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Cheek v. United States: Finally, a Precise Definition of the Willfulness Requirement in Federal Tax Crimes

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Note

CHEEK V. UNITED STATES: FINALLY, A PRECISE DEFINITION OF THE WILLFULNESS REQUIREMENT IN FEDERAL TAX CRIMES

INTRODUCTION

In *Cheek v. United States*,[1] the Supreme Court held that a defendant on trial for evasion of federal income taxes must be acquitted if the jury finds that he sincerely believed he was not violating the law, regardless of whether the defendant's belief was "objectively reasonable."[2] However, a defendant's belief in the unconstitutionality of the tax laws will not serve as a defense.[3] By reversing the Court of Appeals for the Seventh Circuit, which had upheld the trial court's use of the objective reasonableness standard,[4] the Court finally laid to rest a persistently troublesome problem of statutory construction: how to interpret the word "willfully" in the context of the tax crime statutes.[5]

After first reviewing the Court's previous interpretations of the willfulness requirement, this Note assesses the soundness of the *Cheek* decision, concluding that it strikes a sensible balance between disciplined regard for the dictates of precedent and awareness of practical policy ramifications. The Court wisely chose to heed the principle of stare decisis rather than follow the Seventh Circuit's adoption of a standard of objective reasonableness, which would have benefitted judicial economy at the expense of logic and consistency. The Court did display sensitivity to the issue of judicial economy, however, by holding that a defendant's belief that a statute is unconstitutional will not serve as a defense.[6]

I. THE CASE

John L. Cheek, a pilot for American Airlines since 1973,

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1. 111 S. Ct. 604 (1991).
2. *Id.* at 611.
3. *Id.* at 613.
4. *See* United States v. Cheek, 882 F.2d 1263, 1268 (7th Cir. 1989), *vacated and remanded*, 111 S. Ct. 604 (1991).
5. *See infra* note 12.
6. *See Cheek*, 111 S. Ct. at 613.

stopped filing income tax returns after 1979.[7] Beginning in 1980, he began claiming an inordinately large number of withholding allowances;[8] and in the years 1981 to 1984 he claimed on his W-4 forms that he was exempt from federal income taxes.[9] In 1982, Cheek failed in an attempt to obtain a refund of all tax withheld by his employer that year.[10] For these tax-protest activities, Cheek was indicted on March 7, 1987 and charged with three counts of willfully attempting to evade income taxes for the years 1980, 1981, and 1983, in violation of section 7201 of the Internal Revenue Code;[11] and with six counts of willfully failing to file a federal income tax return for the years 1980, 1981, and 1983 through 1986, in violation of section 7203 of the Internal Revenue Code.[12]

During the trial, at which Cheek represented himself, the evidence revealed that Cheek's failure to pay taxes stemmed from his involvement in the tax protest movement.[13] Cheek had attended several seminars featuring speakers, some of whom were lawyers, who maintained that the federal tax laws were unconstitutional, as was their enforcement by the government.[14] The thrust of Cheek's defense was that his actions were lawful because he sincerely believed during the years in question that the tax laws were being enforced unconstitutionally. Moreover, he claimed to have believed that wages are not income and that he therefore was not required to file a return based on his wages.[15] Thus, Cheek argued, he had not

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7. *Id.* at 606.

8. By the middle of 1980 Cheek was claiming 60 exemptions. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 606-07. Section 7201 reads, in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title shall . . . be guilty of a felony . . . ." I.R.C. § 7201 (1988).

12. *Cheek*, 111 S. Ct. at 606-07. Section 7203 provides: "Any person . . . who willfully fails to pay such estimated tax or taxes, make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor . . . ." I.R.C. § 7203.

Nearly all of the criminal tax provisions include the requirement of willfulness. *See, e.g.*, I.R.C. §§ 7202, 7204-7207, 7213.

13. *Cheek*, 111 S. Ct. at 607. The tax protest movement, whose members commonly believe that the federal tax laws and enforcement procedures are unconstitutional, has been a thorn in the side of federal prosecutors and the federal courts. *See generally* Miller v. United States, 868 F.2d 236, 239 (7th Cir. 1989) (describing problems tax protesters have caused the courts, and noting that in 1981 the Internal Revenue Service investigated 13,600 illegal protest returns); Mark D. Yochum, *Ignorance of the Law is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 228-32 (1989) (discussing the defense tactics of tax protesters, and condemning them for "clutter[ing] the courts with asininity [and] risking incarceration while spreading, unfortunately, the gospel of the inane").

14. *Cheek*, 111 S. Ct. at 607.

15. *Id.*

acted with the willfulness that is an essential element of the crimes with which he was charged.[16]

The trial judge instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness,"[17] and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense."[18] Cheek was convicted on all counts,[19] and the Court of Appeals for the Seventh Circuit affirmed the conviction, holding that the standard of objective reasonableness was the proper test for willfulness in the Seventh Circuit, and that consequently the district court had not erred in its instructions.[20]

Because the Seventh Circuit's interpretation of the term "willfully" in the tax crime statutes conflicted with those of several other circuits,[21] the Supreme Court granted certiorari[22] to resolve the conflict.[23] By a six to two majority, in a well-reasoned opinion authored by Justice White, the Court reversed the Seventh Circuit, holding that it was error to instruct the jury to disregard Cheek's claims that he honestly believed he was not required to file a return and that wages are not taxable income.[24] If the jury had believed Cheek's claims, "the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief."[25] The Court further held, however, that the district court judge was correct in instructing the jury not to consider Cheek's views about the unconstitutionality of the tax laws, because

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16. *Id. See generally* Yochum, *supra* note 13, at 230-31 (discussing the strength of this kind of argument).

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

18. *Id.*

19. *Id.* at 609.

20. United States v. Cheek, 882 F.2d 1263, 1271 (7th Cir. 1989), *vacated and remanded*, 111 S. Ct. 604 (1991).

21. *Cheek*, 111 S. Ct. at 609 (citing United States v. Whiteside, 810 F.2d 1306, 1310-11 (5th Cir. 1987); United States v. Phillips, 775 F.2d 262, 263-64 (10th Cir. 1985); United States v. Aitken, 755 F.2d 188, 191-93 (1st Cir. 1985)); *see also infra* notes 47-48 and accompanying text (elaborating on the collision of the Seventh Circuit and other circuits' decisions).

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

23. *Cheek*, 111 S. Ct. at 611.

24. *See id.* Upon remand, the Seventh Circuit remanded the case to the district court for retrial on the sole issue of whether Cheek sincerely believed that he was not required to file a return or that wages were not taxable income. United States v. Cheek, 931 F.2d 1206, 1209 (7th Cir. 1991).

25. *Cheek*, 111 S. Ct. at 611.

these views were "irrelevant to the issue of willfulness."[26]

Justice Scalia concurred with the majority's result, but argued that errors about constitutional validity should also be allowed as a defense.[27] In his dissent, Justice Blackmun, joined by Justice Marshall, approved of the Seventh Circuit's objective reasonableness standard.[28]

II. THE WILLFULNESS DOCTRINE PRIOR TO *CHEEK*

The Supreme Court first addressed the meaning of the term "willfully" as it appears in the tax crime statutes at issue in *United States v. Murdock*.[29] In *Murdock*, the Court held that a defendant being tried under the predecessor of section 7205[30] of the Internal Revenue Code was entitled to an instruction directing the jury to consider whether he had acted "in good faith and based upon his actual belief."[31] Such an instruction was required because the term "willfully" meant the presence of a "bad purpose"[32] or "evil motive."[33] In adopting this interpretation, the Court rejected an alternative construction of willfulness: that the defendant's actions be "intentional, or knowing, or voluntary, as distinguished from accidental."[34] The Court explained that "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, [or] as to his duty to make a return, . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct."[35]

In requiring "bad purpose" or "evil motive," the *Murdock* Court interpreted the statutory tax crimes as specific intent crimes, meaning that this special mental state constituted a distinct element of those offenses.[36] This interpretation may have been influenced by

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26. *Id.* at 613.
27. *See id.* at 613-14 (Scalia, J., concurring).
28. *See id.* at 614-15 (Blackmun, J., dissenting).
29. 290 U.S. 389 (1933).
30. The predecessor of § 7205, which was virtually identical, was § 145(b) of the Revenue Act of 1936. *See* I.R.C. § 145(b) (1936).
31. *Murdock*, 290 U.S. at 393.
32. *Id.* at 394.
33. *Id.* at 395.
34. *Id.* at 394.
35. *Id.* at 396.
36. *See id.* at 397-98 ("The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense."); *see also Cheek*, 111 S. Ct. at 609 (asserting that Congress carved out an exception to the traditional rule "by making specific intent to violate the law an element of certain federal

the prevailing practice of the legal community to divide crimes between those *mala in se* and those *mala prohibita*, and by the view that it was morally wrong to impose stiff penalties for mere *mala prohibita* offenses without requiring proof of knowledge of criminality.[37] Thus, in requiring evil motive, the *Murdock* Court was responding to the seeming unfairness of imposing heavy penalties for what were considered to be "regulatory offense[s]."[38]

In *United States v. Bishop*,[39] the Court attempted to define willfulness more precisely when it held that the "bad purpose" or "evil motive" of *Murdock* referred to "a voluntary, intentional violation of a known legal duty,"[40] adding that Congress's intent in including the willfulness requirement was to "construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."[41] Three years later, in response to defense arguments citing the "bad purpose-evil motive" language to justify demands for separate jury instructions on good faith,[42] the Court in *United States v. Pomponio*[43] firmly defined willfulness as not "requir[ing] any motive other than an intentional violation of a known legal duty."[44]

Given the Court's approval of an instruction containing the phrase "good faith and . . . *actual* belief" in *Murdock*,[45] and its later use of the phrase "known legal duty" in defining willfulness,[46] it is not surprising that most federal circuit courts determined that will-

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criminal tax offenses"). *See generally* Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 45-51 (1939) (containing a detailed discussion of specific intent crimes and the ignorance of law defense).

37. *See* Yochum, *supra* note 13, at 226; *see also* Morissette v. United States, 342 U.S. 246, 252-57 (1952) (setting out a thorough analysis of *mala prohibita* offenses and the use by courts of specific intent requirements to "protect those who were not blameworthy in mind").

38. Yochum, *supra* note 13, at 226. Yochum argues that this rationale has long ceased to make sense: "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." *Id.* Though he does not believe that this can properly be addressed by the courts, Yochum argues forcefully for congressional amendment of the tax crime statutes. *See id.* at 232-35.

39. 412 U.S. 346 (1973).

40. *Id.* at 360.

41. *Id.* at 361.

42. *See* Yochum, *supra* note 13, at 225 n.19.

43. 429 U.S. 10 (1976).

44. *Id.* at 12.

45. 290 U.S. 389, 393 (1933) (emphasis added).

46. *See* United States v. Bishop, 412 U.S. 346, 360 (1973); *Pomponio*, 429 U.S. at 12; *see also supra* text accompanying notes 39-44.

fulness must be evaluated using a subjective standard.[47] The exception was the Seventh Circuit, which in 1980 clearly articulated its view in *United States v. Moore*[48] that even in tax crimes "[t]he mistake of law defense is extremely limited and the mistake must be objectively reasonable."[49] During the 1980s, many tax protesters appealed their district court convictions to the Seventh Circuit Court of Appeals, insisting that the objective reasonableness standard had allowed them to be convicted without the government proving that they had violated a "known legal duty."[50] The Seventh Circuit uniformly rejected these arguments, refusing to read *Pomponio* and its predecessors as requiring a subjective standard[51] and declining to follow the contrary views of the other circuits.[52]

The practical effect of the reasonableness standard employed by the Seventh Circuit was to make it easier for government prosecutors to convict tax protesters.[53] These protesters had earned the ire of judges who saw them both as a cause of overcrowded court

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47. *See* United States v. Phillips, 775 F.2d 262, 264 (10th Cir. 1985) ("With the exception of the Seventh Circuit . . . , no other circuit has approved of an objective standard in failure to file cases."); *see also* United States v. Whiteside, 810 F.2d 1306, 1310 (5th Cir. 1987) ("[T]he ultimate factual issue . . . was whether appellant actually held his erroneous views of the law."); United States v. Aitken, 755 F.2d 188, 193 (1st Cir. 1985) ("[R]easonableness of a mistake of law should *not* be a factor."); United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983) (holding that a good faith misunderstanding of law is a defense, but a good faith disagreement is not).

48. 627 F.2d 830 (7th Cir. 1980).

49. *Id.* at 833. This view of the law is not well supported by authority and is likely incorrect. Although there is a strong common-law tradition that ignorance of the law is no defense, certain specific intent crimes such as tax offenses have long been excepted from this rule. *See Aitken*, 755 F.2d at 193 (Tax crimes are an "enclave apart" from common-law crimes, in which "the mistake of law defense has particular vitality, and the key is whether the defendant honestly held a mistaken belief as to what the law requires."); *cf.* Perkins, *supra* note 36, at 52 (For specific intent crimes, "guilt may be disproved by an honest belief inconsistent with such an intent, even if the belief results from a mistake of law not based upon reasonable grounds.").

One commentator has theorized that "the Seventh Circuit fell into error . . . in the great nether world of mistake of law and fact defenses." Yochum, *supra* note 13, at 230. This is plausible, because reasonableness is generally required for mistakes of fact, but not for mistakes of law. *See* Perkins, *supra* note 36, at 52-56.

50. *See generally* Yochum, *supra* note 13, at 229-30 (discussing representative cases).

51. *See, e.g.*, United States v. Cheek, 882 F.2d 1263, 1267 (7th Cir. 1989), *vacated and remanded*, 111 S. Ct. 604 (1991); United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987) (determining that "only objectively reasonable mistakes negate the necessary mental element for tax offenses"); United States v. Dube, 820 F.2d 886, 891 (7th Cir. 1987) (stating that the Seventh Circuit had read *Pomponio* as permitting a reasonableness standard).

52. For cases illustrating the alignment of other circuits with the subjective standard, see *supra* note 47.

53. At trials for tax crimes, it is of course the prosecutor who requests the application of the reasonableness standard. *See, e.g.*, *Aitken*, 755 F.2d at 189-90.

dockets and as bearers of frivolous claims and "tired arguments."[54] The usual defense raised by these protesters was that they had not willfully violated the tax laws because they had acted in accordance with what they believed the law required. These defense claims were commonly premised on beliefs that wages earned from private corporations are not taxable income and that Federal Reserve Notes have no value.[55] It followed that a jury instructed to apply a standard of reasonableness to a protester's claims had little choice but to convict.[56] In fact, courts often used the reasonableness standard to rule as a matter of law that these and similar beliefs could not negate willfulness, thus taking the issue entirely away from the jury.[57] The Court of Appeals had gone so far as to compile a list of seven "stock arguments of the tax protester movement" that would never be considered objectively reasonable in the Seventh Circuit.[58] These arguments could be defeated via an instruction directing the jury to disregard evidence supporting them[59] or by an order excluding such evidence during the course of the trial.[60]

A good example of the latter approach appears in *United States*

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54. *See* Coleman v. Commissioner, 791 F.2d 68, 70-72 (7th Cir. 1986). In reviewing the Seventh Circuit's decisions in cases involving tax protesters, one quickly notices the unusually blunt tone of the opinions. It almost seems as if these judges hope that scornful language will deter future litigation by tax protesters, when upheld convictions and the use of civil sanctions have not. *See, e.g.*, *Buckner*, 830 F.2d at 103 (maintaining that if courts accepted every mistake of law as a defense, people would choose to be delusional about the law); *Dube*, 820 F.2d at 887-89 (derisively describing tax protesters' activities as a "sham church"); *Coleman*, 791 F.2d at 69 ("Some people believe with great fervor preposterous things that just happen to coincide with their self-interest.").

55. *See Buckner*, 830 F.2d at 103; Dube, 820 F.2d at 891. Some tax protesters have professed belief in even more unusual ideas. *See, e.g.*, United States v. Mann, 884 F.2d 532, 534 n.1 (10th Cir. 1989) (Defendant claimed that he resisted the "tyranny" of IRS agents because they were "Satan's little helpers.").

56. The jury at Cheek's trial was clearly unhappy with the objective reasonableness standard. They expressed their dissatisfaction by taking the unusual step of submitting a note to the judge along with their guilty verdict. The note stated that several jurors wished to air "a complaint against the narrow and hard expression under the constraints of the law." *Cheek*, 111 S. Ct. at 608 n.6.

57. See *infra* notes 58-64 and accompanying text for representative cases.

58. United States v. Cheek, 882 F.2d 1263, 1268-69 n.2 (7th Cir. 1989), *vacated and remanded*, 111 S. Ct. 604 (1991). The list, which the court felt could only expand over time, included the following seven beliefs: that the Sixteenth Amendment was never ratified, that the Sixteenth Amendment is unconstitutional, that income tax violates the takings clause of the Fifth Amendment, that the tax laws are unconstitutional, that wages are not income and therefore are not taxable, that filing a tax return violates the privilege against self-incrimination, and that Federal Reserve Notes are not legal tender. *Id.*

59. *See* United States v. Davenport, 824 F.2d 1511, 1517-18 & nn.8-9 (7th Cir. 1987); United States v. Moore, 627 F.2d 830, 833 & n.1 (7th Cir. 1980).

60. *See, e.g.*, United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987).

v. Buckner.[61] In *Buckner*, the district court had granted the prosecutor's request to exclude evidence relating to the defendant's various theories about taxation.[62] The Seventh Circuit, in approving what it termed "a preemptive strike"[63] by the prosecutor, candidly stated its rationale for prohibiting the "obtuse" tax protester from using his allegedly sincere beliefs as a defense: "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."[64] Despite this argument's logical basis in policy (after all, the tax protesters' manipulation of the judicial system was at the expense of the government, courts, and other litigants), it would not be persuasive in the Supreme Court.

III. THE COURT'S REASONING IN *CHEEK*

In *Cheek*, the Supreme Court confronted two questions: first, whether the willfulness requirement found in the criminal provisions of the Internal Revenue Code demands a subjective reasonableness standard—that a defendant's allegedly honest, though irrational, misunderstanding of law be considered a valid defense—or instead permits an objective reasonableness standard;[65] and second, whether a defendant's claimed "good faith" belief in the unconstitutionality of the tax statutes is relevant to the issue of willfulness.[66]

The majority began its analysis by noting that "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."[67] However, the Court recognized that, because of the complexity of tax statutes and regulations, in some instances Congress had mitigated that presumption by requiring that a prosecutor prove specific intent.[68] The Court proceeded to review *Murdock*, *Bishop*, and *Pomponio*, and from them it concluded that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' "[69] Consequently, the government bears the burden of proving "actual knowledge of the

61. 830 F.2d 102 (7th Cir. 1987).
62. *Id.* at 103.
63. *Id.*
64. *Id.*
65. *Cheek*, 111 S. Ct. at 609-12.
66. *Id.* at 612-14.
67. *Id.* at 609 (citations omitted).
68. *See id.*
69. *Id.* at 609-10.

pertinent legal duty."[70] This burden cannot be met if the defendant can convince the finder of fact that, based on a misunderstanding of the tax code, he had a good faith belief that he was complying with the code.[71] The Court explained its reasoning:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.[72]

Thus, the jury should have been allowed to consider Cheek's claim that he believed the tax laws did not treat wages as income, and to acquit him if they determined that he honestly held that belief.[73]

The majority bolstered this conclusion by noting that an objective reasonableness standard may abrogate the Sixth Amendment's jury trial provision by giving a court the power to decide the key factual issue in many cases.[74] Because it is clearly possible for a defendant to be "ignorant of his duty based on an irrational belief that he has no duty,"[75] forbidding the jury to consider that belief—which could negate the essential element of willfulness—may be unconstitutional.[76] The majority put the final nail in the coffin of the objective standard by noting the Court's traditional policy of interpreting statutes so as to avoid raising serious constitutional questions.[77]

The Court next addressed the issue of whether a defendant's beliefs about the constitutional validity of the tax laws can negate the willfulness requirement. Concluding that these views "are irrelevant to the issue of willfulness,"[78] the Court held that it was not error for the trial judge to instruct the jury to disregard Cheek's beliefs on this subject.[79] Emphasizing the congressional intent recognized in the *Murdock-Pomponio* line of cases—the desire to protect

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70. *Id.* at 610.
71. *Id.* at 610-11.
72. *Id.* at 611.
73. *Id.* The Court added, though, that "the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income." *Id.*
74. *Id.* The Sixth Amendment provides: "In all criminal trials, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.
75. *Cheek*, 111 S. Ct. at 611.
76. *Id.*
77. *See id.*
78. *Id.* at 613.
79. *See id.*

taxpayers who make "innocent errors" as a result of our "complex tax system"[80]—the Court contrasted Cheek's constitutional views, which "reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable."[81] Furthermore, Cheek could have paid his tax, filed for a refund, and then brought a civil claim if the refund was denied.[82] His faulty constitutional ideas, though, would not save him from conviction for willfully violating the tax laws.

IV. ANALYSIS

In criticizing the majority's rejection of the objective reasonableness standard, Justice Blackmun noted in his dissent that Cheek's claimed misunderstandings did not result from "the complexities of the tax laws,"[83] but rather involved the code's "most elementary and basic aspect: Is a wage earner a taxpayer and are wages income?"[84] Blackmun expressed disbelief that seventy years after the establishment of the present federal income tax system, citizens of "competent mentality"[85] could avoid conviction by claiming to believe that wage earners are not taxpayers and wages are not income. The dissent concluded with an echo of the Seventh Circuit's decisions:[86] "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."[87]

While the Court no doubt was aware that by approving an objective reasonableness standard it might deter would-be tax protesters from violating the law, or at least from wasting the time and resources of appellate courts, it wisely chose to respect the unmistakable dictates of the *Murdock-Pomponio* line of cases. The *Murdock* Court made clear that tax crimes were specific intent offenses, not-

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

81. *Id.* at 612-13.

82. *Id.* at 613. Many tax protesters have challenged the validity of the tax laws in civil actions, but, as a Seventh Circuit judge put it, these claims are "sanction-bait." United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987); *see also* Coleman v. Commissioner, 791 F.2d 68 (7th Cir. 1986) (approving sanctions against tax protester for filing frivolous claim, then imposing additional sanctions for frivolous appeal).

83. *Cheek*, 111 S. Ct. at 614 (Blackmun, J., dissenting).

84. *Id.*

85. *Id.* at 615.

86. *See, e.g.*, *Buckner*, 830 F.2d at 103-04 (discussed *supra*, text accompanying notes 61-64); *cf. Coleman*, 791 F.2d at 72 ("The more costly obtuseness becomes, the less there will be.").

87. *Cheek*, 111 S. Ct. at 615 (Blackmun, J., dissenting).

ing that "evil motive is a constituent element of the crime."[88] In both *Bishop* and *Pomponio*, the Court defined the required evil motive as "the voluntary, intentional violation of a known legal duty."[89] Basic principles of Anglo-American criminal jurisprudence, as reflected in the Supreme Court's longstanding interpretation of the Constitution, dictate that when a special intention is made an element of an offense, whether the defendant had the requisite mental state is an issue of fact that must be proven beyond a reasonable doubt and decided upon by the factfinder.[90] The Seventh Circuit's requirement of objective reasonableness, then, appears to have abridged two distinct but related constitutional guarantees: The Due Process Clause's requirement that the prosecutor prove a defendant's guilt beyond a reasonable doubt,[91] and the Sixth Amendment's guarantee of trial by jury.[92]

The majority could have strengthened its opinion with a more extensive discussion of the burden of proof problem inherent in an objective standard, for this is probably the most compelling reason to reject such a standard. When a court requires that a defendant's erroneous beliefs be "objectively reasonable," it effectively creates a rebuttable presumption of intent;[93] even if the court does not pronounce these beliefs unreasonable as a matter of law (thus allowing the jury to consider them), the jury still must find willfulness *unless* the defendant has convinced them that his views were reasonable. The Supreme Court has held that even rebuttable presumptions of intent are generally unconstitutional, for they impermissibly shift

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88. United States v. Murdock, 290 U.S. 389, 395 (1933). The *Murdock* Court noted as an example a revenue statute proscribing a method of conducting a business to prevent loss of tax revenue. Because "a willful failure to obscure the directions [is] a penal offense," an integral element of the offense is an evil motive. *Id.* (alluding to Felton v. United States, 96 U.S. 699 (1877)).

89. *Bishop*, 412 U.S. at 360; *Pomponio*, 429 U.S. at 12.

90. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1(a) (1986); *see also* Morissette v. United States, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."); *cf.* Francis v. Franklin, 471 U.S. 307, 318 (1985) (overturning defendant's murder conviction because jury instruction created "an unconstitutional burden-shifting presumption with respect to the element of intent").

91. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

92. For the pertinent text of the Sixth Amendment, see *supra* note 74.

93. A presumption has been defined as describing "situations in which the court instructs a jury that proof of one fact entitles the jury to infer, assume, or presume the existence of another fact." STEPHEN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 877 (1984).

the burden of proof to the defendant.[94] In cases involving tax protesters like Cheek who claim an honest belief in unreasonable views, the objective reasonableness requirement imposes an impossible burden on the defendant (even when a jury is allowed to decide the issue): the defendant simply cannot prove that these views are reasonable. It is certainly appropriate for jurors to consider the objective reasonableness of a defendant's belief as one factor in judging the defendant's credibility,[95] but as the threshold test it inexcusably dispenses with the prosecutor's duty to prove every element of the offense.

The majority did effectively address the closely related issue of the defendant's Sixth Amendment right to a jury trial.[96] The objective reasonableness standard allowed the district judge, not the jury, to decide whether Cheek's claims that he misunderstood the tax laws negated willfulness. The Court made this point precisely when it noted that "knowledge and belief are characteristically questions for the factfinder,"[97] and that "[c]haracterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it."[98] The Court's subsequent reference to its traditional policy of attempting to interpret statutes so as to avoid raising constitutional questions further reinforced its conclusion by casting it as an example of appropriate judicial restraint.[99]

In deciding the second issue in *Cheek*—the relevance of a defendant's views on the constitutionality of tax laws—the Court sensibly drew a line apparently intended to place a limit on the ability of tax protesters to consume the time and resources of the courts and

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94. *See Francis*, 471 U.S. at 317 (holding that a rebuttable presumption of intent violates due process by "reliev[ing] the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding"); Sandstrom v. Montana, 442 U.S. 510, 520-24 (1979) (holding jury instruction constitutionally improper because it did not force the State to prove " 'beyond a reasonable doubt . . . every fact necessary to constitute the crime' " (quoting *In re* Winship, 397 U.S. 358, 364 (1970))).

95. *See* United States v. Collins, 920 F.2d 619, 622-23 (10th Cir. 1990); United States v. Turano, 802 F.2d 10, 11 (1st Cir. 1986).

96. *See Cheek*, 111 S. Ct. at 611; *see supra* text accompanying notes 74-76.

97. *Cheek*, 111 S. Ct. at 611.

98. *Id.*; *cf.* United States v. Murdock, 290 U.S. 389, 394 (1933) ("[T]he decision of issues of fact must be fairly left to the jury.").

99. *See Cheek*, 111 S. Ct. at 611; *see also, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (holding that the Court will construe a statute so as to avoid constitutional questions "unless such construction is plainly contrary to the intent of Congress"); *cf. supra* note 38 (noting that Congress may amend the tax crime statutes, as at least one commentator has urged).

the government. By holding that such views are "irrelevant to the issue of willfulness"[100] and need not be heard or considered by a jury, the Court was in effect stating that a defendant commits an "intentional violation of a known legal duty" when he refuses to comply with what he knows the statute *purports* to mean because of his erroneous opinion that the statute is unconstitutional.[101]

In a strongly worded but ultimately unconvincing concurring opinion, Justice Scalia objected to the logic behind this assertion:

> I find it impossible to understand how one can derive from the lonesome word "willfully" the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (*i.e.*, the legal nonexistence) of a textual prohibition does not.[102]

Citing *Marbury v. Madison*,[103] Scalia argued that it is conceptually impossible to say that defendants violate a "known legal duty" when they disregard a statute that they believe to be unconstitutional, because if the statute was in fact unconstitutional it would impose no legal duty.[104]

Although this argument is interesting and theoretically compelling, the majority wisely rejected it, choosing instead to focus on Congress's intent in placing the word "willfully" in the tax crime statutes. After remarking that Cheek's constitutional opinions "reveal full knowledge of the provisions at issue,"[105] and that Cheek had passed up the opportunity to test his beliefs in a civil action,[106] Justice White wrote:

> We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions.[107]

This argument is sound. It is difficult to believe that Congress, in enacting taxation statutes, or the Supreme Court, in interpreting

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100. *Cheek*, 111 S. Ct. at 613.

101. *See id.* at 612-13. Cheek's attorney expressed agreement with this view at oral argument: "[P]ersonal belief that a known statute is unconstitutional smacks of knowledge with existing law, but disagreement with it." *Id.* at 612 n.9.

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

103. 5 U.S. (1 Cranch) 137, 177-78 (1803).

104. *See Cheek*, 111 S. Ct. at 613-14 (Scalia, J., concurring).

105. *Id.* at 612.

106. *Id.* at 613.

107. *Id.*

them, anticipated that a person who understood the purported duties imposed by the tax laws could violate them and escape conviction merely because that person believed the tax system to be unconstitutional. As the authors of a recent article about the *Cheek* decision have noted, common sense supports the majority's position, as "Congress doubtless supposed its revenue laws were within Constitutional bounds."[108]

Finally, although the Court did not acknowledge this, it must also have been aware that excluding constitutional beliefs as a defense would benefit judicial economy. While one cannot be certain in predicting the actual effect of this exclusion, it seems likely that fewer tax protest cases will go to trial, and that those that do will consume less time. This practical concern may explain why the exclusion of constitutional beliefs has been the rule in several of the circuits,[109] contrary to Justice Scalia's contention that the majority's opinion "works a revolution in past practice."[110]

CONCLUSION

In *Cheek*, the Supreme Court finally announced the definitive interpretation of the willfulness requirement of the federal tax crime statutes. By holding that a defendant's claimed misunderstanding of the tax laws need not be objectively reasonable in order to negate willfulness, the Court brought the Seventh Circuit in line with the other circuits. But more significantly, the Court made clear that there can be no short-cuts in the prosecution of a specific intent offense, and at the same time reaffirmed the vitality of stare decisis by indicating that a circuit court may not ignore the clear dictates of Supreme Court precedent,[111] no matter how unfortunate the effect

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108. Jules Ritholz & David M. Kohane, *Supreme Court Finds Subjective Ignorance of the Law a Defense to Criminal Tax Fraud*, 1991 J. TAX'N 258.

109. *See* United States v. Whiteside, 810 F.2d 1306, 1311 (5th Cir. 1987) (branding defendant a "willful violator" despite belief that tax laws are unconstitutional); United States v. Phillips, 775 F.2d 262, 264 (10th Cir. 1985) (finding beliefs as to unconstitutionality irrelevant to issue of willfulness); United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983).

110. *Cheek*, 111 S. Ct. at 614 (Scalia, J., concurring).

111. It should be noted that the Court has been anything but steadfast in respecting stare decisis in its most recent criminal decisions. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (overruling two recent cases and holding that "victim impact" statements may be introduced during the penalty phase of capital trials); California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) (expanding the "automobile exception" for warrantless searches of vehicles and containers found therein, reversing the *Chadwick-Sanders* rule); Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991) (broadening the harmless error doctrine so that it may apply to coerced confessions in some instances, departing from the *Chapman* rule).

might be on law enforcement and judicial economy. Finally, by holding that a tax protester should be prohibited from submitting his constitutional opinions as a defense to a tax crime, the Court accurately perceived congressional intent while also making a sound policy choice.

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