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## Ignorance of the Law Is No Excuse Except for Tax Crimes

Mark D. Yochum\*

The reduction of law to slogans or aphorisms or the elevation of commonplaces to legalities occurs with good sense. Laws are made to be obeyed but obeisance is dependent upon the awareness and comprehension by the object of the law. Similarly, laws are expressions of understood beliefs and relationships, memorialized to give formal effect to the collective notion. Consequently, the law is loaded with maxims which rhythmically convey principles of general application. These maxims, when freed of latinate bounds, rendered in the vulgate, both describe and shape attitudes toward the law by the unstudied. *Ignorance of the Law Is No Excuse* is one of these.<sup>1</sup>

That ignorance of the law provides no defense is a cornerstone in the edifice of criminal law generally.<sup>2</sup> While lawyers know that mental states of various character must often be proven for conviction of crime, proof of knowledge of criminality is immaterial.<sup>3</sup> The effect of widespread knowledge of the maxim among the unstudied, however, is terror. The objective of criminal laws is to conform conduct to their strictures. Knowledge of their provisions is critical

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1. (Latin Expression) *Ignorantia juris quod quisque tenetur scire, meninem excusat.* (Ignorance of the law, which everyone is bound to know, excuses no man.).

2. See Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939). See MODEL PENAL CODE § 2.02(9) (1985).

3. This comment, of course, excludes statutes as the tax provisions have been interpreted, which make knowledge of criminality a specific element of the crime. See, e.g., *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984).

to conformance. The maxim terrorizes us to make an effort to know the law, for a misstep can lead to reprobation or worse, even if we did not know the step we took was false.<sup>4</sup>

Under our constitution, the maxim is limited in effect by concepts of vagueness or notice.<sup>5</sup> Conduct which does not give fair notice of its criminality cannot be prosecuted.<sup>6</sup> Yet, a step away from these subtleties, people know (because all know the maxim) that shady behavior may lead to jail in spite of the cry, "I didn't know

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4. Oliver W. Holmes, Jr. disagrees with this interpretation.

The principle cannot be explained by saying that we are not only commanded to abstain from certain acts, but also to find out that we are commanded. For if there were such a second command, it is very clear that the guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known, yet the failure to know would receive the same punishment as the failure to obey the principal law.

The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *THE COMMON LAW* 48 (1881).

While Holmes' logic for the rationale of the principle has its own elegance, the mundane practical effect of enforcement of the maxim is that we must know the law or else. See Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958).

5. See *United States v. Harriss*, 347 U.S. 612, 617 (1953) (definiteness requirement under the Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.*) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by the statute."). The run of the mine vagueness case involves first amendment considerations, like flag abuse. See *id.* at 624 n.15 for a long list, even in 1953.

6. This requirement should not be confused with the oft-argued notion as to whether crimes which are punished by incarceration must constitutionally have as an element, *mens rea*. Simply, strict liability crimes may be constitutional so long as the conduct giving rise to criminality gives fair warning that sanctions may follow. See *Stepniewski v. Gagnon*, 732 F.2d 567 (7th Cir. 1984). Wholly passive conduct together with an unknowable statutory requirement cannot support criminal prosecution under the constitution. See *Lambert v. California*, 355 U.S. 225 (1957). Assuming there is no constitutional restriction on imposing punishment without proof of mental states, a strict liability tax crime may be enforceable given the common awareness in the citizenry of tax obligations, in spite of the fact that the conduct producing the liability may be viewed as passive. In other words, criminal liability, perhaps including imprisonment, may be constitutionally permissible simply for failing to pay tax. Whether such a broad stroke is wise is another thing. The MODEL PENAL CODE draftsmen at § 2.05 believe that strict liability has little place in criminal law as imprisonment implies moral condemnation. Moral condemnation is only appropriate if the "defendant's act was culpable," that is, at least negligent. MODEL PENAL CODE § 2.05 comment (1985).

it was against the law.”

Perversely, the maxim does not with force apply to the crimes against the Federal Income Tax Code. The income tax is collected through voluntary compliance, a fictive locution meaning a gun is not pointed at the payor by the collector. Compliance is achieved through simplicity in calculations and payment, through honesty and altruism of our citizens, and through the uneasy feeling, purposefully engendered by the tax collector, that his baleful eye watches us all always, his strong arm ready to nab a transgressor for a penalty or worse. In the achievement of the end of voluntary compliance, the Internal Revenue Service often seeks increases in simplicity and provides guidance and aid for the untutored. While the Service seeks to be portrayed as it often is, human, sincere, honest, and compassionate, it still sends shivers down spines and turns stomachs. It is fierce, unrelenting, an enforcer of each letter of the law. This reputation, which nauseates even the innocent taxpayer finding an unscheduled correspondence from the collector in his mailbox, cautions the would-be evader and produces queasily voluntary compliance.

If voluntary compliance, so described, is so critical to the collection of the revenue, ignorance of the laws requiring the payment of taxes should not be a defense to prosecution for crimes against the code. In fact, as our significant federal tax crimes are written and interpreted, ignorance is a defense, not just in the constitutional sense of vagueness, but as the flat, unadorned lack of knowledge of the law. While in prosecutions of tax offenders this defense, with some small effort and care, is easily overcome, its existence is an anomaly in an overall enforcement system designed to encourage taxpayers to know and follow the law.

There can be no valid criticism of the cases which have interpreted federal tax crimes to allow ignorance of the law as an excuse, at this time; the history of the cases is long and the language of the felony statutes, unchanged. The origin of the defense, in part, is the word *willfully*, the adverb that modifies the criminal attempt to evade tax in I.R.C. section 7201,<sup>7</sup> the failure to pay tax

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7. Section 7201 provides:

**ATTEMPT TO EVADE OR DEFEAT TAX**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

in I.R.C. section 7202,<sup>8</sup> or the supplying of false or fraudulent information under I.R.C. section 7206.<sup>9</sup> In *United States v. Murdock*,<sup>10</sup> the Supreme Court held that a taxpayer in a criminal prosecution under a predecessor to I.R.C. section 7205 was entitled to an instruction that, in determining willfulness, the jury could consider whether a refusal to comply was "in good faith and based upon his actual belief."<sup>11</sup> While the Court noted that *willful* sometimes means simply voluntarily, the Court, closer in time and disposition to the niceties of traditional criminal law than to modern commerce, felt willfulness in this criminal statute requires proof of evil motive.<sup>12</sup>

In *Spies v. United States*,<sup>13</sup> the Court reviewed a taxpayer's conviction for evasion under a predecessor to I.R.C. section 7201. Spies offered as a reason for his failures to make a return and pay

I.R.C. § 7201 (1986).

8. Section 7202 provides:

**WILLFUL FAILURE TO COLLECT OR PAY OVER TAX**

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

I.R.C. § 7202 (1986).

9. Section 7206 provides:

**FRAUD AND FALSE STATEMENTS**

(1) **DECLARATION UNDER PENALTIES OF PERJURY.**—Willfully 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 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.

I.R.C. § 7206 (1986).

10. 290 U.S. 389 (1933) (Roberts, J.; Cardozo and Stone, JJ., dissenting without opinion). I.R.C. § 7205 makes a misdemeanor of "willfully" supplying false information. The ordinary citizen would be pressed hard to distinguish this statute from I.R.C. § 7206, save for the severity of penalty and the surfeit of words.

11. 290 U.S. at 393.

12. *Id.* at 395-96. The word *willfully*, with this two-headed meaning, was purposely removed from the MODEL PENAL CODE. As Judge Learned Hand told the Reporters: "It's a very dreadful word. . . . It's an awful word. It's one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." MODEL PENAL CODE § 2.02(10) comment n.47 (1985). The MODEL PENAL CODE defines *willfully* as knowingly. MODEL PENAL CODE § 2.02(8) (1985). This approach ostensibly removes the issue of ignorance of the law from gradations of culpability to whether the statute requires specifically proof of knowledge of the law for conviction.

13. 317 U.S. 492 (1943) (prosecution under § 145(b) of the Revenue Act of 1936; I.R.C. § 145(b)).

the tax a psychological disturbance "amounting to something more than worry [and] something less than insanity."<sup>14</sup> The trial court rejected this defense, essentially interpreting *willfully* in the statute as voluntarily. The difficulty with that interpretation, according to the Court, was that it failed to give effect to congressional intent, unstated but inferred, from the classification of certain tax crimes as felonies and others as misdemeanors.<sup>15</sup> The perplexing language languishes in the code today. Section 7202 provides that one who willfully fails to pay tax is guilty of a felony. Section 7203 provides that one who willfully fails to pay tax is guilty of a misdemeanor. If Congress had written two statutes, a difference must exist.<sup>16</sup>

The felony in any system of criminal law which is subject to severest punishment must be "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency."<sup>17</sup> The Court added an American touch and noted that we culturally have an "aversion to imprisonment for debt."<sup>18</sup> One must suppose the aversion to pay taxes was too universal for mention. Nonetheless, in prosecution for tax felonies, willfulness meant, after *Spies*, bad motive. Further, because the word is used in virtually every tax crime, felony and misdemeanor, *willfully* came to mean commonly bad motive, "a voluntary, intentional violation of a known legal duty."<sup>19</sup> Simple passive neglect, however, was insufficient for a felony conviction. Active conduct or positive knowledge of violation would have to be shown, two sets of books, false entries, or, perhaps, a degree in accountancy.<sup>20</sup> The Court in *Spies* did not note as a factor to be considered in evaluating the evilness of the taxpayer the amount of the deficiency.

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14. *Id.* at 493.

15. *Id.* at 497.

16. *Id.*

17. *Id.*

18. *Id.* at 498.

19. *United States v. Bishop*, 412 U.S. 346, 360 (1973) (*willfully* interpreted in I.R.C. §§ 7206, 7207). The loose language in the above text is a playful reference to the problems created by *Bishop*, which, as cases before, referred variously and with lack of discrimination to a requirement in *willfully* of "evil motive". Clever defense attorneys argued that not only proof of knowledge of legal duty was required but some other evil motive. In *United States v. Pomponio*, 429 U.S. 10 (1976), the Court, in a sheepish *per curiam* opinion, settled the controversy. Willfully done acts are voluntary, intentional violations of known legal duties. *Id.* at 12.

20. *Spies*, 317 U.S. at 499.

Before World War II, the incidence of the tax on the populace and the rate of taxation was not as widespread or severe as today.<sup>21</sup> In the Jazz Age there was a sense that, in the bustle of more significant enterprise, an otherwise honest citizen or, perhaps, even a jurist, could just forget to pay his tax. Here, in the late twentieth century, it is impossible to believe that anyone with income of any significance does not know the government will take some share, and even aliens must know April 15 is our day of reckoning. In the days of *Spies* and *Murdock* and, in fact, through the drafting of the MODEL PENAL CODE, the juridical scholars divided crimes (again with Roman rhythm) at first between *mala in se* and *mala prohibita* and then among crimes with mental states of culpability and of strict liability. Strict liability crimes, crimes in which no mental state was required to be proven, were abhorred by the drafters of the MODEL PENAL CODE as functionally ineffective and morally deficient. Severe punishment for crimes which were simply *mala prohibita*, without proof of knowledge of the law, is morally inappropriate.<sup>22</sup> The type of statute examined, of course, as *mala prohibita*, was the regulatory offense. The mechanism for avoiding the moral problem, as in *Murdock*, was simply to interpret such a statute as requiring proof of knowledge of criminality. What has not occurred in the tax crime area is a recognition that, socially, the tax obligations of the citizen have moved from an arcane regulatory burden to a fundamentally understood part of American life.

The Court in *Spies* minimized its ruling, certain that violators deserving of felony prosecution would surely engage in other conduct which would brand them as felons.<sup>23</sup> If felony prosecution, however, is to be the "capstone" of an enforcement system which burns the desire to comply voluntarily with the tax laws into the soul, ignorance of that law, born of stupidity or clever non-education, should not be a defense to the crime.

Further, although *Spies* clearly grounds its rationale on the notion that *willfully* in the felony statute must mean an especially bad motive, later courts, as noted above, have held that the word means the same in misdemeanor prosecutions. In *Sansone v.*

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21. Clearly in the early days of the tax, barely a single percent of the populace paid tax and its incidence fell with the modest severity of an innocent age on the top several percent of those with income. Of course, the rich still bitterly complained. See G. PERRET, *AMERICA IN THE TWENTIES* 131 (1982).

22. See Hart, *supra* note 4, at 419-20.

23. *Spies*, 317 U.S. at 499.

*United States*,<sup>24</sup> the Court held that a defendant charged under I.R.C. section 7201 was not entitled to a lesser included offense instruction. Sansone argued that his failure to pay was not willful in, what he argued to be, the felonious sense because he intended to pay when he was financially able; he conceded he purposefully did not include an item of gain on his return which would have increased his liability. The Court concluded that a lesser included offense instruction is only appropriate where, if all the elements of I.R.C. section 7201 have not been proven, the elements of lesser offenses, I.R.C. section 7203 in this case, have been. The Court held that affirmative commission of the act and knowledge of the taxability of the item is sufficient under both statutes; if the act was not thusly willful, he was innocent under both.<sup>25</sup> *Spies* was distinguished because the Court in that case had gushed that the felony prosecution requires more evil conduct than simply an I.R.C. section 7203 violation.<sup>26</sup>

The judicial history of the interpretation of these tax crime statutes has not been a procession of ordered logic. In any case, the development of the law from *Spies* onward (which Congress has done nothing to stunt) has been toward an interpretation which encourages ignorance and charlatany. “[I]t [is] irreconcilably inconsistent to say in one breath that guilty knowledge of the consequences of the act done is the essence of the offense, and in the next breath say that ignorance of the consequences of those acts is no excuse.”<sup>27</sup> In the United States, individuals know they have income tax obligations; if confusion exists, competent advice should be sought. If they fail to seek that advice because of stupidity or a *sub rosa* belief that they will learn they have to pay, full criminal sanctions should be able to be brought against them.

That ignorance of the law as a defense should be modified or reduced is justified in several respects. First, many who are uneducated in the law but aware of the maxim think ignorance is without avail. Thus, only the crafty and the prosecuted bring ignorance to their defense. Further, if the great trickle down theory of prosecutions’ effects on general conduct is valid, harsher treatment will lead to an urgency to comply. The moral bankruptcy of societal

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24. 380 U.S. 343 (1965).

25. *Id.* at 353.

26. *Id.* at 351.

27. Haigler, 49-1 U.S. Tax Cas. (CCH) ¶ 9171 at 162 (10th Cir. 1949) (reversing conviction under I.R.C. § 145(b) (1939) because trial court charged the jury that ignorance is no excuse).

sanction of crimes with limited culpability in terms of mental state would not be present. As with the crime of murder, general tax obligations are so well-known that taking liberties with them produces in the good citizen a sense of rashness akin to the sense of temerity in the taking of liberties with others' lives and limbs. Of course, the argument in this area is somewhat circular. If everyone knows the law such that we are justified in eliminating the requirement that everyone know the law, why do we need to eliminate the requirement to encourage knowledge? An examination of the use of the defense will illustrate in part how that circle does not fully close.

The first consequence of this interpretation of the requirement of willfulness is that, as a description of mental state, proof of subjective intent is required. For example, in *United States v. Aitken*,<sup>28</sup> the First Circuit considered, in a prosecution under I.R.C. section 7203 and I.R.C. section 7205, whether willfulness meant a subjective intent to disobey the law or "merely the absence of what a jury would consider an objectively reasonable ground for failure to comply."<sup>29</sup> The trial court had instructed the jury that a mistaken belief must be reasonably held; the taxpayer did not file returns and had filed false W-4's, thinking he owed nothing because he did not believe an exchange of time (his) for money created income. His conviction was vacated by the First Circuit because willfulness must be evaluated subjectively.<sup>30</sup> The outrageousness of the belief should certainly influence the jury's determination as to whether the belief is actually held, but if held, the taxpayer is innocent.

While the uninitiated may lump all of the law in the category of the vague and unknowable, the tutored realize that the laymen's perception of vagueness is actually a haze from the shimmer of complexity. Rarely have courts struck down prosecutions for tax crimes based upon vagueness.<sup>31</sup> The regulatory authority of the

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28. 755 F.2d 188 (1st Cir. 1985) (Coffin, J.).

29. *Id.* at 189.

30. *Id.* at 193-94. The conclusion is unassailable and has been adopted by virtually every circuit which has had occasion to consider the matter. See *United States v. Philips*, 775 F.2d 262 (10th Cir. 1985). Note, however, the discussion of *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), below.

31. Tax protesters, for example, have urged the device of filing false (a legal conclusion the protestors must be careful not to draw overtly) W-4's, claiming the western world as dependents or some other group which will eliminate withholding. These groups roamed the mid-West in the mid-seventies, speaking before farm groups or others of the put-upon. See, e.g., *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (Prosecution under I.R.C. § 7205

Treasury is exercised with sufficient vigor that technical matters are explained and fora are provided for disagreement and discussion short of criminal prosecution. Typical violations of tax crimes are produced by transgressions of the simplest statutes, not from deep code subsections. The tax criminal is the common criminal who pays no tax on ill gotten gains, the tax adept who knows what cheating is and how to do it, and the tax protestor who clutters the courts with asininity, risking incarceration while spreading, unfortunately, the gospel of the inane.

The government has argued, with little success, that a good faith belief to be a defense must be objectively reasonable. In *United States v. Burton*,<sup>32</sup> the Fifth Circuit reversed and remanded the taxpayer's conviction under I.R.C. section 7203 and I.R.C. section 7205 because the trial court instructed the jury that the defendant's belief that wages were not income was no defense. The Fifth Circuit noted, with a wistful tone of sympathy, that trial judges dislike this rule because defendants may escape justice through deceptive arguments and may confuse juries as to what the tax law is.<sup>33</sup> Further, the court noted, with what must be the Treasury's hope, "a jury is the ultimate discipline to a silly argument."<sup>34</sup>

The Seventh Circuit, in *United States v. Moore*,<sup>35</sup> suggested the trial court could withdraw from the jury's consideration a misunderstanding of the law defense if that misunderstanding was objectively unreasonable. In that case, a tax protestor was prosecuted for failure to file, his returns containing only his name, address and social security number but none of the other numbers which are sought with more gravity. He said dollars were worthless and his tax return, adequate. The trial court instructed the jury that will-

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(1954) (Taxpayer argument that "two thousand pages of regulations are too vague to be understood by the ordinary citizen," rejected); *United States v. Echols*, 677 F.2d 498 (5th Cir. 1982), cert. denied, 437 U.S. 906 (1978). Because of the structure of our tax crimes, courts cannot decide as a matter of law that ignorance of an obligation to pay some tax on wages is no defense whereas the common sense of the matter is that every citizen actually knows the tax falls on nearly every worker. Convictions under I.R.C. § 7206(1), (2), were reversed on vagueness grounds in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985). In that case, the taxpayer used deductions in a coal tax shelter scheme (annual minimum royalties) to reduce other income. The court held that the basis for the Service's determination that the deduction was not allowed, I.R.C. Reg. § 1.612-3(b), was vague. At the time, there were no cases or other construction of the rule but the Service argued its conclusion was compelled by common sense.

32. 737 F.2d 439 (5th Cir. 1984).

33. *Id.* at 442-43.

34. *Id.*

35. 627 F.2d 830 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981).

fully meant the violation of a known legal duty, but also added that "the question is, did he reasonably believe" the returns were adequate.<sup>36</sup> Arguably this latter comment was in error because it places upon the taxpayer the additional burden of proving his belief is reasonable when the real issue is whether the belief was actually held. The Seventh Circuit held that "the mistake of law defense is extremely limited and the mistake must be objectively reasonable."<sup>37</sup> How could anyone reasonably believe dollars are worthless?

While one must have sympathy with the common sense of *Moore*, its statement of the law is simply wrong.<sup>38</sup> Where the Seventh Circuit fell into error is in the great nether world of mistake of law and fact defenses. Simply, as defined by the Supreme Court, tax crimes require as an element of criminality, knowledge of the legal duty. There is no requirement that lack of knowledge, which may be manifested by some conduct which is believed to be conforming, be reasonable.<sup>39</sup> A defense which is not allowed is disagreement with the law, which is not a mistake or ignorance but an act of civil disobedience.<sup>40</sup> A taxpayer cannot interpose his belief that the revenue is being collected from him for an improper purpose as a defense to evasion. But if a mistaken belief is held, however wild and weird, that he does not owe taxes, he must be acquitted.

One facet of this assault on sense where courts have taken some meager stand in reducing the force of the defense is the limitation on the use of extrinsic evidence to establish how the taxpayer came to his wacky conclusion. For example, in *United States v. Harold*,<sup>41</sup> a tax protestor who had formed the notion, from his own research, that wages were not income, sought to present evidence of that research. The Tenth Circuit held the evidence was properly excluded because the reasonableness of the belief has little relevance; what is relevant is whether he actually held that belief.<sup>42</sup> This limitation on parading tax palaver before juries, however, may not be easily preserved. The reasonableness of the belief is

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36. *Id.* at 833.

37. *Id.*

38. See *United States v. Philips*, 775 F.2d 262 (10th Cir. 1985) (rejecting *Moore*).

39. See MODEL PENAL CODE § 2.04 comment 1 (1985) (discussion of similar issues under general criminal statutes).

40. See *United States v. Ware*, 608 F.2d 400 (10th Cir. 1979).

41. 796 F.2d 1275 (10th Cir. 1986).

42. *Id.* at 1285.

relevant in considering whether that belief is actually held. Evidence of reasonableness, proffered by the taxpayer, can come in two forms: proof of the "expert" sources upon which he relied and, more tenuously, proof that other misguided citizens or putative experts hold that belief even though he had not relied upon them.

In *United States v. Burton*,<sup>43</sup> the taxpayer sought to have a so-called expert, a "Professor," testify. The Fifth Circuit affirmed the trial court's exercise of discretion in excluding the testimony. While relevant, the testimony had potential for prejudice and confusion. "[A]part from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance."<sup>44</sup> Burton had not alleged that he had relied on the Professor.

In cases where the taxpayer has relied on the advice of others, the primary issue still is not the validity or arguable merit of that advice, but the personal nature of the taxpayer's reliance. Again, the requirement of willfulness for conviction provides a possible defense to the taxpayer who seeks out the charlatan or, more charitably, is seduced. In *Bursten v. United States*,<sup>45</sup> the taxpayer who was himself a lawyer was convicted under I.R.C. section 7201. He argued that his return was prepared with specific advice from tax counsel; he requested an instruction that such reliance was grounds for acquittal. The trial court refused, saying "[t]hat's no excuse at all for a lawyer . . ." and "[y]ou can always find a crook that will give you any advice that you don't owe any tax."<sup>46</sup> The conviction was reversed on grounds of judicial impropriety.

Reliance on counsel is a defense if there has been actual reliance in good faith and the advice is obtained after disclosure of all facts to which the advice pertains.<sup>47</sup> The Eighth Circuit has held that advice must be "competent legal advice." In *United States v. Farber*<sup>48</sup> and *United States v. Barney*,<sup>49</sup> the Eighth Circuit affirmed the trial court's rejection of an instruction on the defense where

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43. 737 F.2d 439 (5th Cir. 1984).

44. *Id.* at 444.

45. 395 F.2d 976 (5th Cir. 1968).

46. *Id.* at 981. The Fifth Circuit wryly took judicial notice that often common lawyers know nothing of the practice of tax.

47. See *United States v. Mitchell*, 495 F.2d 285 (4th Cir. 1974) (conviction reversed; reliance on Montgomery Ward tax preparer; I.R.C. § 7206 (1954)); *Conforte*, 80-1 U.S. Tax Cas. (CCH) ¶ 9417 (9th Cir. 1980).

48. 630 F.2d 569 (8th Cir. 1980).

49. 674 F.2d 729 (8th Cir. 1980).

the taxpayers' "counsel" was obtained at a tax protest seminar and the taxpayers did not inquire as to whether the advisor was a licensed attorney.<sup>50</sup>

The reliance on counsel defense allows the taxpayer to plead with specious honesty that he was uncertain or unaware as to the correctness of his putative expert's tax decision. If the limitation on the defense, as intimated in the Eighth Circuit to "competent legal counsel," with the competency determined by the court, is preserved, a determination that counsel was incompetent will lead the taxpayer to argue that he actually believed the outrageous advice. Nonetheless, under the supervening theory of personal belief of legal impropriety to support conviction, the Eighth Circuit's limitation of the reliance on counsel defense to competent legal counsel should be modified. If the taxpayer actually believes the counsel is competent, reliance upon that counsel should be a defense regardless of his actual competence.<sup>51</sup> Vigorous defense counsel in this treacherous movement of tax nihilism may be successful in persuading courts that if the mental state of evilness is such a critical element of the crime, a defendant should be permitted to defend himself by showing fully how and why he relied on counsel, however bizarre, or upon an idea held by others similarly twisted.

The magnitude of the problem created by this logical anomaly is difficult to gauge. Trial courts are littered and trial judges, irritated. Prosecutions are successful but time is drawn away from what must be more meritorious pursuits. Tax protest movements seem to blaze dementedly, then are beaten to a few radical embers, only to flame with some new spark of insanity elsewhere.

Nonetheless, a rational system of criminal penalties to encourage voluntary compliance should motivate the citizen to seek competent tax counsel. Further, the tax law should be recognized as sufficiently branded on the American mind that citizens with certain levels of income or types of income know they have a tax liability. Certain citizens, who might be objectively described by deficiency or source of income, should not be provided a defense by arguing they did not consult counsel because they did not know they had a tax problem.

The foregoing objectives cannot be accomplished by judicial opinion. It is too late to say that *willfully* means without inadver-

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50. *Farber*, 630 F.2d at 569, 575; *Barney*, 674 F.2d at 729, 732.

51. *Platt*, 70-2 U.S. Tax Cas. ¶ 9719 (2d Cir. 1970) (Friendly, J.) (taxpayer entitled to an instruction on reliance if there is any foundation that he thought accountant was complying with the law).

tence, not with knowledge of criminality. The law in this area is well-developed (in the sense of mature, not well-formed) and understood. Some statutory changes, however, might preserve the distinctions between felonies and misdemeanors and render in some measure ignorance of the law as no longer an excuse, all without running afoul of constitutional restrictions.

In reviewing a revised criminal tax code, certain elements of the knowledge of criminality defense must be maintained. The tax result in many situations is not free from ambiguity. For example, the taxation of the receipt of a transfer without consideration is subject to legal ambiguity in the sense that, under I.R.C. section 102, some receipts are excludable if they are a gift. The taxpayer who mistakenly concludes an item was a gift should not be prosecuted. The taxpayer who ignorantly concludes that an item given by his employer to him was an excludable gift should be subject to criminal sanction. In the first instance, the law was considered but rejected; in the second, the law was ignored. In such distinctions, it becomes apparent that simply abrogating ignorance as a defense is ineffective in achieving justice along with the aims of encouraging education in the law and compliance.<sup>52</sup>

Further, affirmative disobedience of a known law should subject an actor to greater punishment. Presently, willful evasion of tax under I.R.C. section 7201, with its stiff punishment but greater proof level, maintains this notion. While the constitution may not prohibit a tax crime which punishes as a felony the voluntary failure to pay tax of a deficiency of a particular amount (without regard to knowledge of the deficiency), we might wish to punish more severely the same failure by one who knows the law.

The tax criminal provisions, unlike most of the rest of the code, do not display an exercise in the precise use of terms. Unlike modern penal systems, the code uses a hodgepodge of terms to describe various (and often the same) mental states or elements of crimes: willfully, falsely, fraudulently, knowingly, corruptly. These words are placed fitfully and irregularly and do not reflect levels of malevolence which correspond to criminal culpability. In the past several years, Congress' and the Treasury's concern has been directed

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52. When ignorance of the law is a defense, a long series of mistakes by the criminal who has offered his reliance on counsel may be examined. Even the MODEL PENAL CODE has been unable to logically resolve this problem. Although the MODEL PENAL CODE states that ignorance of the law is no defense, reliance on authorities is a defense. Suppose an actor errs in judging the scope of that reliance? See Fletcher, *Mistake in the Model Penal Code: A False Problem*, 19 RUTGERS L.J. 363 (1988).

elsewhere to provide the stick for taxpayers' compliance. Our reform acts over the last decade have done furious work on the system of civil penalties imposed on the taxpayer and the tax preparer. Too often in this area, taxpayers are given the opportunity to play games, evaluating the risk of getting caught, the value of the penalty, the confusion in the law, and the profit in non-compliance. Burdened, the Service fears these civil tools of terror no longer frighten the citizenry into voluntary compliance.<sup>53</sup> Payment of taxes is not seen (if it ever was) as the purchase of civilization, but as an inhibition on enterprise. In this twisted perspective, the law, the tax, is viewed as the crime hampering the freedom to flex indiscriminately some economic muscle. Disrespect for the law ends it. At least for the tax collector, his ultimate weapon, the law of crimes, should not be fully spiked by the ignorance of the law of his target.

Without major reform or reorganization of the criminal statutes, which in their present state have the moderate virtue of being fairly well understood by lawyers in the field, a small step could be taken to regularize the carrot of the defenses which are the product of the excuse of ignorance. If the taxpayers are permitted the defense of reliance on counsel, expansion of that defense may be limited by statute. If a taxpayer raises as a defense that he relied upon the advice of some third party, he should prove: (1) reliance in good faith; (2) full disclosure of material facts; and (3) the advisor was a licensed attorney, taxpreparer, or certified public accountant. Further, as to this last requirement, while the most effective rule would be to require that the advisor actually be so licensed, the law might be drafted to at least provide that the taxpayer make a reasonable effort to determine licensure.

More aggressive would be a provision requiring taxpayers arguing that they had a belief about the tax law to establish that belief as not only subjectively held, but objectively reasonable. Such a provision might modify the result in current tax cases such that the protestor who argues the sixteenth amendment is unconstitutional would not be permitted to parade the notion before a jury, but the recipient of the putative gift posited above might have his argument considered.

Piecemeal renovation of the tax code's criminal provisions is not the most desirable approach, while overall recodification is a possi-

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53. The Service's Tax Force on Civil Penalties is currently examining these issues. See *IRS Official Discusses New Penalty Study*, *Taxnotes* at 1371 (June 20, 1988).

bility. The code's crimes should be reconsidered now that the income tax laws are aged, if not venerated. The crimes should not be described or interpreted with the timidity of a young regulatory idea sneaking up on an unsuspecting public, but as social obligations as familiar as "thou shalt not steal." The greatest threat to voluntary compliance comes when no public disdain is heaped upon the violator. In earlier days, felony prosecutions for nascent regulatory offenses may have been viewed as morally unjustified because of the caution, "how was one to know the law." Felony convictions brought down the derision of the community because a felon had breached a fundamental tenet of his social obligations. In those days, it was felt unjust to brand as a felon what was perceived to be the inadvertent criminal. There is no justification for treating income tax obligations as mere regulations. People who fail to consider their tax obligations are felons and deserve the disrespect of us all.

