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Cheek v. United States: Beliefs That Tax Credulity Still Get to the Jury

Daniel Anker

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CASE COMMENTS

CHEEK V UNITED STATES: BELIEFS THAT TAX CREDULITY STILL GET TO THE JURY

JASON SOUGHT THE Golden Fleece, Lancelot sought the Holy Grail, and John L. Cheek sought the magical formula that would reduce his federal income tax debt to zero. His quest led him to believe not only that his wages did not constitute income and were therefore not taxable but also that the income tax itself was unconstitutional.¹

Mr. Cheek was convicted in federal district court of “three counts of tax evasion, one count of false claims against the government for income tax withheld, and six counts of willful failure to file individual tax returns.”² These criminal convictions were based on his failure to file federal income tax returns for the years 1980 through 1986,³ his listing of up to sixty withholding allowances on his W-4 forms, and his “W-4 form [assertion] that he was exempt completely from taxation.”⁴

The central issue at trial was whether Cheek had “willfully” violated the tax law. During the course of its deliberations, the jury requested additional instructions from the judge on the legal effect of a good faith misunderstanding of the law by Cheek. The

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1. *Cheek v. United States*, 111 S. Ct. 604, 607 (1991).
 2. *United States v. Cheek*, 882 F.2d 1263, 1265 (7th Cir. 1989).
 3. Cheek filed a “frivolous” return for 1982. *Id.* at 1265.
 4. *Id.* at 1263.

trial judge's instructions required that Cheek's violations be found willful unless his incorrect beliefs about the tax laws were held in good faith and those beliefs were "objectively reasonable."⁵ Under this standard, the jury found Cheek guilty on all counts.

The Seventh Circuit affirmed Cheek's convictions.⁶ The Seventh Circuit was the only circuit to require objective reasonableness along with good faith misunderstanding in order to negate the willfulness requirement. Because of this split in the circuits, the Supreme Court granted certiorari.⁷

A five Justice majority, in an opinion written by Justice White, rejected the Seventh Circuit's reasonableness requirement but distinguished between Cheek's misunderstanding of the tax law and his belief that the law was unconstitutional.⁸ Justice Scalia wrote a concurring opinion outlining his disagreement with the majority's test for willfulness.⁹ Justice Blackmun wrote a dissenting opinion, joined by Justice Marshall, agreeing with the decision of the Seventh Circuit.¹⁰

This comment argues that the *Cheek* Court correctly decided the major point at issue, in rejecting "objective reasonableness" as a prerequisite to finding a willful violation of the tax law. Even seemingly outrageous beliefs about tax law continue to be protected under the *Cheek* holding. Nevertheless, the majority opinion incorrectly distinguishes good faith ignorance and misunderstandings of the tax law from good faith belief in its unconstitutionality; it held that beliefs of the latter kind do not negate willfulness. Justice Scalia's concurring opinion correctly identifies this inconsistency.

I. BACKGROUND

A. The Supreme Court and the "Willfulness" Requirement

First year criminal law students learn what every citizen already knows: ignorance (of the criminal law) is no excuse. In more formal terms, the Court has long recognized the principle

5. *Cheek*, 111 S. Ct. at 608. Notes sent to the trial judge by some jurors at the time the verdict was announced clearly indicate that Cheek had convinced those jurors that he held these beliefs in good faith. *Cheek*, 882 F.2d at 1266-67.

6. *Cheek*, 882 F.2d at 1263.

7. *Cheek v. United States*, 110 S. Ct. 1108 (1990).

8. See *infra* text accompanying notes 60-71.

9. 111 S. Ct. at 613 (Scalia, J., concurring).

10. 111 S. Ct. at 615 (Blackmun, J., dissenting).

that "ignorance of the law or a mistake of law is no defense to criminal prosecution."¹¹ The Supreme Court, however, has carved out an exception to this principle in the area of federal tax law. In *United States v. Murdock*,¹² the Court considered an indictment for failure to supply information regarding deductions claimed on federal income tax returns. The defendant had asserted that his fifth amendment right against self-incrimination justified his refusal to provide testimony and information about the deductions. The Court focused on the statute's¹³ language, which required conviction of a defendant who "willfully fails to supply such information"¹⁴ as is legally required.

In an often cited paragraph, the Court set out the meaning of the requirement that an act be done willfully:

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; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.¹⁵

The Court also indicated that the context within which the word "willfully" appears may be useful in determining its meaning.¹⁶ In the *Murdock* context of federal criminal tax liability, the Court stated:

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 he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.¹⁷

Accordingly, the Court held that *Murdock* was entitled to a jury instruction to the effect that his sincere and actual belief in a fifth

11. *Cheek v. United States*, 111 S. Ct. 604, 609 (1991).

12. 290 U.S. 389 (1933).

13. Two statutes were at issue in *Murdock*, The Revenue Act of 1926, ch. 27, § 1114(a), 44 Stat. 9, 117 (current version at I.R.C. § 7203 (1988)) and the Revenue Act of 1928, ch. 852, § 146(a), 45 Stat. 791, 835 (current version at I.R.C. § 7203 (1988)).

14. *Murdock*, 290 U.S. at 392 (quoting the Revenue Act of 1926, ch. 27, § 1114(a), 44 Stat. at 116 (emphasis added)).

15. *Id.* at 394-95 (citations omitted).

16. *Id.* at 395.

17. *Id.* at 396.

amendment right might be considered by the jury in determining whether his refusal had been willful.¹⁸ Only a willful violation would be criminal. Ignorance of the tax law, or a genuine misunderstanding of it, would negate willfulness. Insofar as federal tax law is concerned, ignorance is a defense.

The Court returned to a consideration of the tax law's willfulness requirement in *United States v Bishop*.¹⁹ Bishop was accused under two sections of the tax law,²⁰ both requiring a willful act. Section 7207 defined the misdemeanor of "willfully deliver[ing] or disclos[ing] to the Secretary any return or other document, known by him to be fraudulent or to be false as to any material matter."²¹ Section 7206(1) classified as a felony "[w]illfully mak[ing] and subscrib[ing] any return' under penalties of perjury, 'which [the taxpayer] does not believe to be true and correct as to every material matter.'²² Bishop maintained that the word "willfully" indicated a lesser degree of scienter in the misdemeanor statute than in the felony statute.²³

The Court rejected Bishop's argument. In the course of doing so, it further explained the meaning of the word willfully in the tax law. In tax statutes, "the word 'willfully' generally connotes a voluntary, intentional violation of a known legal duty. It [may be] 'bad faith or evil intent,' or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer.'²⁴ In summary, the Court explained that it seeks an "element of mens rea" where the tax law uses the word "willfully," in order to "implement[] the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."²⁵

In *United States v Pomponio*,²⁶ the Court had occasion to make an additional distinction concerning the meaning of "willfully." Pomponio was accused of "willfully filing false income tax returns"²⁷ under the penalties of perjury, the same felony statute

18. *Id.*

19. 412 U.S. 346 (1973).

20. I.R.C. §§ 7206(1), 7207 (1988).

21. *Bishop*, 412 U.S. at 348 (quoting I.R.C. § 7207).

22. *Id.* at 350 (quoting I.R.C. § 7206(1)).

23. *Id.*

24. *Id.* at 360 (citations omitted).

25. *Id.* at 361.

26. 429 U.S. 10 (1976) (per curiam).

27. *Id.* at 10.

at issue in *Bishop*.²⁸ Along with the *Bishop* instruction that a “willful act was one done ‘voluntarily and intentionally,’”²⁹ the trial judge added that “[g]ood motive alone is never a defense where the act done or omitted is a crime,” and that consequently motive was irrelevant except as it bore on intent.³⁰ The Supreme Court held that, in the tax law, “‘evil motive’ [means no] more than the specific intent to violate the law”³¹ The instruction was, therefore, found not to be given in error.

B. The Seventh Circuit and the Willfulness Requirement

Alone among the federal courts of appeals, the Seventh Circuit has held that a good faith error or ignorance of the federal tax law defense also includes a “reasonableness” test.³² Seventh Circuit judges betray an impatience with the “tired arguments”³³ of the tax protest movement,³⁴ rejecting many of the tenets of the movement out of hand.³⁵ The policy underlying the rule is obvious:

“[i]f 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 recog-

28. See *supra* note 22 and accompanying text.

29. *Pompomo*, 429 U.S. at 11.

30. *Id.*

31. *Id.* “Evil motive” was one of the descriptive explanations of the word “willful” suggested by the Court in *United States v. Bishop*, 412 U.S. 346, 360 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 498 (1943)).

32. See *Cheek*, 111 S. Ct. at 608-09.

33. *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986).

34. “The term ‘tax protester’ apparently loosely refers to persons who the government believes do not pay taxes for reasons of political protest.” Brief for Petitioner at 4 n.2, *Cheek v. United States*, 111 S. Ct. 604 (1991) (No. 89-658).

35. In *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989), *rev’d*, *Cheek v. United States*, 111 S. Ct. 604 (1991), the Seventh Circuit held that the following beliefs would never be considered “objectively reasonable” in the Seventh Circuit:

- (1) the belief that the sixteenth amendment of the constitution was improperly ratified and therefore never came into being;
- (2) the belief that the sixteenth amendment is unconstitutional generally;
- (3) the belief that the income tax violates the takings clause of the fifth amendment;
- (4) the belief that the tax laws are unconstitutional;
- (5) the belief that wages are not income and therefore are not subject to federal income tax laws;
- (6) the belief that filing a tax return violates the privilege against self-incrimination; and
- (7) the belief that Federal Reserve Notes do not constitute cash or income.

Id. at 1269.

nize a mistake of law as a defense or accepts only a reasonable mistake as a defense this leads people to learn and comply with the law."³⁶

In the Seventh Circuit, "[b]elieving an incorrect proposition of law is a 'reasonable' mistake only if there is a bona fide dispute about it. Clinging to a proposition that has been unanimously rejected by numerous courts is not a 'reasonable' mistake."³⁷ Evidence concerning a defendant's good faith belief in one of the "unreasonable beliefs"³⁸ may be excluded from jury consideration as irrelevant.

The Seventh Circuit is well aware, of course, of the Supreme Court's *Murdock* rule and its subsequent interpretations of the willfulness requirement. The Seventh Circuit view, however, is that its reasonableness requirement is in harmony with *Murdock*. "The reasonableness requirement is intended to give the jury a method by which they can distinguish between a bona fide misunderstanding of the law and obdurate refusal to acknowledge (present in so many tax protester cases) what the law indeed does require."³⁹ As a matter of law in the Seventh Circuit, therefore, certain "unreasonable beliefs" are found to be held only in bad faith. This is the rule that was under consideration in the *Cheek* case.

II. *CHEEK V UNITED STATES*⁴⁰

A. The Majority Opinion

Writing for the majority, Justice White began by quoting the language from the Internal Revenue Code sections that Cheek was accused of violating. These were section 7201, which "provides that any person 'who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof' shall be guilty of a felony,"⁴¹ and section 7203, which defines the misdemeanor of "willfully fail[ing] to make [a tax] return"⁴² when required to do so under the act.

Justice White summarized Cheek's efforts to pay no federal

36. *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

37. *Id.* at 104.

38. *See supra* note 35.

39. *United States v. Bressler*, 772 F.2d 287, 291 n.2 (7th Cir. 1985).

40. 111 S. Ct. 604 (1990).

41. *Id.* at 606 (quoting I.R.C. § 7201).

42. *Id.* (quoting I.R.C. § 7203).

income tax. Although Cheek filed federal tax returns through 1979, he ceased doing so after that year.⁴³ Beginning in an unspecified year and culminating in mid-1980, he claimed an increasing number of withholding allowances—reaching a peak of sixty—on his W-4 forms. In 1983 he sought a complete refund of all amounts withheld by his employer, American Airlines.⁴⁴ As a result, he was charged with repeated violations of sections 7203 and 7201 of the tax code.

During the years 1982-1986, Cheek was active as a civil plaintiff, challenging the validity of the tax laws several times in federal court. His claims were based on beliefs that are common to the tax protest movement.⁴⁵ Cheek was informed by the court in those actions, however, that his beliefs “were frivolous or had been repeatedly rejected by the courts.”⁴⁶

Cheek’s defense at his criminal trial was that he sincerely believed that the federal tax system was unconstitutional.⁴⁷ This sincerity, he argued, negated the willfulness required by the statutes under which he was charged.

In keeping with prior decisions of the Seventh Circuit,⁴⁸ the trial judge instructed the jury that “an objectively reasonable good-faith misunderstanding of the law would negate willfulness but mere disagreement with the law would not.”⁴⁹ The jury was instructed that “if it found that Cheek ‘honestly and reasonably believed that he was not required to pay income taxes or to file tax returns’ ”⁵⁰ he should be acquitted.

After deliberating for several hours, the jury sent a note asking for further instructions from the judge. They requested additional clarification on the matter of “‘good faith misunderstanding & disagreement.’ ”⁵¹ A supplemental instruction was provided,

43. *Id.* The Court noted that Cheek filed a return in 1982 described, by the Seventh Circuit Court of Appeals, as “frivolous.” *Id.* at 606 n.1.

44. Cheek has worked as an American Airlines pilot since 1973. *Id.* at 606.

45. The Court mentioned Cheek’s arguments that “wages are not income, that the Sixteenth Amendment does not authorize the imposition of an income tax on individuals, and that the Sixteenth Amendment is unenforceable.” *Id.* at 607.

46. *Id.*

47. His belief was the result of his own study of the tax law and his attendance at seminars given by a group which teaches that the federal tax system is unconstitutional. Cheek also found an attorney who asserted that “the Sixteenth Amendment did not authorize a tax on wages and salaries but only on gain or profit.” *Id.*

48. *See supra* text accompanying notes 33-39.

49. *Cheek*, 111 S. Ct. at 608.

50. *Id.*

51. *Id.*

but at the end of the first day of deliberations the jury was still unable to reach a verdict. It sent another note to the judge informing him that they were "divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax."⁵²

Later, the judge sent an additional instruction explaining, among other things, that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness."⁵³ The jury returned a verdict of guilty two hours after receiving these instructions. Cheek appealed his convictions, but the Seventh Circuit affirmed, relying on its rule that only a reasonable mistake of law negates a willful violation of the federal tax law⁵⁴

In the next section of his opinion, Justice White reviewed the "general rule that ignorance of the law is no defense"⁵⁵ and the exception that the Court has created in federal tax law *United States v Murdock*,⁵⁶ *United States v Bishop*,⁵⁷ and *United States v Pomponio*⁵⁸ were cited. The Court concluded that "[t]aken together, *Bishop* and *Pomponio* conclusively establish that the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty'⁵⁹

Justice White then announced that the Court agreed with Cheek's contention that the trial court and the Court of Appeals erred in requiring that "a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law"⁶⁰ must be reasonable in order to negate willfulness. He next analyzed the willfulness requirement. The Government must prove three elements to demonstrate a willful violation of the tax law: that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty"⁶¹ The knowledge prong is critical to a finding of willfulness. When a defendant claims to have been ignorant of the existence of a particular duty or to have misunderstood a duty, but does not

52. *Id.*

53. *Id.*

54. *See supra* text accompanying notes 33-39.

55. *Cheek*, 111 S. Ct. at 609.

56. 290 U.S. 389 (1933); *see supra* text accompanying notes 12-18.

57. 412 U.S. 346 (1973); *see supra* text accompanying notes 19-25.

58. 429 U.S. 10 (1976) (per curiam); *see supra* text accompanying notes 26-31.

59. *Cheek*, 111 S. Ct. at 610.

60. *Id.*

61. *Id.*

claim that the duty imposed by the law is invalid, the government's burden is simply to negate the defendant's claim of ignorance or the good-faith nature of the misunderstanding. The government will prevail in either case if it demonstrates actual knowledge of the duty by the defendant. "This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist."⁶²

Therefore, Cheek's claim of sincere belief "that the Internal Revenue Code did not purport to treat wages as income"⁶³ would prevail if the government could not prove Cheek's actual knowledge of the duty to pay a tax on income. Any evidence demonstrating Cheek's knowledge would be admissible, including "court decisions rejecting his interpretation of the tax law,"⁶⁴ instructions from tax returns and IRS rulings. But the Supreme Court rejected the requirement that Cheek's claim be objectively reasonable.⁶⁵

The question of a defendant's belief, where that matter is at issue, is a matter for the factfinder, here the jury. By characterizing Cheek's beliefs as unreasonable, the Seventh Circuit transformed the question of belief into an issue of law rather than fact. A defendant's belief may be "irrational"⁶⁶ yet truly held. The Seventh Circuit's rule forbidding jury consideration of evidence that might be probative on the question of knowledge or belief "would raise a serious question under the Sixth Amendment's jury trial provision."⁶⁷ It was therefore error to exclude from the jury evidence concerning Cheek's beliefs regarding the taxability of wages or his belief that he was not required to file a tax return.

The opinion then goes on to consider the trial court's exclusion of evidence relating to Cheek's good faith belief that the federal tax laws are unconstitutional. The Court contrasts this type of belief with good faith ignorance or mistake, which would negate a willful violation of the tax law, as discussed in the preceding section. Its conclusion is that such evidence may be excluded, "not because [the] constitutional arguments are not objectively reason-

62. *Id.* at 611.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

able,"⁶⁸ but because such beliefs demonstrate a different type of knowledge. Beliefs regarding the unconstitutionality of tax law sections "do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue."⁶⁹ The taxpayer's very claim of unconstitutionality, therefore, exhibits the knowledge that the government must demonstrate to prove willfulness. Evidence concerning a claim of unconstitutionality, therefore, may be excluded as irrelevant.

Justice White provided two justifications for treating claims of unconstitutionality differently than claims of ignorance or misunderstanding. The first was that Congress could not have "contemplated that a taxpayer could ignore the duties [he was aware were] imposed upon him"⁷⁰ by the tax code. The second is that procedures exist, other than continually refusing to pay the tax, for testing a belief in the unconstitutionality of a tax statute. The taxpayer can pay the tax, request a refund, and protest the denial to the courts. Alternatively, a taxpayer can refuse to pay the tax and litigate the case in the tax courts when the tax is pursued by the government.

The majority opinion concluded by setting out its holdings in summary fashion:

[A] defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper. However, it was error for the court to instruct the jury that [Cheek's] asserted beliefs that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code should not be considered by the jury in determining whether Cheek had acted willfully.⁷¹

B. The Concurring Opinion

Justice Scalia concurred with the majority's judgment but found fault with the major distinction drawn by the Court. He found no "rational basis" for the majority's acceptance of Cheek's good faith ignorance or mistake argument while rejecting his good

68. *Id.* at 612.

69. *Id.*

70. *Id.* at 613.

71. *Id.*

faith constitutional argument.⁷²

Justice Scalia began with a brief review of the *Murdock* line of cases,⁷³ restating the Court's requirement that a "willful" tax violation requires "'bad purpose,' or 'evil motive' of 'intentional[ly] violat[ing] a known legal duty'"⁷⁴ Under this standard, "[i]t is quite impossible to say that a statute which one believes unconstitutional represents a 'known legal duty'"⁷⁵

A defendant's "erroneous reliance" on a tax statute or regulation when ignoring a tax regulation or assessment, respectively, also "meet[s] the [majority] opinion's crucial test of 'reveal[ing] full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable.'"⁷⁶ The majority's logic, Justice Scalia concluded, would require that such defendants be found guilty of criminal violations along with those who base their reliance on the Constitution. Such a conclusion "works a revolution in past practice."⁷⁷

Justice Scalia restated the majority holding in terms of a definition of the willfulness requirement. His understanding is that the opinion would find a willful violation of the tax law even where a defendant was "conscious[] that some legal text exists, [but was not] conscious[] that that legal text [was] binding."⁷⁸ This is not what the word "willful" has previously been held to mean in the tax field, and Justice Scalia suggested that it is not what a willful tax violation should be taken to be.

C. The Dissenting Opinion

Justice Blackmun, with whom Justice Marshall joined, filed a dissenting opinion. Justice Blackmun restated the *Bishop-Pomponio* "voluntary, intentional violation of a known legal duty"⁷⁹ standard for willfulness. But he found it "incomprehen-

72. *Id.* at 614 (Scalia, J., concurring).

73. *See supra* text accompanying notes 12-31.

74. *Id.* at 613 (Scalia, J., concurring).

75. *Id.* at 614 (Scalia, J., concurring).

76. *Id.* (Scalia, J., concurring) (quoting *id.* at 613 (majority opinion)).

77. *Id.* (Scalia, J., concurring).

78. *Id.* (Scalia, J., concurring). On these facts, the majority held that Cheek could be found to be aware of the tax law yet not conscious that it was binding (based on his good faith understanding of the Constitution). Since the majority found Cheek to have willfully violated the law on this basis, it can be said to have defined "willful" as rephrased by Justice Scalia.

79. *Id.* at 614-15 (Blackmun, J., dissenting).

ble [that] any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he receives is not income."⁸⁰

Furthermore, Justice Blackmun asserted that the "District Court's instruction that an objectively reasonable and good faith misunderstanding of the law negates willfulness" gives a defendant more, not less, protection.⁸¹ The government must prove the unreasonableness of the defendant's belief in order to make its case. Without a reasonableness requirement, the government would need only to show that the defendant did not hold the belief in question in good faith.

Finally, Justice Blackmun claimed that the majority opinion's standard would "encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity"⁸² For these reasons, he dissented from the majority's judgment.

III. ANALYSIS

*Cheek v United States*⁸³ upholds the tax law's long-standing exception to the rule that ignorance is no excuse. By doing so, the majority opinion reaffirms a central principle of federal tax law—that criminal liability for tax violations will not be found in the absence of evil intent. This aspect of its holding is in keeping with the Court's earlier tax jurisprudence. But Justice Scalia's concurring opinion isolates an inconsistency in the majority holding, the distinction drawn between the culpability of one who acts under a misunderstanding of the law and one who acts believing a law is unconstitutional. Justice Scalia, however, misreads the majority's application of this distinction in his characterization of the majority's definition of a willful violation. The dissenters demonstrate an understandable impatience and skepticism regarding the beliefs propounded by tax protesters like Cheek, but they offer no precedential support for their position.

"Ignorance of the law is no excuse for breaking it."⁸⁴ Holmes explained this principle by reference not to the supposition that all people know the law but that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to

80. *Id.* at 615 (Blackmun, J., dissenting).

81. *Id.* (Blackmun, J., dissenting).

82. *Id.* (Blackmun, J., dissenting).

83. 111 S. Ct. 604 (1991).

84. O.W. HOLMES, THE COMMON LAW 47 (1881), cited in *Cheek*, 111 S. Ct. at 609.

make men know and obey”⁸⁵ The principle has been upheld by the Court “whether the law be a statute or a duly promulgated and published regulation.”⁸⁶

But this principle has been modified in the area of the tax law Where Congress requires that a violation be committed knowingly or willfully, the actor must not only understand the nature of the act being performed but know that it violates the requirement to pay the tax. When a failure to pay a tax or file a return is based on a genuine misunderstanding or difference of opinion regarding the application of the law to one’s individual circumstances, the taxpayer does not know about the duty to pay the tax. The taxpayer therefore cannot be violating a known legal duty

The majority held, correctly, that the exception is justified in such settings, because misunderstandings are inevitable in an area as complex as federal income tax law An additional justification for the exception is the compulsory nature of the tax. Regarding voluntary involvement in a highly regulated area, the Court has “presumed”⁸⁷ that those involved are aware of regulations. That presumption is not justified in the federal tax area.

The policy favoring the exception is less persuasive for those areas or principles of tax law that are sufficiently clear. Wages, after all, are taxable income.⁸⁸ To a certain extent, then, the claims made by the tax protester movement “amount to obdurate refusal to acknowledge the law”⁸⁹ Nonetheless, the majority held that such a refusal may suffice to negate the willfulness requirement. They are correct in doing so, because an obdurate refusal does not represent the level of culpability Congress required by using the word “willfully” in the tax statutes. By requiring the violation to be willful, Congress has made the mental state of the taxpayer an issue. The simplest tax code section may be misunderstood even by a well-meaning taxpayer.⁹⁰ Genuine errors or misunderstandings as to whether a gift is income, whether wages are

85. *Id.* at 48.

86. *United States v. International Minerals & Chem. Corp.*, 402 U.S. 561, 563 (1971).

87. *Id.* at 565.

88. *See, e.g., Coleman v. Commissioner*, 791 F.2d 68 (7th Cir. 1986) (citing cases).

89. *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987).

90. Even a well-meaning taxpayer may be expected to pay the lowest tax possible consistent with the law. It is the intention to act consistently with the law that defines the taxpayer as well-meaning.

income, or "as to [one's] duty to make a return"⁹¹ all seem equally possible if not likely. The Court's majority exercised admirable restraint in not suggesting that all taxpayers who believe in clearly erroneous interpretations of the tax law are either acting in bad faith or are self-deluded.

While some taxpayers doubtless act with evil intent, determination of their intent must be left to the jury⁹² "[T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely [they] will [be] consider[ed] nothing more than simple disagreement with known legal duties."⁹³ Defendants shown to have knowledge of the legal duty will be convicted.

The majority errs, however, in distinguishing a belief in the unconstitutionality of any provision of the tax code from "a frank difference of opinion or innocent error[.]"⁹⁴ The Court asserts that such beliefs do not "arise from innocent mistakes caused by the complexity of the Internal Revenue Code."⁹⁵ While it is true that such a defendant may be mistaken about the Constitution and not the tax code, that difference does not alter the *Bishop* definition of willfulness: "a voluntary, intentional violation of a known legal duty"⁹⁶

Justice Scalia is correct in pointing out the inconsistency in the majority's contention that a belief in the unconstitutionality of a statute "reveal[s] full knowledge of the provisions at issue"⁹⁷ while an error regarding the meaning of a regulation or statute does not reveal such knowledge. In either case, the belief may be based on "a studied conclusion, however wrong, that those provisions are invalid and unenforceable."⁹⁸ Without knowledge, neither action reasonably can be found willful.

However, Justice Scalia seems to think that the majority held that "a 'willful' violation is established by full knowledge of a statutory requirement, but is not established by full knowledge of

91. *United States v. Murdock*, 290 U.S. 389, 396 (1933).

92. *See Francis v. Franklin*, 471 U.S. 307 (1985) (where intent is an element of a criminal violation, the state may not be relieved of its burden of proving that element beyond a reasonable doubt).

93. *Cheek v. United States*, 111 S. Ct. 604, 611-12 (1991).

94. *Id.* at 612 (quoting *United States v. Bishop*, 412 U.S. 346, 360-61 (1973)).

95. *Id.*

96. *United States v. Bishop*, 412 U.S. 346, 360 (1973).

97. *Cheek*, 111 S. Ct. at 614 (Scalia, J., concurring) (quoting *id.* at 612 (majority opinion)).

98. *Id.* (Scalia, J., concurring).

a requirement explicitly imposed by regulation or order.”⁹⁹ The distinction is actually between the knowledge of a defendant whose error, misunderstanding, or belief involves a tax statute, regulation, or ruling and one whose error, misunderstanding, or belief involves the Constitution. In the latter case, the majority held that defendants who do not avail themselves of the appropriate procedures for testing the constitutionality of the tax law cannot be said to be acting in good faith. Justice Scalia’s criticism of the majority’s departure from the analysis of a defendant’s actual knowledge is well-taken.

Justice Scalia also refuted the concerns that seem to motivate the dissenters. They fear that the majority’s holding will encourage taxpayers to cling to incorrect and definitively refuted doctrines of law. It will do nothing of the kind, in part because “[t]he law already provides considerable incentive for taxpayers to be careful in ignoring any official assertion of tax liability, since it contains civil penalties that apply even in the event of a good-faith mistake.”¹⁰⁰ Furthermore, it may be presumed that it is the rare defendant who will be able to convince a jury, made up of persons who pay taxes, that he or she has a good faith belief that wages are not taxable.

The *Cheek* decision leaves in place a sensible exception to the rule that ignorance of the law is no excuse. However, the opinion narrows the exception when it shifts its concern from the mental state of the defendant to the source of the law misunderstood. The majority opinion exposes to criminal penalties sincere, although misguided, taxpayers. The *Cheek* decision, therefore, is only a partial vindication of the principle that criminal convictions for tax law violations must be based on a finding of evil purpose.

DANIEL ANKER

99. *Id.* (Scalia, J., concurring).

100. *Id.* (Scalia, J., concurring).

