⁹

As the dissenters Justices Blackmun and Marshall note, the Court's primary premise, that anyone sane could claim confusion about such fundamental tax propositions of long standing, is false.²⁰ They suggest that Cheek is even lucky to have the jury consider whether reasonable delusions vitiate the criminal intent. In a sense, the dissenters are a step shy of saying that the time has come to overrule this singular construction of tax crimes which flouts the maxim that ignorance of the law is no excuse.

The decision in *Cheek* does have the virtue of being a consistent application (in part) of prior Supreme Court decisions. Sadly, no reconsideration of the basis of the rule, the supposed complexity of tax obligations, was accomplished. Rethinking that proposition may have led to a different result. The decision which removes the "unconstitutionality" argument from the set of tax protesters' defenses may be tortured but is at least helpful and direct. At the first glance toward *Cheek*, the Treasury viewed the decision as a helpful victory for the home team.²¹ The criminal element in this field is, however, maddeningly perverse and still well-armed.

The real harm of the *Cheek* decision is its effect, albeit difficult to gauge, on the wavering ethics of the citizenry and the shaky sense of justice in our world of somewhat voluntary self-assessment. Decisions which proclaim knowledge of the law as a prerequisite to incarceration must suggest to the possible tax risk-taker that ignorance is a little more valuable than seeking competent tax advice. This real problem, manifested by the virulent tax protest movement, is the reason the initial interpretation of the tax crimes

18. *Id.* at 614.

19. Whether others similarly convicted prior to *Cheek* may get new trials is a matter of the procedural posture of their case. See e.g. *United States v Dunkel* 927 F2d 955 (7th Cir 1991)(United States had waived its claim that the defendant had waived a *Cheek* claim; *Cheek* error is plain error).

20. *Cheek*, 111 S Ct at 615 (cited in note 4).

21. Marianne Evans, *This Week's Tax News*, Tax Notes 567 (February 11, 1991).

was and continues to be so shortsighted. Taxpayers should be encouraged to discover the law. But the day after *Cheek* was issued, the picture of a sober and sadfaced Cheek topped the front page of USA Today and the headline teased: '*Sincere*' Tax Evaders May Skip Jail.²²

The Seventh Circuit considered on remand whether Cheek should be retried,²³ properly concluding that because Cheek raised both constitutional and statutory misunderstandings, a retrial was in order. The Seventh Circuit issued a stern warning, however, that "evaders who persist in their frivolous beliefs . . . should not be encouraged by . . . *Cheek*."²⁴ In spite of this almost private chastisement, *Cheek* has fired the twisted imaginations of those who would seek to expand the perverse notion that ignorance of the law is an excuse. Further, *Cheek*-based arguments have been met with sympathy and acceptance even when the decision itself is plainly distinguishable or inapposite. *Cheek* has created a fashion, a rage. To display this fashion, this author has selected a series of snapshots of *Cheek* in vogue. This array is particularly time bound, as fashion always is. As these words are read, new decisions with a patch of *Cheek* are being issued, decisions which will color or rend the illustrations presented here. But the pattern of the problems presented by *Cheek* will continue. This brief album with its not-so-pretty pictures is produced to persuade those who might be tempted to dress an argument in *Cheek* that the look is singularly unattractive.

First, as evidence of the confusion generated by a misplaced enthusiasm for *Cheek*, witness *United States v Moran*.²⁵ Moran, an Omaha policeman and owner of a video rental store, was charged under 17 USC section 506(a)²⁶ as a "person who infringes a copyright willfully and for purposes of commercial advantage . . ."²⁷ Moran purchased commercial videos, copied them, and rented the copies. He argued that he was not pirating but rather insuring his purchased tapes from vandalism. The issue was whether the word *willfully* in this statute means knowledge of illegality as *Cheek*

22. Tony Mauro, '*Sincere*' Tax Evaders May Skip Jail, USA Today 1A (January 9, 1991).

23. *United States v Cheek*, 931 F2d 1206 (7th Cir 1991) ("*Cheek II*").

24. *Cheek II*, 931 F2d at 1208-09 (cited in note 23).

25. 757 F Supp 1046 (D Neb 1991).

26. Copyrights, 17 USC § 506(a) (1988).

27. *Moran*, 757 F Supp at 1048 (citation omitted).

confirmed is the case in tax crimes.²⁸ The Government argued that in the copyright statute, *willfully* simply means intended to copy.²⁹

Writing virtually without precedent in the law of copyright crimes but with *Cheek* chic, the District Court held that when "used in complex statutory schemes, such as federal criminal tax statutes," the term *willfully* requires proof of knowledge of illegality.³⁰ Further, the court swallowed all of *Cheek*, holding that the test of knowledge is a subjective one; that is, unreasonable beliefs, if actually held, will preclude conviction.³¹ The court believed Moran did not know he was sinning and entered a judgment for acquittal.³²

Moran exemplifies the problems associated with applying the *Cheek* interpretation of the mental state in "willful" crimes generally. The District Court, echoing *Cheek*, perpetuates the myth that the particular law which generates the social obligation (albeit tax or copyright) is so complex that the criminal law must be interpreted to provide protection for citizens who might be unwarily trapped. Nothing in *Cheek* should be read as establishing a new rule for all federal crimes. This fear of prosecution for crimes which are theoretically unknowable must be so visceral in both judges and citizens that the *Cheek* pattern of analysis is repeated for its soothing qualities. The tax thieves, like *Cheek* himself, however, take from all of us by not performing their well-understood responsibilities, failing to pay tax on wages, or not reporting illegally gotten gains. Prosecutions based on arcane interpretations should be adequately protected by ordinary principles of vagueness, an issue not reached in *Moran*.

Under color of *Cheek*, in *United States v Aversa*,³³ the District Court, in an anguish-filled opinion, reviews the appropriate mental state for conviction under 31 USC section 5322(a)³⁴ for "willfully" structuring a cash transaction. Aversa, experiencing marital difficulties, structured cash transactions with a co-defendant to avoid the cash reporting requirements.³⁵ The "structuring" was keeping a series of transactions in cash between Aversa and his partner

28. *Id.*

29. *Id.*

30. *Id.* at 1049.

31. *Id.* at 1051.

32. *Id.* at 1053.

33. 762 F Supp 441 (D NH 1991).

34. Money and Finance, Pub L No 97-258, 96 Stat 877 (1982), codified at 31 USC § 5322(a) (1988).

35. *Aversa*, 762 F Supp at 441-42.

under ten thousand dollars per transfer.³⁶ There was no element of tax evasion; the intent was to hide the money from his wife.³⁷ The District Court, however, instructed the jury based upon *United States v Scanio*.³⁸

In *Scanio*, the Second Circuit had held that, with respect to structuring transactions, proof of knowledge of illegality is not required. The Second Circuit's rationale was that in ordinary criminal statutes, *willfully* does not imply such proof.³⁹ Furthermore, the legislative history suggests Congress intended that a conviction only required proof the defendant was aware of the reporting provisions (as Aversa was), not that he was aware his proposed transaction was illegal.⁴⁰ Obliquely dealing with a charge of vagueness, the Second Circuit in *Scanio* noted that the defendant "engaged in affirmative conduct and demonstrated an awareness of the legal framework relative to currency transactions which . . . should have alerted him to the consequences of his conduct."⁴¹ Would that such were the rule for tax crimes.

Aversa moved to set aside his conviction based upon newly-decided *Cheek*, a conviction under the *Scanio* instruction which the District Court characterized as "shooting fish in a barrel."⁴² Rethinking, the District Court concluded that *Cheek* required a knowledge-of-illegality element in tax or tax related crimes which use the term *willfully*.⁴³ Consequently, *Scanio* was wrongly decided, at least in New Hampshire.⁴⁴ Jurisdictional impediments in the case restricted the ability of the court to grant a new trial to Aversa. The opinion promises that the court will do all it can to remedy what it characterizes as a "miscarriage of justice."⁴⁵ After all, the court notes, "[u]nderstanding one's duties under the structuring statute is certainly more difficult and less common than understanding ones' legal duty to file a tax return."⁴⁶

36. Id at 442.

37. Id at 442-43.

38. Id at 444-47 citing *United States v Scanio*, 900 F2d 485 (2d Cir 1990).

39. *Scanio*, 900 F2d at 489.

40. Id at 491.

41. Id at 490.

42. *Aversa*, 762 F Supp at 444.

43. Id at 447.

44. But see *United States v Dashney*, 937 F2d 532 (10th Cir 1991), cert denied in 112 S Ct 402 (1991). *Cheek* does not require proof of knowledge of illegality in cash structuring transactions. "*Cheek* involves only certain criminal tax statutes, and we see no reason to extend [it] into straightforward currency reporting requirements." *Dashney*, 937 F2d at 540.

45. *Aversa*, 762 F Supp at 447.

46. Id.

In recommending the elimination of the "ignorance-of-the-law" defense or its modification by a statutory "reliance-on-counsel" defense, or in simply arguing that *Cheek* should be limited to its facts, this author is not arguing for increased prison terms for more individuals. The purpose of this piece is to illustrate that *Cheek* effectuated no change in prior law and should not be treated as enunciating a new principle or philosophy which might have application beyond the bounds of that case. *Cheek* should be treated as having no impact beyond tax crimes which contain the expression, *willfully*. Confusion engendered by *Cheek* chic is simply a waste of time.

Those who fear eased possibilities of incarceration if the *Cheek* rule were modified may contest the revenue and social value of marginally increased deterrence. Who can measure the impact of the publicity about prison terms on compliance and collection? More concrete is the concern that tax often presents issues which are truly dicey and that running afoul of such provisions should not land you in jail. The *Cheek* rule is further justified if ordinary vagueness principles are inadequate to protect innocent but unwary citizens against a rapacious state. Our concern, however, should not be about all legal or colorably legal principles which are claimed to be uncertain but are not (wages are not income). Rather, our concern should be with the way in which protection is afforded a defendant who is prosecuted for a violation which is in some sense less certain, not only to the particular defendant, but to everyone.

Two sorts of cases present the possibility of prosecution for debatable (but not frivolously so) tax matters. These may be styled "the gift problem" and "the tricky section problem." The gift problem deals with tax cases that are determined by simple legal principles, but for which, because the outcome is fact-based on multiple factors, the ultimate result may be difficult to predict. Gifts are excludable under section 102,⁴⁷ but the great *Commissioner v Duberstein*⁴⁸ relies on life to supply the answer as to whether the dominant motive of the transferor was a detached generosity, springing from affection or charity.⁴⁹ The law is well known; however, facts may make determination complex. The tricky section problem, on the other hand, is presented by the tax-

47. IRC § 102 (1986).

48. 363 US 278 (1960).

49. *Duberstein*, 363 US at 285.

payer who engages in a transaction in which the salient facts are without dispute but the law is purportedly uncertain. The issue is whether either of these sorts of cases presents a rationale for the preservation or advancement of *Cheek* chic, where ignorance is exculpatory.

The well publicized post-*Cheek* case of *United States v Harris*⁵⁰ presents the gift problem at its lurid best. In *Harris*, twin sisters, Harris and Conley, lived with (in its full colloquial meaning) the wealthy Mr. Kritzen. Their favors were appreciated and, before he died, Kritzen transferred more than a half a million dollars to each. He paid no gift tax; they paid no income tax. The sisters each were convicted of willful evasion and failure to file.

In this post-*Cheek* opinion, the Seventh Circuit's reversal of the convictions unnecessarily blurs several issues. (This running of ideas together, like bleeding madras, is part of *Cheek* fashion.) At once, the court holds that the evidence was insufficient to show that the sisters had income, a necessary predicate to the charges, and that the evidence was insufficient to show they acted with *Cheek*, with a knowing disregard of legal obligations.⁵¹ It is in the former conclusion that the major protection for defendants is revealed in those factually complex but legally simple cases. The prosecution must prove, beyond a reasonable doubt, that the item was not a gift. Knowledge of the illegality of failure to report income that is not a gift, is not reached. Consequently, those worried about aggressive prosecution in cases such as the gift problem should be comforted by knowing that a dicey factual predicate precludes prosecution because a tax obligation itself or a requirement to file cannot be proven.

Of course, the author's sympathy in this area is still with the prosecutor, as several opportunities are available for the doubtful taxpayer to avoid evasion charges without leaning on the ignorance of the law excuse. Seeking truly expert advice, ruling requests, disclosing an item on the return and noting the proposed treatment, or paying tax and seeking a refund are ways (admittedly not pain or cost free) to educate the citizen without criminal surprise.⁵² The gift problem is not a vagueness problem. The receipt of anything of

50. 942 F2d 1125 (7th Cir 1991).

51. *Harris*, 942 F2d at 1128.

52. The Service will not issue determinations on everything. Fact-based problems may permit the Service to refuse a request. Rev Proc 92-1 at 17. Generally, the limitation on ruling requests involves particular rules such as to whether compensation is reasonable, rather than a blanket prohibition of fact-based items. Rev Proc 92-3.

value by a citizen should be presumed by the citizen to create a tax issue even if it is later resolved by the exclusion of the income. Further, the alternative defensive position (it was an excludable item) presents the sort of studied approach to evasion that the Court, in part, found so abhorrent in restricting the use of constitutional delusions as a defense in *Cheek*.

Of course, in the flush of *Cheek* chic, the Seventh Circuit could not rest on lack of proof by the Government that there was no gift. Instead, it held "that current law on the tax treatment of payments to mistresses provided . . . no fair warning that [the] conduct was criminal."⁵³ The Seventh Circuit does not ground acquittal on grounds of vagueness but rather takes a middle *Cheek* position that "[i]f the obligation to pay a tax is sufficiently in doubt, willfulness is impossible as a matter of law . . ."⁵⁴ The opinion reviews a short rasher of cases with disparate treatment on payments to mistresses which, the Seventh Circuit concludes, "turn entirely on their facts"⁵⁵ and provide no warning. Of course, the court fails to recognize that the simple existence of such cases presents a measure of warning that the government might feel such payments might be taxable. The Seventh Circuit is firm however, in that "[n]ew points of tax law may not be the basis of criminal convictions."⁵⁶

The conclusion intimated by *Harris* is that "fact"-based impositions cannot serve as the basis for prosecution, absent direct precedent on the fact pattern. One might note that such issues dot tax law, and law generally. The oft-quoted aphorism about life supplying us the answer to our tax riddles comes from far before *Cheek*, well before *Dubenstein*, in Justice Cardozo's brief and pithy *Welch v Helvering*⁵⁷ a case examining the (now) section 162⁵⁸ deduction. Would the Seventh Circuit suggest that, as business deductions are tested in a fact-based way, untoward taxpayer enthusiasm for the

53. *Harris*, 942 F2d at 1131.

54. *Id.* at 1132. The Seventh Circuit implies that a law might present two levels of ambiguity. "Objective ambiguity," the failure to provide fair notice, requires the court to review the law and, if ambiguity is found, dismiss the indictment. "Subjective ambiguity" is simple wrongheadedness by the defendant (which is endemic in the protest movement); this sort of ambiguity is the one which should be argued to the jury as part of the defendant's case that he in good faith held the contrary view, vitiating the *Cheek* requirement that he knew the law. *Id.* at n 6.

55. *Id.* at 1134.

56. *Id.* at 1131.

57. 290 US 111 (1933).

58. IRC § 162 (1986).

deduction cannot serve as the basis for prosecution?

Before *Cheek*, the gift problem was similarly resolved. In *United States v Garber*,⁵⁹ the Fifth Circuit reversed the evasion conviction of Ms. Garber who failed to pay tax on the sale of her own rare blood to a pharmaceutical company. Although she had ample warning that the payments might be income from experts and the company that paid her, she followed her own experts and chose to treat the receipts as non-taxable.⁶⁰ The majority held that restricting the admission of evidence concerning the law's uncertainty was reversible error.⁶¹ Anticipating *Cheek*, the court held that evidence about doubtful construction of the statute is admissible because it tends to reduce a taxpayer's ability to know the law.⁶² The Fifth Circuit noted:

To hold otherwise would advocate convicting an unsophisticated taxpayer who failed to seek expert advice . . . while setting free a wise taxpayer who could find advice that taxes were not due.⁶³

While there is a populist appeal in the *Garber* court's characterization of the problem, such a dichotomy is false. The unsophisticated taxpayer who has a receipt would be hard pressed to conclude any receipt is not income. After all, his life is testimony that all gotten gain is taxed. There can be no real argument that the law is so vague that the taxpayer did not even know there was a problem. In any case, even under *Cheek*, the so-called ambiguity in the law should merely be evidence of the ability to form the criminal intent, not grounds for dismissing indictments, unless the ambiguity truly rises to vagueness.

For example, in the off-cited *United States v Critzer*,⁶⁴ the Fourth Circuit reversed the willful evasion conviction of an Eastern Cherokee Indian. Critzer failed to report income from her various businesses which were located on the reservation. Again, the opinion notes that even the government conceded that the taxability of the items arising on the reservation was legally undecided.⁶⁵ The Department of the Interior advised Ms. Critzer that the items were exempt. The court held that if the law is "vague or highly debatable," a defendant necessarily lacks the requisite intent,

59. 607 F2d 92 (5th Cir 1979) en banc, four judges dissenting.

60. *Garber*, 607 F2d at 100.

61. *Id* at 97.

62. *Id* at 98.

63. *Id*.

64. 498 F2d 1160 (4th Cir 1974).

65. *Critzer*, 498 F2d at 1161.

namely, to violate a known legal duty.⁶⁶

The behavior of Ms. Critzer was less culpable than that of Ms. Garber. Critzer sought advice with more than colorable competence and followed it. Garber was given advice that her blood produced income and disregarded it. Neither consulted the IRS.⁶⁷ The issue is, however, whether the elimination of the knowledge of law element of the felony would result in unjust prosecutions and conviction. Ms. Critzer could have gone through the usual civil alternatives of payment and suit for refund. The Fourth Circuit held that "the appropriate vehicle to decide this pioneering interpretation of tax liability is the *civil* procedure . . ."⁶⁸ Thus, rather than confronting the issue of law whether the items were taxable, the court punted.

There has been a dearth of cases holding that any particular tax obligation is vague. The Supreme Court itself, in *James v United States*,⁶⁹ has provided the classic case of confusion over what to do in the close case. *James* illustrates the second sort of problem case, the tricky statute or more properly, the tricky opinion. In *James*, the facts were agreed upon, but the tax law applied was subject to disagreement at the highest levels. (Perhaps the greatest testimony to the theoretical complexity of tax issues is how often the Supreme Court clouds rather than clears.) The Court had determined, in *Commissioner v Wilcox*,⁷⁰ that the proceeds of embezzlement were not income largely because the criminal has a contemporaneous obligation to repay. Six years later, in *Rutkin v United States*,⁷¹ the proceeds of extortion were held taxable, but *Wilcox* was not explicitly overruled. Finally, Mr. James, an embezzler, was convicted of evasion, in spite of *Wilcox*.⁷² In *James* the Supreme Court reexamined *Wilcox* and concluded that embezzled funds were income.⁷³ The issue then became what to do with the convicted felon James.⁷⁴

Justice Warren was joined by Justices Brennan and Stewart for

66. *Id.*

67. Evidence in *Critzer* was refused at argument on appeal that the IRS itself had been telling other Eastern Cherokee Indians to file for refunds for taxes paid on identical items. *Id.* at 1161.

68. *Id.* at 1164 (emphasis added).

69. 366 US 213 (1961)(*James*).

70. 327 US 404 (1946).

71. 343 US 130 (1952).

72. *US v James*, 273 F2d 5 (7th Cir 1959)((*James D.*).

73. *James*, 366 US at 221.

74. *Id.* at 221-22.

a plurality opinion on the disposition of James' conviction.⁷⁵ Warren argued that the old precedent, *Wilcox*, had been "thoroughly devitalized" by the subsequent decision in *Rutkin* as there is no difference in the obligation to repay of an embezzler or extortionist.⁷⁶ Many circuits had found the most subtle of distinctions from *Wilcox* to allow embezzlers' convictions on tax evasion charges in spite of the old case.⁷⁷ James' argument (that reenactment of the code post-*Wilcox* implied congressional approval of its rule) was dismissed by Warren who, in turn, cleverly suggested that Congress itself may have thought the case had been impliedly overruled.⁷⁸ Nonetheless, Warren held, not that the statute or law was vague, but rather that as a matter of law willfulness could not be proven because of this level of confusion.⁷⁹ This opinion proposed reversal of the conviction and dismissal of the indictment.⁸⁰ The test for conviction was *Cheek*, as it always had been, violation of a known legal duty.

Black and Douglas dissented (an intact record of taxpayer oriented decision-making).⁸¹ Participants in *Wilcox*, they agreed with its analysis, and thought it was being shabbily overruled.⁸² Justice Black, in an instructive opinion, suggests that if *Wilcox* were wrong, then it was always wrong and James should be convicted.⁸³ These two tax dinosaurs agreed with the plurality only on the dismissal of James' case.⁸⁴ Justice Whittaker latched onto this view.⁸⁵

Justice Clark, writing separately, thought *Wilcox* was not only wrong but had been overruled "sub silentio" by the pervasive *Glenshaw Glass*.⁸⁶ Clark suggested the conviction should be affirmed because the proof showed James had "placed no bona fide

75. *Id.*

76. *Id.* at 215. "Questions of federal income taxation are not determined by such 'attenuated subtleties.'" *Id.* at 216 quoting *Lucas v Earl*, 281 US 111, 114 (1929).

77. See, for example *Kann v Commissioner*, 210 F2d 247 (3d Cir 1953); *United States v Wyss*, 239 F2d 658 (7th Cir 1957); and *Briggs v United States*, 214 F2d 699 (4th Cir 1954).

78. *James*, 366 US at 220.

79. *Id.* at 221-22.

80. *Id.* at 222.

81. *Id.*

82. *Id.* at 223-25.

83. *Id.* at 222. "In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application." *Id.*

84. *Id.*

85. *Id.* at 248-50.

86. *Id.* at 241.

reliance on *Wilcox*.”⁸⁷ This response is aggressively tres *Cheek*. Prosecutors can still show that the defendant is lying when he says he believes the law is other than what it is. Trial courts today can determine that claims of ambiguity ought to be put to the jury to test the defendant’s good faith belief in those claims.

Justice Harlan and Frankfurter thought *Wilcox* was wrong but that James should be retried.⁸⁸ Unlike the plurality but like Justice Clark, they agreed that the mere existence of the legal uncertainty did not preclude conviction.⁸⁹ James should be retried with a jury charged that “his good faith and actual belief” in the wrongly decided *Wilcox* required acquittal.⁹⁰ This conclusion is straight *Cheek*.

As in *Critzer*,⁹¹ *James* never reaches (or needs to reach) the question of vagueness. The problem of doubtful legal interpretation is at the center of *Cheek*, and the response of the courts might be (as in *James*) that the debate is evidence of intent or precludes forming the intent. The debate, however, is admissible and material, whether reasonable or not. One would hope that courts will not encourage the tax felon in even a minute way by supporting dismissals as a matter of law. Nothing in *Cheek* requires that conclusion.⁹² Constitutional vagueness principles have not come into play largely because courts need not reach the issue if they believe the law is confused enough to preclude formation of the mental state.

Unsettled legal issues involving sophisticated schemes, more tricky statute problems, have produced results which are *Cheek/James*-like dispositions. In *United States v Schmidt*,⁹³ the Fourth Circuit affirmed the taxpayer’s conviction on a number of the “willful” tax felonies. Schmidt sold a trust scam, called Unincorporated Business Organizations, a trail of shady paper which, he claimed, resulted in the deductibility of personal items (like food).

87. *Id.* See *United States v Sturman*, 951 F2d 1466 (6th Cir 1991). In *Sturman*, the defendant, a pornography dealer, was convicted of willfully failing to maintain records. He argued that the prosecution failed to show he was aware of the filing requirements. The Sixth Circuit properly held that *Cheek* had not altered the rule that willfulness may be proven through inferences from the actor’s conduct. *Sturman*, 951 F2d at 1466.

88. *James*, 366 US at 241.

89. *Id.* at 245.

90. *Id.* at 246.

91. For a discussion of *Critzer*, see notes 64-68 and accompanying text.

92. See for example *United States v Diamond*, 788 F2d 1025 (4th Cir 1986)(*Critzer* defense rejected; broker-dealer taxation rules are not highly debatable.)

93. 935 F2d 1440 (4th Cir 1991).

The Fourth Circuit held that the law relating to the taxation of these arrangements, primarily the assignment of income doctrine, was not "highly debatable."⁹⁴

In *United States v Dahlstrom*,⁹⁵ however, a case involving evasion through foreign tax shelters and trusts, the Ninth Circuit held, as in *Critzer*, that the legality "was completely unsettled by any clearly relevant precedent."⁹⁶ A blunt dissent argued that the law was sufficiently clear that these purportedly complex tax structures were no more than sham trusts to allow prosecution.⁹⁷ As long as knowledge of illegality was proven, as it could be from the facts of the scheme, conviction was appropriate.⁹⁸

Finally in *United States v Baer*,⁹⁹ the District Court denied a motion to dismiss the indictment of an executor for failing to include property transferred to him by the decedent, his mother, on the Federal Estate Tax Return. The executor offered that confusion in the language on the effective dates of the modifications to the transfers within three years rule of IRC section 2035¹⁰⁰ (a withering mouthful there) precluded his prosecution as a matter of law.¹⁰¹ In rejecting this idea, the court wisely noted, "[a]ttorneys make arguments ranging from the astute to the absurd; the mere fact that arguments have been made is no basis for finding a statute uncertain as a matter of law."¹⁰²

If the law itself is an issue, how is it to be debated in a criminal prosecution? Note, at this point, that the issue will be debated in these post-*Cheek* days in virtually every case in which the defendant is willing to testify.¹⁰³ While the reasonableness of the belief of the defendant is not a prerequisite to the discussion of the delusion, certainly the craziness of the idea is pertinent to whether the defendant actually believes what he says. Prior to *Cheek*, courts

94. *Schmidt*, 935 F2d at 1448.

95. 713 F2d 1423 (9th Cir 1983), cert denied in 466 US 980 (1984).

96. *Dahlstrom*, 713 F2d at 1428.

97. *Id* at 1430.

98. *Id* at 1431-32.

99. 662 F Supp 126 (W D NY 1987).

100. 26 IRC § 2035 (1986).

101. *Baer*, 662 F Supp at 127.

102. *Id* at 130.

103. The position of the Justice Department is that a *Cheek* instruction is not appropriate unless the defendant testifies. See J. Andrew Hoerner, 54 Tax Notes 934 (February 24, 1992). That is, the only competent testimony to introduce the issue of a lack of knowledge of the law is the defendant's. But the knowledge of illegality is more properly an element of the offense which must be proven. This matter seems untested. Nonetheless, each defendant who testifies can certainly say that he did not know that what he did was illegal.

refused evidence proffered by the defense in the nature of expert testimony as to either what the law actually is or what it is purported to be by the deluded. This exclusion of testimony about the state of the law was longstanding and consistent with the view that the trial court itself is the jury's source of law.¹⁰⁴ Now, post-*Cheek*, there has been dithering about how we may examine the taxpayer's purported misunderstanding.

In *United States v Powell*,¹⁰⁵ for example, the Ninth Circuit reviewed the conviction of Roy and Dixie Powell for willful failure to file returns. Their study of the Code led them to the belief that filing returns was voluntary and they volunteered not to.¹⁰⁶ The Ninth Circuit reversed their conviction on two grounds. First, the Ninth Circuit concluded that the trial court violated *Cheek* chic by instructing the jury that: "if a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for you to decide whether the defendants acted in good faith."¹⁰⁷ The Ninth Circuit gushed that this overt reference to reasonableness implied that the belief must be reasonable for acquittal.¹⁰⁸ This conclusion is rather prissy as it is clear that the more illogical and wild the purported belief, the more unbelievable it is that the defendant actually believes it. The Supreme Court explicitly recognized this possible analysis in *Cheek*.¹⁰⁹ Worse, the Ninth Circuit gave full blown respect for the defendant's thought process, believing that such a conclusion was impelled by *Cheek*, a decision treated as hot news.¹¹⁰

Soon thereafter, in *United States v Hirschfeld*,¹¹¹ the Fourth Circuit considered a virtually identical instruction. The defendant objected and was also refused in his request that the jury be told that a defendant could hold a erroneous belief in good faith even if there were no reasonable grounds for the belief.¹¹² "Good faith" in the context of these prosecutions refers to the need for the jury to find for acquittal that the defendant actually believed his errone-

104. See *United States v Poschwatta*, 829 F2d 1477 (9th Cir 1987), cert denied in 484 US 1064 (1988).

105. 936 F2d 1056 (9th Cir 1991)(*Powell I*) opinion superseded by *United States v Powell*, 955 F2d 1206 (9th Cir 1992)(*Powell II*).

106. *Powell I*, 936 F2d at 1059.

107. *Id.*

108. *Id.* at 1061-62.

109. *Cheek*, 111 S Ct at 611 (cited in note 4).

110. *Powell I*, 936 F2d at 1061.

111. 964 F2d 318 (4th Cir 1992).

112. *Hirschfeld*, 964 F2d at 322.

ous interpretation of the law as distinguished from garden variety lying or a self-imposed delusion created for trial.¹¹³ In an action in which the defendant claims that wages are not income, there are no reasonable grounds for the belief. The defendant would not want any tie between the rationality of the belief and whether he believed. The Fourth Circuit held that the trial court did not err in pointing out this logic and approved the instruction with some limitations. The Fourth Circuit distinguished *Powell I*, holding that the trial court had given a more elaborate and complete discussion of the good faith principle than that in *Powell I*.¹¹⁴ Consequently, the isolated focus in the instruction on reasonableness of the belief was not prejudicial.¹¹⁵

Cheek chic is a confusion of fashion produced by the unfounded notion that *Cheek* actually represents a change in tax crime principles. In an unpublished opinion, *United States v Kimball*,¹¹⁶ the Ninth Circuit considered the same instruction, identical to *Powell I* and *Hirschfeld*. This time, however, the Ninth Circuit concluded that viewing the instructions as a whole, there was no prejudice.¹¹⁷ But, thinking out loud again, the Ninth Circuit reaffirmed its skepticism about the instruction.¹¹⁸ In *Powell II*,¹¹⁹ the Circuit's modified opinion still reversed Powell's conviction based on the instruction.¹²⁰ "The vice of the jury instruction given is that it did not make clear that a defendant must demonstrate only a subjective good faith belief is held and not that the belief must also be found to be objectively reasonable."¹²¹

Under *Cheek*, juries are permitted to consider the outrageousness of the defendant's purported belief in determining whether he actually believes it.¹²² *Cheek* does not require that juries be left to

113. Compare *United States v Dockray*, 943 F2d 152 (1st Cir 1991). Convicted of mail and wire fraud, Dockray complained that the trial court failed to instruct the jury that "good faith" is a defense. Reviewing a split in the circuits on this issue, the court held that an adequate instruction that intent to defraud is a element of the crime would suffice to convey the notion of "good faith." *Dockray*, 943 F2d at 155. At the oral argument, the defendant asked about *Cheek*. *Cheek* was distinguished, thankfully, the court holding that the "willfulness requirement in tax evasion serves a function unique in criminal law: it makes ignorance of the law a defense." *Id* at 156 (citation omitted).

114. *Hirschfeld*, 964 F2d at 323.

115. *Id* at 322-23.

116. 1991 US APP LEXIS 16094 (July 16, 1991 9th Cir) (unpublished opinion).

117. *Kimball*, US APP LEXIS 16094 at 10-11.

118. *Id*.

119. 955 F2d 1206 (9th Cir 1992).

120. For a discussion of *Powell II* see notes 126-136 and accompanying text.

121. *Powell II*, 955 F2d at 1212.

122. *Cheek*, 111 S Ct at 611-12.

their own devices in figuring the connection. Proof of law on the government's side in conventional cases results in a conventional instruction about what the law is. Defendants, however, have long recognized that to the extent that they can "prove" that their wrong belief is reasonable, they are more likely to be acquitted. With the law itself at issue, the issue becomes what evidence may be presented to the jury as to the formation of the defendant's belief and, in response, how outrageous that belief is.

Before the new *Cheek* rage, proof of the source of defendant's beliefs and proof of the "right" law was under some control. Several principles dealt with excluding evidence from either side about the law. The trial judge is considered the source of law for the jurors. Consequently, testimony about what the law is was properly excluded.¹²³ Testimony about how the defendant formed his beliefs, including the law itself and the sources and so-called experts on which he relied also had been typically excluded on grounds of confusion and irrelevance.¹²⁴ Pre-*Cheek* chic, the evidentiary issue was characterized, not as how the defendant reached these odd conclusions, but whether he actually held them. But the character of the odd belief and how far afield it is from mainstream thought is relevant to determining the ability of the taxpayer to hold such a belief. However salutary these proof limitations were in the expeditious prosecution of tax criminals, now with *Cheek* in vogue, the old limits are being tested.

The California Powells wished to offer as evidence in their defense IRC section 6020(b)¹²⁵ which empowers the Secretary to prepare a return if the taxpayer fails to make one.¹²⁶ This statute is the one, the Powells said, that led them to the conclusion that return making must be voluntary.¹²⁷ The trial court would not allow the statute to be read to the jury.¹²⁸ The jury deliberated and (much like *Cheek's* jury) then inquired of the judge: "[c]an IRS file a 1040 without persons signing?"¹²⁹ The trial court then took the bit and read IRC section 6020(b) to the jury and told them correctly that the statute only empowers the IRS to file a return in

123. See *United States v Powell*, 936 F2d 1056, 1064 (9th Cir 1991) ("Powell I") for a discussion of traditional approaches to proof of law in tax crimes.

124. See discussion in Yochum, *Ignorance*, 27 Duquesne L Rev at 230 (cited in note 1).

125. IRC § 6020(b) (1986).

126. *Powell II*, 955 F2d at 1209.

127. *Id.*

128. *Id.*

129. *Id.*

the event the taxpayer does not fulfill his obligation.¹³⁰ The Ninth Circuit recognized that the jury cannot be allowed to interpret section 6020(b) as obviating the filing requirement of section 7203¹³¹ and acquit on that basis.¹³² Nonetheless, the Ninth Circuit held that any such instruction on the real state of the law must be tied to a "strong reminder" that the only issue is the defendants' good faith belief in their interpretation.¹³³

The Powells also wished to introduce other statutes and cases, a request that the trial court refused.¹³⁴ The Ninth Circuit in *Powell II* cautioned that such evidence may be relevant and probative as to the defendants' mental state, but may be excluded if unnecessarily confusing.¹³⁵ This holding represents a substantial modification of the Ninth Circuit's view in *Powell I*,¹³⁶ gushed out in the first full flush of *Cheek* chic. In *Powell I*, the Ninth Circuit had held that *Cheek* had impliedly overruled all cases which had permitted the trial court to control proof of law in tax cases such that the refusal to allow section 6020(b) into evidence was itself reversible error. This over-expansion of *Cheek* which could lead to a tax-protestor free for all with respect to a parade of oddities before innocent juries had had only a six months life in the Ninth Circuit but will surely spring to life elsewhere.

In *United States v Lankford*,¹³⁷ the Eleventh Circuit considered the availability of expert testimony on legal issues offered by both sides after Sheriff Lankford was convicted of extortion and willfully filing false income tax returns. Part of the income tax conviction was based on the failure to report a \$1,500 item solicited from an inmate at the Sheriff's county jail by a sergeant. The Sheriff explained that he thought the money was a non-taxable gift because it was given to him ultimately by his re-election campaign workers with an explanation that the check was to provide for his family during the financial hardship of the coming campaign.¹³⁸

130. Id at 1209-10.

131. IRC § 7203 (1986).

132. *Powell II*, 955 F2d at 1213. (It might be noted that in this needlessly confused area of law popularized by *Cheek*, deciding that the defendant taxpayer may be legally correct seems to be exactly what juries try to do; witness the jury's questions in *Powell* and *Cheek*.)

133. Id.

134. Id.

135. Id at 1214.

136. 936 F2d at 1056. For a discussion of *Powell I*, see notes 106 -110 and accompanying text.

137. 955 F2d 1545 (11th Cir 1992).

138. *Lankford*, 955 F2d at 1551. No claim of quasi-vagueness was made a la *Harris*

The trial court refused a defense request to allow expert testimony as to the reasonableness of Lankford's belief.¹³⁹ The government, however, was permitted to examine Lankford's tax-preparer as an expert as to the proper accounting for campaign contributions which are used for personal expenses.¹⁴⁰ (Such items are not gifts but income.) The Eleventh Circuit held that the exclusion of the proffered defense expert was an abuse of discretion by the trial court.¹⁴¹

Clearly, as the Eleventh Circuit notes, expert testimony as to the reasonableness of the taxpayer's belief is relevant to determining willfulness, and disallowing such testimony inhibits the ability of a defendant to show that his belief was reasonable and thus more likely held in good faith. The taxpayer must be allowed to show through expert testimony that which a jury cannot figure out on its own; that it would have been reasonable to treat the receipt as a gift, not income.¹⁴² It should be noted that as a additional ground for reversal, the Eleventh Circuit held that allowing the United States to use expert testimony to prove the craziness of the belief requires, in fairness, an allowance for the defense to use experts in rebuttal.¹⁴³ With a nod to ancient practice, the Eleventh Circuit authorized the trial court to exclude testimony about the law itself.¹⁴⁴ For example, Lankford's expert was to testify about the distinction between gifts and taxable income under the Code. The Eleventh Circuit held that "because it is for the judge to explain the law to the jury," the testimony was properly refused.¹⁴⁵

The facility for juries to be confused will ease the defendant's chore in creating reasonable doubt. The honest juror knows wages are income but an untutored first-time view of the Code, presented in a perverse fashion, can raise doubts about meaning even to the second-year law student. In *United States v Lussier*,¹⁴⁶ the First Circuit held that the trial court properly excluded the tax evasion defendant's proffered exhibits of a superseded 1946 treasury regulation, the whole Code, and the Constitution. But, the First Circuit noted that the exclusion was only proper because the evidence

even though this case also presents the issue what is a gift.

139. *Id.*

140. *Id.*

141. *Id.* at 1552.

142. *Id.* at 1551-52.

143. *Id.* at 1552.

144. *Id.* at 1551.

145. *Id.* at 1551 n 16.

146. 929 F2d 25, 31 (1st Cir 1991).

lacked proper foundation,¹⁴⁷ a tactical error which will be avoided by the next malevolently clever ignorant tax evader.¹⁴⁸ In permitting or limiting expert or lay testimony with respect to the source of the defendant's confusion, trial courts will find slight guidance from *Cheek*.¹⁴⁹ As long as the decision remains popular, consideration of proffers by defendants of protestor palaver will predictably increase. A criminal case reduced to a battle between putative legal experts presents a good bet for the defendant.

In mid-polemic, the author reiterates that the problem with the *Cheek* rule, even narrowly drawn, is that it discourages sensible attention to well understood obligations. Because there exists such a vast array of sources of information upon which a taxpayer might rely, the truly criminal can avoid knowledge of the real law as a dodge to protect against incarceration. Consequently, the fabric of willful ignorance or blindness instruction, as *Cheek* increases in chic, may be subject to alteration. The *Jewell* instruction¹⁵⁰ has been useful to infer knowledge of illegality in criminal tax prosecutions.¹⁵¹ Nothing in *Cheek* should alter its use but, of course, that will not preclude defendants from arguing that actual knowledge of illegality must be directly proven.¹⁵²

147. *Lussier*, 929 F2d at 31.

148. See also *United States v Regan*, 937 F2d 823 (2d Cir 1991). The Second Circuit reversed Regan's evasion conviction arising out of a stock parking scam. The trial court held that the defendant's analysis of section 1058, the basis for the dodge, was too "sophistical" and contrary to law for the jury to consider. *Regan*, 937 F2d at 826. The Second Circuit properly held that this was error under *Cheek*. The issue of the rejection of experts' testimony was not reached.

149. Note that the Federal Rules of Evidence, applicable in tax crime prosecutions, provide little basis for the exclusion of such testimony. FRE 701 does allow a lay person to offer an opinion as to a defendant's state of mind if the lay person's opinion is based on the witness's perception and if it is helpful. Consequently, if the foundation is made, opinion testimony that the defendant knew he was evading tax is admissible. See *United States v Rea*, 958 F2d 1206 (2d Cir 1992). Experts on either side are limited, however, by FRE 704(b) which precludes expert testimony with respect to whether a criminal defendant did or did not have the mental state required by the crime. This limitation, created to remove ultimate issue testimony in insanity cases, does not restrict expert testimony as to the basis for belief or confusion in the law itself. For example, psychiatric testimony that the defendant believed his delusion is excluded. *United States v Felak*, 831 F2d 794 (8th Cir 1987).

150. *United States v Jewell*, 532 F2d 697 (9th Cir 1976) (en banc), cert denied 426 US 951 (1976).

151. See *United States v Bussey*, 942 F2d 1241, 1246 (8th Cir 1991): "A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge." *Bussey*, 942 F2d at 1246.

152. *Id* at 1249. (*Cheek* held to be inapposite to a challenge to a willful blindness instruction.) Compare, however, *Mattingly v United States*, 924 F2d 785 (8th Cir 1991). In *Mattingly*, a proceeding to impose the penalty under section 6701 for one who aids in the preparation of return which the actor "knows" will understate liability, the Eighth Circuit

The Second Circuit reviewed the instruction, post-*Cheek*, in *Unites States v Fletcher*,¹⁵³ a case involving convictions for conspiracy to defraud the government. The defendants were involved in a complex scheme to mask profits on certain firearm sales.¹⁵⁴ The Fetters conceded that they knew that the purpose of the arrangements they had made was to minimize tax, but they denied knowing that the means of the conspiracy was illegal.¹⁵⁵ The trial court instructed the jury that, in *Cheek* style, if the defendants "actually believed" the conspiracy would not be used to defraud the Service, they must be acquitted.¹⁵⁶ The trial court, however, also instructed that the defendant may be found guilty if he acted with deliberate disregard of a high probability that the conspiracy had an unlawful objective.¹⁵⁷ The Second Circuit approved the latter instruction, noting an ample factual predicate: use of aliases, failure to file tax returns, and the sneaky movement of guns and funds.¹⁵⁸

Similarly, in *United States v Fingado*,¹⁵⁹ the Tenth Circuit has continued to approve the use of the instruction in a willful failure to file prosecution. As a devoted student of *The Big Bluff, Tax Tyranny in the Guise of the Law, The Constitution v The Tax Collector* by the criminal authority Art Marvin Cooley, Mr. Fingado failed to file a tax return.¹⁶⁰ Again, a factual predicate was found for the instruction.¹⁶¹ The court noted: 1) that the defendant was, with high probability, aware that his understanding was erroneous; 2) that he never consulted a professional; 3) that he attended tax protest seminars; and 4) that he knew his interpreta-

held that a willful blindness instruction cannot be used as a substitute for knowledge. *Mattingly*, 924 F2d at 791-92. See also William C. Raby, *Section 6701 Aiding-and-Abetting Cases: What Does the Service Have to Prove?*, Tax Notes 367 (April 20, 1992).

153. 928 F2d 495 (2d Cir 1991).

154. *Fletcher*, 928 F2d at 497.

155. *Id.* at 502.

156. *Id.*

157. *Id.* at 501.

158. *Id.* at 503.

159. 934 F2d 1163 (10th Cir 1991).

160. *Fingado*, 934 F2d at 1164. The Tenth Circuit reviewed also Fingado's claim that he should have been permitted to present the jury with all of his tax protestor seminar material. The tome referred to in the text was submitted into evidence but was taped shut so that the jury could not look into it. Presumably, the trial court felt that the existence of the book was of sufficient benefit to the defendant in displaying to the jury that there was at least tangible evidence of his delusion. Nonetheless, the Tenth Circuit concluded that exclusion was proper and that *Cheek* does not require the admission of everything. *Id.* at 1165 n 1.

161. *Id.* at 1166-67. Happily, the facts which form that foundation are almost universal in the protest movement cases.

tion differed from the bulk of citizens and the Service.¹⁶² The willful ignorance instruction is another way of calling to the jury's attention the notion that the more outrageous the belief, the less likely that it is really held in good faith.¹⁶³ None of these approaches should be affected by *Cheek*.

Cheek chic also must not infect other areas of tax crimes and penalties. Recent revisions in the penalties of a non-criminal nature are untested and ripe for assault. Chapter 68 of the Code¹⁶⁴ contains additions to the tax and assessable penalties. The first category relates primarily to failures of the principal taxpayer; the latter with reporting and other third party information requirements. This chapter is a mix of statutes new and old and is peppered with the evil word *willfully*.

For example, section 6651 imposes an addition to tax for failure to file or pay unless the failure was "due to reasonable cause and not due to willful neglect."¹⁶⁵ The coupling of *willful* with *neglect* seems almost oxymoronic in that it implies a purposeful forgetfulness. Another set of these civil penalties is imposed if the violation is "willfully" done. The model, and most highly employed, statute of this category is section 6672¹⁶⁶ which imposes a 100% penalty for "willfully" failing to collect and pay. This penalty is chiefly exacted from those who fail to withhold, or fail to pay over, that which has been withheld.¹⁶⁷

Pre-*Cheek*, the penalty provisions had been interpreted differently from the criminal statutes that use the troublesome word. In Revenue Ruling 54-158,¹⁶⁸ the Service attempted to explain this

162. *Id.*

163. The use of the instruction is not without limitation, but those limits are a product of ordinary criminal law and do not arise because the prosecution is for tax crimes. See *United States v de Francisco-Lopez*, 939 F2d 1405 (10th Cir 1991).

164. IRC Ch 68, "Additions to the Tax, Additional Amounts, and Assessable Penalties," §§ 6651 - 6708 (1986).

165. IRC § 6651 (1986). The Code is replete with sections which provide the same affirmative defense to penalty. See IRC §§ 6652 (Failure to file certain information returns); 6656 (Failure to make deposit of taxes); 6695 (Certain penalties against preparers); 6704 (Pension record violations); 6706 (Original issue discount rules); 6708 (Failure to maintain shelter information); 6709 (Mortgage credit reporting violations).

166. IRC § 6672 (1986).

167. Other statutes also follow this formula. See IRC §§ 6674 (Furnishing a false statement); 6690 (False pension information); 6684 (Taxes under Chapter 8); 6685 (Tax exempt organization records). In addition, section 6694(b) imposes a greater penalty on income tax preparers when the understatement of liability was because of a "willful attempt." IRC Reg. 1.6694-1(b)(2) defines, however, this *willful* as "disregard of information furnished by the taxpayer or others."

168. Rev Rul 54-158, 1954 Cum Bull 247.

linguistic trick. Simply, the ruling concluded that where evil motive is a constituent element of the tax felonies, the imposition of penalties containing the word *willfully* does not require knowledge of illegality.¹⁶⁹ Few cases have arisen testing the penalty provisions except with respect to that most common form of evasion, the cheating employer committing a withholding violation. There, the word *willfully* has produced a split in the circuits. *Cheek* involvement would only worsen the fray.

In *Olsen v United States*,¹⁷⁰ the taxpayer sought reversal of the imposition of the 100% penalty because he had made a deal with an IRS agent concerning the way in which his withholding obligations would be satisfied. He knew that the funds, in fact, were not being paid to the IRS but were being used to pay company creditors, and he knew the consequences of his failure to pay.¹⁷¹ The circuits, however, are split as to whether "reasonable cause" for the failure vitiates the willfulness element of the penalty statute.¹⁷² The Eighth Circuit in *Olsen* rejected this defense, holding that the willfulness requirement of the penalty provision is satisfied if, knowingly or with reckless disregard of risk, the taxpayer acts in a fashion which causes the government not to be paid.¹⁷³

This interpretation of *willfully* is properly afield from the *Cheek* gloss on the word in the criminal statutes. The Seventh Circuit, in following this approach in *Monday v United States*,¹⁷⁴ explained that although denominated as a penalty, this exaction was civil in nature and designed to make the government whole. The consideration of cause factors such as financial conditions, creditor demands or bad advice were inappropriate.¹⁷⁵

The Fifth Circuit has recognized the defense of "reasonable cause" but with little success on the part of the taxpayer. In *Newsome v United States*,¹⁷⁶ the Fifth Circuit reversed a trial court's order which had found the imposition of the penalty improper. The district court had held that non-negligent reliance on erroneous advice from corporate accountants and lawyers vitiated the

169. 1954 Cum Bull at 249.

170. 92-1 USTC ¶ 50,036, 83,144 (8th Cir 1991).

171. *Olsen*, 92-1 USTC at 83,146.

172. *Id* at 83,147. See also *Harrington v United States*, 74-2 USTC ¶9772, 85,538 (1st Cir 1974).

173. *Olsen*, 92-1 USTC at 83,146.

174. 70-1 USTC ¶9205, 82,828 (7th Cir 1970).

175. *Monday*, 70-1 USTC at 82,831.

176. 70-2 USTC ¶ 9504, 84,147 (5th Cir 1970).

taxpayer's willfulness.¹⁷⁷ The Fifth Circuit, while recognizing the existence of a defense, held that this taxpayer did not qualify because none of the advice he received told him that he was permitted not to pay the withholding without subjecting himself to penalties.¹⁷⁸

Is *Cheek* fashion broad enough to intrude into this discussion? Clearly, the popular implication of the decision is that knowledge of illegality is a component of the word *willfully*, and that to some extent, perhaps under a trickle down theory of levels of culpability, other penalty statutes might be newly considered to provide at least a reasonable cause defense. For example, in *Williams v United States*,¹⁷⁹ the Eleventh Circuit, in reversing a judgment entered after a jury verdict for refund of the 100% penalty, noted that the simple inability to pay was ineffective to vitiate willfulness. Yet the court, spellbound by *Cheek*, cited the case for the proposition that *willful* means the "voluntary, intentional violation of a known legal duty."¹⁸⁰ The criminal decision of *Cheek* is out of place here and can only encourage those seeking to restrict the reach of civil penalties.¹⁸¹

The civil penalty statutes which provide an affirmative defense specifically for "reasonable cause and not willful neglect" have yet to display a rash from *Cheek*. In these cases, the taxpayer must show not only the lack of neglect but also affirmative reasonable cause.¹⁸² As noted in the First Circuit's *Harrington v United States*,¹⁸³ an action reviewing the imposition of a section 6672 penalty, the presence of the reasonable cause defense in other penalty statutes implies that, had Congress intended the defense everywhere *willfully* occurs, the legislature could have said so.

The common sense of the First Circuit's notion that Congress could specify offenses has been brought to fruition in the new accuracy-related penalty provisions of the Code. While the purpose of this piece is not to explore the voluminous mass of new and frightening provisions, some legal experiments are being conducted

177. *Newsome*, 70-2 USTC at 84,150.

178. *Id.* at 84,151.

179. 931 F2d 805 (11th Cir 1991).

180. *Williams*, 931 F2d at 810.

181. But see *Jenny v United States*, 581 F Supp 1309 (CD Cal 1984) (The frivolous return penalty of section 6702 was held to be penal in nature and was to be strictly construed).

182. *Coshocton Securities Co.*, 26 Tax Ct 935 (1956) (Taxpayer must seek advice to establish reasonable cause).

183. 74-2 USTC ¶9772, 85,538 (1st Cir 1974).

with these statutes which may provide a future clue to a statutory structure for limiting the ignorance of the law defense in criminal prosecutions. Section 6662¹⁸⁴ imposes accuracy-related penalties for various levels of infractions based both on the dollar amount of the infraction and the mental state of the actor. A penalty is imposed for negligence or disregard of rules which includes, under section 6662(c), failure to make a reasonable attempt to comply and careless or reckless disregard.¹⁸⁵ The regulations provide that a taxpayer fails to make a reasonable attempt to ascertain the reasonableness of a deduction when the item would seem to a reasonable and prudent person too good to be true.¹⁸⁶ A penalty will be imposed for a substantial understatement under section 6662(d) unless there was a disclosure of the aberrant treatment on the return, or the position was supported by substantial authority.¹⁸⁷ Under section 6662(d)(2)(D)(i),¹⁸⁸ the Secretary must create a list of those positions for which he believes there is not such authority. Justice would be served if, for example, the published list of frivolous positions might be withdrawn from consideration in a taxpayer's criminal prosecution as well.

There is hope that *Cheek* will eventually recede and those who take positions that are too good to be true will be incarcerated, in spite of their hollow claims of confusion and delusion. *Cheek* himself was retried and a properly *Cheek*-instructed jury found him completely guilty.¹⁸⁹ Judge Zagel gave him a year and a day and with good sense called *Cheek*, "fundamentally lawless."¹⁹⁰

While the desire of most authors is to create a timeless work, this author hopes that this brief sketch of late twentieth century fashionable issues of criminal tax law will soon be relegated to a dusty corner, for archivists only. Like the leisure suit, *Cheek* should be hung in a rarely opened closet, only rarely to be exhumed and then only so that we might marvel at what we once thought appropriate for public wear. *Cheek* only brought the Seventh Circuit into line with the other circuits, which have always held that ignorance of the law is a sorry excuse for tax crimes.

184. IRC § 6662 (1986).

185. IRC § 6662(c) (1986).

186. Treas Reg § 1.6662-3(b)(ii) (1986).

187. See IRC § 6662(d)(2)(B)(i) (1986).

188. IRC § 6662(d)(2)(D)(i) (1986).

189. R. Zeider, "Cheek Convicted of Tax Evasion," Tax Notes 1597 (March 30, 1992).

190. Zeider, Tax Notes 1597.