A BRIEF HISTORY OF WILLFULNESS AS IT APPLIES TO THE BODY OF AMERICAN CRIMINAL TAX LAW

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An article describing the history of the willfulness requirement in criminal tax law, with a goal of demonstrating that willfulness is an important legal standard.

"Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records . . . , should become a criminal by his mere failure to measure up to the prescribed standard of conduct."[1] The *Murdock* decision in 1933 established one of the

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1. United States v. Murdock, 290 U.S. 389, 396 (1933) (interpreting willfulness under the Revenue Acts of 1926, § 1114(a), and 1928, § 146(a)).

longest chains of relatively undisturbed stare decisis in American jurisprudence: the law of willfulness in criminal tax cases.[2] A special exception to the golden rule of law, that ignorance of the law is no excuse,[3] was carved out for the criminal tax arena.

I. WILLFULNESS IN WESTERN LAW

For a moment, let us go back to England in the year 1649 for an early interplay between the law of willfulness and taxes.

Charles I, King of England, was tried and executed for waging wars and improperly levying taxes without the authority of Parliament.[4] "The greatest number of complaints were provoked by the levying of ship money."[5] The King was charged with avoiding the Magna Carta and Parliament by imposing a ship fee.[6] Oliver Cromwell died and Charles II was installed as King; then, the lawyer who tried Charles I, John Cooke, was himself tried in 1660.[7] Cooke was charged with *willfully and knowingly* engaging in conduct that ultimately led to the death of Charles I.[8] These words, "willfully" and "knowingly," are the exact words used in today's Tax Code, and it is thus worth exploring some predecessors to modern U.S. tax law.[9]

2. *Id.* For example, *Murdock* was already thirty-three years old at the time *Miranda* was decided. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (established possibly the most famous legal doctrine in the United States: the right to remain silent during custodial interrogation). The endurance of *Murdock* is clearly demonstrated in *Cheek*, when the Court follows the then fifty-eight year old opinion. Cheek v. United States, 498 U.S. 192, 200 (1991).

3. The general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 182 (1820).

4. A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9, 20 (2007).

5. GRAHAM E. SEEL, REGICIDE AND REPUBLIC: ENGLAND 1603–1660, at 55 (2001).

6. Until 1638, over ninety percent of the assessed ship tax was paid. *Id.* at 56. The chief use for the tax was war, which ultimately was a major cause for the indictment of Charles I for "treasons and crimes." *Id.*; GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD 149 (2005).

7. ROBERTSON, *supra* note 6, at 370–71.

8. *Id.* at 296.

9. John Cooke was the first recorded person to claim that "poverty was a major cause of crime"; to suggest that national health care would be appropriate; to suggest that lawyers should do ten percent of their work pro bono; to suggest an end to debtor's prison; to suggest the abolition of Latin in courts so that common people could understand the proceedings; and to suggest the abolition of portions of the death penalty. *Id.* at 11. Cooke devised the theory of charging the King (the leader of the nation) through the doctrine of command responsibility. *Id.* at 15. The same theory has been used in modern times against imperial rulers such as Pinochet, Milosevic, and Saddam Hussein, who unsuccessfully

Twenty-three years before the execution of Charles I, England watched John Hampton's related tax trial.[10] King Charles I declared a war, but Parliament refused to finance it.[11] The King wrote out a writ to receive ship money to build ships.[12] His writ stated that there were thieves and Turks at sea and that the kingdom needed immediate emergency ships to fight them.[13] The King's theory was that ship money was not a tax and was therefore not covered by the Magna Carta, which gave Parliament the sole right to tax.[14] Therefore, the King did not need Parliament's permission to compel ship money fees. Hampton, a landowner, was charged 20 shillings for ship money in November 1637.[15] Disagreeing with the King, Hampton thought he was being taxed illegally. His lawyer, Solicitor-General Oliver St. John, defended Hampton before twelve judges, arguing that ship money was really a tax by another name.[16]

There was, prior to the Magna Carta, a right of the king to charge landowners in coastal areas with a ship fee, if necessary, to build ships.[17] The Magna Carta eliminated much of the taxation tradition by vesting the power to tax with Parliament.[18] In 1215, King John, who agreed personally and on behalf of his successors that taxes would be assessed by Parliament and not by the king, signed the Magna Carta.[19] This tradition would later be written into the United States Constitution, giving the sole power to tax to Congress, not the Executive branch.[20]

John Hampton had three defenses.

(1) He first argued that charging money for the purpose of

pleaded sovereign immunity when arraigned in world courts for killing their own people based on a universal right to punish a tyrant who denies civil and religious liberty to his own people. *See id.*

10. *See* SEEL, *supra* note 5, at 55. Hampton's name also has been spelled "*John Hampden*." *See id.*

11. *See id.* at 55–56.

12. *See* ROBERTSON, *supra* note 6, at 48.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The author was unable to find any cases of interior landowners refusing to pay a ship "tax" during the subsequent reign of Charles II. This is presumably either because by that time anyone charged had been incarcerated, drawn and quartered, or decapitated (commoners were not allowed the relative comfort of decapitation), or because they complied with the orders of the King.

18. *See* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 239 (Burt Franklin 1960) (1914).

19. *See id*. at 36–38.

20. U.S. CONST. art. I, § 8, cl. 1.

building ships was a tax, no matter what the King chose to call it. Therefore, the King had no authority to charge this tax without the concurrence of Parliament.[21]

(2) Secondly, Hampton did not own any coastal property. His property was in the interior of England. The original stated purpose of the ship fee was to charge coastal landowners for shipbuilding.[22] There was no authority ever, dating back to at least the reign of Queen Elizabeth, to charge the ship fee to anyone not owning property on the coast.[23]

(3) Finally, the ship fee doctrine had only ever been invoked in times of emergency.[24] If this were an emergency, it could not be solved by a present tax—the money would not magically create the vessels, as it took months to build a ship. "There was, in short, no national emergency of the kind that alone could justify a tax so urgent that its imposition could not wait the forty-day interval between the summoning of a new Parliament and its meeting—especially since it would take seven months to build a ship."[25] Hampton seriously doubted that the King had any interest in building a ship. The truth was less subtle. The money was to be used for the immediate purpose of ground troops for the civil war.[26]

The King's twelve judges ultimately convicted Hampton in the ship fee case, but not without long and serious debate about such familiar issues as the power of the sovereign, property rights, and separation of governmental powers.[27] With the King ahead 5-0, Sir George Croke voted for Hampton based on the principle of no taxation without representation.[28] "That night they joked at the Inns that the King would have his ship money 'by hook, but not by Croke' . . . ."[29] Ship money was plainly a tax, which required Parliamentary action and could not be overridden even by a monarch claiming emergency, argued Croke.[30] But, notwithstanding that others joined Croke's viewpoint, Hampton lost, 7-5, because "the King was

21. *See* ROBERTSON, *supra* note 6, at 48.
22. *Id*.
23. KEITH FEILING, A HISTORY OF ENGLAND: FROM THE COMING OF THE ENGLISH TO 1918, at 457 (1950).
24. ROBERTSON, *supra* note 6, at 48.
25. *Id*.
26. *See id*.
27. *Id.* at 48–49.
28. *Id*. at 49.
29. *Id.*
30. *Id.*

above the law."[31] Ultimately, after Oliver Cromwell took over after winning the civil war and King Charles I lost his criminal trial and his head over the issue, Hampton's conviction was reversed, and many other tax prisoners were released.[32] Parliament declared the raising of ship money to be an unlawful tax.[33]

The general rule of law was that "*Rex* is *Lex*"—the King is the Law—and, therefore, the king may not be charged with violating himself.[34] The rule of law was that the king could do no wrong in the estimation of the law.

When Cromwell took power and Parliament decided King Charles I had committed treason against England, the papers requesting an advocate were handed to Cooke, a solicitor (and later solicitor and barrister), who happened to be the only lawyer left to argue that the *Rex*, King Charles I, had violated the law.[35] All other advocates, solicitors, and barristers had fled from the Inns of Court or had "taken ill."[36]

Other serious charges were brought against Charles I. One was that he had engaged in so many civil and foreign wars that "[t]ens of thousands of lives had been lost by his 'commands, commissions and procurements.'"[37] However, we are presently concerned with the ship charge. Charles I kept disbanding Parliament (which he had the right to do at any time) because Parliament would not do his will.[38] After each new Parliament refused to do his will, Charles I instituted his own scheme to obtain additional funding using a charge that he would

31. *Id.*

32. *See id.* at 367–69.

33. *Id.* at 54.

34. *Id.* at 49. It was generally believed that kings were appointed by God and ruled by divine right as benign spiritual and political dictators through elite ministers, bishops, and judges, "who must *never* question the royal prerogative, for 'that is to take away the mystical reverence that belongs to those that sit in the throne of God.'" *Id.* at 25 (quoting James I).

35. *See id.* at 9, 142, 144.

36. *See id.* at 9, 144. In theory, while a solicitor could write briefs, only a barrister could argue them, and any member of the esteemed legal union, the Inns of Court, requested by Parliament to act, must do so. Unfortunately, all others had fled, leaving Cooke to flee or to act as solicitor and barrister. Cooke, a deeply religious man, accepted this onerous duty as his calling. "John Cooke did not hesitate: this brief was his destiny. 'I readily harkened to their call to this service, as if it had been immediately from heaven. . . . I went as cheerfully about it as to a wedding.'" *Id*. at 144.

37. *Id.* at 148, 191.

38. For example, in May 1640, Charles disbanded parliament after only three weeks because they refused to discuss his proposed taxes. This became known as the "Short parliament." FEILING, *supra* note 23, at 466.

call something other than a tax.[39]

After Cromwell died in September 1658, Charles II was "restored" to his father's throne, and Cooke was charged with the crime of regicide: "willful and knowing" conduct that led to the death of King Charles I.[40] Cooke responded, "whereby I did truly and conscientiously act, and look upon us as so many men got together without authority . . . I humbly make bold to say I have not received satisfaction in my judgment."[41] In October 1660, Cooke was convicted and sentenced.[42] The charge to the jury in Cooke's trial would be beyond reproach; therefore, the jury was required to find that Cooke's conduct against the King was not only inappropriate, but was also willfully and knowingly wrong.[43] A jury of his "peers" found Cooke guilty.[44] The Crown stacked the cards by asking the jurors to deliberate at the bench instead of adjourning to the deliberation room.[45] After the jurors found Cooke guilty as charged, they were rewarded with titles of nobility.[46]

Why "willful and knowing" conduct? The English common law rule, adopted from the Roman law precept, is *ignorantia juris non excusat*—ignorance of the law is no excuse.[47] However, in certain limited and special situations, modern-day Western governing bodies have created laws which deny that Roman rule.[48]

The 1979 *Garber* case, which some practitioners refer to as the "vampire case," provides an interesting example of the intrinsic

39. *See* ROBERTSON, *supra* note 6, at 48. In many respects, politicians in the United States today play the same game, pretending that the Social Security tax on wages is not an "income tax," for example.

40. *Id.* at 296, 370. Both words are used in the American criminal tax statutes. *See* 26 U.S.C. §§ 7206–7207 (2000 & Supp. II 2002). "Willful" is the focus of discussion in this article. "Knowing," its less-important cousin, will have to wait for another day. The argument that knowingness is subsumed by willfulness is ongoing, but unconvincing.

41. ROBERTSON, *supra* note 6, at 321 (alteration in original).

42. *Id.* at 294, 321, 324–25.

43. *Id.* at 296.

44. *Id.* at 321.

45. *Id.* at 3, 321 ("[T]he partisan judges of Charles II . . . instructed vetted jurors to convict without bothering to leave the jury-box.").

46. *See, e.g.*, *id*. at 321 (noting that the jury foreman became a baron).

47. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 182 (1820); s*ee also* BLACK'S LAW DICTIONARY 1721 (8th ed. 2004).

48. United States v. Fierros, 692 F.2d 1291, 1294–95 (9th Cir. 1982) ("There are . . . two categories of cases in which a defense of ignorance of law is permitted . . . . The first category involves instances where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime. . . . The second category . . . involves prosecution under complex regulatory schemes that have the potential of snaring unwitting violators.").

confusion built into tax law[49] that justifies the deviation from the general legal position—that although ignorance of the law is no excuse, only willful violations of the tax law will be punished with criminal sanctions.[50] Dorothy Garber's blood had "substantial commercial value due to the presence of an extremely rare antibody known to be possessed by only two or three other persons in the world."[51] Garber did not report income on the sale of her blood, believing there was no requirement to pay tax money for her own blood.[52] Garber was wrong.[53] But was the charge of income tax evasion—intentionally not paying the tax she owed on her own blood—fair? The Fifth Circuit Court of Appeals, in an en banc hearing, ruled that the law was ambiguous with regard to the payment of taxes on "blood money," and that although, henceforth, it was clear that a person owed income tax for the sale of his or her own blood, Garber had no way of knowing the law since the law had not been clearly and firmly established.[54] Garber's conviction was reversed.[55]

The exercise now before us is to explore the question, "Did the landowners who refused to pay the ship tax *willfully* violate the law?" It is an interesting question in light of American criminal tax law, which of course would not exist for nearly another century-and-a-half. American income tax law, with two short-lived exceptions,[56] would start with the passage of the Sixteenth Amendment to the Constitution in 1913.[57]

49. What is taxable income? The question is far more confusing than it appears on the surface and cannot be handled in a simple article, let alone a footnote. For example, a loan is not income. *See* 26 U.S.C. § 61(a) (2000). However, if it is *never* repaid, at some point it becomes taxable income unless excluded by other operation of law, such as a bankruptcy or an act of Congress, like the one currently contemplated for "forgiving" sub-prime loan debt. *See* 26 U.S.C. § 108(a)(1)(A)–(B) (2000).

50. United States v. Garber, 607 F.2d 92, 97 (5th Cir. 1979) (en banc).

51. United States v. Garber, 589 F.2d 843, 845 (5th Cir. 1979), *rev'd en banc*, 607 F.2d 92 (5th Cir. 1979).

52. *Id.* at 846.

53. *Id.* at 847–48.

54. *Garber*, 607 F.2d at 99–100.

55. *Id.* at 100. Other federal circuits have been in frequent conflict with this close decision. *See, e.g.*, United States v. Curtis, 782 F.2d 593, 599 (6th Cir. 1986).

56. Prior to 1913, there were two short-lived periods of income taxation. The first was during Lincoln's term, when a tax was collected to finance the Civil War. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 428 (3d ed. 2005). The tax was not fully challenged and was eliminated after the war. *See id.* The second, in 1894, was thrown out as unconstitutional. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI; *see also* FRIEDMAN, *supra*, at 429.

57. U.S. CONST. amend. XVI.

II. MODERN U.S. CRIMINAL TAX LAW—HOW IS WILLFULNESS PROVEN?

We will return later to the question of whether the English willfully and knowingly violated the ship tax law. Until then, we remain across the ocean in the United States after 1913.

The term willfully appears in both the felonies and misdemeanors portions of the Internal Revenue Code (Code).[58] Section 7206, defining a specific felony, states:

> Any person who . . . [w]illfully makes and subscribes 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 matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.[59]

Section 7207, defining a specific misdemeanor, states:

> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.[60]

It is the word indicating intent in these provisions—willfully—that is of most importance in criminal tax cases. These definitions are so broad that often particular conduct could satisfy either statute. The decision of which to charge is purely a matter of prosecutorial discretion.

58. Sections 7201–7446 of Title 26 are reserved for tax violations. *See generally* 26 U.S.C. §§ 7201–7446 (2000). Additionally, "[t]he Supreme Court has made it clear that conviction for the felony of tax evasion under § 7201, requires a showing of 'some willful commission in addition to the willful omissions that make up the list of misdemeanors.'" United States v. DeTar, 832 F.2d 1110, 1114 (9th Cir. 1987) (quoting Spies v. United States, 317 U.S. 492, 499 (1943)).

59. 26 U.S.C. § 7206(1) (2000).

60. 26 U.S.C. § 7207 (Supp. II 2002).

Murdock was the defendant in a case[61] that established the modern definition of willfulness and would later be referred to as the "fountainhead" case.[62] Murdock did not want to give the Internal Revenue Service (IRS) papers, objecting on Fifth Amendment grounds.[63] His argument was that signing a form declaring his income under oath was potentially incriminating.[64] *Murdock* established the definition of the word "willfulness," although even after *Murdock* the Court recognized that "willful . . . is a word of many meanings, its construction often being influenced by its context."[65] In *Murdock*, willfulness was defined as an *intentional or knowing* act.[66] The court in *Murdock* included in the definition of "willfully" an evil motive as a constituent element of the crime: "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose."[67] In order to convict someone of a tax crime under *Murdock*, the jury would have to be charged with finding an evil motive, not merely an intentional violation of the law.

Some of the courts of appeals had ruled that the misdemeanor

61. United States v. Murdock, 290 U.S. 389 (1933).

62. United States v. Aitken, 755 F.2d 188, 191 (1st Cir. 1985).

63. *Murdock*, 290 U.S. at 391. Courts have subsequently eviscerated the Fifth Amendment defense. *See* United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973); United States v. Porth, 426 F.2d 519, 522–23 (10th Cir. 1970); discussion *infra* Part IV. Murdock's behavior was not dissimilar to that of people who were given the "tax protestor" label by the Government in recent years. Although the courts had not yet resorted to calling citizens tax protestors, the Seventh Circuit would take the lead in that effort decades later. *See* discussion *infra* Part V.

64. *Murdock*, 290 U.S. at 393.

65. Spies v. United States, 317 U.S. 492, 497 (1943). Willful is also a word of more than one spelling—"willful" and "wilful." It is interesting to note that in all federal criminal statutes that include the term willfulness, the word is spelled "willfulness," but in the multitude of case law the courts substitute the word "wilfulness," with one "l," for no apparent reason. Perhaps there are two possible spellings, and perhaps one court spelled it wrong, and its error was copied by other courts over the last near century of law. Perhaps the *Aitken* court, which spelled it both ways, intended a subtle difference between the two spellings. *See Aitken*, 755 F.2d at 189–93. The *Murdock* Court used two "l's" in places and one in others. *See Murdock*, 290 U.S. at 393–95.

Black's Law Dictionary notes and approves of the two different spellings of the term. BLACK'S LAW DICTIONARY 1630 (8th ed. 2004). It defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." *Id.* The definition of "willfulness" is "[t]he fact or quality of acting purposely or by design; deliberateness; intention. . . . The voluntary, intentional violation or disregard of a known legal duty." *Id.* The *American Heritage Dictionary* defines "willful" as "[b]eing in accordance with one's will; deliberate. Inclined to impose one's will; unreasonably obstinate." AMERICAN HERITAGE DICTIONARY 1382 (2nd college ed. 1982).

66. *Murdock*, 290 U.S. at 394–95.

67. *Id.* at 394.

statute did not require evil motive or bad purpose.[68] In *Bishop*, the Supreme Court reiterated that willfulness is the "voluntary, intentional violation of a known legal duty."[69] Although it also reiterated that willfully required "bad faith or evil intent,"[70] it seemed to dance on the head of legal pins by making the use of the word "evil" or "malicious" alternate choices in describing willfulness rather than mandatory language.[71]

Cecil Bishop, an attorney, had been convicted on three counts of violating § 7206(1)—felony filing of false income tax returns—for 1963, 1964, and 1965.[72] In *Bishop*, the Supreme Court decided whether willfulness was different for the felony tax statute, § 7206(1), and the misdemeanor tax statute, § 7207.[73]

The *Bishop* district court had refused a lesser-included offense jury charge under § 7207, which makes it a misdemeanor when one willfully delivers or discloses to the IRS a document known to be false in a material matter.[74] Bishop argued that because it takes less willfulness to commit the misdemeanor than the felony, the § 7206 charge should be a lesser-included offense.[75] The Ninth Circuit Court of Appeals agreed and reversed, holding that willfully in § 7206, a felony, included an evil motive, but the same word in § 7207, a misdemeanor, required only proof of capricious, unreasonable, or careless disregard for the truth.[76] But the Supreme Court disagreed with the Ninth Circuit and ruled that "willfully" means the same in the misdemeanor statute as in the felony statute.[77] In both statutes, the term "connotes a voluntary, intentional violation of a known legal duty."[78] The distinction between the statutes was not a distinction of willfulness.[79]

68. *See, e.g.*, Abdul v. United States, 254 F.2d 292, 293 (9th Cir. 1958).
69. United States v. Bishop, 412 U.S. 346, 360 (1973).
70. *Id.* (quoting *Murdock*, 290 U.S. at 398).
71. *See id.* at 360–61.
72. *Id.* at 348.
73. *Id.* at 356.
74. *Id.* at 349–50.
75. *Id.* at 350.
76. United States v. Bishop, 455 F.2d 612, 615 (9th Cir. 1972), *rev'd*, 412 U.S. 346 (1973).
77. *Bishop*, 412 U.S. at 361.
78. *Id.* at 360.
79. Prior to this time, the federal circuits differed in construing "willfully" in misdemeanor statutes and in felony statutes. *See, e.g.*, Abdul v. United States, 254 F.2d 292, 293 (9th Cir. 1958) ("The meaning of the word 'wilfully' . . . with respect to felonies [is] 'with a bad purpose or evil motive.' But the meaning of the word 'wilfully' as used in the statute defining a misdemeanor has not as yet reached such repose." (citations omitted)).

These differences in the respective applications of § 7206(1) and § 7207 provide solid evidence that Congress distinguished the statutes in ways that do not turn on the meaning of the word "willfully." The distinction has been described as "found in the additional misconduct which is essential to the violation of the felony statute . . . and not in the quality of willfulness which characterizes the wrongdoing."[80] The Supreme Court concluded: "Thus the word 'willfully' may have a uniform meaning in the several statutes without rendering any one of them surplusage."[81]

In what would become significant in the so-called tax protestor cases of the 1970s,[82] the *Bishop* court clearly expressed the reason that Congress used the word willfulness in the tax statutes:

> This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." . . . The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court.[83]

Finally, the Supreme Court in *Bishop* ruled:

> 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.
>
> Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock*.[84]

Congress would not "speak" on the issue again before the Court reevaluated and "explained" its position in *Pomponio* in 1976.[85]

Two subsequent decisions from the courts of appeals were entirely consistent with *Bishop*, while the courts at the same time explained the standards by which a lesser-included offense charge was

80. *Bishop*, 412 U.S. at 358–59 (alteration in original) (quoting United States v. Vitiello, 363 F.2d 240, 243 (3d Cir. 1966)).

81. *Id.* at 359.

82. *See* discussion *infra* Part III.

83. *Bishop*, 412 U.S. at 360–61 (citation omitted).

84. *Id.* at 361.

85. *See* United States v. Pomponio, 429 U.S. 10, 12 (1976).

required when the two types of tax crime statutes, misdemeanor and felony, were involved—*United States v. DeTar*[86] and *United States v. Doyle*.[87] The position in *Bishop* was that willfulness is defined in both statues identically, which might have led some to think that there could be no lesser-included charge in a crime of willfulness. But when the issue was directly reviewed in *Doyle* and *DeTar*, the courts concluded there could be a lesser-included defense based on different elements, all of which are required to be proved beyond a reasonable doubt.

Dr. John DeTar was convicted on eight counts of income tax evasion.[88] From 1977 to 1984, he filed tax returns, reporting over half a million dollars in income, but paid virtually no taxes.[89] This conduct violated the failure-to-pay misdemeanor statute, § 7203, if he had the ability to pay (and the trial court found that he did) and if his failure was willful.[90] DeTar hid money in the family trust, and some patients paid him in cash.[91]

As a general rule, the misdemeanor tax statute charges a failure to do something, an *omission*.[92] It can be raised to a felony by the addition of a *commission*, an affirmative act.[93] Not filing a return and not paying taxes are omissions. But add something to not paying, like an active effort to hide money, keeping information from the government, or putting false numbers on a return, and the act jumps the misdemeanor to a felony.

At trial, the IRS successfully argued that DeTar's actions were sufficient commissions to raise the crime from a misdemeanor to a felony.[94] DeTar's request for a lesser-included offense instruction was denied.[95] The Ninth Circuit reversed: "[T]here was sufficient evidence to support an inference of intent to evade the payment of taxes. But the fact that the intent *may* be inferred does not mean that it *must* be inferred. 'Such inferences are for the jury.'"[96] DeTar presented evidence that he was motivated to put money in the family trust and

86. United States v. DeTar, 832 F.2d 1110, 1113–14 (9th Cir. 1987).
87. United States v. Doyle, 956 F.2d 73, 74–75 (5th Cir. 1992).
88. *DeTar*, 832 F.2d at 1112.
89. *Id.*
90. *See id.* at 1113.
91. *Id.* at 1112.
92. *See, e.g.*, *Doyle*, 956 F.2d at 75.
93. *DeTar*, 832 F.2d at 1113.
94. *Id.*
95. *Id.*
96. *Id.* at 1114 (footnote omitted) (quoting Spies v. United States, 317 U.S. 492, 500 (1943)).

accept cash payments from patients for reasons other than tax evasion.[97] "DeTar was entitled to a lesser-included offense instruction," held the court, if there were disputed issues of fact that would allow a jury reasonably to find that, although the elements of § 7201 were not proved, all of the elements of the lesser-included § 7203 were proved.[98] Bearing in mind that the definition of "willful" is the same for the two statutes, conviction rested on a finding of willful violation of all the elements of the lesser offense. Unlike § 7206 and § 7207, § 7201 and § 7203 have markedly different factual elements.[99] The construction in *DeTar* was different from the construction in *Bishop*. In *DeTar*, the courts essentially forged two misdemeanor statutes together to constitute the felony.

The same issue was addressed by the Fifth Circuit in *Doyle*.[100] Emmett Doyle was an Irish immigrant who stopped filing tax returns after conversations with other Americans of similar mind.[101] To avoid income tax withholding, Doyle admittedly claimed excess exemptions and ultimately was charged with felony tax evasion.[102]

The trial court denied his requested lesser-included misdemeanor offense charge, and he was convicted on the felony count.[103] The Fifth Circuit reversed, holding that he was entitled to the lesser-included offense instruction because "the elements of the lesser offense [were] a subset of the elements of the charged offense and the evidence would permit the jury to rationally conclude that the defendant was guilty of the lesser offense but not guilty of the charged offense."[104] This instruction is warranted when there is a contested factual issue regarding an indispensable element of the charged offense—in this case, felony tax evasion—that is not essential to the lesser-included offense.[105] "The critical difference between the two crimes is that the charged felony offense requires . . . willful *commission*, whereas the misdemeanor merely requires willful *omission*."[106]

> Doyle contends that he did not *willfully* submit inaccurate W-4 forms because he believed, in good-faith, that the information supplied was accurate. His contention thrusts us into the realm

97. *Id.*
98. *Id.* at 1113.
99. *See generally* 26 U.S.C. §§ 7201, 7203, 7206–7207 (2000 & Supp. II 2002).
100. United States v. Doyle, 956 F.2d 73, 74 (5th Cir. 1992).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 75 (citing Spies v. United States, 317 U.S. 492, 498–99 (1943)).

> of *mens rea*, and in particular, the willfulness elements of both crimes. The element of willfulness, though common to both the felony and the misdemeanor, requires different states of mind. To be convicted of the misdemeanor, one need only willfully fail to file one's income tax return. The willfulness involved in failing to file a tax return is not enough to support the felony conviction.[107]

The court reasoned that although both crimes required willful intent, a conviction on the felony required more than a showing only of a willful failure to file—it required an affirmative act constituting attempted tax evasion.[108] "In this case, that affirmative act of commission was Doyle's submission of the inaccurate W-4 forms. Combined with Doyle's failure to file tax returns, the submission of the inaccurate W-4 forms would amount to felony tax evasion—assuming that Doyle *willfully* submitted inaccurate W-4 forms."[109] Doyle denied that he willfully submitted inaccurate W-4 forms, so he was entitled to the lesser-included instruction.[110]

III. WILLFULNESS AND THE TAX PROTESTOR

During the 1970s, the courts began to use the term "tax protestor" or "illegal tax protestor" as a catchall, and derogatory, term for two types of tax crime defendants. The Government failed to distinguish between those who knowingly and willfully violated the law for a political purpose and those who violated the law as a result of a misunderstanding. The first category included those who protested issues like the Vietnam War or another political issue, by knowingly doing something the law forbids, such as illegally manipulating their tax returns to reduce their tax liability. Some of these tax protestors wanted more government funding, and some wanted less, for various causes such as military spending and abortion funding. The second category was made up of those who genuinely believed they were not required to pay taxes. These groups merged in the mind of the judiciary, illustrating a contradiction in American mythology. The true tax protestor cannot be distinguished from the instigators of the Boston Tea Party. Like many Americans and most presidential candidates, these protestors of the U.S. tax system argue that the IRS must be reformed—like mom and apple pie, it is

107. *Id.*
108. *Id.* (citing *Spies*, 317 U.S. at 499).
109. *Id.*
110. *Id.* at 76.

American convention that the IRS is bad. Yet, it is at the same time part of our legal mythology that taxes are rendered fairly, that the purpose of the Code is to extract each citizen's "fair share." Ultimately, Congress forbade the IRS from using the term tax protestor,[111] but the courts persisted in using the term.

What all tax protestors (a category which includes virtually every recent candidate for President: either taxes are too high for some or too low for others) have in common is the stance that they do not act with evil motive but pure motive. For example, in what appears to be the first published criminal case that utilized the term "tax protestor,"[112] John Paul Malinowski, an instructor of theology at St. Joseph's College in Philadelphia, touted the entire litany of "good reasons" for not filing his tax returns.[113] Malinowski and his wife increased their two deductions to fifteen, while understanding that the tax law did not permit the extra thirteen deductions.[114] Malinowski's goal was to protest against the Vietnam War, and he argued that his motive was good, not evil.[115] But the Government proved that he demonstrated a deliberate intention to violate the law by conceding that he knew the thirteen extra deductions were impermissible when he took them. This action constituted a willful violation of the tax law.[116] The Court of Appeals noted its "agreement with the district court's comment that 'bad purpose' and 'evil purpose' are not 'magic words' which must be included in a jury charge on willfulness."[117]

The Government, and perhaps the Supreme Court—although the *Pomponio* opinion clearly indicates otherwise—were concerned about the so-called tax protestors' defense that there was no evil motive and therefore no willfulness. The trend became to carve "bad purpose or

111. The IRS was forbidden to use the term "illegal tax protestor" by the Internal Revenue Service Restructuring and Reform Act of 1998, and had to remove the designation from taxpayers' individual files. Internal Revenue Service Restructuring and Reform Act of 1998 § 3707(a), 26 U.S.C. § 6651 note (2000); *see also* United States v. Buford, 889 F.2d 1406, 1407 n.1 (5th Cir. 1989) (explaining Individual Master Files).

112. The first classic "protest" case was not a protest against the income tax. Rather, it was a protest based on application of the Fifth Amendment to the income tax form—Form 1040. In *Murdock*, the defendant did not want to fill out the federal tax form because he feared it would incriminate him on state issues. *See* United States v. Murdock, 284 U.S. 141, 146 (1931). The Supreme Court held, among other things, that henceforth one could be forced to testify federally by way of a tax form even if fearful of state reprisal. *See id.* at 149.

113. United States v. Malinowski, 472 F.2d 850, 852–53 (3d Cir. 1973).

114. *Id.*

115. *Id.* at 853.

116. *Id.* at 856.

117. *Id.* at 855.

evil motive," as mandatory language, *away* from the *Murdock* and *Bishop* letter of the law. The trend solidified as shown in not one, but two, appellate court en banc rejections—*Pohlman*[118] in the Eighth Circuit and *McCorkle*[119] in the Seventh Circuit.

The Seventh Circuit in *McCorkle* announced that "bad purpose and evil motive are merely 'convenient shorthand expression[s]' for the required elements of proof."[120] The Eighth Circuit similarly clarified the intent standard in *Pohlman*. The *Pohlman* case is another one of those cases in which tough facts against a rather unsympathetic defendant caused an unfortunate turn in the law. Pohlman, a lawyer in North Dakota, prepared thousands of tax returns for clients and was very knowledgeable about tax law.[121] Her jobs as city attorney and mayor of Enderlin, North Dakota in 1969 and 1970, coupled with personal problems (not identified in the appellate court decision), distracted her such that she did not realize until after the deadlines that she had made enough income to file her own returns along with those of her paying clients.[122] The jury was instructed that willfully meant "deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed."[123]

The first panel, citing *Bishop*, reversed Pohlman's conviction, finding the omission of the evil motive requirement fatal.[124] But the en banc court reviewed and affirmed the conviction, ruling, "We do not read this, however, to indicate that the Court was engrafting onto the statute a requirement that the Government prove anything beyond establishing that defendant's action was deliberate, intentional and without justifiable excuse, or otherwise stated, a voluntary, intentional violation of a known legal duty."[125] And, thus, the tax lawyer's ship was sunk.

In 1966, Arthur J. Porth challenged head-on the constitutionality of the tax statutes.[126] His was not called a protest case, as the term was not yet published, but clearly he was the determined pioneer on the

118. United States v. Pohlman, 522 F.2d 974, 977 (8th Cir. 1975).
119. United States v. McCorkle, 511 F.2d 482, 485 (7th Cir. 1975).
120. *Id.* at 485 (alteration in original).
121. *Pohlman*, 522 F.2d at 975.
122. *Id.* at 975–76. This author has successfully represented late filers. These include competent tax people, accountants, and lawyers, who, during floods, divorce, and loss of records, were temporarily rendered incompetent or unable to perform.
123. *Id.* at 976.
124. *See id.*
125. *Id.* at 977.
126. United States v. Porth, 426 F.2d 519, 523 (10th Cir. 1970).

historical path to Captain Cheek. He refused to deduct taxes from his employees' wages, refused to account to the IRS, refused to file withholding tax returns (Form 941), and from 1963 on, did not file individual returns.[127] Porth's complaints, among others, were that by putting numbers on his return he was aiding the Government in its search for incriminating material.[128] The Fifth Amendment protected him from swearing to things under oath.[129]

The *Porth* panel opined, "Porth's defense primarily grew out of his long-time dislike for the taxing and money systems of the United States, his fanatical belief that they are unconstitutional, and his right to resist in good faith."[130] The court seemed to have it right. In 1954, Porth sued the Collector of Internal Revenue for the State of Kansas to recover $135 he paid in 1951.[131] Porth argued that the Sixteenth Amendment allowing taxation was trumped by the Thirteenth Amendment prohibiting slavery.[132] His lawyer in 1954, Jean Oliver Moore, was replaced by Jerome Daly in 1970.[133] Porth went to prison and his conviction was sustained.[134]

As is often the case, the lawyer becomes a target along with the accused. Following his client's trial, Daly went to trial on the same Fifth Amendment argument that had failed his client.[135] Daly was convicted, and his conviction was sustained.[136] Shortly thereafter, the incomplete tax return based on the Fifth Amendment objection became known as a "Porth/Daly" return.[137]

Three years later, the Supreme Court ruled in *Pomponio* that additional instructions on good faith were unnecessary as long as the

127. *Id*. at 521 & n.3. In a common pattern, Porth got ill in 1963 and fell behind. *Id.* This circumstance is common to many who find themselves indicted for tax omissions. A divorce, a death in the family, a serious illness, a mental problem, or a sudden change in economic circumstances are behind the great majority of innocents trapped in a bureaucracy without the mental focus, or mental clarity, or sometimes resources, to hire the experts needed to escape conviction. When the victims of chance or a single bad choice find themselves facing the eight ball of "justice" hurtling towards them, they often reach out to unorthodox providers, which often ensures greater governmental retaliation.

128. *See id.* at 522–23.

129. *See generally* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

130. *Porth*, 426 F.2d at 523.

131. Porth v. Brodrick, 214 F.2d 925, 925 (10th Cir. 1954).

132. *Id*. at 925–26.

133. *Id.* at 925; *Porth*, 426 F.2d at 520.

134. *Porth*, 426 F.2d at 521, 523.

135. United States v. Daly, 481 F.2d 28, 29 (8th Cir. 1973).

136. *Id.*

137. *See, e.g.*, Cupp v. Nixon, No. 77-915, 1978 WL 1207, at *1 (W.D. Pa. Mar. 1, 1978).

appropriate instructions on willfulness were given to the jury.[138] The Supreme Court in *Pomponio* cited both *Pohlman* and *McCorkle* to support its interpretation of *Bishop*.[139] In *Pomponio*, the trial court had given an instruction on willfulness that included the requirement of a finding of evil motive, but qualified it by saying that "[*g*]*ood motive alone is never a defense where the act done or omitted is a crime*."[140] The Fourth Circuit, interpreting *Bishop* as an English teacher might, reversed, holding that "the statute at hand requires a finding of a bad purpose or evil motive."[141] The Supreme Court rejected the Fourth Circuit's interpretation of *Bishop*, holding that willfulness "requires more than a showing of careless disregard for the truth."[142] Willfulness does not, however, "require[] proof of *any motive other than an intentional violation of a known legal duty*."[143] The *Pomponio* Court clarified that the Court's earlier "references to other formulations of the standard" as including a finding of bad faith or evil intent "did not modify the standard."[144] In other words, the words "evil intent" are not required in jury instructions, as long as there are sufficient cautionary instructions.

Some trial courts have taken this as carte blanche to eliminate the words "evil motive" for all purposes; in fact, a published "evil motive" tax case has not reappeared in the courts of appeals or in the Supreme Court this decade.[145] The requirement after *Pomponio* was simply that willfulness be described in an acceptable way. "Evil motive" is not the only acceptable way. The Government has been using *Pomponio* to support an argument in many courts that the evil motive instruction requirement has been reversed.[146] It has not. It is still perfectly acceptable law, used by some trial courts under the proper circumstances, and could still be a requirement in the proper fact situation.

One absolute constant from *Murdock* in 1933, to *Pomponio* in

138. United States v. Pomponio, 429 U.S. 10, 13 (1976).
139. *Id.* at 12–13.
140. *Id.* at 11 (emphasis added) (alteration in original).
141. United States v. Pomponio, 528 F.2d 247, 249 (4th Cir. 1975), *rev'd*, 429 U.S. 10 (1976).
142. *Pomponio*, 429 U.S. at 12.
143. *Id.* (emphasis added).
144. *Id.*
145. *See, e.g.*, United States v. Gollapudi, 947 F. Supp. 768, 770 (D.N.J. 1996), *aff'd*, 130 F.3d 66 (3d Cir. 1997).
146. *See, e.g.*, Brief of Appellee-United States at 20, United States v. Montes, 57 F. App'x 569 (4th Cir. 2003) (No. 02-4253), 2002 WL 32726013.

1976 (and beyond), is that willfulness is *subjective*.[147] The jury is required to test whether the defendant knowingly and intentionally violated the law.[148] The subjective opinions and reasons for doing what the defendant did are absolutely admissible and may be exculpatory on the issue of intent.[149]

Two years after *Malinowski*, the Supreme Court heard the case of another defendant, Jim Scott,[150] a case similar to the so-called tax protestor cases to be examined later in *Cheek*, *Aitken*, and *Willie*. Scott called himself a "national tax resistance leader."[151] He represented himself and unsuccessfully argued to the jury that his failure to follow the law was not willful because it was based on his reading of various Supreme Court cases and his constitutional beliefs.[152] In one of Scott's tax returns, he stated: "Under *protest* I plead the 5th Amendment to the U.S. Constitution."[153] Scott also complained that a man named James Swanson, an officer of the Illinois Tax Rebellion Committee, lied to and misled him, and interfered with his defense.[154] As it turned out, Swanson was on the Government's payroll as an undercover IRS agent.[155] Swanson denied it all (except for his role as an undercover agent) and claimed his participation in the trial was neutral—he was just investigating possible new crimes by tax protestors and sympathizers.[156] The trial court sided with Swanson, finding him more credible than Scott, the real tax protestor.[157]

The *Scott* decision is interesting and compelling, both for the majority opinion and for Judge Browning's dissent. The majority held that while it is not a good thing to have an undercover governmental agent in the defendant's camp, there was no due process or Sixth Amendment violation.[158] There was no showing of ineffective assistance of counsel under the Sixth Amendment, given that Scott was pro se and had therefore waived his right to counsel, effective or

147. *See, e.g.*, United States v. Aitken, 755 F.2d 188, 192 (1st Cir. 1985).
148. *See Pomponio*, 429 U.S. at 12.
149. *See, e.g.*, United States v. Bridell, 180 F. Supp. 268, 273 (N.D. Ill. 1960).
150. United States v. Scott, 521 F.2d 1188 (9th Cir. 1975).
151. *Id.* at 1189.
152. *Id.* at 1189–90.
153. *Id.* at 1192 n.4 (emphasis added).
154. *Id.* at 1190. He also argued that Swanson was guilty of various other acts such as making a bomb threat and riding in the elevator with jurors to influence them against Scott. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1190, 1193.
158. *Id.* at 1192–93.

otherwise, under the Sixth Amendment.[159] Further, there simply was no proof that the Government "would stoop to such clandestine and underhanded tactics in the trial of a lawsuit."[160] At bottom, the defendant simply could not avoid the fact that he admittedly failed to file tax returns; his sole defense was that "since he considered the income tax to be illegal, he could not be convicted. . . . There was never any question but that he committed the acts constituting the offense charged."[161] *There is no constitutional right not to pay tax due*.[162]

Judge Browning dissented, explaining:

> [Scott] was denied due process and the effective exercise of his right to represent himself.
>
> It is undisputed that Swanson was a paid undercover agent of the government posing as a member of a tax protestors organization. . . .
>
> . . . .
>
> The majority recognizes that the Fifth Amendment may be violated by introducing a government agent into the defense camp. As the majority states, "government intrusion into the private councils of a *pro se* defendant, struggling to oppose that government during a trial, for the purpose . . . of gaining trial advantages . . . offend[s] one's sense of fair play and subvert[s] the proper administration of justice . . . [and] may well constitute a denial of due process." . . .
>
> . . . .
>
> Whatever one may think of appellant's defense on the merits, he was and is entitled to a trial that comports with due process.[163]

Judge Browning's dissent is compelling. He believed the Government's alleged interference with the defense to be error as a matter of law.[164] Judge Browning seemed to be speaking to developing nuances in tax protestor cases. Did different constitutional standards apply to so-called protestors, who were more likely to be pro se than other criminal tax defendants? What about the willfulness standard? The *Scott* dissenter said *we cannot change the rules for this pro se defendant*—a government agent in the defense camp is just wrong.[165]

159. *See id.* at 1191–92.
160. *Id.* at 1193.
161. *Id.* at 1192, 1194.
162. *See* Coleman v. Comm'r, 791 F.2d 68, 70 (7th Cir. 1986) (stating that "hundreds of . . . cases" support this conclusion).
163. *Scott*, 521 F.2d at 1196, 1198 (Browning, J., dissenting).
164. *See id*. at 1196.
165. *Id.* at 1198–99.

However irrational a defense position may be, due process requires a fair chance to disprove the position is willful.[166]

Contrast *Scott* with *Dixon v. Commissioner*, a civil case in which the Government promoted a charade by concealing that co-litigants had made a secret deal with the IRS regardless of the outcome of the Tax Court's verdict.[167] The Ninth Circuit blasted the infiltration of the defense camp as well as the false premises of the co-litigants' position, concealed from the court and the other petitioners.[168] "Truth needs no disguise," Judge Hawkins declared, quoting Justice Hugo Black and concluding the Government's misconduct and concealment constituted fraud.[169] In *Dixon*, unlike *Scott*, the interference was with counsel, an attorney secretly influenced and paid by the Government, presumably part of the multiple petitioners/taxpayers' team, sitting at counsel's table.[170] *Dixon* was a civil tax case, and *Scott* was a criminal case. Another distinction is that in *Dixon* the petitioner was represented by counsel, giving rise to Sixth Amendment concerns, whereas although Scott's law office was not infiltrated, his pro se defense team was.[171] Should there not be a stronger standard, not a lesser one, in the criminal arena? Should there not be closer scrutiny when one is not represented by counsel, rather than less scrutiny? In any event, the trend on this issue seems to be toward Judge Browning's dissent.

Tax protest is indelibly engrained into American mythology. When the colonists tossed the tea into Boston Harbor, they violated the law. One person's political good can constitute another's political evil. The legal question in a criminal tax case rests on whether the protestor *believes* he or she is following the law, not whether he or she is legally right.

IV. PROOF OF THE DEFENDANT'S WILLFULNESS—SUBJECTIVE OR OBJECTIVE?

In the 1980s, a divergence of opinion between the Seventh Circuit

166. *Id.* at 1198.

167. Dixon v. Comm'r, 316 F.3d 1041, 1044 (9th Cir. 2003).

168. *Id.* at 1046–47.

169. *Id.* at 1043 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247 (1944)).

170. Ultimately both IRS counsel involved were disciplined. David Cay Johnston, *2 Ex-I.R.S. Lawyers' Licenses Suspended for Misconduct*, N.Y. TIMES, Aug. 21, 2004, at C2; Dixon *Update—IRS Attorneys Sanctioned for "Fraud on the Court,"* 101 J. TAX'N 127, 127–28 (2004).

171. *Dixon*, 316 F.3d at 1043; *Scott*, 521 F.2d at 1189–90.

and all other circuits separated it both on the definition of willfulness and on the method of proving willfulness. Every circuit in the United States, but for the Seventh, required the criminal burden of proof to remain with the Government and required instructions on subjective willfulness to be given to the jury. No matter how unreasonable the taxpayer's belief, or the basis for his or her belief, if the jury found that the defendant truly believed he or she was following the law, then the jury was instructed to find the taxpayer not guilty.

The Seventh Circuit went against the fold, and against *Bishop*, *Murdock*, and *Pomponio*, and ultimately attempted to lay down its own law in *Buckner* in 1987.[172] The Government had decided that it should not have to go to trial when certain tax protestor arguments were raised.[173] So the prosecutor launched a "preemptive strike"[174] in the criminal prosecution of a tax protestor if the protestor offered one of five enumerated defenses:

> [1] That the Sixteenth Amendment to the U.S. Constitution was improperly ratified and therefore never came into being;
>
> [2] That wages are not income and therefore are not subject to federal income tax laws;
>
> [3] That tax laws are unconstitutional;
>
> [4] That filing a tax return violates the privilege against self incrimination under the Fifth Amendment to the U.S. Constitution;
>
> [5] That Federal Reserve Notes do not constitute cash or income.[175]

These five arguments were defeated over and over again, and were—and still are—considered frivolous in civil litigation.[176] There is an abundance of case law in which these issues have been unsuccessfully litigated in virtually every circuit in the United States.[177] One does not have a right to refrain from paying a civil tax due. The Seventh Circuit *Buckner* court reasoned: "These 'tired arguments' are the repertory of the tax protest movement. They amount to obdurate refusal to acknowledge the law. In civil litigation they are sanction-bait."[178] In other words, there is an absolute requirement to file

172. United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987).
173. *Id.*
174. *Id.*
175. *Id.*
176. *See, e.g.*, Coleman v. Comm'r, 791 F.2d 68, 70, 72 (7th Cir. 1986).
177. *See, e.g.*, Stelly v. Comm'r, 761 F.2d 1113, 1115 (5th Cir. 1985).
178. *Buckner*, 830 F.2d at 103 (citation omitted).

income tax returns, to report income, and to pay taxes on income.

What the Government successfully sought to do in *Buckner* is prohibit these arguments as unreasonable for all purposes, including criminal defense, as a matter of law.[179] If any of these five so-called tax protestor arguments were offered, as a matter of law, they would not be allowed to be heard by the jury.[180] Whether a defendant knew any of the case law or not, it was deemed objectively unreasonable for a citizen to believe any of these enumerated tax protest ideas and act on them.[181] For instance, if a citizen thought that wages were not income and therefore not subject to federal income tax laws, the citizen was guilty as a matter of law. The Seventh Circuit acknowledged that the taxpayer could still be forced to pay the tax, or incur ever-mounting penalties in interest, even if acquitted on criminal charges.[182] Thus, the only thing that the taxpayer with an incorrect subjective viewpoint won was freedom from incarceration—he or she did not remain free from impoverishment. Buckner argued that even that was too much and essentially stood *Murdock* on its head.[183]

The *Buckner* court acknowledged that most other circuits disagreed with it but stubbornly insisted it was on the right path. It reasoned:

> If the legal system accepts every mistake of law as a defense, this leads people to be ignorant, to delude themselves, or to tell tall tales to the jury. If the legal system either refuses to recognize a mistake of law as a defense (the usual rule) or accepts only a reasonable mistake as a defense (our rule in tax cases), this leads people to learn and comply with the law. Limiting the defense in tax cases is essential because the desire to keep as much of one's income as possible would supply an irresistible temptation to be obtuse about the law, if obtuseness eliminated the duty to pay.[184]

The proscribed "limitation" also limited the defendant's Sixth Amendment right to access to a jury of his peers.[185] The reasoning in *Buckner* is frighteningly similar to the reasoning in King Charles's day. An experienced trial court lawyer or trial court judge might argue

179. *Id.* at 103–04.
180. *Id.*
181. *Id.*
182. *See id.* at 103.
183. *See id.* at 103–04; United States v. Murdock, 290 U.S. 389, 396 (1933) ("Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax . . . should become a criminal . . . .").
184. *Buckner*, 830 F.2d at 103.
185. *See id.* at 103–04.

that determining the difference between a manufactured tall tale and truth is the domain of the jury, not the court. If the courts determine that there are five enumerated defenses that constitute guilt as a matter of law, what is to say there will not be more such defenses? What limitations, if any, exist on the authority of the trial court to choose other barriers to a jury determination?

Another problem with the opinion is that the *Buckner* court had no interest in dealing with "the Schiff factor."[186] Should a con artist's victims, who pay millions of dollars for his advice and who suffer multi-millions in penalties and interest, also suffer incarceration? The Buckner panel said resoundingly, *yes*.[187]

The essence of the law in every other circuit was that a taxpayer found to *believe* he or she followed the law could not be put in prison. The First Circuit, in *Aitken*, took on the Seventh Circuit's deviation from *Murdock*.[188] In one of the most scholarly opinions in U.S. tax history, Judge Coffin, writing for the panel, explained that all the other reporting circuits disagreed with the Seventh Circuit: "[S]ome six other circuits, in addition to our own, either explicitly or implicitly have required *proof of subjective intent to disobey the filing requirement*."[189]

This question would be expressly resolved in *Cheek*.

V. *CHEEK V. UNITED STATES*

The Seventh Circuit's position, which defied *Pomponio*,

186. "The Schiff factor" is this author's term connoting a con artist such as Irwin Schiff who sells tax magic that has been demonstrated to be ineffective. Schiff, a very successful swindler, has sold more than $4.2 million of his products, avoiding over $2 million in taxes himself. *See generally* Press Release, Department of Justice, Court Rules Irwin Schiff Owes U.S. Treasury Over Two Million Dollars (June 17, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/June/04_tax_417.htm. Over several decades, he has been convicted repeatedly for tax evasion. *See, e.g.*, United States v. Schiff, No. 05-15233, 2006 WL 4753400, at *1 (9th Cir. Sept. 20, 2006), *cert. denied*, No. 07-5812, 2007 WL 2300494 (U.S. Oct. 1, 2007) (affirming summary judgment in Government's favor); United States v. Schiff, 876 F.2d 272, 273 (2d Cir. 1989) (affirming conviction for willful tax evasion); United States v. Schiff, 801 F.2d 108, 108–10, 115 (2d Cir. 1986) (affirming tax crime conviction); Schiff v. Comm'r, 751 F.2d 116, 117 (2d Cir. 1984) (affirming finding of tax fraud); Schiff v. Comm'r, T.C.M. (RIA) 92,183 (1992) (finding fraudulent underpayment of taxes). Now in his late seventies, he is currently in prison serving a 13-plus year sentence for tax crimes until October 2016 and is appealing his most recent conviction.

187. If the victims' reasons for failing to paying tax are not objectively reasonable (fall within one of the five established categories), the fact that they were swindled is irrelevant. *See Buckner*, 830 F.2d at 103.

188. United States v. Aitken, 755 F.2d 188, 191–93 (1st Cir. 1985).

189. *Id.* at 192 (emphasis added).

Murdock, and *Bishop*, finally reached the Supreme Court in *Cheek* in 1991.[190] Airline Captain John Cheek was the quintessential tax protestor. He adopted and espoused nearly all the failed reasons for not paying income taxes, some of which were logically inconsistent.[191] Not only that, but he had been instructed by lawyers, accountants, and judges, and in legal opinions, that he was wrong; he watched friends go to prison, and he actually challenged cases over and over again in civil arenas, losing over and over again in several courts.[192] The Seventh Circuit, honoring its line of unique cases summarized by *Buckner*, held that Cheek was not entitled to these defenses.[193] The jury was to be instructed that the defendant is guilty if his or her reason for making a mistake is not *objectively* reasonable.[194]

The Supreme Court granted the appeal. Examining the court of appeals' opinion in its entirety, it held that to take away from the jury the decision as to the defendant's intent violates the statute.[195] It is not the purpose of the criminal tax law to punish people who are mistaken in their good faith interpretation of the law.[196] Although "[t]he general rule [is] that ignorance of the law . . . is no defense to criminal prosecution . . . the Court almost 60 years ago interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule."[197] The genius of *Cheek* was to pick the law back up from where *Buckner* had laid it down and to reaffirm the spirit of *Murdock*, declaring, *We don't want to put people in prison who make mistakes on tax cases.*[198] Why? *Because, unlike other areas of law, taxes are very complex and tax cases are very complicated*.[199]

Choosing *Cheek* to end the Seventh Circuit's rebellion against *Murdock* and its own sister circuits performed another function—to return the question of intent to the jury where it belonged. Objective reason still had a place in these cases. The more reasonable the

190. Cheek v. United States, 498 U.S. 192, 198 (1991).

191. *See* United States v. Cheek, 882 F.2d 1263, 1265 (7th Cir. 1989), *vacated*, 498 U.S. 192 (1991).

192. *See* United States v. Cheek, 3 F.3d 1057, 1060 (7th Cir. 1993).

193. *Cheek*, 882 F.2d at 1271.

194. *Id.*

195. *Cheek*, 498 U.S. at 206–07.

196. *Id.* at 200.

197. *Id.* at 199–200.

198. *Id.* at 200.

199. *Id.* at 200, 205. The very complication of the tax laws often shields the con artist, and politicians, who for years can hide behind the ambiguities of the Code while simultaneously subjecting their victims to immediate civil liability and on some occasions criminal prosecution.

defendant's belief as to why he or she was not required to pay taxes, the more likely the jury would acquit. A defendant's ridiculous belief about taxes was less likely to convince a jury. Either way, the judgment would be up to the jury, where it belonged. On remand, when Cheek was afforded his Sixth Amendment right to a jury trial in its full meaning of the term—the jury heard evidence about Cheek's subjective belief as to why he owed no taxes—he was convicted again.[200] This time, though, he was convicted after a fair trial with the evidence admitted and the jury properly instructed.[201]

Contrary to many critics' views of *Cheek*, the Supreme Court was not trying to protect tax protesters. The Court's opinion was almost prescient, anticipating the tax protestor anti-labeling statute Congress would later pass, and left the presumption of innocence relatively intact, as well as Sixth Amendment access to the jury.[202] In the best tradition of American jurisprudence, the Court declared that no one shall be deprived of a jury trial. It prohibited trial judges from carving out exceptions to the Sixth Amendment right to a jury trial.[203]

Cheek also changed slightly what type of evidence could be put before the jury. *Anything* regarding the individual's belief system or beliefs on a particular tax statute is fair for jury review, with one exception.[204] After *Cheek*, this Constitution-based argument was not permitted: I don't have to pay taxes because taxes are unconstitutional. If the defendant contends that he or she understands the tax statute but does not have to obey it because of the Constitution, then he or she, in effect, is admitting a willful intent to violate that statute.[205] Evidence purporting to show that taxes are unconstitutional would not be permitted.[206]

Justice Scalia concurred, writing what this author believes was the most apropos argument. He would have kept the law of *Murdock* unchanged.[207] If it is possible that the citizen did not understand the complex tax laws, was it not also possible that he or she misunderstood a constitutional provision? Scalia noted:

> [O]ur opinions from the 1930's to the 1970's have interpreted the word "willfully" in the criminal tax statutes as requiring the

200. United States v. Cheek, 3 F.3d 1057, 1059 (7th Cir. 1993).
201. *Id.*
202. *See Cheek*, 498 U.S. at 203–04; *see also supra* note 111 and accompanying text.
203. *Cheek*, 498 U.S. at 203.
204. *Id.* at 203–04.
205. *Id.* at 205–06.
206. *Id.* at 206.
207. *See id.* at 207 (Scalia, J., concurring).

> "bad purpose" or "evil motive" of "intentional[ly] violat[ing] a known legal duty." It seems . . . today's opinion squarely reverses that long-established statutory construction when it says that a good-faith erroneous belief in the unconstitutionality of a tax law is no defense. It is quite impossible to say that a statute which one believes unconstitutional represents a "known legal duty."[208]

Cheek dissenters Blackmun and Marshall were concerned that it would be impossible now to convict taxpayers for income tax crimes.[209] After all, there was no possibility that Captain Cheek, a commercial airline pilot, did not know that he was required to pay tax and file income tax returns.[210] He should not be allowed to argue his belief that the tax statute was inapplicable to him.

> [I]t is incomprehensible to me how, in this day, more than 70 years after the institution of our present federal income tax system with the passage of the Income Tax Act of 1913, 38 Stat. 166, any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he receives for his labor is not income, irrespective of a cult that says otherwise and advises the gullible to resist income tax collections. One might note in passing that this particular taxpayer, after all, was a licensed pilot for one of our major commercial airlines; he presumably was a person of at least minimum intellectual competence.
>
> . . . .
>
> This Court's opinion today, I fear, will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity. If that ensues, I suspect we have gone beyond the limits of common sense.[211]

That fear proved to be groundless. Four years after *Cheek*, in 1995, nearly ninety percent of taxpayers charged with violations of the income tax laws were convicted.[212]

Cheek confirmed again—after *Murdock*, then *Pomponio*, and then *Bishop*—that the subjective belief of a citizen accused of a tax crime that he or she was not violating the law was an absolute defense

208. *Id.* at 207–08 (alterations in original) (citations omitted).
209. *See id.* at 210 (Blackmun, J., dissenting).
210. *Id.* at 209–10.
211. *Id.*
212. Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 ARIZ. ST. L.J. 639, 640 (1997). As the majority in *Cheek* correctly surmised, under subjective instructions the defendant nevertheless faces a progressively steep hill if he or she espouses an irrational position.

regardless of how inaccurate that belief was.[213] *Buckner* was specifically reversed.[214]

VI. POST-*CHEEK* TWEAKING—SHOW AND TELL, OR TELL ONLY?

According to *Cheek*, the accused is entitled to jury instructions that a subjective, and even irrational, opinion is a defense to the tax laws.[215] But, is the defendant entitled to admission of evidence to support that opinion? *Yes*. The Supreme Court was not ambiguous: "and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision."[216]

Almost simultaneously with *Cheek*, two cases appeared before the appellate courts—one in the Ninth Circuit, *United States v. Powell*,[217] and one in the Tenth Circuit, *United States v. Willie*.[218] Both cases were argued in 1991, just before the Supreme Court decided *Cheek*. They addressed a question the *Cheek* Court would not reach: how much is the defendant entitled to say about his subjective belief regarding taxes?

Mrs. Dixie Lee Powell was a schoolteacher in Tucson, Arizona, who, unfortunately, was confused with another person named Powell by the Government.[219] Some of her tax returns were rejected on this basis.[220] She began her own tax research in the law library, where she found 26 U.S.C. § 6020(b), which ostensibly requires the Government to prepare returns for the taxpayer in special circumstances.[221] Armed with this statute, Powell submitted W-4 forms to her employer claiming complete exemption from federal income tax.[222] An angry

213. *Cheek*, 498 U.S. at 203.
214. *Id.* at 198–99, 203.
215. *Id.* at 203.
216. *Id*.
217. 955 F.2d 1206 (9th Cir. 1991).
218. 941 F.2d 1384 (10th Cir. 1991).
219. *See* Appellant's Opening Brief at 4, *Powell*, 955 F.2d 1206 (No. 93-10203).
220. Appellant's Brief at 10, *Powell*, 955 F.2d 1206 (No. 93-10202).
221. *Powell*, 955 F.2d at 1209. The statute does in fact provide that the Government, under certain circumstances, may prepare a return. "If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise." 26 U.S.C. § 6020(b)(1) (2000). In cases that appeared after *Powell*, courts found that this statute does not relieve taxpayers from their obligation to file a return because it serves only as a permissive grant of authority to the Secretary. *See, e.g.*, United States v. Stafford, 983 F.2d 25, 27 (5th Cir. 1993).
222. *Powell*, 955 F.2d at 1209.

Government responded by indicting Powell for failure to file income tax returns.[223]

At trial, Powell attempted to offer the jury a copy of § 6020(b) to explain what she relied upon to form her belief that she was no longer responsible for preparing and filing tax returns.[224] The trial court allowed her to *explain* what she relied upon but told her that *showing* the jury a copy of the tax statute would confuse the jury, and refused to admit the document.[225] The court seemed to create a new rule: *You can tell, but not show*. The court also instructed the jury that Powell's reason for not filing needed to be *objectively* reasonable.[226]

On appeal to the Court of Appeals for the Ninth Circuit, Powell argued two errors: (1) Powell was not allowed to put on her evidence; and, (2) Powell wanted to have an instruction about her subjective belief regarding her tax responsibility submitted to the jury, but the court instructed the jury that her belief had to be objectively reasonable.[227]

After oral argument, but before *Powell* was decided, *Cheek* was published. The Ninth Circuit ordered the parties to re-brief based on *Cheek*.[228] The *Powell* appellate court then reversed.[229]

First, it held that Powell was entitled to instructions on her subjective belief.[230] Second, although the court hesitated to instruct the trial court specifically what to do with evidence, it strongly advised that if Powell's proffer was not admitted during the subsequent trial, the Ninth Circuit would consider review again.[231] Clearly, the Ninth Circuit expressed a "show-and-tell" rule if willfulness is an element of the offense.

> [A] district court . . . ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant *thought the law was* in § 7203 cases because willfulness is an element of the offense. . . . [S]tatutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance.[232]

223. *Id.* at 1208.
224. *Id.* at 1209.
225. *See id.*
226. *Id.* at 1209–10.
227. *Id.* at 1208, 1210–11, 1213.
228. *Id.* at 1208.
229. *Id.* at 1214.
230. *Id.* at 1211–12.
231. *See id.* at 1213–14.
232. *Id.* at 1214.

Simultaneously, while the Government was requesting an en banc rehearing, the IRS' chief counsel issued national letters informing its various trial teams that *Powell* was *not* the law except in the Ninth Circuit, and its reversal there was imminent. The prediction would prove the equal of King George's that he would defeat the American army, which rebelled in part because of "taxation without representation."

While the Ninth Circuit was deciding *Powell*, the Tenth Circuit was deciding *Willie*.[233] Wesley Willie, a Native American, argued that he did not have to file income tax returns because he was an Indian and could not be taxed on that basis.[234] (Willie is an interesting contrast to Cheek, who asserted as one of his reasons why he should not have to file income tax returns that he was a free white male, immune to income taxation.)

Willie had evidence to support his reasons for not filing. In addition to being an Indian, Willie argued that he had not agreed to be "adopted" by the United States of America, which had seized his country and forced him into its legal system.[235] Willie also had something extraordinary, and perhaps more convincing, to show the jury: a treaty between the Navajo tribe and United States.[236] The treaty gave Willie and his tribe immunity from federal taxation, Willie argued.[237] The trial court imposed the no-show rule. It essentially said to him, *You can tell the jury that you have this treaty, the basis for your belief about taxation, but you may not show the treaty to the jury*.[238] The jury convicted Willie.[239]

233. The *Willie* opinion was published on August 12, 1991, in time for review by the *Powell* court, which rendered its decision, as amended, on February 6, 1992. United States v. Willie, 941 F.2d 1384, 1384 (10th Cir. 1991); *Powell*, 955 F.2d at 1206.

234. *Willie*, 941 F.2d at 1387.

235. *See id.* at 1400. Persons born in the United States to a member of an Indian tribe are U.S. citizens. 8 U.S.C. § 1401(b) (2000). This was not the case until 1924, with passage of the Indian Citizenship Act:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b)). With citizenship comes enforced responsibilities.

236. *Willie*, 941 F.2d at 1391. The record does not reflect whether or not Willie's treaty was real.

237. *Id.* at 1401, 1403 & n.3 (Ebel, J., dissenting).

238. *See id.* at 1391, 1393–94 (majority opinion).

239. *Id.* at 1387.

The case was appealed to the Tenth Circuit, which supported Willie's conviction two-to-one, ruling that the trial court had a right to exclude evidence that was confusing to the jury.[240] The court examined the multitude of evidence that Willie had attempted to show the jury—not just the treaty, but also historical information from libraries, congressional records, and a plethora of seemingly irrelevant historical materials from before the United States became a country.[241] Here was the problem: Willie did not distinguish whether he wanted to submit the treaty for the *permissible* purpose of showing what he relied on in forming his belief that he did not owe taxes or for the *impermissible* reason of showing what the law was.[242] Theoretically, if Willie had offered the treaty only for the limited purpose of proving his state of mind, the Government would have been allowed limiting instructions that the treaty was not, in fact, law—but the treaty would have been admitted.[243]

Willie's good-faith belief, if sincere, that federal tax laws did not apply to him and his tribe, was a valid defense to the element of willfulness. "Thus, a defendant's good faith belief that he has no legal obligation to file and evidence showing the reasonableness of that state of mind is relevant."[244] So, the documents Willie relied upon for his view on taxes were admissible, in theory. But Willie had made an inadequate offer of proof about the documents that he wanted to put into evidence. He never explained *why* the documentary evidence was relevant to show the basis for his belief that he was not required to file tax returns, or how he relied upon the documents. Willie did not explain to the trial judge *why* his historical documents negated the element of willfulness and therefore should be admissible into evidence. It seems rather unfair to Wesley Willie. His testimony, quoted in the opinion, indicates that he was not very literate and likely did not know how to make his prima facie case.[245] The rule is that ignorance of the law can be an excuse in a criminal tax case, but in *Willie*, the court was brutally unforgiving with regard to ignorance of procedure.

In his dissenting opinion in *Willie*, Judge Ebel (whose logic mirrored that of the unanimous opinion in *Powell*) remarked that much of the offered materials were irrelevant and properly kept out of

240. *Id.* at 1387, 1391, 1395–98.
241. *See id.* at 1391, 1393.
242. *Id.* at 1392–94.
243. *Id.* at 1392.
244. *Id.*
245. *See id.* at 1393–94.

the trial; however, some documents, such as the treaty, were relevant in spite of the fact that Willie did not make an adequate and succinct offer of proof.[246] To Judge Ebel, Willie's pro se effort was clear: one basis for Willie's belief that he was not required to pay income taxes was this treaty between the Navajos and the United States. According to Judge Ebel, the *show-and-tell* rule should prevail. Evidence of subjective beliefs about taxation should include relevant documentary evidence.[247]

No other circuit ever adopted *Willie*, and the Supreme Court has not yet distinguished between *Willie* and *Powell*. A careful review of the reasoning in *Willie* shows that it is not altogether inconsistent with the reasoning in *Powell*. It is only through Judge Ebel's insightful dissenting opinion in *Willie* that we realize that Willie simply was not allowed to prove the evidentiary basis for his subjective opinion. One could presume that, had he made a single appropriate legal proffer, the trial court would have allowed him to present the treaty.

The next year, the Sixth Circuit held, in direct conflict to *Willie*, that it was error for the trial court to exclude the evidence, including case law, that pro se defendant Richard Gaumer relied on to form his belief that he did not owe taxes.[248] Gaumer had read one of Irwin Schiff's books entitled, *How Anyone Can Stop Paying Income Taxes*.[249] He then did personal research at a law library to verify some of the information from the book, obtaining three cases.[250] He proffered the book and these cases as evidence upon which he relied to form his belief that people in his situation could not be required to file tax returns.[251] Gaumer testified that "since . . . one of the issues in the crime is willfulness, it's important that the jury be able to know that I relied upon this information."[252] The trial judge excluded all four exhibits.[253] The Sixth Circuit held this was error.[254] Comparing the decisions in *Willie* and *Powell*, the *Gaumer* court specifically adopted the reasoning of the court in *Powell* and Judge Ebel's dissent in *Willie*.[255]

These arguments culminated in the First Circuit's *Bonneau*

246. *See id.* at 1401 & n.1 (Ebel, J., dissenting).
247. *Id.* at 1404.
248. United States v. Gaumer, 972 F.2d 723, 723 (6th Cir. 1992).
249. *Id.*
250. *Id.* at 723–25.
251. *Id.* at 724.
252. *Id.* (alteration in original).
253. *Id.*
254. *Id.* at 725.
255. *Id.* at 724.

opinion.[256] Bonneau did not make a clear proffer of the materials he wanted to present, but the trial court still admitted much (not all) of the evidence.[257] Bonneau was convicted, and he appealed to the First Circuit.[258] The court of appeals discussed *Powell* and *Willie*, indicating an interest in the difference between the two cases.[259] It neither endorsed nor attacked either appellate court's opinion, but ruled that it was not time to decide whether documents supporting a belief about exemption from taxation were generally allowable since Bonneau had not made a proper proffer, or any proffer whatsoever.[260] The magic words missing from his offer of proof were: *this is what I relied upon*. The First Circuit declined to find error because Bonneau's reasons were not on the record even as clearly as Willie's.[261] Furthermore, much of Bonneau's proffered evidence was submitted to the jury. The *Bonneau* decision thus is in conformity with *Powell*, *Cheek*, and *Gaumer*.

A comparative evaluation of the show and tell cases demonstrates subtle differences in the circuits. In the First Circuit, Judge Collins finds plain error.[262] Even if the proffer is not made properly, the denial requires review. In *Willie*, the Tenth Circuit majority found that Willie sought to dump a load of theories out without explaining why. The dissent separates them and finds plain error. The exclusion of the treaty is plain error. The majority, and thus the law of the Tenth Circuit, requires abuse of discretion and therefore a clear unequivocal proffer of why the evidence should come in. Willie failed by shoving clearly relevant evidence into a pile of questionable documents and never saying, "I relied on the treaty." In the Sixth Circuit, Gaumer is held to the standard of the Ninth

256. United States v. Bonneau, 970 F.2d 929 (1st Cir. 1992).

257. *Id.* at 931.

258. *Id.*

259. *See id.* at 932–33.

260. *Id.* at 933.

261. *Id.* (indicating that there can be no claim of error for excluding evidence if the substance of the evidence was not offered to the court or patently apparent).

262. In *United States v. Aitken*, the First Circuit reviewed (prior to *Cheek*, but with great prescience) the case of Aitken, a veteran Massachusetts fire fighter indicted for his failure to file under 26 U.S.C. § 7203, and filing false W-4 withholding certificates under 26 U.S.C. § 7205. United States v. Aitken, 755 F.2d 188, 189 (1st Cir. 1985). Judge Coffin's 1985 opinion reads like a good book, teaching the history of willfulness in an opinion that would be cited by the Supreme Court in *Cheek* in 1991. *See* Cheek v. United States, 498 U.S. 192, 199 (1991). Aitken believed that he was tax-exempt because his labor involved a barter exchange of his time for money. *Aitken*, 755 F.2d at 189. The Government argued that the jury should be instructed only about objective belief. *Id.* at 189–90. Aitken's green counsel (he was trying his first case) erroneously agreed. *Id.* The First Circuit disagreed and reversed, finding plain error. *Id.* at 194.

Circuit, adopting *Powell*, and *show* is easier to bring in to supplement *tell*.

Thus, the Tenth Circuit's majority ruling cautions a litigant to make clear his reason for his evidentiary admission: It must be for the purpose of proving what he relied on in coming to his belief, not what he wishes to convince the jury the law actually is.

Generally, the trial court must allow evidence offered to support the reliance testimony of a criminal tax defendant.

VII. WILLFULNESS IN THE 21ST CENTURY

After the millennium, the Government had become increasingly aggressive in prosecuting tax crimes, finding willful evasion in cases that would have never seen the light of a courtroom during the years of tax protestor cases decades before. In *United States v. DeSimone*, the First Circuit again considered the meaning of willfulness in the federal criminal tax statutes.[263] Rocco DeSimone, an art broker, was convicted of willfully filing a false tax return under § 7206(1).[264] His crime was that he reported $1 million, in what the Government proved was ordinary income, as long-term capital gains.[265] The income was reported on Schedule D instead of Schedule C, lowering his tax rate.[266] In DeSimone's defense, his accountant testified that DeSimone told him he held the paintings on which he earned the $1 million for the requisite one-year holding period.[267] The accountant admitted on cross-examination at trial that he had never been clear about the ownership of the paintings or the exact sale date.[268] Although DeSimone later admitted that the return was wrong in that it categorized the income as capital gains, he argued that his error was not willful but resulted from his accountant's mistake.[269] He argued on appeal, among other things, that the trial court erred by excluding evidence that would have shown his lack of willfulness.[270]

The court of appeals reviewed the evidence and the proffer, and concluded that the proffer was not sufficiently stated to connect the evidence with the issue of willfulness.[271] "[T]he fact remains that at no

263. 488 F.3d 561, 567 (1st Cir. 2007).
264. *Id.* at 563.
265. *Id.*
266. *See id.* at 565.
267. *Id.*
268. *Id.* at 566–67.
269. *Id.* at 567.
270. *Id.*
271. *See id.* at 569–72.

time during the course of the trial did the defendant state that the proper ground for admission was DeSimone's own state of mind."[272] The error may have been due in part to an overly aggressive IRS position and in part to trial counsel who was not much more familiar with framing offers than was pro se Willie.

Because of the complexity of the tax code and the myriad opportunities for civil error, such as putting the correct number on the wrong line or the wrong form, the study of the law of willfulness is the *sine qua non* of a criminal tax defense.

Concurrently with the Sentencing Guidelines instituted in 1987 and a political effort to be tough on white-collar crime, the Government and the judiciary became more aggressive and brutal in dealing with tax crimes.

VIII. SHIP TAX PROTESTORS' FATE UNDER *CHEEK* AND ITS PROGENY

We can now try to determine what would have happened had the seventeenth century landowners been tried for violating the tax laws of Charles I and Charles II under late twentieth century U.S. jurisprudence. The exercise is obviously academic but very useful in understanding current American criminal tax jurisprudence.

If they had gone to trial before a jury of their peers during the years 1650 to 1660, when Parliament was in control of taxation and after the orders of the monarchy to pay taxes were deemed illegal,[273] then the proper result would have been for the jury to find the landowners not guilty or for an instructed verdict to acquit them. The Government would not have made out a prima facie case of a willful crime having been committed in the first place.

It gets more complicated if the landowners were tried during the reign of Charles II by application of *Cheek* and its progeny. The monarchy was restored in 1660.[274] Cooke, the architect of the trial against Charles I, had been tried, tortured, and drawn and

272. *Id.* at 569 n.6. But compare to United States v. Moran, 493 F.3d 1002, 1011–14 (9th Cir. 2007), where counsel properly predicated her proffer, but the trial court improperly excluded opinions the Morans had relied on as hearsay. On remand the court appointed a new defense team comprised of the author, his daughter Rain Minns, Jon Zulauf, and Peter Mair (who with Sheryl Gordon McCloud had won the reversal of the convictions). The jury, with all reliance evidence before them, acquitted the Morans on all sixty-four counts on December 21, 2007.

273. *See* Satvinder S. Juss, *The Constitution and Sikhs in Britain*, 1995 BYU L. REV. 481, 513 (1995).

274. ROBERTSON, *supra* note 6, at 370.

quartered.[275] The laws of Charles I were restored retroactively to their majestic position.[276] *Rex* was again *Lex*, ex post facto.[277] Nevertheless, when *Rex* was *Lex*, there was no power to stop ex post facto laws (which was one reason why our Constitution was created), so the landowners, by violating the command of the King in refusing to pay their taxes, were violating the law.

Although they were violating the law, were they *willful and knowing* in their violation of the law? In other words, was it *subjectively* reasonable for them to rely on the Magna Carta (Parliament, not the King, could tax them), and the reasoning of Hampton and his solicitor? What *Cheek* tells us is that some of Hampton's arguments would have been allowed and others excluded. Hampton would have been allowed, under *Cheek*, to tell the jury that he subjectively and in good faith believed that he was not subject to the ship fee because he did not own coastal property. Under *Cheek*, the jury would have been instructed that such a subjective belief was a complete defense to the crime of willfully failing to pay taxes. The jury might have acquitted. But what about the Magna Carta? A defense based on the Magna Carta would not be allowed. Like an argument about the constitutionality of a particular tax statute, an argument that the King's ship fee violated the Magna Carta would be no defense. The "tax protester's argument"—the tax is invalid—would fail under modern-day American tax law just as it failed Hampton in 1637.

What about under the reasoning of the Seventh Circuit in *Buckner*? Was it objectively reasonable for Hampton to believe he was not subject to the ship tax? That is a much tougher question, although it would seem the same answer would be true: that Hampton's view was objectively reasonable even though it was not the correct interpretation of the law. Presuming a fair trial, an acquittal by the jury should have been possible. On the other hand, under the rule *Rex* is *Lex*, all arguments against the King were objectively *un*reasonable. One could certainly argue that under the Seventh Circuit's rule, conviction of the landowners was inevitable.

This is the reason why *Buckner* and its progeny were rejected in *Aitken* and overruled by the Supreme Court in *Cheek*. The objective standard of *Buckner* was as harmful to the Sixth Amendment right to a jury trial as were the standards imposed by Charles I.

275. *Id.* at 337–38.

276. Richard H. Jones, Book Review, 76 YALE L.J. 431, 435 (1966).

277. Ex post facto laws are illegal under the U.S. Constitution. U.S. CONST. art. I, § 9, cl. 3. However, it should be pointed out that the Supreme Court has sustained laws in the middle of the year going back to the beginning of the year on some civil tax issues.

IX. CONCLUSION

The Government has always been pro-conviction while at the same time interested in demonstrating to the populace that its convictions are justified. The very purpose of instructions from the bench is to properly transfer decision-making to the jury as an independent force. During the Reformation, the Royal British Government sought, above much else, the appearance of legitimacy. The stronger the language allowing the jury to acquit, the fairer in appearance would be the court. The tribunal judging Cooke used the word "willfully" in describing the crime in order to make it more difficult to convict—to create a higher perceived burden. The fact that Cooke's "crooked" jury was fixed and bribed was another matter—a political safeguard.

Since the *Murdock* decision in 1933, the tax laws have changed nearly every single year, becoming more and more difficult to understand and more and more conflicted with special-interest legislation. The use of the word "willful" to prevent an innocent victim from falling prey to a very complex system of enforcement and legislation has been a bedrock of criminal tax defense law. The *Murdock* court's interpretation of willful behavior is even more relevant in 2007 than it was when the U.S. Supreme Court first reviewed the case. It has been one of the most firmly supported doctrines of Western law, going back even to the Reformation, when it was used for the pretense of showing fair trials. Under our Sixth Amendment right to jury trial, there is an obstacle to the doctrine of *Rex* is *Lex*. With taxes being "the power to destroy,"[278] the power must be closely scrutinized.

278. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (Chief Justice John Marshall wrote: "[T]he power to tax involves the power to destroy.").