

4-15-1976

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Recommended Citation

Thomas J. Gallagher Jr. *Psychiatric Defenses in Tax Fraud Cases*, 3 Pepp. L. Rev. 2 (1976)

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Psychiatric Defenses in Tax Fraud Cases

THOMAS J. GALLAGHER, JR.*

I. INTRODUCTION

Tax fraud is wrought with difficulties from the viewpoint of both the taxpayer and the government.¹ Notwithstanding the fact that "fraud" is not defined in the Internal Revenue Code, tax evasion is trifurcated into the civil² and criminal³ offenses listed in the Code, and the crimes as codified in Title 18 of the United States Code.⁴ In addition to the varying degrees of proof required under the different offenses, merging shades of culpability must be established for decisions favorable to the government. Furthermore, almost every successful criminal prosecution could result in a sustained assessment of civil penalties in a separate proceeding.⁵ However, if the taxpayer can successfully establish that he lacked the

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1. See, e.g., TAX FRAUD (G. Holmes & J. Cox eds. 1973).

2. INT. REV. CODE OF 1954, §§ 6651, 6653, and various other sections. All tax sections references are to the INTERNAL REVENUE CODE OF 1954 unless noted otherwise [hereinafter cited as INT. REV. CODE OF 1954].

3. See, e.g., *id.* §§ 7201-06.

4. 18 U.S.C. § 287 (false, fictitious or fraudulent claims), § 371 (conspiracy), § 1001 (false statements), § 1621 (perjury) (1972).

5. See Balter, *Three New Cases Hold Criminal Tax Conviction "Proves" Civil Fraud*, 23 J. TAX. 158 (1966).

requisite intent to evade his taxes, the fraud allegations must fail.⁶ By proving the absence of a willful intent due to mental incapacity, several defendants have prevailed in their contentions that a psychiatric defense to a tax fraud charge can exculpate them from both civil and criminal penalties.⁷ However, other cases in which psychiatric defenses have been asserted indicate that although the defense is valid, it often fails for lack of proof.⁸ Little is known about psychiatric defenses to tax fraud charges, and the courts have been reluctant to consider the issues in those cases in which the defenses have been raised.⁹ The purpose of this article is to examine the defense and the questions presented by its assertion. After briefly reviewing the substantive federal tax fraud offenses, and examining the traditional psychiatric defenses in other settings, the tax fraud cases in which the defense has been raised will be considered. The interrelated policy considerations will be discussed, as will the constitutional and procedural aspects of the defense in tax fraud cases. In conclusion, suggestions will be made which will facilitate a reconsideration of the present practices.

II. FRAUD UNDER FEDERAL TAX LAW

Although undefined in the Code, tax fraud refers to a willful attempt to reduce or to eliminate tax liability by paying less tax than that which is known to be due.¹⁰ Tax avoidance differs from tax evasion in that the tax avoider attempts to diminish taxation in a manner which he believes to be legal, while the tax evader attempts to do so in a manner which he knows to be illegal. Thus tax evasion charges always require proof of an intentional factual

6. Cf. *United States v. Bishop*, 412 U.S. 346 (1973).

7. See, e.g., *Emanuel Hollman*, 38 T.C. 251 (1962).

8. *Estate of Craddock*, 27 CCH TAX CT. MEM. 805, 809 (1968); *Clinton H. Martin*, 18 CCH TAX CT. MEM. 100 (1959), *aff'd*, 272 F.2d 191 (2d Cir. 1959); *J.E. Handy*, 450 F.2d 145 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972); *Fred W. Staudt*, 12 CCH TAX CT. MEM. 1417 (1953), *aff'd*, 216 F.2d 610 (4th Cir. 1954); *United States v. Benus*, 196 F. Supp. 601 (E.D. Pa. 1961), *aff'd*, 305 F.2d 821 (3rd Cir. 1962).

9. See *Ritholz & Fink, New Developments and Dangers in the Psychiatric Defense to Tax Fraud*, 32 J. TAX 322 (1970); *Ritholz, Intent and Psychiatric Disturbances in Tax Fraud Cases*, N.Y.U. 23RD INST. ON FED. TAX. 1339 (1965).

10. *Spies v. United States*, 317 U.S. 492, 497 (1943): "[T]he serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax."

misrepresentation, while a tax avoidance characterization merely denotes an attempt to construe the facts so as to minimize tax liability.¹¹

The distinction between avoidance and evasion is critical as different consequences attach to each. An honest but unsuccessful evasion scheme will subject the taxpayer to various civil fraud and criminal evasion penalties.¹²

Because the concept of criminal tax fraud in section 7201 of the code is similar to the civil fraud concept in section 6653(b), it is possible to impose civil penalties in every criminal evasion case.¹³ However, because civil fraud may be proved by "clear and convincing evidence,"¹⁴ while criminal fraud must be proved "beyond reasonable doubt,"¹⁵ criminal prosecutions are generally restricted to the most flagrant cases.¹⁶

Although numerous sections of the Code provide for penal sanctions, section 7201 is the provision most frequently used in criminal tax indictments. The statute 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.¹⁷

This section has been construed to encompass a variety of situations including attempts to evade the taxes of another.¹⁸ In addition to the statutory prerequisites of willfulness and an attempt to evade or defeat a tax or the payment thereof, the statute requires proof that a tax was due for the year involved. Evidence establishing that the taxpayer substantially¹⁹ understated his income or

11. See Beck, *When Avoidance: When Evasion*, N.Y.U. 18TH INST. ON FED. TAX. 1093 (1960); Rice, *Judicial Techniques in Combating Tax Avoidances*, 51 MICH. L. REV. 1021 (1953).

12. See *supra* notes 2-4.

13. See *supra* note 5.

14. See, e.g., Estate of Craddock, 27 CCH TAX CT. MEM. 805 (1968).

15. See, e.g., United States v. Benus, 196 F. Supp. 601, 603 (E.D. Pa. 1961), *aff'd*, 305 F.2d 821 (3rd Cir. 1962): "We were, and still are, convinced by the evidence beyond a reasonable doubt that on those dates this defendant was not suffering from any disease of the mind. . . ."

16. Cf. Lipton, *The Substantial Understatement Requirement in Criminal Tax Fraud Cases*, N.Y.U. 19TH INST. ON FED. TAX. 1175 (1961).

17. INT. REV. CODE OF 1954, § 7201.

18. See *Benhan v. United States*, 215 F.2d 472 (5th Cir. 1954) (husband and wife); *United States v. Brill*, 270 F.2d 525 (3rd Cir. 1959) (corporation and director).

19. The "substantial" requirement is a judicial gloss. See Lipton, *supra* note 16.

overstated his expenditures so that a considerable tax was due and owing, must be introduced; further, it must be shown that the taxpayer knowingly falsified his return and willfully attempted to evade or defeat his taxes.²⁰ In *Spies v. United States*, the Supreme Court described the nature of the attempt required to support a tax evasion charge:

The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempting murder. Although the attempt succeeds in evading tax . . . the prosecution can be only for attempt.²¹

The Court elaborated further, requiring an affirmative act of wrongdoing as a prerequisite to liability for a criminal attempt. The Court reasoned that:

By way of illustration . . . we think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, any conduct, the likely effect of which would be to mislead or conceal.²²

This criterion is satisfied in a majority of prosecutions by the filing of a false and fraudulent return, an affirmative act in itself.²³ Thus, the mere fact of filing in these circumstances is sufficient to support a conviction for evasion.²⁴

In addition to the felony provision of section 7201, section 7206(1) makes it an offense for one to:

Willfully [make] and [subscribe] any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter²⁵

20. *Spies v. United States*, 317 U.S. 492 (1943).

21. *Id.* at 498-99.

22. *Id.*; *United States v. Bishop*, 412 U.S. 346 (1973).

23. *Achilli v. United States*, 353 U.S. 373 (1957).

24. In *Imholte v. United States*, 226 F.2d 585, 588 (8th Cir. 1955), the court stated: "The wilful attempt to evade or defeat any tax *in any manner* is the offense defined. The offense may be committed in any manner so long as there is a wilful attempt to evade the tax."

25. INT. REV. CODE OF 1954, § 7206(1). This section is referred to as the "back-door" statute because there is no need to prove income.

This statute makes the falsification of a return a felony regardless of the tax consequences of the falsification. It is useful primarily where evasion itself may be difficult to prove because of the small amount of tax avoided or where the exact amount evaded is difficult to ascertain. The only showing required under 7206(1) is that the defendant willfully signed a document he knew to be false.²⁶

Section 7206(2) makes it a felony to:

Willfully aid or assist in, or procure, counsel, or advise the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document which is fraudulent or false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized to present such return, affidavit, claim, or document.²⁷

This section is designed to prevent the giving of advice in the preparation of false returns.²⁸ Since the acts constituting an attempt to evade or defeat a tax under section 7201 may differ from those comprising a violation of section 7206(2), a defendant may be prosecuted under both sections without being placed in jeopardy twice for the same offense.

Section 7203 is the most frequently used misdemeanor provision of the Code. It provides that:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6105), keep such records, or supply such information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.²⁹

This section facilitates the enforcement of the Code's administrative provisions; prosecutions may be commenced for (1) failure to make a return, (2) failure to pay any tax, (3) failure to keep records,

26. *United States v. Ratner*, 464 F.2d 101 (9th Cir. 1972).

27. INT. REV. CODE OF 1954, § 7206(2).

28. *United States v. Kelley*, 105 F.2d 912, 917 (2d Cir. 1939):

[T]he statute . . . expressly provides that the assistance shall be a crime 'whether or not such falsity or fraud is with the knowledge or consent of the person authorized . . . to present such return.' The purpose was very plainly to reach the advisors of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.

29. INT. REV. CODE OF 1954, § 7203.

and (4) failure to supply information. In addition, liability under this section does not depend on the existence of a tax liability for the year in which the offense allegedly occurred.³⁰ Because a section 7203 violation is not a lesser included offense under section 7201,³¹ a person may be convicted under both sections as long as each offense requires proof of a fact not essential to the establishment of the other.³² Because it is not necessary to show a failure to file a return to establish an attempt to evade, or to demonstrate an affirmative act to prove a failure to file, a person may be prosecuted for both offenses without inviting double jeopardy problems.

There are numerous other civil and criminal code offenses for which a taxpayer may be prosecuted.³³

III. MENTAL STATE

In all criminal tax fraud prosecutions the government must prove that the defendant acted willfully. Evidence that the defendant acted voluntarily is insufficient to establish willfulness.³⁴ In *United States v. Murdock*,³⁵ the Supreme Court defined a willful act as:

an act done with a bad purpose . . . without justifiable excuse . . . ; stubbornly, obstinately, perversely . . . [w]ithout ground for believing it lawful . . . or . . . marked by careless disregard whether one has the right to so act.³⁶

In addition to reaffirming this definition, the Court in *United States v. Bishop*³⁷ held that: "[T]he word 'willfully' has the same meaning in section 7207 that it has in section 7206 (1),"³⁸ and probably in all criminal tax fraud statutes. The Court reasoned that an analysis which expressly distinguishes the necessary elements of each offense from the uniform requirement of willfulness would result

30. See *Pereira v. United States*, 347 U.S. 1, 9 (1954).

31. *United States v. Bishop*, 412 U.S. 346, 355-57 (1973); *Berra v. United States*, 351 U.S. 131 (1956).

32. See *Pereira v. United States*, 347 U.S. 1, 9 (1954).

33. INT. REV. CODE OF 1954, §§ 7207-15, 6651-59, 6671, 6672, 6674-89; see *Symposium on Tax Fraud*, 1968 U. ILL. L.F. 431.

34. *Spies v. United States*, 317 U.S. 492, 497-98 (1943).

35. 290 U.S. 389 (1933).

36. *Id.* at 394-95.

37. 412 U.S. 346 (1973).

38. *Id.* at 361.

in greater clarity.³⁹ Mr. Justice Blackmun concluded by recognizing that:

The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.⁴⁰

Because willfulness requires a specific intent, it "must be proved by independent evidence and . . . cannot be inferred from the mere understatement of income."⁴¹ However, willfulness may be inferred from the facts and circumstances of the taxpayer's acts, since direct proof of such willfulness is rarely found.⁴² But such facts and circumstances must indicate the requisite degree of *mens rea* beyond a reasonable doubt. The "bad purpose" necessitated is difficult to establish due to its subjectivity. While both the tax avoider and the tax evader *intend* to diminish tax liability, they are motivated in different manners.⁴³ Thus, intention is the ultimate reason for aiming at their immediate objective, and motive is the ulterior intent or the cause underlying their intent. Intention is the object of their act; motive is the basis of the intent. In tax fraud cases it is not the intention as evidenced by external conduct which constitutes the essence of the offense, but rather the *specific intent* accompanying the act or omission, or the cause underlying the intent as evidenced by external conduct, which comprises the offense.⁴⁴ The willful element of tax fraud necessitates the intentional and something more. The Supreme Court interpreted it to include "an act done with a bad purpose . . . without justifiable excuse."⁴⁵ If the motive underlying the externally evidenced intention to diminish tax liability is within the law, the taxpayer does not become a criminal by an inadvertent failure to conform to the standard of conduct prescribed in the Code. The necessity of the defense of a reasonable mistake of fact, or even law, is obvious when the complexities of tax law are considered. Randolph Paul recognized this fact when he stated that "[A] rough and ready moral sense of 'right' and 'wrong' is hardly adequate to guide the citizen

39. *Id.* at 360 n.8, "Greater clarity might well result from an analysis that distinguishes the express elements, such as an 'attempt to evade,' prescribed by section 7201, from the uniform requirement of willfulness."

40. *Id.* at 361.

41. *Holland v. United States*, 348 U.S. 121, 139 (1954).

42. *See, e.g., Shinyo Noro v. United States*, 148 F.2d 696 (5th Cir. 1954).

43. *See Beck, When Avoidance: When Evasion*, N.Y.U. 18TH INST. ON FED. TAX. 1093 (1960).

44. *Cf. United States v. Bishop*, 412 U.S. 346, 361 (1973).

45. *United States v. Murdock*, 290 U.S. 389, 394 (1933).

through the devious paths of the spawning tax jungle."⁴⁶ Consequently, if it can be established that the taxpayer was motivated by an attempt to perpetrate a lawful tax avoidance scheme no criminal or fraudulent liability will attach as a result of his actions. However, if he was motivated by a "bad purpose," sufficiently established, liability will issue. This is because in the former case the taxpayer lacked the required *mens rea*, and in the latter instance the defendant possessed the culpability needed for a finding of willfulness. Whenever the element of willful intent is absent, the prosecution must fail because the essential element of intent is abrogated. If the defendant can vitiate the "bad purpose" required by *United States v. Murdock*⁴⁷ the indictment must be ter-
givesated.

In fact, in *Leland v. Oregon*,⁴⁸ the Supreme Court approved a charge allowing the jury to consider evidence of the defendant's mental disability on the issue of intent, even though the defendant was found legally sane by the jury. Despite the difficulty involved, one commentator has asserted that:

The opportunity for full consideration of all the evidence, including the psychiatric, and the full development of the whole truth offered by the intent route must be fully developed in tax cases.⁴⁹

In another context it was stated that:

[T]he paucity of judicial authority on . . . that defense . . . often results in the vitiation of its potential success. The unequal application of a criminal defense in situations where it could be raised successfully seems to be a prohibition of substantive rights by an uncertain and ersatz criminal procedure.⁵⁰

IV. TRADITIONAL APPLICATIONS OF THE PSYCHIATRIC DEFENSE

Any consideration of the use of psychiatric evidence in tax evasion cases must begin with an examination of the defense as it has evolved in other contexts. In the *M'Naghten Case*,⁵¹ the defendant

46. R. PAUL, *SELECTED STUDIES IN FEDERAL TAXATION* 289 (1938).

47. 290 U.S. 389, 394 (1933).

48. 343 U.S. 790 (1952).

49. Ritholz, *Intent and Psychiatric Disturbances in Tax Fraud Cases*, N.Y.U. 23RD INST. ON FED. TAX. 1339, 1360 (1965).

50. Gallagher, *The Viability of Discriminatory Prosecution as a Defense to a Criminal Case*, 19 LOYOLA L. REV. 318, 331 (1973).

51. 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

was acquitted of a murder charge because the jury found that he was incompetent. In reviewing the case, the House of Lords determined that at the time the act was committed the defendant did not have a sufficient ability to understand that what he was doing was wrong. The Law Lords pointed out that although everyone is considered to be sane and responsible for his acts, a successful defense of insanity could clearly prove that, at the time of the commission of the act, the defendant was laboring under such a defect of reason, due to a mental disease, that he did not know the nature and the quality of the act he was committing. Even if he was aware of the nature of his act, he may not have known that the act was wrong. But, if the accused was aware that the act was one which he should not have committed, and if the act was simultaneously contrary to established law, he was then subject to punishment. The House of Lords concluded that the question of whether the defendant's reason was sufficient to enable him to know that the act was wrong was for the jury's determination based upon explanations and observations.⁵² The rationale of *M'Naghten* and of the insanity defense itself may be better understood when it is realized that the purpose of the law is to deter people from committing offenses and to preserve society from the depredations of the dangerous and the vicious. It would be futile for the law to attempt to deter individuals who understand neither what they were doing nor the premises upon which the law operated from committing crimes if their mental conditions had deteriorated to the point that they could not be influenced by either the possibility or the probability of subsequent punishment. Consequently, in considering the defense of insanity, the jury may be concerned with the state of the actor's mind only at the time the offense was committed, although a disordered mind may be inferred from the accused's actions prior and subsequent to the commission of the offense.⁵³ If the defendant's mind was disordered to the requisite degree at the time of the offense he should be acquitted by reason of insanity.

One of the earliest modifications of the *M'Naghten* rule was announced in *Durham v. United States*.⁵⁴ Judge Bazelon's erudite opinion supplemented the right-wrong criteria with the irresistible impulse standard in an effort to accommodate certain doctrinal ad-

52. The test of criminal responsibility advocated in *M'Naghten* was adopted by most common law countries. Cf. *King v. Portor*, 55 COMMW. L.R. 182 (High Court of Australia, 1933).

53. See generally, Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955).

54. 214 F.2d 62 (D.C. Cir. 1954).

vances in the social sciences. Although the *Durham* rule has since been abandoned,⁵⁵ many of its underlying premises remain accurate. The Court postulated that because reason is only one element of man's integrated personality and not the sole determinant of his conduct, the right-wrong test's emphasis on the *cognitive* function was an inadequate guide to criminal responsibility. Relying upon inadequate, invalid and irrelevant testimony in attempting to define insanity in terms of a symptom, the *M'Naghten* court had assumed an impossible task for which it had no special competence.

The court rejected the irresistible impulse test⁵⁶ which would have relieved the defendant of culpability if the impulse was uncontrollable. Under the new standard the urge to act had to be overwhelming, so overriding the accused's reason and judgment that he could no longer choose between right and wrong. But even though he was impelled to act in accordance with his impulse, the defendant was still required to remain capable of distinguishing right from wrong. A verdict of acquittal meant that his mental state had clouded his reasoning, depriving him of the power to resist the insane impulse to perpetrate the deed. This test later proved to be inadequate because it failed to recognize a mental state characterized by brooding and reflection.

The *Durham* court held that an accused is not criminally responsible if his unlawful act is the "product of mental disease or defect."⁵⁷ The problem consisted of determining whether the defendant acted because of a mental disorder or whether he merely displayed particular symptoms which do not necessarily accompany mental disorders. The Court defined insanity as a diseased and deranged condition of the mind which renders a person incapable of knowing or of understanding the nature and quality of his act, or of distinguishing right from wrong in relation to that act. If the accused is able to know and to understand the nature and quality of his act and to distinguish right from wrong at the time of the

55. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

56. *Durham v. United States*, 214 F.2d 862, 869 (D.C. Cir. 1954).

57. *Id.* at 874. For the difficulties involved in this determination, see: Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U.L.Q. 87; Schwartz, "Mental Disease": *The Groundwork for Legal Analysis and Legislative Action*, 111 U. PA. L. REV. 389 (1963).

commission of the offense, the insanity defense is not available to him.⁵⁸

McDonald v. United States,⁵⁹ developed this concept further, holding that the jury must be instructed that a mental disease or defect includes any abnormal condition of the mind which "substantially affects" mental or emotional processes and which "substantially impairs" behavioral controls.⁶⁰ The jury was required to evaluate all expert and lay testimony in arriving at its decision. The *McDonald* court also excluded the possibility that specific disease might constitute insanity *per se*.

In *Blocker v. United States*,⁶¹ expert psychiatric testimony was held insufficient to establish a sociopathic personality⁶² within the meaning of "mental disease or defect."⁶³ *United States v. Currens*⁶⁴ then refused to recognize a psychopathic personality,⁶⁵ labelling it a statistical abnormality.⁶⁶ These two decisions raise doubts as to soundness of the Court's reasoning processes. Because punishment is geared to those individuals who are neither a part of, nor capable of conforming to, societal norms due to a mental disease or defect, those persons who are incapable of such conformity should not be subjected to the deterrents society has created.⁶⁷ Although the accused might outwardly present a "convincing mask of sanity" and a "minority of human life,"⁶⁸ he might have lost contact with the deeper emotional aspects of experience.

Despite judicial hostility toward psychiatric classifications, the courts have been anxious to admit expert testimony concerning the defendant's condition. In *Washington v. United States*⁶⁹ the Court held that while expert testimony could not be used to establish the ultimate fact that the act was the product of the defect, it could be introduced to explain how the accused's disease or defect related

58. Cf. *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

59. 312 F.2d 847 (D.C. Cir. 1962).

60. See Acheson, *McDonald v. United States: The Durham Rule Re-defined*, 51 GA. L. REV. 580 (1962).

61. 274 F.2d 572 (D.C. Cir. 1959).

62. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS* (2d ed. 1968).

63. See also, *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967).

64. 290 F.2d 751 (3rd Cir. 1961).

65. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS* (2d ed. 1968).

66. 290 F.2d 751, 762 (3rd Cir. 1961). But see the problems raised in *Lambert v. California*, 355 U.S. 225 (1957), as to status punishment and the Eighth Amendment's proscription of cruel and unusual punishment.

67. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 181-83 (1968).

68. *United States v. Currens*, 290 F.2d 751, 762 (3rd Cir. 1961).

69. 390 F.2d 444 (D.C. Cir. 1967).

to his alleged defense. This ruling permitted a demonstration of how the development, adaptation and functioning of the defendant's behavioral processes may have influenced his conduct.

Intertwined with the judicial decisions on insanity was the test formulated by the American Law Institute⁷⁰ which states that a person is not responsible for his criminal conduct if at the time of such conduct and as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. This formulation is broad enough to exclude volitionally and cognitively impaired non-deterrables from strictly penal sanctions. In this respect it overlaps the *M'Naghten* standards and the irresistible impulse test, yet it distinguishes between incapacity and indisposition.

Under the ALI formulation, the trier must determine whether, due to the accused's mental disease or disorder, the threat of punishment could not exercise a significant restraining influence upon him. The defendant's ability to conform his conduct to the requirements of the law and his "non-deterrability" are somewhat interrelated and contingent, to a degree, upon his capacity and understanding.

The ALI test was considered quickly and adopted by the Second Circuit in *United States v. Freeman*.⁷¹ In that case the defendant was convicted for selling narcotics in violation of 21 U.S.C. §§ 173 and 174. Although he denied committing the offense, he contended that he did not possess sufficient capacity and will to be held responsible for his acts. Psychiatrists testified that the defendant, a narcotics addict and confirmed alcoholic for over fourteen years, suffered from toxic psychosis, delusions, hallucinations, epileptic convulsions and occasionally amnesia.⁷² The trial court, however, found that the defendant's condition did not satisfy the rigid requirements of *M'Naghten*. The appellate court noted that while the *M'Naghten* test encompassed cognitive elements of behavior, the "unrealistically tight shackles . . . place[d] upon expert psychiatric testimony"⁷³ deprived the trier of fact of vital information. In ad-

70. MODEL PENAL CODE, § 4.01 (1962).

71. 357 F.2d 606 (2d Cir. 1966).

72. *Id.* at 610.

73. *Id.* at 619.

dition, the court rejected both the irresistible impulse test as too narrow and the *Durham* test because of the definitional difficulties inherent in its terms. In remanding the case for a new trial under the ALI formulation, the court elucidated in sufficiently precise terms the standards under which experts would be recognized as experts without encroaching upon the function of the trier of fact.

In *United States v. Brawner*,⁷⁴ the Court of Appeals for the District of Columbia abandoned the *Durham* rule in favor of the ALI formulation, but retained the *McDonald v. United States* definition of mental disease or defect. Chief Judge Bazelon expressed the hope that the change was not an instance of "the generals . . . designing an inspiring new insignia for the standard, [while] the battle is being lost in the trenches."⁷⁵

The cohesive element in these decisions, despite their differences in application, is the belief that an individual must knowingly choose to act wrongfully before he will be punished for his act.⁷⁶ The criterion of responsibility as affected by mental disease or defect parallels the traditional *mens rea* rules in requiring a determination of blame-worthiness; an individual will not become subject to legal sanctions until he does something which is the product of a choice.⁷⁷ This is similar to the simple *actus reus* required for all criminal acts whether *malum in se* or *malum prohibitum*. If the accused is so affected by a disease or defect of the mind that he is not responsible for his act, then it is arguable that there was *no act* for which the defendant could be convicted.⁷⁸ Consequently, for the purposes of criminal responsibility the insane defendant should not be subject to societal deterrents;⁷⁹ punishing such an individual would be both futile and unjust.⁸⁰

V. PSYCHIATRIC DEFENSES IN TAX FRAUD

Without distinguishing between civil and criminal tax evasion cases, the courts have treated the defense of mental abnormality (which negates the willful element required for tax fraud) in an erratic manner. In an early case, *Estate of Gladys Forbes*,⁸¹ the

74. 471 F.2d 969 (D.C. Cir. 1972); see *Symposium: United States v. Brawner*, 1973 WASH. U.L.Q. 17.

75. *United States v. Brawner*, 471 F.2d 969, 1012 (D.C. Cir. 1972).

76. See generally, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

77. Cf. Kadish, *The Decline of Innocence*, 26 CUMB. L.J. 273 (1968); Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. 354.

78. Kadish, *The Decline of Innocence*, 26 CUMB. L.J. 273 (1968).

79. *Id.*

80. See generally, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

81. 12 CCH TAX CT. MEM. 176 (1953).

taxpayer was assessed penalties for substantial underestimation of her income for the years 1944-1946. The court upheld the taxpayer's contentions that she was mentally incompetent in 1946 and that her failure to file an estimated return was for reasonable cause and not willful.⁸² The court did, however, affirm the Service's assessment for the other years. *Estate of Gladys Forbes* was rejected in *Pasquale and Mary A. Calabella*⁸³ where the taxpayer understated his income and tax. He contended that his failure to report was not due to an intent to evade the tax, but was rather attributable to his mental condition and a defective memory resulting from repeated electric shock treatment. Psychiatric evidence was introduced by the prosecution tending to show that because the taxpayer kept records he could have made the reports despite the fact that "[E]lectric shock treatment generally results in a temporary loss of memory and . . . repeated subjection to such treatment causes a general mental condition"⁸⁴ In rejecting this psychiatric evidence, the court cloaked its lack of belief in its efficacy in a failure of proof rationale.

The defendant in *United States v. Cain*⁸⁵ was convicted of income tax evasion after having been indicted under section 7201. The trial court found that although the evidence tended to prove organic impairment and a neurotic personality, it was not sufficiently persuasive to negate willfulness. In affirming the conviction, the Court of Appeals refused to recognize gradations of responsibility for crime,⁸⁶ stating that:

[I]f a person can distinguish between right and wrong or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action . . . the law requires that he be held responsible for his acts.⁸⁷

But in applying the dogmatic *M'Naghten* rule, the court did not acknowledge that while the law may decline to recognize gradations of crime it does recognize degrees of responsibility and of *mens rea*.⁸⁸

82. *Id.* at 177.

83. 17 CCH TAX CT. MEM. 704 (1958).

84. *Id.* at 711.

85. 298 F.2d 934 (7th Cir. 1962).

86. *Id.* at 936.

87. *Id.* at 937.

88. Cf. Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. 354.

The apex of the defense of mental abnormality was reached in *Emmanuel Hollman*.⁸⁹ At his trial for *criminal* tax fraud the taxpayer was found to be mentally incompetent and a *guardian ad litem* was appointed. In the subsequent civil action for tax evasion evidence of his severe psychosis was introduced. The court held that despite the defendant's intricate financial operations,

[I]t must be remembered the fraud must be proved by clear and convincing evidence, and while we are not fully satisfied that the false returns were a product of mental disease, the psychiatric testimony leaves us with such troubling doubts that we cannot find that fraud has been proved in this case.⁹⁰

Reversal would have been probable if the court had decided otherwise.

In *Jacob D. Farber*,⁹¹ a nebulous Tax Court opinion upheld the failure to report penalty assessed against the taxpayer. Although he previously had pled guilty to criminal tax evasion, psychiatric evidence was proffered concerning the taxpayer's pituitary tumor and his history of uncontrolled convulsive seizures and endocrine disturbances caused by the tumor, all of which contributed to his mental deficiency. However, because the testimonies of the neuropsychiatrist, neurosurgeon, endocrinologist and psychiatrist were unsupported by any contemporaneous records or data,⁹² the court found the opposite inference persuasive. In finding the evidence to be "clear and convincing" and without effectively discussing the issue of willfulness, the court stated that the *manner* in which the petitioner failed to report large amounts of taxable income was strong evidence that he had the *intent* to evade taxes. The court did not consider the fact that certain mental abnormalities are often concretized in ingenious acts directed toward anti-social goals.⁹³

The Second Circuit apparently recognized the erratic manner in which the defense of mental abnormality was being handled. In a tandem of tax evasion cases⁹⁴ the court affirmatively decided that their decision in *United States v. Freeman*,⁹⁵ adopting the ALI test for criminal responsibility should operate retroactively. Evidence of psychotic reactive depression resulting in an inability to consistently distinguish right from wrong was introduced to exculpate the

89. 38 T.C. 251 (1962).

90. *Id.* at 260.

91. *Jacob D. Farber*, 43 T.C. 407 (1965), *modified by*, 44 T.C. 408 (1965).

92. 44 T.C. 408, 410 (1965).

93. *Cf.* J. KATZ & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY & THE LAW* (1967).

94. *United States v. Tarrango*, 398 F.2d 621 (2d Cir. 1968); *United States v. Sheller*, 369 F.2d 293 (2d Cir. 1966).

95. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

defendant attorney in *United States v. Sheller*.⁹⁶ In *United States v. Tarrango*,⁹⁷ experts testified that the defendant manifested schizophrenic reaction, paranoid type, a psychotic condition in which one loses touch with reality. The court reversed and remanded both cases on the grounds that fraud requires specific intent and that:

[T]he purpose of the Freeman rule was to deal more humanly and intelligently with the substantive question whether "certain classes of wrongdoers are properly the subjects of criminal punishment."⁹⁸

The Second Circuit continued to develop the application of the defense of mental abnormality to tax fraud charges in *United States v. Baird*.⁹⁹ In reversing and remanding defendant's conviction for failure to file income tax returns under section 7203, the court held that since the defendant's analyst had testified regarding statements made by the defendant, not during treatment but subsequent to the occurrence of the offense, the prosecution's expert could testify similarly. Moreover, the court adopted the position taken by the New Jersey Supreme Court in *State v. Whitlow*,¹⁰⁰ wherein the Court observed that:

There seems to be a tendency elsewhere in insanity cases to allow the defense psychiatrist to recount the full history obtained from the defendant regardless of its hearsay or self-serving quality, so long as the doctor regards it as essential to the formulation of his opinion.¹⁰¹

Thus, having molded the general rule of *Freeman*, the Court then began to sculpt the details of the rule in typical common-law fashion.

Other circuit courts have not been as consistent or enlightened as the Second Circuit. For example, in *United States v. Haseltine*,¹⁰² the defendant had been convicted of willfully failing to file income tax returns under section 7203 even though he had contended that his failure to file was the product of psychological and emotional pressures rather than for the purpose of avoiding payment of the tax. Because he did not specifically raise the insanity

96. 369 F.2d 293 (2d Cir. 1966).

97. 398 F.2d 621 (2d Cir. 1968).

98. *Id.* at 624; cf. *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968).

99. 414 F.2d 700 (2d Cir. 1969).

100. *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965).

101. 210 A.2d at 771.

102. *United States v. Haseltine*, 419 F.2d 579 (9th Cir. 1969).

defense, the Ninth Circuit construed his allegations as a tender of proof of diminished capacity and rejected it as applicable only to capital crimes.¹⁰³ The Court affirmed the conviction without considering the possibility that diminished capacity, not rising to the level of insanity, might abrogate the element of willfulness required to support tax fraud charges. Had he convinced the court that his reduced mental capacity had affected his ability to consciously form the intent to evade the defendant might have successfully established the absence of willfulness.

The Failure of Proof Paradigm

One method that several courts have employed to circumvent the defense is the failure of proof paradigm coupled with a questionable application of burden of proof standards. In *Fred W. Staudt*,¹⁰⁴ the taxpayer was charged with fraudulently understating his income in 1942 and 1943. During a portion of that period he was hospitalized with a bladder condition and subsequently spent time in a sanitarium for a mental condition. The court found him guilty because he “failed to meet his burden of proof” which required a showing that his illness had developed to the required extent by May 15, 1943, and that he was therefore unaware of what he was doing.¹⁰⁵ However, the court did not adequately consider the fact that, because fraud must be proved by clear and convincing evidence in civil cases, a defendant’s mental condition must necessarily have cast substantial doubt on the element of willfulness.

The technique adopted in *Staudt* was utilized in *Clinton H. Martin*¹⁰⁶ where the taxpayer-doctor understated his professional income in his 1950 return by \$7,201.91. He contended that the understatement was due to poor judgment caused by the effects of arteriosclerosis and that he could not therefore have entertained the intent to defraud. The court rejected this defense because it was not alleged that “the doctor was *non compos mentis* in 1951 or did not know right from wrong, or was not aware of the significance

103. *Id.* at 581, relying on *United States v. Fahey*, 411 F.2d 1213 (9th Cir. 1969), *cert. denied*, 396 U.S. 957 (1969). *But see* *United States v. Bishop*, 412 U.S. 346 (1973).

104. 12 CCH TAX CT. MEM. 1417 (1953), *aff'd*, 216 F.2d 610 (4th Cir. 1954).

105. *Cf.* *United States v. Griffin*, U.S. Tax Cas. 69-2, at 9611, *aff'd*, 432 F.2d 558 (8th Cir. 1970); *United States v. Gorman*, 393 F.2d 209 (7th Cir. 1968), *cert. denied*, 393 U.S. 832 (1968).

106. 18 CCH TAX CT. MEM. 100 (1959), *aff'd*, 272 F.2d 191 (2d Cir. 1959); *See also* *United States v. Mitchell*, 432 F.2d 354 (1st Cir. 1970), *cert. denied*, 401 U.S. 910 (1970).

of his actions."¹⁰⁷ In an aside, the court noted that the defendant's lack of cleverness did not alter the character of his fraud because "... anyone attempting to defraud the United States shows *ipso facto* a certain lack of judgment regardless of his mental acuteness."¹⁰⁸ In rigidly applying the *M'Naghten* test in *Martin*, the court appeared to be very result-oriented and stressed the lack of ingenuity in the taxpayer's actions. A better approach would consider the lack of ingenuity as an indicium of the mental deficiency of the taxpayer. One who willfully violates tax laws is more likely to take every precaution to avoid detection and will usually devise the most ingenious plans possible. On the other hand, a taxpayer who fails to take precautionary steps in his evasion plan is likely to be either careless or sufficiently deficient mentally to realize the nature of his acts. The court in *Martin* should consequently have given more than perfunctory consideration to the taxpayer's claims.

Another failure of proof case was *United States v. Benus*,¹⁰⁹ wherein the defendant dentist was found guilty by the court of willful failure to file income tax returns under section 7203. The dentist contended that he was incapable of willful conduct and was therefore insane within the rule of *United States v. Currens*.¹¹⁰ Since he could not introduce expert evidence that related to other than the post-indictment period, however, the court thought that willfulness had been proved beyond a reasonable doubt.¹¹¹ This is one of the few "failure of proof" cases in which the court appears to have reached a reasonable result in entertaining a defendant's attempted psychiatric defense to tax fraud charges.

The taxpayer in *Estate of Craddock*¹¹² was a purchasing agent for a corporation who received but failed to report kickbacks from suppliers of the corporation. He was charged with a violation of section 6653 (b), but contended that his failure to report these moneys was the result of alcoholism. The court, relying on *Jacob D. Farber*,¹¹³ discounted the taxpayer's allegations characterizing them

107. 18 CCH TAX CT. MEM. 100, 102-03 (1959).

108. *Id.* at 103.

109. 196 F. Supp. 601 (E.D. Pa. 1961), *aff'd*, 305 F.2d 821 (3rd Cir. 1962).

110. 290 F.2d 751 (3rd Cir. 1961).

111. *Cf.* *United States v. Johnson*, 460 F.2d 20, 22 (9th Cir. 1972).

112. 27 CCH TAX CT. MEM. 805 (1968).

113. 43 T.C. 407, *modified by*, 44 T.C. 408 (1965).

as vague theories supported by equivocal testimony. The court stated that he failed to prove the defense as the taxpayer did in *Emmanuel Hollman*¹¹⁴ because:

There is nothing in the record to indicate that Craddock was always out of touch with reality or that he rarely, if ever, realized what he was doing.¹¹⁵

Craddock presents a recurring problem in the courts, especially in the Tax Court. There appears to be no uniformly applied standard for determining the amount of proof that must be supplied concerning the accused's mental state to preclude a finding of fraud. Both "clear and convincing" and "reasonable doubt" standards have been applied. In addition, the courts are hesitant to indicate exactly what must be proved and by whom it must be proved when the defense of mental abnormality is raised. Without a consistent application of uniform rules, at least in the criminal area, there may be a violation of the "fundamental fairness" required for "ordered liberty."¹¹⁶

VI. SPECIAL CONSIDERATIONS IN PSYCHIATRIC DEFENSES TO TAX FRAUD CHARGES

One of the special considerations inherent in the opinions discussed above and in the psychiatric defense to tax fraud charges generally is the unarticulated premise that tax crimes are *sui generis*. This powerful silence has deferred the consideration of a traditional judicial safeguard (the requirement of willfulness) to a stage in the proceedings subsequent to an independent determination of guilt. Although the requirement of willful intent has not been deleted from tax fraud statutes, the courts frequently treat such offenses as if they were administrative transgressions or possessory crimes free from the requirement of intent. Perhaps this *sub silentio* treatment exists because the courts harbor an intrinsic belief that tax evasion is a serious public welfare offense which detrimentally affects all other societal members through increased taxes. The courts are correct in this assumption, for despite the fact that tax fraud may appear to be a victimless crime, it has more profound implications than many other more deviant activities.

114. 38 T.C. 251 (1962).

115. 27 CCH TAX CT. MEM. 805, 809 (1968).

116. Cf. Packer, *Mens Rea and the Supreme Court*, 1962 S. CT. REV. 107; Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUSTON L. REV. 1039 (1973).

Nevertheless, the Supreme Court has consistently construed tax evasion statutes to require (1) willfulness, (2) an affirmative act, and (3) a bad purpose. Chief Justice Vinson once observed that "the existence of *mens rea* is the rule of rather than the exception to the principles of Anglo-American criminal jurisprudence."¹¹⁷ Mr. Justice Brennan later qualified this statement: "Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter . . . [but] there is precedent in this Court that this power is not without limitations."¹¹⁸ Professor Packer considered these statements to mean that "[*m*]ens rea is an important requirement, but it is not a constitutional requirement, except sometimes."¹¹⁹ The "sometimes" exception applies when the statute necessitates the existence of *mens rea* before the accused may be convicted of its violation. To convict an individual of an *mens rea* offense without valid evidence of the *mens rea* itself is to deprive him "of life, liberty, or property, without due process of law" in disregard of the Fifth Amendment. Similarly, to accord recognition to a *mens rea*-abrogating defense is to accomplish indirectly what could not be done directly.

Substantially negating the psychiatric defense in tax fraud cases is equivalent to punishing conduct without reference to the actor's state of mind and is therefore inefficacious and unjust. Furthermore, as prosecutions for tax evasion *require* allegations of *mens rea*, ignoring the psychiatric defense may be unconstitutional. Certainly the *in terrorem* effect of the tax laws must be maintained to continue an effective revenue service; but the better method of narrowing psychiatric defenses in tax fraud cases would be to establish clearly enunciated standards of uniform application in all criminal tax evasion prosecutions. Under existing statutes, there appears to be no rational basis for distinguishing between tax crimes and other crimes. No impairment of the defenses to the requirement of a finding of "willfulness" in tax fraud cases should be tolerated when similar restrictions would be impermissible in other contexts.

117. *Dennis v. United States*, 341 U.S. 494, 500 (1951).

118. *Smith v. California*, 361 U.S. 147, 150 (1959).

119. Packer, *Mens Rea and the Supreme Court*, 1962 S. CT. REV. 107.

Strict Liability

One method of effectuating a sounder approach to psychiatric defenses in tax evasion cases would be to remove the necessity of proving willfulness in civil tax fraud offenses. By restricting those civil offenses requiring willfulness to *per se* violations,¹²⁰ unless reasonable cause (other than psychiatric defenses) can be shown,¹²¹ the *in terrorem* effect could be retained without threatening revenues or the psychiatric defense in criminal cases. A new standard that abrogated the intent element in civil tax cases would allow a defendant to successfully interject the psychiatric defense in a criminal proceeding and yet remain subject to civil penalties. The need for the defense in civil cases would be diminished and the courts could fully develop the criminal defense without fear of allowing exceptions to vitiate the rule.

The abandonment of *mens rea* as an element of an offense has been upheld by the Supreme Court on several occasions.¹²² In *United States v. Balint*,¹²³ Chief Justice Taft stated:

[T]he emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se* . . . So, too, in the collection of taxes, the importance to the public of their collection leads the legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment.¹²⁴

Professor Wechsler has written that:

Existing law goes further in some areas, prescribing liability without regard to any mental factor, the theory being that the object of control would be defeated if proof of purpose, knowledge, or even negligence were required for conviction. The most that can be said for such provisions is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issue; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.¹²⁵

120. See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73, 84 (1933); Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952). *Contra*, Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 403 & n. 70 (1958).

121. Cf. *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

122. *Supra* note 121; Packer, *Mens Rea and the Supreme Court*, 1962 S. CT. REV. 107.

123. 258 U.S. 250 (1922).

124. *Id.* at 252.

125. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952).

The requirement that unpaid taxes be paid coupled with the imposition of civil penalties would be a light penalty upon conviction and would not constitute an abuse of an absolute penal liability.¹²⁶ It would also tend to minimize the court's apprehension of the psychiatric defense in criminal trials. It must be remembered that a defendant who successfully establishes a psychiatric defense in a criminal tax fraud case has surpassed the level of proof required to vindicate himself in a civil action. Therefore, if the psychiatric contentions of the accused in a criminal prosecution are irrelevant in the civil proceeding, it is likely that the courts will increase the recognition they accord the defense in criminal trials.

Burden of Proof

This approach should also minimize "burden of proof" problems. Once a sufficient allegation of psychiatric impairment has been made (regardless of whether the defense has been raised specifically), the *government* would have the burden of showing beyond a reasonable doubt that the defendant *was not* suffering from a psychiatric disability.¹²⁷ If the evidence, including the presumption of sanity, does not disprove psychiatric impairment then there must be an acquittal, providing there was *some* proof of the mental disability introduced. It should be noted that the approach taken by the Supreme Court has not been consistently adhered to in tax fraud cases.¹²⁸ With the exceptions of the Second Circuit and the Tax Court in *Emmanuel Hollman*,¹²⁹ the courts have tended to shift this burden to the taxpayer-defendant.¹³⁰ In fact, the Ninth Circuit in *United States v. Haseltine*¹³¹ affirmed a rejection of psychiatric evidence by the district court where the defendant did not interpose the defense specifically. This result is clearly incorrect and must not be permitted to recur.

126. Cf. *id.*

127. *Davis v. United States*, 160 U.S. 469 (1895); *Dusky v. United States*, 295 F.2d 743 (8th Cir. 1961), *rev'd*, 362 U.S. 402 (1960).

128. *Supra* note 127.

129. 38 T.C. 251 (1962).

130. See, e.g., *United States v. Benus*, 196 F. Supp. 601 (E.D. Pa. 1961), *aff'd*, 305 F.2d 821 (3rd Cir. 1961); *Estate of Craddock*, 27 CCH TAX CT. MEM. 805 (1968).

131. 419 F.2d 579 (9th Cir. 1969).

VII. PSYCHIATRIC EVIDENCE

Although under the modern view, proof of a psychiatric defense should come from experts,¹³² lay testimony is admissible.¹³³ In fact:

[M]any courts in tax cases have permitted lay testimony to become the make-weight for overcoming what appears to have been quite substantial expert testimony.¹³⁴

For example, the court in *United States v. Peele*¹³⁵ ignored the testimony of five psychiatrists and instead adopted the opinions of three laymen who testified that the defendant was competent despite a prior finding by the court that he was incompetent to stand trial for criminal tax fraud. However, the better view is to rely on medically qualified experts.

The testifying expert may not state a conclusion or opinion without telling the jury what investigations, observations, reasoning and medical theory led to that opinion. He must explain how the development and functioning of the defendant's behavioral process may have influenced his conduct. However, the expert may not testify as to whether the psychiatric impairment caused the defendant's act, for to do so would be a usurpation of the jury's function.¹³⁶ Consequently, a diagnosis of the accused's mental condition must be limited to a description of how his impairment would tend to influence his conduct. Yet there appear to be no consistent standards for determining *whether* his condition has affected his conduct in a particular manner.

Expert testimony problems are exacerbated by the question of whether a particular condition is a mental disease or defect:

Real disputes arise in sanity determinations over the question of whether a particular diagnosis is or is not a "mental disease" if the expert witness says it is. But psychiatrists do not agree at all among themselves as to which of these diagnoses are diseases. Psychiatrists are even less in agreement as to the general definition of what constitutes mental disease, although many psychiatric the-

132. See *Frisone v. United States*, 270 F.2d 401 (9th Cir. 1959); *Symposium: United States v. Brawner*, 1973 WASH. U.L.Q. 17; Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, in PLI, EFFECTIVE UTILIZATION OF PSYCHIATRIC EVIDENCE 99 (1970); Deiden & Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CALIF. L. REV. 534 (1965).

133. Cf. *United States v. Peele*, 137 F. Supp. 905, 917 (E.D.N.Y. 1956).

134. Ritholz, *Intent and Psychiatric Disturbances in Tax Fraud Cases*, N.Y.U. 23RD INST. ON FED. TAX. 1339, 1363 (1965).

135. 137 F. Supp. 905 (E.D.N.Y. 1956); see *United States v. Benus*, 196 F. Supp. 601 (E.D. Pa. 1961), *aff'd*, 305 F.2d 821 (3rd Cir. 1961).

136. Cf. Diamond & Louisell, *supra* note 132, at 103. See discussion in Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U.L.Q. 87.

orists have opinions on this point. But it sometimes happens in a trial that the psychiatrists agree on the defendant's symptoms and diagnosis, but they disagree as to whether the diagnosis in question is a mental illness. Such cases are not rare, and they would be far more frequent if every defendant were examined by more than one psychiatrist. Since most defendants are examined by only one psychiatrist, this issue is usually resolved invisibly by the luck of the draw. Now, to have a sanity verdict be determined by the examining psychiatrist's views on a rather arcane area of abstract psychiatric theory, rather than by the facts (poorly as they may be known) of the defendant's psychiatric history, seems ridiculous to me. And yet the problem appears to have no solution.¹³⁷

These problems concerning the definitional differences between the legal and medical concepts of mental disease or defect are widely recognized and yet remain unsolved.¹³⁸

VIII. THE SUCCESSFUL PSYCHIATRIC DEFENSE

The successful assertion of a psychiatric defense in "normal" criminal situations has profound consequences that should not necessarily be extended to criminal tax evasion cases.¹³⁹ In the District of Columbia, for example, an acquittal for insanity will usually result in the commitment of the defendant to a mental institution.¹⁴⁰ The duration of the commitment will vary depending upon the probability that the accused's release will present a danger to society or to himself.¹⁴¹ However, these committals can result in excessive red tape and may eventually necessitate habeas corpus petitions for release.¹⁴² In other jurisdictions where there is no commitment requirement the question will probably be delegated to the state agency responsible for incompetents.

137. Pugh, *supra* note 136, at 104.

138. Cf. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967).

139. Naturally, if during administrative procedure, the decision is against criminal prosecution there is no immediate consequence to the taxpayer because of his reliance on psychiatric evidence.

140. D.C. CODE ANN. § 24-207(2) (1970); see Broderick, *Justice in the Books or Justice in Action: An Institutional Approach to Involuntary Hospitalization for Mental Illness*, 20 CATH. U.L. REV. 547 (1971); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

141. Broderick, *supra* note 140, at 569-89; see A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

142. See, e.g., *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968).

In *Saur v. United States*,¹⁴³ the Court of Appeals sought to rationalize its provincial approach to the psychiatric defense on the basis of its inability to provide post-acquittal arrangements for the defendant. The court was apparently ready to adopt a more enlightened position but lacked a power comparable to that of the Court of Appeals of the District of Columbia to arrange post-acquittal provisions.¹⁴⁴ If the *Saur* court had had a post-acquittal power it may have adopted a more liberal psychiatric defense rule.

The harshness of the automatic commitment rule was ameliorated by the Supreme Court's decision in *Baxstrom v. Herold*.¹⁴⁵ In that case a New York procedure whereby the defendant was civilly committed without jury review of the incompetency determination (a review available to other persons civilly committed) was held to be violative of equal protection requirements. The Court of Appeals for the District of Columbia has utilized this approach to circumvent the mandatory commitment provisions. In *Bolton v. Harris*,¹⁴⁶ the court stated that its prior decisions had found it:

. . . reasonable to treat those not guilty by reason of insanity differently from other mentally ill persons because of the greater likelihood that the former will be dangerous to society, and that habeas corpus provided a sufficient safeguard for their rights [However, under *Baxstrom v. Herold*] prior criminal conduct cannot be deemed a sufficient justification for substantial differences in the procedures and requirements for commitment.¹⁴⁷

Consequently, because the tax evader is usually not physically dangerous to society, civil commitment should not ordinarily follow the successful assertion of a psychiatric defense. The defendant should be able to convince a jury that even though he lacks the *mens rea* necessary for tax evasion, it is unlikely that he is dangerous. Therefore, he should escape criminal penalties and civil commitment and yet remain subject to civil tax evasion penalties.

Psychiatric Condition As a Mitigating Element

If the defendant is not successful in his assertion of the psychiatric defense, a psychiatric condition should nevertheless influence

143. 241 F.2d 640 (9th Cir. 1957).

144. *Id.* at 650:

Many observers implicitly assume in their criticism of the present law that if the accused is set free on the criminal side that he will be confined on the civil. Unfortunately, that is not the case. If it were, this court might be much more disposed to alter its current views. The choice today in this jurisdiction is not between confinement and commitment, but rather between confinement and freedom.

145. 383 U.S. 107 (1966).

146. 395 F.2d 642 (D.C. Cir. 1968).

147. *Id.* at 649.

the post-conviction stages of the case. For example, in *United States v. Cain*¹⁴⁸ the court weighed the defendant's psychiatric condition on the sentencing issue more heavily than when ruling upon the substantive issues at trial.¹⁴⁹ This approach has been debated vehemently by scholars but no consensus has yet been reached.¹⁵⁰

A Particular Danger

Although there has been considerable discussion of the desirability of allowing the judge or the prosecution to raise the issue of insanity, one eminent commission has noted that such a procedure ". . . may prejudice the legitimate interests of the defense."¹⁵¹ The authors of the Model Penal Code declined to give this authority even to the judge alone because to do so would threaten "too great an interference with the conduct of the defense."¹⁵² In addition, the defendant's credibility would be impaired should he decide to testify in his own behalf. However, in *Whalemn v. United States*¹⁵³ the Court of Appeals for the District of Columbia held that the refusal of the defense to raise the insanity issue did not preclude the court from raising it *sua sponte*.

Judicial intervention for the purpose of raising the psychiatric defense in tax fraud cases (and in other criminal cases where the accused is not obviously dangerous) appears to be an unconstitutional intrusion into the adversary process.¹⁵⁴ Moreover, it would allow the government to introduce the defendant's psychopathic or sociopathic tendencies (not his mental defects or diseases) to show that he willfully intended to evade his taxes. Clearly, this proce-

148. 298 F.2d 934 (7th Cir. 1962).

149. Cf. *Insanity as a Defense, A Panel Discussion*, 37 F.R.D. 365, 369 (1964), where former Chief Justice Weintraub of the New Jersey Supreme Court stated: "[I]nsanity should have nothing to do with the adjudication of guilt but rather should bear upon the disposition of the defendant after conviction. . . ."

150. See generally, Weihofen & Overholser, *Mental Disorder Affecting the Degree of a Crime*, 59 YALE L.J. 959 (1947).

151. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, Report 154 (1953).

152. MODEL PENAL CODE, Comments to 403 (Tent. Draft No. 4, 1955).

153. 346 F.2d 812 (D.C. Cir. 1965).

154. Cf. *Anders v. California*, 386 U.S. 738 (1967); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RES. 52, 60-8 (1967); see *supra* note 140.

dure would constitute an impermissible violation of due process of law and must not be allowed.¹⁵⁵

IX. CONCLUSION

Tax fraud, especially that aspect involving the assertion and application of the psychiatric defense, is an ambiguous and mutable area that R. Paul once aptly referred to as "the devious paths of the spawning tax jungle."¹⁵⁶ An imperfect knowledge of the defense has produced disparate procedures and, ultimately, unequal applications of substantive laws. A portion of this confusion is attributable to the notions that civil fraud is not evidentiary ripe enough for criminal prosecution and that criminal fraud is too insidious for merely civil penalties. However, by recognizing and treating tax crimes as crimes these problems might be alleviated.

155. *Supra* note 140.

156. R. PAUL, *SELECTED READINGS IN FEDERAL TAX LAW* (1938); *see supra* notes 5 & 11.