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COMMENTS

IGNORANCE IS BLISS, ESPECIALLY FOR THE TAX EVADER

Comedian Steve Martin, in an old stand-up routine, tells his audience that by following his simple plan, they can have a million dollars and never pay taxes. Step one, he advises, is to get a million dollars. Step two, naturally, is to not pay taxes. The beauty of the strategy, however, rests in step three. When the Internal Revenue Service agent comes to your door asking why you have not paid taxes, Martin says, simply smile and say, "I forgot."¹

Although Martin was joking, under current Federal tax law, his plan succeeds. "Forgetting" to pay your taxes actually constitutes a valid defense to a charge of criminal tax evasion.² Other defenses include believing that wages are not income or that paper currency is not money.³ Forget what your criminal law professor taught you. Ignorance of the law is an excuse in tax crimes, and the only joke is on the Internal Revenue Service.

The Internal Revenue Service ("IRS") may assess criminal charges on taxpayers who willfully evade the payment of income taxes.⁴ In *Cheek v. United States*, the United States Supreme Court interpreted "willfully" as the taxpayer's actual knowledge that his actions violate the law.⁵ One who avoids taxes can avoid conviction

¹ STEVE MARTIN, *You can be a Millionaire*, on COMEDY IS NOT PRETTY! (Warner Bros. 1979).

² See *Cheek v. United States*, 498 U.S. 192, 202-03 (1991). In *Cheek*, the United States Supreme Court held that a good faith belief that one is not violating the law negates willfulness, a required element of criminal tax evasion.

³ *Id.*

⁴ I.R.C. § 7201 (1988). Section 7201 penalizes attempts to evade or defeat tax in the following manner:

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.

Id.

⁵ *Cheek*, 498 U.S. at 201.

by demonstrating his truly held belief that he owes no taxes.⁶ Moreover, the jury may not consider the reasonableness of this belief.⁷

The Supreme Court's interpretation of "willfulness" in *Cheek* created a huge tax loophole. This comment argues that Congress must close the *Cheek* loophole by modifying the Internal Revenue Code. The law should hold a taxpayer in "willful" violation of the tax code if he either subjectively intends to break the law or if, under an objective standard, he unreasonably relies upon a mistaken belief about the tax law. Part I traces the development of the "willfulness" doctrine, discussing the traditional rule that ignorance of the law is no defense to a crime, the split in the circuit courts regarding the interpretation of "willfulness," and the Supreme Court's decision in *Cheek*. Part II examines the post-*Cheek* application of the doctrine to tax evasion and to other white collar crimes. Part III argues that the law should require a taxpayer's mistaken belief that he does not owe taxes to be both objectively reasonable and truly held to serve as a defense.

I. DEVELOPMENT OF THE "WILLFULNESS DOCTRINE"

A. THE LAW OF IGNORANCE AND MISTAKE

A mistake of law occurs, for example, when one person shoots and kills another, believing that murder is not a crime.⁸ A mistake of fact, on the other hand, occurs if that same person knows that murder is illegal, but pulls the trigger anyway under the mistaken belief that the gun is not loaded.⁹ When a taxpayer miscalculates her income, she makes a mistake of fact, but if she believes, for instance, that the Internal Revenue Code does not tax capital gains, she operates under a mistake of law. In most cases, enormous legal consequences hinge on whether the defendant made a mistake of fact or a mistake of law. Generally, mistake of law is no defense to a criminal act, while mistake of fact is a valid defense if the error is both reasonable and honest.¹⁰ The tax law, however, renders the distinction meaningless, because either type of mistake exculpates

⁶ *Id.*

⁷ *Id.* at 203.

⁸ See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 406 (2d ed. 1986).

⁹ *Id.*

¹⁰ See Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939). Perkins further distinguishes between mistake of law and ignorance. "Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion." *Id.* at 35. Perkins notes that this distinction has been widely ignored by courts. This Comment treats mistake of law and ignorance of law as equivalent.

the defendant if honestly, even though unreasonably, made.¹¹ The tax law's failure to distinguish between mistakes of law and fact represents a significant departure from traditional criminal law.

"*Ignorantia legis neminem excusat*," or "ignorance of the law excuses no man" ranks among the most familiar maxims of law.¹² This rule usually applies regardless of the severity of the crime, and even if the entire community holds the mistaken belief.¹³ Commission of a crime requires both a criminal act and a criminal intent, although the defendant need not specifically intend to break the law.¹⁴ Simply intending to commit the criminal act satisfies the intent requirement in all but a small class of offenses in which the mental element is part of the crime itself.¹⁵

There are numerous reasons why the law has not historically allowed ignorance to excuse a criminal act. Protecting the public safety and welfare requires the presumption that each person knows the law.¹⁶ Justice Oliver Wendell Holmes made the following observation:

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.¹⁷

By establishing the rule that each citizen "must know what the law is and act at his peril,"¹⁸ the law encourages knowledge in an arena where ignorance is extremely harmful. Without this policy, said one court, "a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated [and] immunity from punishment would in most cases result. . . . The plea would be universally made, and would lead to interminable questions incapable of solution."¹⁹

¹¹ See, e.g., *Cheek*, 498 U.S. at 203.

¹² Mark D. Yochum, *Ignorance of the Law is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 221 (1989).

¹³ Perkins, *supra* note 10, at 37.

¹⁴ LAFAYE & SCOTT, *supra* note 8, at 223-24.

¹⁵ *Id.* at 133-34.

¹⁶ Perkins, *supra* note 10, at 40-41.

¹⁷ Yochum, *supra* note 12, at 222 n.4 (quoting HOLMES, *THE COMMON LAW* 48 (1881)).

¹⁸ Perkins, *supra* note 10, at 38 (quoting *Needham v. State*, 32 P.2d 92, 93 (1934)).

¹⁹ *Id.* at 41 (quoting *People v. O'Brien*, 31 P. 45, 47 (1892)).

B. SPECIFIC INTENT CRIMES

Some crimes require specific intent, or knowledge of violation of the law, as an essential element. In specific intent crimes, ignorance or mistake can serve as a defense if it negates the required mental state.²⁰ Certain statutes, including the Internal Revenue Code, expressly criminalize only "willful," "knowing," or "purposeful" conduct.²¹ Such statutes, however, have received different treatment from the courts depending on the nature of the regulated activity.

For example, in *United States v. International Minerals & Chemical Corp.*,²² the Supreme Court held that a shipper could "knowingly" violate a regulation without knowledge of the regulation's existence.²³ The defendant, International Minerals, was charged with shipping sulfuric and hydrofluosilicic acid interstate without proper shipping papers, in violation of Interstate Commerce Commission regulations.²⁴ International Minerals made no mistake of fact; it knew the shipment contained corrosive materials.²⁵ Rather, International Minerals contended that it was unaware of the regulation, and the question before the Court was, therefore, whether to allow the mistake of law as a defense.²⁶ A divided Court did not permit ignorance of the regulation to be a defense to its violation.²⁷ Because of the involvement of dangerous materials, "the probability of regulation [is] so great that anyone who is aware that he is in possession of . . . or dealing with [the materials] must be presumed to be aware of the regulation."²⁸ The majority reached the holding over the dissent of Justices Stewart, Harlan, and Brennan, who argued that a defendant cannot "knowingly" violate a regulation if the defendant is not aware of the terms of the regulation or that the activity violates the regulation.²⁹ According to the dissent, the majority

²⁰ Section 2.04(1) of the Model Penal Code states:

Ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

Model Penal Code § 2.04(1) (1985).

²¹ See *supra* note 4 for the full text of § 7201.

²² 402 U.S. 558 (1971).

²³ *Id.* at 565.

²⁴ The specific regulation was 49 C.F.R. 173.427. *Id.* at 559.

²⁵ *Id.* at 560.

²⁶ *Id.*

²⁷ *Id.* at 563.

²⁸ *Id.* at 565.

²⁹ *Id.* at 567 (Stewart, J., dissenting).

opinion ignored the statute's use of the word "knowingly."³⁰

C. "WILLFULNESS" IN TAX LAW

The Internal Revenue Code uses the word "willful" liberally.³¹ Before the Court addressed the issue in *Cheek v. United States*, several circuit courts formulated their own interpretations of the willfulness component of tax crime.

The Fifth and Tenth Circuits applied a subjective test, which asked whether a tax crime defendant truly believed his actions complied with the law. In *United States v. Phillips*,³² a taxpayer defended himself on the grounds that he truly believed his wages were not income.³³ The trial court had instructed the jury as follows:

A mistake of law must be objectively reasonable to be a defense. If you find that the defendant did not have a reasonable ground for his belief, then regardless of the defendant's sincerity of belief, you may find that he did not have a good faith misunderstanding of the requirements of the law.³⁴

The trial court convicted the defendant under this instruction, but the Tenth Circuit reversed and remanded for a new trial.³⁵ The court reasoned that by requiring a "willful" violation, Congress did not intend to impose criminal liability on those who rely on their good faith belief that they need not file a tax return.³⁶ For this reason, the Tenth Circuit stated, courts should use a subjective standard when evaluating a defendant's claim that he did not know he was breaking the law.³⁷ Thus, prosecutors must prove that tax eva-

³⁰ *Id.* at 568 (Stewart, J., dissenting).

³¹ See, e.g., I.R.C. § 7201 (1988) ("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 . . ."). See also I.R.C. § 7202 (1988) ("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 and pay over such tax shall . . . be guilty of a felony . . ."); I.R.C. § 7203 (1988) ("Any person required under this title to pay any estimated tax . . . [or] make a return, keep any records, or supply any information, who willfully fails to [meet these requirements is] guilty of a misdemeanor . . ."); I.R.C. § 7206(1) (1988) ("Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which . . . is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . ."). Similarly, I.R.C. § 7207 (1988) provides that a taxpayer who "willfully delivers or discloses to the Secretary any . . . [tax] document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$10,000 (\$50,000 in the case of a corporation) or imprisoned not more than 1 year, or both."

³² 775 F.2d 262 (10th Cir. 1985).

³³ *Id.* at 263.

³⁴ *Id.*

³⁵ *Id.* at 264.

³⁶ *Id.*

³⁷ *Id.*

sion defendants subjectively intended to disobey the law.

The subjective intent standard of *Phillips* paralleled decisions in several other circuits.³⁸ The circuits following the subjective standard have carefully distinguished between those taxpayers who misunderstand the law and those who understand but disagree with it.³⁹ A taxpayer who is unaware of the law may assert ignorance as a defense, but a taxpayer who merely disagrees with the law may not.⁴⁰

Before the Supreme Court decided *Cheek*, the Seventh Circuit took a different approach⁴¹ by permitting only honest and reasonable mistakes as a defense to a tax evasion charge.⁴² The Seventh Circuit applied an objective test to the taxpayer's mistaken "belief."⁴³ If a reasonable person would realize the groundlessness of the belief, the court may impose criminal sanctions.⁴⁴ A defendant's honest but unreasonable belief that he owed no taxes was held to be no defense to tax evasion.⁴⁵ If a court found the defendant's belief unreasonable as a matter of law, the sincerity of the belief became irrelevant.⁴⁶ In such a case, the court was not obligated to accept evidence demonstrating that the defendant actually held the mistaken belief.⁴⁷

Under the Seventh Circuit's pre-*Cheek* approach, courts determined the reasonableness of a belief on a case by case basis.⁴⁸ In *United States v. Buckner*,⁴⁹ however, the court accepted the prosecutor's list of five defenses which would always be considered unreasonable, or, in Judge Easterbrook's words, "sanction bait."⁵⁰ The

³⁸ See *United States v. Whiteside*, 810 F.2d 1306 (5th Cir. 1987); *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985); *United States v. Kraeger*, 711 F.2d 6 (2nd Cir. 1983); *Cooley v. United States*, 501 F.2d 1249 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); *Yarborough v. United States*, 230 F.2d 56 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956); *Battjes v. United States*, 172 F.2d 1 (6th Cir. 1949).

³⁹ See, e.g., *United States v. Whiteside*, 810 F.2d 1306 (5th Cir. 1987) (holding that district court properly instructed jury to apply subjective test).

⁴⁰ *Id.* at 1311.

⁴¹ This Comment argues that the pre-*Cheek* Seventh Circuit standard is superior to the current system and should be adopted. See *infra* Part III.

⁴² See *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987); *United States v. Danvenport*, 824 F.2d 1511 (7th Cir. 1987); *Coleman v. Commissioner*, 791 F.2d 68 (7th Cir. 1986); *United States v. Bressler*, 772 F.2d 287 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *United States v. Witvoet*, 767 F.2d 338 (7th Cir. 1985); *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

⁴³ *Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986).

⁴⁴ *Id.*

⁴⁵ *United States v. Witvoet*, 767 F.2d 338 (7th Cir. 1985).

⁴⁶ *United States v. Buckner*, 830 F.2d 102, 103-04 (7th Cir. 1987).

⁴⁷ *Id.*

⁴⁸ *Id.* at 104.

⁴⁹ 830 F.2d 102 (7th Cir. 1987).

⁵⁰ *Id.* at 103.

prima facie unreasonable defenses included the belief that the Sixteenth Amendment, establishing income taxes, was never properly ratified, that wages are not income, that tax laws are unconstitutional, that filing a return is self-incriminating and therefore privileged by the Fifth Amendment, and that federal reserve notes are not income.⁵¹ The court noted that a mistake could be reasonable only if there was a genuine dispute about the law.⁵²

These five rejected defenses are all common defense tactics of tax protestors.⁵³ The Seventh Circuit developed the objective standard to combat what it perceived as abuse of the legal system by the tax protest movement.⁵⁴ It vigorously defended its standard, even in the face of criticism from other circuits,⁵⁵ in part out of its desire to deprive tax protestors of their favorite weapons. The subjective standard followed in other circuits deferred to the "true beliefs" of the defendant, an approach the Seventh Circuit simply refused to accept. As Judge Easterbrook wryly noted, "some people believe with great fervor preposterous things that just happen to coincide with their self-interest."⁵⁶

The tax protest movement frustrated the increasingly impatient Seventh Circuit with creative but absurd defenses. In *United States v. Witvoet*,⁵⁷ for example, the defendant argued that he did not pay taxes because "tax experts" advised him that payment of income tax was "purely voluntary" and in some cases, illegal.⁵⁸ One of these experts called himself a C.P.A., a designation not for "certified public accountant," but for "citizen's protection agent."⁵⁹ In *United States v. Davenport*,⁶⁰ the defendant gave several reasons for not paying his taxes. First, "[ninety-eight] percent of federal reserve notes [were] bogus."⁶¹ Second, tax laws only applied to government

⁵¹ *Id.*

⁵² *Id.* at 104. As an example of a "reasonable" mistake, the court said that a person who sold his blood might not believe that the sale is taxable, since there is no direct precedent. However, "[c]linging to a proposition that has been unanimously rejected by numerous courts is not a 'reasonable' mistake." *Id.*

⁵³ *Id.* See *infra* Part III.A. for a description and discussion of tax protestors.

⁵⁴ See, e.g., *Miller v. United States*, 868 F.2d 236, 240 (7th Cir. 1989); *Coleman v. Commissioner*, 791 F.2d 68, 69 (7th Cir. 1986) (both upholding assessment of civil penalty on tax protestor defendant for filing frivolous return).

⁵⁵ See *Buckner*, 830 F.2d at 103 ("Although [the standard of objective reasonableness] has been challenged by other circuits, we have reaffirmed it.") (citation omitted).

⁵⁶ *Coleman v. Commissioner*, 791 F.2d 68, 69 (7th Cir. 1986).

⁵⁷ 767 F.2d 338 (7th Cir. 1985).

⁵⁸ *Id.* at 339.

⁵⁹ *Id.*

⁶⁰ 824 F.2d 1511 (7th Cir. 1987).

⁶¹ *Id.* at 1513.

workers and corporate officers.⁶² Finally, the defendant reasoned that wages were not income because income tax is based on "net receipts after deduction of all expenses."⁶³ The Seventh Circuit rejected all of these beliefs as objectively unreasonable.⁶⁴

D. THE CHEEK DECISION

In 1991, the United States Supreme Court addressed the conflict between the circuits in *Cheek v. United States*.⁶⁵ In *Cheek*, the Court faced the task of defining "willfully," and determining whether a defendant taxpayer could use an honest but unreasonable mistake of law as a defense.⁶⁶

John L. Cheek, an American Airlines pilot, stopped filing income tax returns in 1980.⁶⁷ Additionally, he claimed as many as sixty withholding allowances on his W-4 forms.⁶⁸ The IRS charged Cheek with six counts of willfully failing to file a federal income tax return in violation of United States Code Section 7203,⁶⁹ and three counts of willfully attempting to evade federal income taxes, in violation of United States Code Section 7201.⁷⁰

Representing himself at trial, Cheek testified that in 1978, he began following the advice of a group which believed, among other

⁶² *Id.*

⁶³ *Id.* In 1978, Davenport sent a letter to the IRS explaining how he was computing his taxes:

Nowhere in the instruction booklet could I find a computation table that ideally conforms to my particular demands. . . . Ex-President Richard M. Nixon and cohorts has [sic] had access to such a table apparently, in that he based his taxes on less than one half of one percent .005 percent [sic] This is the formula I am basing my taxes on since the Constitution of the United States of America requires that taxes be levied equal to all.

Id. at 1512.

John Hyde, an attorney and fellow member of the Citizens for Just Taxation testified on behalf of Davenport. In the following excerpts from testimony contained in an appendix to the *Davenport* case, Hyde recalls a conversation between himself and the defendant:

[H]e said . . . Leviticus calls for a system of honest weights and measures . . . the Bible speak [sic] of money as the fruit of the earth, substances from the earth. And that's why we use gold and silver. . . . I said . . . [y]our income tax is a tax not on value, but on excess value. . . . It's a tax on net receipts after deduction of all expenses. I said, so the question of whether you have received anything, receive value that can constitute a profit or a gain, gets right down to the nub of what the heck is value. Money of gold and silver has unquestioned value.

Id. at 1519-20.

⁶⁴ *Id.* at 1519.

⁶⁵ 498 U.S. 192, 198-99 (1991).

⁶⁶ *Id.*

⁶⁷ *Id.* at 194.

⁶⁸ *Id.*

⁶⁹ See *supra* note 31 for the text of § 7203.

⁷⁰ See *supra* note 4 for the full text of § 7201.

things, in the unconstitutionality of income taxes.⁷¹ Cheek claimed he had not acted willfully because he had sincerely believed the teachings of this group.⁷² Cheek also claimed to believe that wages were not income and that he was not a "person" as defined by the Internal Revenue Code.⁷³

The district judge instructed the jury that "willfulness" meant a "voluntary and intentional violation of a known legal duty, a burden that could not be proved by showing mistake, ignorance, or negligence."⁷⁴ The court also instructed the jury that a reasonable, good faith mistake of law would negate willfulness, but mere disagreement with the law would not.⁷⁵ When the jury requested clarification of the good faith requirement, the judge instructed that "an honest but unreasonable belief is not a defense and does not negate willfulness."⁷⁶ Under this standard, the jury found Cheek guilty.⁷⁷

Cheek appealed, arguing that the district court erred by giving the jury an objective reasonableness instruction.⁷⁸ The Seventh Circuit, following its own precedent, upheld the instruction.⁷⁹ Because the Seventh Circuit's interpretation of "willfully" in the tax code conflicted with the interpretation of other circuits, the Supreme Court granted certiorari.⁸⁰

The Supreme Court began by noting the traditional principle that ignorance of the law provides no defense and the corresponding presumption that every person knows the law because the law is "definite and knowable."⁸¹ The Court said, however, that the growing volume and complexity of statutes and regulations, including the Internal Revenue Code, raised questions about the soundness of this premise.⁸² Consequently, the Court long ago determined that Congress used the word "willfully" in the tax code to carve an exception to the traditional principle.⁸³ The Court recalled its sixty year old statement from *United States v. Murdock*:

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 re-

⁷¹ *Id.* at 195-96.

⁷² *Id.* at 196.

⁷³ *Id.* at 197 n.5.

⁷⁴ *Id.* at 196.

⁷⁵ *Id.*

⁷⁶ *Id.* at 197.

⁷⁷ *Id.* at 198.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 198-99.

⁸¹ *Id.* at 199.

⁸² *Id.* at 199-200.

⁸³ *Id.* at 200.

turn, 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.⁸⁴

Since *Murdock*, the Court had defined "willfully," in the context of the tax code, as a "voluntary, intentional violation of a known legal duty."⁸⁵

Cheek argued that by allowing the jury to consider the objective reasonableness of his beliefs, the district court's instruction was inconsistent with the *Murdock* interpretation.⁸⁶ The Supreme Court agreed, stating that the jury should have determined whether the prosecution had proved Cheek's awareness of his duty to file a return and pay taxes.⁸⁷ The objective reasonableness of his claimed belief or misunderstanding was completely irrelevant to this question.⁸⁸ No matter how unreasonable a jury might find Cheek's belief that the Internal Revenue Code did not treat wages as income, if they found that Cheek truly held such a belief, they must acquit him.⁸⁹

The Court rejected Cheek's claim that he believed income tax laws violated the Constitution.⁹⁰ This belief, said the Court, was not an innocently mistaken belief about the content of the law, but a studied conclusion that the law was invalid.⁹¹ In other words, Cheek did not make a mistake about the law; he simply disagreed with it.⁹²

Over the dissent of Justices Blackmun and Marshall, who feared that the majority opinion would "encourage taxpayers to cling to frivolous views . . . in the hope of convincing a jury of their sincerity,"⁹³ the Court vacated and remanded the case.⁹⁴ The Seventh Circuit, the majority held, erred by allowing objective reasonableness to enter the calculation.⁹⁵ Thus, *Cheek* demands a purely subjective inquiry into the taxpayer's mental state to determine whether the defendant willfully violated the tax code.⁹⁶

⁸⁴ *Id.* at 200 (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)).

⁸⁵ *Cheek*, 498 U.S. at 200 (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)).

⁸⁶ *Id.* at 201.

⁸⁷ *Id.*

⁸⁸ *Id.* at 202.

⁸⁹ *Id.*

⁹⁰ *Id.* at 204.

⁹¹ *Id.* at 205.

⁹² The Court noted that taxpayers who know the law but disagree with it have access to mechanisms through which they can challenge the law. A taxpayer can pay taxes according to the law and then challenge the law in court. *Id.* at 206.

⁹³ *Id.* at 210 (*Blackmun, J.*, dissenting).

⁹⁴ *Id.* at 207.

⁹⁵ *Id.* at 206-07.

⁹⁶ *Id.*

II. "WILLFULNESS" AFTER *Cheek*

Commentators have given *Cheek* mixed reviews. One commentator hails the decision for striking "a sensible balance between disciplined regard for the dictates of precedent and awareness of practical policy ramifications."⁹⁷ The Seventh Circuit approach, he argues, would have "benefitted judicial economy at the expense of logic and consistency."⁹⁸ Another commentator, however, contends that the Supreme Court's narrow interpretation of "willfulness" emasculates the Internal Revenue Code by making it virtually impossible to convict tax evaders.⁹⁹

Cheek has raised new questions as the circuits struggle to determine the scope of *Cheek*'s definition of "willfulness." Circuit courts have construed *Cheek* narrowly in some cases but broadly in others.¹⁰⁰

A. APPLICATION OF *CHEEK* TO TAX CASES IN THE COURTS OF APPEALS

The Second Circuit gives *Cheek* its broadest reading.¹⁰¹ In *United States v. Regan*,¹⁰² the Second Circuit relied on *Cheek* to reverse a district court decision.¹⁰³ In *Regan*, an investment firm entered into several stock sale and repurchase agreements with other investment houses in order to recognize tax losses on stock which had depreciated in value.¹⁰⁴ The defendants improperly recognized tax losses, they claimed, because they mistakenly believed that their transactions fell outside the scope of Internal Revenue Code Section 1058, which provides for nonrecognition of gains or losses under certain circumstances.¹⁰⁵ The defense produced witnesses who testified that the firm's interpretation of section 1058 was reasonable, but the district court ruled as a matter of law that the firm's interpretation was incorrect.¹⁰⁶ Citing *Cheek*, the Second Circuit re-

⁹⁷ Dwight W. Stone, II, Note, *Cheek v. United States: Finally, A Precise Definition of the Willfulness Requirement in Federal Tax Crimes*, 51 MD. L. REV. 224, 224 (1992).

⁹⁸ *Id.*

⁹⁹ See Walter T. Henderson, Jr., Comment, *Criminal Liability Under the Internal Revenue Code: A Proposal to Make the "Voluntary" Compliance System a Little Less "Voluntary"*, 140 U. PA. L. REV. 1429, 1436 (1992).

¹⁰⁰ See, e.g., *United States v. Regan*, 937 F.2d 823 (2d Cir. 1991) (broad interpretation of *Cheek*); *United States v. Fingado*, 934 F.2d 1163 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 320 (1991) (narrow reading of *Cheek*).

¹⁰¹ David Spears, *Good Faith Defense One Year After 'Cheek'*, N.Y.L.J., June 2, 1992, at 1, 5.

¹⁰² 937 F.2d at 823.

¹⁰³ *Regan*, 937 F.2d at 827.

¹⁰⁴ *Id.* at 825.

¹⁰⁵ *Id.* at 825-26.

¹⁰⁶ *Id.* at 826.

versed, holding that the only relevant issue was whether the defendant's belief was held in good faith.¹⁰⁷ The district court erred by not giving the jury a specific good faith instruction.¹⁰⁸ The appellate court reasoned that although the district court had given a "generalized" good faith instruction, the defendant-appellants, who were charged with sixty-four counts of tax, securities, and mail fraud, were entitled under *Cheek* to a clear instruction that a genuine, though incorrect, belief required an acquittal on the tax evasion charges.¹⁰⁹

In *United States v. Pabisz*,¹¹⁰ the Second Circuit again reversed a district court decision.¹¹¹ Defendant Ronald Pabisz, an electrician, conducted his own legal research¹¹² and concluded that the law did not require him to file income tax returns or pay taxes.¹¹³ As in *Regan*, an unclear jury instruction proved fatal.¹¹⁴ The Second Circuit concluded that the given instruction could have "seriously misled [the jury] into believing that Pabisz's good faith beliefs could negate the element of willfulness only if those beliefs were objectively reasonable."¹¹⁵ The court should have instructed the jury to consider whether Pabisz subjectively believed he was not obligated to pay taxes.¹¹⁶

Unlike *Cheek*, however, the Second Circuit distinguishes between reckless ignorance and deliberate ignorance. While deliberate ignorance undercuts a good faith defense in the Second Circuit, reckless ignorance does not.¹¹⁷ The Second Circuit upheld a district court's instruction that "reckless ignorance of the tax law does not constitute willful intent to violate the law."¹¹⁸

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 827.

¹⁰⁹ *Id.*

¹¹⁰ 936 F.2d 80 (2d Cir. 1991).

¹¹¹ *Id.* at 84.

¹¹² Pabisz read several Supreme Court cases, studied the Internal Revenue Code, wrote letters to three Congressmen and contacted the IRS. Additionally, he accompanied his friends to meetings of a group which questioned the legal obligation of taxpaying. *Id.* at 81.

¹¹³ *Id.*

¹¹⁴ The instruction provided:

The issue for you is was the defendant reasonable in having a good faith belief that the income tax law did not apply to him, or did he willfully evade the assessment of taxes? This issue of intent as to the defendant is one which the jury must determine from consideration of all the evidence in the case bearing on defendant's state of mind.

Surprisingly, defense counsel agreed to this instruction. *Id.* at 82.

¹¹⁵ *Id.* at 83.

¹¹⁶ *Id.*

¹¹⁷ *United States v. Fletcher*, 928 F.2d 495, 502 (2d Cir. 1991).

¹¹⁸ *Id.*

In *United States v. Fletcher*,¹¹⁹ the Second Circuit permitted the jury to rely on some objective factors when determining the defendant's actual beliefs.¹²⁰ Because a jury cannot easily determine a defendant's subjective belief, the trial court permitted the jury to consider the defendant's education and training.¹²¹ The defendant, an attorney with an accounting background, argued that such an instruction "invited a jury to infer his knowing membership in the conspiracy from what he ought to have known about the tax law."¹²² The Second Circuit, however, upheld the instruction in its entirety, reasoning that the trial court's instruction adequately warned the jury that the Fletchers were guilty only if they knew their actions violated the law.¹²³

Other circuits have applied the *Cheek* rule differently. The Fifth Circuit, like the Second Circuit, permits a jury to consider the basis for the defendant's good faith belief. The Fifth Circuit reasons that the Supreme Court's *Cheek* decision "clearly anticipated and condoned the jury's consideration of the bases upon which the defendant claims to have held his subjective belief."¹²⁴ This rationale recognizes the practical difficulty in distinguishing between subjective and objective beliefs.

The Tenth Circuit, on the other hand, may actually prohibit the defendant from introducing evidence demonstrating the basis of his subjective beliefs. In *United States v. Fingado*,¹²⁵ the defendant testified that he sincerely believed he was not required to file tax returns.¹²⁶ He based his belief on materials he received at a seminar, a newspaper article, and a book entitled *The Big Bluff, Tax Tyranny in the Guise of the Law, The Constitution v. The Tax Collector*.¹²⁷ The district court, however, did not allow the jury to review the contents of the book¹²⁸ and the circuit court affirmed, a result which one commentator called "distinctly unfair."¹²⁹

According to *Cheek*, true ignorance of the tax law is a defense.¹³⁰ Under the Tenth Circuit's interpretation of *Cheek*, however, as in the

¹¹⁹ *Id.* at 495.

¹²⁰ *Id.* at 502.

¹²¹ *Id.* at 501.

¹²² *Id.*

¹²³ *Id.* at 503.

¹²⁴ *United States v. Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991).

¹²⁵ 934 F.2d 1163 (10th Cir. 1991).

¹²⁶ *Id.* at 1164.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Spears, *supra* note 101, at 5.

¹³⁰ *Cheek v. United States*, 498 U.S. 192, 206 (1991).

Second Circuit, true ignorance of the tax law is a defense only if the ignorance is not deliberate.¹³¹ Under a deliberate ignorance instruction,¹³² the question is no longer simply "what did the defendant actually know?" but also "was the defendant deliberately ignorant?" With the inquiry into "deliberate ignorance," the Tenth Circuit has transformed *Cheek's* holding. A taxpayer who truly does not know he is breaking the law can still be found guilty if the jury decides that he purposely avoided learning the law.¹³³ This arguably sensible standard¹³⁴ limits the application of *Cheek*. According to the Tenth Circuit, ignorance of the law alone does not excuse the defendant from tax evasion. A taxpayer must also have never declined an opportunity to become knowledgeable.¹³⁵

As a practical matter, the court must give the jury something on which to base its determination other than the defendant's testimony that he truly believed he complied with the law. Under *Cheek*, however, the court must carefully instruct the jury to ultimately inquire into what the defendant actually believed.¹³⁶ If the court permits the jury to consider evidence which does not directly relate to the taxpayer's state of mind, the jury may inappropriately answer the wrong question. For example, in a case in which the court admits into evidence the defendant's background as an accountant, the jury should consider that information only to the extent it bears on that particular defendant's beliefs. This inquiry comes perilously close to the improper question of whether it is reasonable for an accountant to be unaware of the tax rule in question.

A proper instruction also makes it clear that a taxpayer may assert a good faith misunderstanding, but not a good faith disagreement with the law, as a defense.¹³⁷ If a defendant honestly holds a mistaken belief about the obligations imposed by the tax law, he has

¹³¹ See *Fingado*, 934 F.2d at 1166 (10th Cir. 1991); *Fletcher*, 928 F.2d at 502 (2d Cir. 1991).

¹³² In *Fingado*, the Tenth Circuit upheld the "deliberate ignorance" instruction:

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.

Id.

¹³³ *Id.*

¹³⁴ In Part III, this Comment argues that the court should impose a duty to learn on taxpayers.

¹³⁵ *Fingado*, 934 F.2d at 1166.

¹³⁶ *Cheek v. United States*, 498 U.S. 192, 202-03 (1991).

¹³⁷ *United States v. Barnett*, 945 F.2d 1296, 1298 (5th Cir. 1991).

not acted willfully.¹³⁸

B. APPLICATION OF *CHEEK* TO NON-TAX CRIMES

The Supreme Court once said that “‘willful’ is a word of many meanings, its construction often being influenced by its context.”¹³⁹ Judge Learned Hand has called it “one of the most troublesome words in a statute.”¹⁴⁰ The word so bedeviled the drafters of the Model Penal Code that they purposely excluded it.¹⁴¹ In spite of this judicial trepidation, the term “willfully” appears throughout the criminal law, raising the question of whether the Supreme Court’s definition of “willfulness” in *Cheek* has any application outside of tax cases. Although non-tax cases frequently cite *Cheek*, generally only those charged with tax crimes have enjoyed the full protection of *Cheek*’s ignorance defense.

In *United States v. Dockray*,¹⁴² the government charged the defendant with mail and wire fraud, an offense requiring proof of intent to defraud.¹⁴³ In defense, Dockray claimed that he acted in good faith.¹⁴⁴ He asked the judge to specifically instruct the jury that if they found that he truly, even if mistakenly, believed he was acting properly, they should find him not guilty.¹⁴⁵ The district court explained the requirement of intent to defraud to the jury, but did not use the words “good faith.”¹⁴⁶ The First Circuit affirmed, recognizing the good faith defense in mail fraud cases but holding that the words “good faith” were not magical and not required in the jury instruction.¹⁴⁷ The court said *Cheek* did not control because the issue in the instant case was whether the existence of the good faith defense had been adequately conveyed to the jury, a point which *Cheek* did not address.¹⁴⁸

One commentator asserts that in *Dockray*, the First Circuit took a “half step” in its “aggressive effort to limit the rule of *Cheek*” to tax evasion cases.¹⁴⁹ The court completed this step in *United States v.*

¹³⁸ *Id.*

¹³⁹ *Spies v. United States*, 317 U.S. 492, 497 (1943).

¹⁴⁰ Yochum, *supra* note 12, at 224 n.12 (quoting Model Penal Code § 2.02(10) comment n.47).

¹⁴¹ *Id.*

¹⁴² 943 F.2d 152 (1st Cir. 1991).

¹⁴³ *Id.* at 154.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 154 n.1.

¹⁴⁶ *Id.* at 154.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 156.

¹⁴⁹ Spears, *supra* note 101, at 5.

Donovan.¹⁵⁰ In *Donovan*, the government charged a bank president with willfully failing to file currency transaction reports, which the law requires whenever a bank accepts any cash deposit exceeding \$10,000.¹⁵¹ The defendant argued that *Cheek* established a purely subjective test for every white collar crime which includes willfulness as an element of the offense.¹⁵² Consequently, he asked for a *Cheek* jury instruction which would require the jury to exonerate him if they found that he honestly did not know that his failure to report the transaction violated the currency transaction report filing requirement, regardless of the reasonableness of his belief.¹⁵³

Rejecting the defendant's argument, the court explicitly stated that *Cheek* applies only to tax crimes.¹⁵⁴ Calling *Donovan's* interpretation of *Cheek* "distorted," the First Circuit noted that "nowhere in *Cheek*, or in the Court's earlier opinions involving criminal prosecutions under the tax laws, is there any indication that a purely subjective standard should be used in evaluating state-of-mind defenses in prosecutions under other federal statutes."¹⁵⁵ In *Cheek*, the Court "crafted a narrow exception, limited to tax cases, in which subjective mistake of law can constitute an absolute defense."¹⁵⁶ The *Donovan* court believed that *Cheek's* rationale—that tax laws were complicated and difficult to understand—did not apply to the bank's filing requirements.¹⁵⁷

Thus, as subsequent non-tax decisions make clear, *Cheek* created a specific, narrow exception to the traditional common law principle that ignorance is no defense. Ignorance of the law is still no defense—unless the crime is tax evasion.

III. THE NEED FOR AN OBJECTIVE STANDARD

From a *stare decisis* perspective, the Supreme Court correctly decided *Cheek*. Supreme Court cases have long supported the notion that, in the tax law, "willfulness" means knowledge that one's activity violates the law.¹⁵⁸ The Seventh Circuit, believing that the Supreme Court cases of *Murdock*,¹⁵⁹ *Bishop*,¹⁶⁰ and *Pomponio*¹⁶¹ did

¹⁵⁰ 984 F.2d 493 (1st Cir. 1993).

¹⁵¹ *Id.* at 494.

¹⁵² *Id.* at 500.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Murdock*, 290 U.S. 389 (1933).

¹⁵⁹ 290 U.S. 389 (1933).

not preclude an objective reasonableness instruction,¹⁶² was clearly an aberration among the circuit courts, the rest of which applied a purely subjective standard. In *Cheek*, the Supreme Court clarified its position on the impropriety of an objective reasonableness instruction.¹⁶³ At the very least, the *Cheek* decision was consistent with previous Supreme Court interpretations of "willfulness."

Although the Supreme Court has clearly defined willfulness, this definition is not necessarily optimal in terms of benefits to society and fairness to individual taxpayers.¹⁶⁴ So far, this Comment has attempted only to chronicle the development and application of the "willfulness" doctrine in federal tax law, before and after the Supreme Court's decision in *Cheek*. In this section, however, this Comment argues that the Seventh Circuit's pre-*Cheek* approach is superior to the present state of the law. Before a defendant should be permitted to claim mistake or ignorance as a defense, the law should require her to demonstrate that her mistaken belief or lack of knowledge was objectively reasonable. An unreasonable belief, even if sincerely held, should not serve as a defense to tax evasion.

Under this proposal, a taxpayer's mistaken belief would excuse the taxpayer from criminal liability only if the belief is both objectively reasonable and sincerely held. Similar to a negligence standard, the law would presume the taxpayer to have at least a minimal knowledge of the tax law. This standard would not require taxpayer expertise or even familiarity with all aspects of tax law. It simply presumes that all Americans are aware that taxes exist and insists they take basic steps to learn the fundamentals, such as reading the IRS tax form instructions.

Using an objective reasonableness standard would bring tax law into alignment with other areas of criminal law. Also, an objective standard is fair to the defendant, it better prevents flagrant abuse of the tax system, and it would improve tax compliance. Congressional action, in the form of either replacing or redefining the word "willfully" in the Internal Revenue Code, could effectively realize the advantages that an objective approach would generate without upsetting a long line of Supreme Court jurisprudence.

A. THE OBJECTIVE STANDARD PROVIDES CONSISTENCY

Our fundamental sense of fair play insists that we treat similar

¹⁶⁰ 412 U.S. 346 (1973).

¹⁶¹ 429 U.S. 10 (1976).

¹⁶² *United States v. Davenport*, 824 F.2d 1511, 1518 (7th Cir. 1987).

¹⁶³ *Cheek v. United States*, 498 U.S. 192, 202-03 (1991).

¹⁶⁴ *Yochum*, *supra* note 12, at 233.

situations similarly. The law, in its pursuit of justice, places a great premium on consistency. One of the oldest and best known principles of the American legal system is that ignorance of the law cannot serve as a defense for a criminal act.¹⁶⁵ As drafted by Congress and interpreted by courts, the Internal Revenue Code contains an unnecessary and ill-advised exception to this principle for tax crimes.

In *Cheek*, the Supreme Court failed to provide a logical basis on which to distinguish tax evasion from other types of crime, where citizens are presumed to know the law and act at their peril. Even if the courts could provide a distinction between common law crimes such as murder and more modern regulatory crimes, they have failed to provide a justification for applying one standard of willfulness to tax cases and a different standard of willfulness to other white collar crime cases.

The Supreme Court argues that the great complexity of the tax code justifies the tax crime exception.¹⁶⁶ However, complex laws govern other white collar crimes, and in these cases, the law does not excuse ignorance. *Cheek* gives special treatment to "ignorant" tax evaders.¹⁶⁷ *Donovan* makes clear that *Cheek*'s subjective test applies only to tax crimes.¹⁶⁸ Other white collar crime defendants can "willfully" violate a law even if they truly, subjectively believe they are faithfully complying with it.¹⁶⁹ Thus, "willfully" means one thing to a tax defendant and something else to a defendant accused of a different white collar crime.

The courts should not excuse taxpayer ignorance because of the complexity of the tax code. Other white collar crime statutes can be equally complex.¹⁷⁰ In *Donovan*, a bank president claimed to misunderstand the currency transaction recording requirements of 31 U.S.C. § 5313(a);¹⁷¹ in *Cheek*, an airline pilot claimed to misunderstand the law which says income is taxable.¹⁷² While some provisions of the Internal Revenue Code are extremely complicated, the basic concepts of taxation that apply to most taxpayers are not. As one commentator writes, "[i]f anything, the laws relating to money laundering, securities, and other 'white-collar' areas are more esoteric and more difficult to comprehend than the comparatively straightforward requirements concerning the reporting of wages as

¹⁶⁵ *Id.* at 221.

¹⁶⁶ *See Cheek*, 498 U.S. at 199-200.

¹⁶⁷ *Id.*

¹⁶⁸ *United States v. Donovan*, 984 F.2d 493, 500 (1st Cir. 1993).

¹⁶⁹ *Id.*

¹⁷⁰ *Spears*, *supra* note 101, at 6.

¹⁷¹ *Donovan*, 984 F.2d at 494.

¹⁷² *Cheek v. United States*, 498 U.S. 192, 194 (1991).

income and the payment of taxes.”¹⁷³

Tax statutes and white collar crime statutes arguably differ in one important respect: the types of people attempting to comply with them. Individuals who must comply with securities laws or bank recording regulations, for instance, usually possess some technical expertise as a result of their vocation. Individuals who must comply with tax laws often have no business background. This argument, however, does not justify the use of different standards. Courts should hold an individual responsible for knowing the laws governing that individual's sphere of activity. The bank president bears the responsibility of operating a bank and complying with applicable laws, and the ordinary citizen bears the responsibility of paying taxes and following the Form 1040 instructions.

The criminal law currently applies the subjective standard only in tax cases, even though the special treatment of tax defendants has no logical foundation. The disparate treatment of tax crime defendants and other white collar crime defendants is unfair because it is based on transparent distinctions. Using an objective standard in both instances would make the law more consistent, and therefore more just.

B. THE OBJECTIVE STANDARD PROVIDES FAIRNESS

John Cheek's Seventh Circuit brief analogizes his indoctrination into a tax protest group to the foibles of a naive fraud victim who is taken in by a smooth-talking "con man."¹⁷⁴ Cheek compares the tax protestors who persuaded him that their beliefs were true to "snake-oil salesmen of lore" and argues that he "bought their desert real estate and their wellness potions."¹⁷⁵ Unlike the sucker who buys snake-oil, however, John Cheek and the others directly benefitted from being "taken in." Because he benefitted, the law need not sympathize with him as though he were a victim. Cheek and other tax protestors more closely resemble a person who buys a new color television set from the back of a truck in an alley for twenty dollars. Despite suspicions about the legitimacy of the sale and the television's origin, the purchaser keeps the television and remains silent.

Critics of the pre-Cheek Seventh Circuit objective standard contend that it unfairly punished taxpayers who made innocent, honest mistakes. Even though the objective standard only punishes unrea-

¹⁷³ Spears, *supra* note 101, at 6.

¹⁷⁴ See Brief for Petitioner, Cheek v. United States, 882 F.2d 1263 (7th Cir. 1990) (No. 89-658).

¹⁷⁵ *Id.*

sonable mistakes, critics fear that the courts will jail "honest and sincere persons whose legal sophistication fails to reach some judicially-created standard."¹⁷⁶ The judicially created standard of reasonableness, however, can be set at a level which ensures that those who make an effort to reach it will succeed. The fishnet can be dropped low enough to capture only the bottom-dwellers.

An objective standard would impose a duty on taxpayers to know the fundamental concepts of the tax law. It would not require the taxpayer to understand all the nuances of the tax code. The law would simply presume that all citizens know that a tax system exists which requires taxpayers to pay income taxes, just as it presumes that everyone who drives a car knows the traffic laws. For example, a taxpayer's honestly held but mistaken belief that she may deduct all of her capital losses would qualify as reasonable;¹⁷⁷ John Cheek's honestly held but mistaken belief that wages are not income would not.

The presumption that citizens are aware of tax filing requirements does not unduly burden taxpayers. If death and taxes are the only two sure things in life, it seems only natural to presume that adults are aware of each.

In his brief, Cheek criticized the Seventh Circuit for using a standard under which taxpayers with questions or confusion about their tax obligations act at their peril.¹⁷⁸ Forcing taxpayers to act at their peril is, if anything, an advantage of the Seventh Circuit objective approach. When faced with an objective standard, a taxpayer who is uncertain about his obligations under the law will either carefully read his instructions, seek advice from a professional or obtain free assistance from the IRS. If the same confused taxpayer is not forced to act "at his peril," instead of taking steps to inform himself, he may simply assume that the correct answer to his tax question is the one which most reduces his tax liability.

Congress should give the taxpayer the benefit of the doubt, defining reasonableness broadly so as to allow all but the most outrageous mistakes as a defense. In practice, almost nobody would fall into the crack between the objective and subjective standards. There is the discomfoting possibility, however, that under the objective standard a taxpayer who truly wanted to do the right thing could make an honest mistake which is deemed unreasonable—and by implication, criminal—by a jury.

¹⁷⁶ *Id.*

¹⁷⁷ Capital losses may be deducted only to the extent of capital gains, plus the lesser of \$3000 or the excess of losses over gains. I.R.C. § 1211(b) (1988).

¹⁷⁸ Brief for Petitioner, *Cheek* (No. 89-658).

There are two safeguards, however, which would prevent this unfortunate result. The first is IRS discretion in deciding which taxpayers to prosecute. The objective standard gives the IRS a powerful weapon because the standard makes it easier to convict tax evaders. Because the IRS operates with limited resources of time and money, however, it probably will not try to use this weapon in marginal cases, where the taxpayer's mistake looks honest even if it does not look reasonable.

The second safeguard is that in practice, the same outcome will usually result regardless of the chosen standard. Even when the court instructs the jury to use the subjective standard and to determine what the defendant actually believed, the jury often uses an objective standard anyway. Under *Cheek*, juries may consider the reasonableness of the belief, but only as it pertains to the ultimate issue of the defendant's subjective belief.¹⁷⁹ As the Court put it, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties."¹⁸⁰ When the jury tries to look into the defendant's mind, the reasonableness of the claimed beliefs will inevitably enter the calculation.

At worst, the objective standard would create uncertainty. "Reasonableness" is impossible to define clearly and could vary, depending on the particular case and jury. As one court said, however, "[u]ncertainty is a fact of legal life. 'The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.'"¹⁸¹

In *Cheek*, the Supreme Court quoted an earlier case which said, "it is not the purpose of the law to penalize frank differences of opinion or innocent errors made despite the exercise of reasonable care."¹⁸² This statement implies that when reasonable care is not exercised, the law may penalize even innocent errors. An objective standard does precisely that, without unfairly burdening taxpayers.

C. THE OBJECTIVE STANDARD PREVENTS ABUSE OF THE SYSTEM

This analysis has, until this point, assumed that the defendant taxpayer truly holds an unreasonable belief about his income tax obligations. One of the most compelling reasons to move away from the subjective standard of *Cheek*, however, is to enable effective

¹⁷⁹ *Cheek v. United States*, 498 U.S. 192, 202 (1991).

¹⁸⁰ *Id.*

¹⁸¹ *United States v. Coleman*, 791 F.2d 68, 71 (7th Cir. 1985) (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

¹⁸² *Spies v. United States*, 317 U.S. 492, 496 (1943), quoted in *Cheek*, 498 U.S. at 205.

prosecution of those who do not "truly" hold their mistaken beliefs—those who either consciously cheat on their taxes or intentionally avoid learning the applicable rules and then feign ignorance when caught. Most taxpayers do not realize that the "ignorance of the law is no excuse" maxim does not apply to tax law.¹⁸³ As a result, the ignorance defense is most often invoked by sly taxpayers who are well aware of the heavy burden the government bears in tax crime prosecution.¹⁸⁴

The objective standard would add another hurdle for manipulative taxpayers to clear before the law exonerates them. The Seventh Circuit used the objective approach, in large part, for this reason. The *Cheek* decision, in overruling the Seventh Circuit, invites abuse.

Allowing ignorance as a defense without regard to reasonableness creates undesirable incentives. The law encourages taxpayer ignorance, because the prosecution can use a taxpayer's knowledge against him.¹⁸⁵ In *Cheek*, the Court noted that the jury could consider evidence showing that Cheek was aware of his tax obligations.¹⁸⁶ This would include evidence that the taxpayer knew of the relevant Internal Revenue Code provisions, court decisions rejecting the taxpayer's interpretations, IRS rulings, and the contents of the personal income tax return forms and instructions.¹⁸⁷ Under this rule, a taxpayer wishing to pay as few taxes as possible should ignore all mail from the IRS. The IRS could later use the fact that the defendant read the 1040 instructions as evidence of the taxpayer's subjective awareness of the law.¹⁸⁸ As a result, a taxpayer who reads the instructions and still makes a mistake will have difficulty demonstrating ignorance.¹⁸⁹ A taxpayer who is truly confused about the rules would be better off taking a wild guess, filing a return, and later pleading ignorance if the guess proves inaccurate. Under the subjective standard, having knowledge of the tax law can only work against a defendant. Consequently, this standard creates an enormous disincentive for a taxpayer to learn about tax obligations.

The objective standard, on the other hand, provides an incentive for the taxpayer to learn. To escape criminal liability, the taxpayer need not hold completely accurate beliefs, but she must hold

¹⁸³ Yochum, *supra* note 12, at 227.

¹⁸⁴ *Id.*

¹⁸⁵ See *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

¹⁸⁶ *Cheek v. United States*, 498 U.S. 192, 202 (1991).

¹⁸⁷ *Id.*

¹⁸⁸ Henderson, *supra* note 99, at 1444.

¹⁸⁹ *Id.*

reasonable beliefs. A taxpayer who generally familiarizes herself with the tax rules, understands her obligation to file a return, and makes an honest attempt to comply should have little difficulty meeting this standard. As the Seventh Circuit summarized this principle, "[i]f the legal system either refuses to recognize a mistake of law as a defense (the usual rule) or accepts only a reasonable mistake as a defense (our rule in tax cases), this leads people to learn and comply with the law."¹⁹⁰

The subjective standard also encourages defendants to lie to the jury. Since the case focuses on the defendant's state of mind at the time of the alleged transgression, the defendant's personal testimony becomes extremely important. Although the subjective standard permits the jury to consider objective factors,¹⁹¹ the jury must ultimately determine what the taxpayer actually believed. Because corroborating evidence on this question is understandably hard to produce, the jury might not demand any, and instead place great weight on the defendant's explanation. A skillful liar thus has a better chance of acquittal in a tax case than in non-tax criminal cases, where the prosecution has greater opportunity to present evidence contradicting the defendant's testimony.

The nature of tax crime especially tempts a defendant to lie, not only because it is in the offender's best interest and is likely to work, but because, in the offender's mind, it is easy to justify from a moral standpoint. Tax evaders often rationalize non-compliance on the grounds that the government wastes tax dollars anyway, that loopholes unfairly allow others to avoid taxes, or that failure to comply does not really hurt anyone.¹⁹² Ordinarily law-abiding citizens, whose personal moral codes would prevent them from committing other crimes or lying about it afterwards, might intentionally violate tax laws and then lie to a jury without even flinching.

The objective standard allows the jury to evaluate a defendant's testimony against a backdrop of reasonableness. As the Seventh Circuit explains, "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 . . . what the law indeed does require."¹⁹³ Thus, the defendant

¹⁹⁰ United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987).

¹⁹¹ Cheek v. United States, 498 U.S. 192, 202 (1991).

¹⁹² Henderson, *supra* note 99, at 1432 n.11 (citing Quint C. Thurman et al., *Neutralization and Tax Evasion: How Effective Would a Moral Appeal Be in Improving Compliance to Tax Laws?*, 6 LAW & POL'Y 309, 310 (1984)).

¹⁹³ United States v. Davenport, 824 F.2d 1511, 1518 (7th Cir. 1987) (quoting United States v. Bressler, 772 F.2d 287, 291 n.2 (7th Cir. 1985)).

needs more than a convincing lie to avoid punishment. In addition to convincing a jury that his mistaken belief was truly held, a taxpayer using this defense must convince the jury that the belief was reasonable.

In addition to encouraging ignorance of the law and deception, the subjective standard encourages people to lie to themselves.¹⁹⁴ If a taxpayer can convince herself that her view of the tax law, no matter how mistaken, is correct, she technically has not committed a crime. In many cases, this self-persuasion will not prove too difficult a task. Most taxpayers are probably all too eager to believe whatever interpretation will reduce their taxes the most. As the Seventh Circuit summarized, "[l]imiting the [ignorance] defense in tax cases is essential because the desire to keep as much of one's income as possible would supply an irresistible temptation to be obtuse about the law, if obtuseness eliminated the duty to pay."¹⁹⁵

Critics of the objective standard have argued that the Seventh Circuit fashioned its doctrine solely out of frustration with the tax protest movement.¹⁹⁶ While this charge may have merit, it does not follow that the Seventh Circuit standard is improper. On the contrary, destruction of the tax protest movement is an advantage of the objective standard. The fact that the development of the doctrine might have been driven by the Seventh Circuit's desire to discourage "tax protest"¹⁹⁷ makes it no less desirable in other circumstances.

By some estimates, there are over 13,000 tax protestors in the United States.¹⁹⁸ They call themselves "great American heroes,"¹⁹⁹ and they conduct seminars to teach their followers, among other things, that the Sixteenth Amendment is unconstitutional.²⁰⁰ They instruct followers to claim hundreds of dependents on their W-4s, thereby preventing income from being withheld²⁰¹ and to file frivo-

¹⁹⁴ *Buckner*, 830 F.2d at 103.

¹⁹⁵ *Id.*

¹⁹⁶ See Brief for Petitioner, *Cheek v. United States*, 882 F.2d 1263 (7th Cir. 1990) (No. 89-658). The brief argues that "for a court to deal so harshly and summarily with the 'tax protester movement' is dangerous indeed [because] the innocently gullible are caught in the same *Buckner* net as the cynically willful violators." *Id.*

¹⁹⁷ The Seventh Circuit is not opposed to the holding of the belief that taxes are unconstitutional or unfair; it is interested in interpreting the law. "The government may not prohibit the holding of these beliefs, but it may penalize people who act on them." *United States v. Coleman*, 791 F.2d 68, 69 (7th Cir. 1985). If people have grievances with the tax law, they must choose other forums in which to express them. *Id.* at 71.

¹⁹⁸ *Miller v. United States*, 868 F.2d 236, 239 (7th Cir. 1989).

¹⁹⁹ *Id.* at 240.

²⁰⁰ *Id.*

²⁰¹ *Yochum*, *supra* note 12, at 228 n.31.

lous tax returns.²⁰² They encourage followers to obtain a jury trial so that sympathetic jury members will acquit after the jurors themselves are indoctrinated into the tax protest movement²⁰³ during the course of the trial.²⁰⁴ True "tax protestors" are not really ignorant of the law; they simply disagree with it. Because disagreement with the law is not a defense under *Cheek*,²⁰⁵ the tax protestor should in theory be found guilty under either the objective or subjective standard. In practice, however, tax protestors are much more difficult to convict under the subjective standard. Since the reasonableness of the "mistake" is irrelevant under the subjective standard, a defendant tax protestor can escape conviction by successfully feigning ignorance.

Tax protestors hold various beliefs about taxation, few of which are objectively reasonable. One defendant, for instance, said he failed to pay taxes because he believed that IRS agents were "Satan's little helpers."²⁰⁶ Whatever their belief, tax protestors do not pay taxes and jam court dockets with frivolous litigation. Tax protestors drain judicial resources which could be better spent elsewhere. Tax dollars are lost at both ends: revenues lost because protestors do not pay taxes, and revenues spent bringing them to justice.²⁰⁷

Tax protestors thrive under a subjective standard. They wither, however, under a standard which requires their beliefs to be reasonable.²⁰⁸ An objective standard gives the IRS an effective tool in its pursuit of those tax evaders who routinely shirk their tax responsibilities. If the law defines reasonableness broadly enough, truly innocent taxpayers will not be convicted.

The case of John L. Cheek illustrates the need for an objective standard. A sophisticated commercial airline pilot claims to believe that his wages are not income and that he has over fifty depen-

²⁰² *Miller*, 868 F.2d at 240. "Frivolous" tax returns are specifically addressed in I.R.C. § (1989). *Id.* at 238 n.1. Additionally, courts may use Fed. R. Civ. P. 11 to sanction those who make frivolous arguments. *Id.* at 238 n.3.

²⁰³ The *Miller* court quoted the following passage from *The Law that Never Was*, the tax protest "manifesto," written by two tax protestors in 1985:

The tax protestor will be the great American hero of 1985 just as in 1776. It was tax protestors, not any political party, or judge or prosecutor who gave us our Republican form of government. The tax protest is more American than baseball, hot dogs, apple pie or Chevrolet!

Id. at 240.

²⁰⁴ *Id.*

²⁰⁵ *Cheek v. United States*, 498 U.S. 192, 203 (1991).

²⁰⁶ *Stone*, *supra* note 97, at 230 n.55 (quoting *United States v. Mann*, 884 F.2d 532, 534 n.1 (10th Cir. 1989)).

²⁰⁷ *United States v. Coleman*, 791 F.2d 68, 71 (7th Cir. 1985).

²⁰⁸ *Id.*

dents.²⁰⁹ Were these beliefs objectively reasonable? Certainly not. Were they truly held? Given the fact that for most of his adult life, Cheek had properly filed his tax returns, it is hard to believe that he was genuinely unaware of his obligations. A more plausible explanation is that John Cheek was nothing more than a tax protestor who disagreed with the tax laws. At least two district court jurors, however, were convinced that he sincerely held his unreasonable beliefs.²¹⁰ Under a subjective standard, Cheek would have probably been acquitted at the trial level.

As Justice Blackmun suggests in the *Cheek* dissent, there are certain things that every person of minimum intellectual competence knows.²¹¹ The dispute in *Cheek* did not involve complex tax law, but "the income tax law in its most elementary and basic aspect: Is a wage earner a taxpayer and are wages income?"²¹² If Cheek could escape criminal sanctions, it is difficult to conceive of a defendant who would not.

D. THE OBJECTIVE STANDARD WOULD IMPROVE TAX COMPLIANCE

The "tax gap" statistic refers to the difference between the revenues actually collected by the IRS and the revenues which the IRS would collect if every citizen filed an accurate tax return.²¹³ According to IRS estimates, the gap in the United States is over \$80 billion annually.²¹⁴ Using an objective standard would help to bridge this "gap."

The Internal Revenue Code views criminal sanctions as merely the "capstone"²¹⁵ of an elaborate enforcement system which utilizes a variety of civil remedies, including fines and penalties.²¹⁶ The IRS may apply these penalties to taxpayers who do not comply with the law, even if the taxpayer did not act "willfully" as defined by the Supreme Court. In a "voluntary"²¹⁷ compliance system like the one

²⁰⁹ *Cheek*, 498 U.S. at 194.

²¹⁰ *Id.* at 198 n.6.

²¹¹ *Id.* at 210 (Blackmun, J., dissenting).

²¹² *Id.* at 209.

²¹³ Henderson, *supra* note 99, at 1431 n.7.

²¹⁴ *Id.*

²¹⁵ Yochum, *supra* note 12, at 225 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)).

²¹⁶ *Id.*

²¹⁷ "Voluntary" does not mean optional, but rather that the tax system depends on taxpayer honesty. Professor Mark Yochum defines the term "voluntary" in the following manner:

["Voluntary" is] 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, pur-

in the United States, the law must give taxpayers strong incentives to comply.

Empirical evidence suggests that criminal punishment serves as a powerful deterrent to tax evasion.²¹⁸ Given the infrequency of IRS audits and the correspondingly high probability that a tax evader will escape detection, the law should make the consequences for those who are caught especially dire. Civil penalties have questionable deterrent effect, since they merely involve a financial transaction between the transgressor and the IRS. A potential tax evader may perceive his choice as either dutifully paying now or paying only when and if he gets caught. Although financial penalties are levied on top of the amount the tax evader would have paid had he complied,²¹⁹ tax evasion becomes a rational gamble. Facing the possibility of imprisonment and the stigma of a criminal label, however, the risk calculus changes.

Because revenue collection in a voluntary system depends so heavily on taxpayer cooperation, the law should not allow ignorance as a defense.²²⁰ An objective standard encourages taxpayers to learn and follow the law. If a taxpayer knows the IRS is watching and will press criminal charges unless he acts reasonably, he will be all the more inclined to look up the rule in question. Under a purely subjective standard, where ignorance is bliss, that same taxpayer may simply assume that the rule works in his favor. After all, what he does not know cannot hurt him.

One commentator has suggested that the Internal Revenue Code incorporate a standard of "recklessness."²²¹ Under this approach, a taxpayer could be prosecuted even if he did not behave willfully.²²² This standard, however, encounters many of the same pitfalls as the subjective standard. A "recklessness" standard still accepts ignorance of the law as a defense unless the taxpayer was

posefully 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.

Id. at 223.

²¹⁸ See Steven Klepper & Daniel Nagin, *Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution*, 23 LAW & SOC. REV. 209 (1989).

²¹⁹ Chapter 68 of the Internal Revenue Code provides the rules for the assessment of penalties. The penalties vary depending on the type of violation and whether the taxpayer is an individual or a corporation, but for non-fraud violations the penalties are relatively small. For example, the penalty for an individual failing to file cannot exceed 25% of the tax owed. I.R.C. § 6651 (a)(1) (1988). The penalty for negligence or disregarding rules or regulations is 5% of the underpayment. I.R.C. § 6653(a) (1988). The penalties for violations involving fraud are greater. See I.R.C. § 6653(b) (1988).

²²⁰ Yochum, *supra* note 12, at 223.

²²¹ See Henderson, *supra* note 99, at 1436 n.28.

²²² *Id.*

reckless.²²³ Therefore, it still provides inappropriate incentives for a taxpayer to avoid knowledge of the law, so long as the taxpayer's avoidance of knowledge never crosses the line into "recklessness." Moreover, it would continue to unduly hamper the prosecution of tax protestors. John Cheek's beliefs, for example, were unreasonable, but was he reckless? The "recklessness" standard offers an unnecessary and potentially confusing compromise.

The recklessness standard attempts to accommodate the honest, but unreasonable, taxpayer who would be guilty under an objective standard. A taxpayer, however, should have an affirmative duty to obtain a reasonable understanding of his income tax obligations. A truly "honest" taxpayer will do more than just refrain from recklessness. A truly honest taxpayer will take her income tax responsibilities seriously enough to read the Form 1040 instructions and conscientiously follow them each year.

IV. CONCLUSION

In *United States v. Cheek*, the Supreme Court made it clear that the traditional maxim "ignorance of the law is no defense" does not apply to tax crimes.²²⁴ A taxpayer may behave outrageously, even to the point of not paying any taxes, without criminal penalty, as long as the taxpayer subjectively believes he is obeying the law.²²⁵

The message to would be tax evaders is clear: If you don't know anything about taxes, you can't be guilty of tax crime. Don't learn, because knowledge can only be used against you. If an armed robbery defendant cried "I forgot armed robbery was illegal,"²²⁶ society would scornfully convict him. Failing to convict in such a case would allow that individual's beliefs to trump the law itself.²²⁷ Yet the tax defendant who pleads, "I didn't know that my wages were income" escapes punishment.²²⁸ His belief becomes reality. Under the current, subjective standard of willfulness, it is not a crime to avoid paying taxes as long as the taxpayer does not believe it is a crime. The tax law to which most Americans attempt to faithfully adhere is robbed of its power. A standard of objective reasonableness, when used in careful conjunction with the standard of subjective belief, can untwist this perversity. Congress should redefine the

²²³ *Id.*

²²⁴ *Cheek v. United States*, 498 U.S. 192, 201-02 (1991).

²²⁵ *Id.*

²²⁶ Steve Martin continues his joke with this example. See MARTIN, *supra* note 1.

²²⁷ LAFAYE & SCOTT, *supra* note 8, at 425.

²²⁸ See *Cheek*, 498 U.S. at 201-02.

willfulness standard to include taxpayers who avoid filing returns or file inaccurately in reliance upon objectively unreasonable mistakes.

While some areas of the tax law are complicated, the fundamental concept is really quite simple: Those who earn income must pay taxes. The IRS, in fact, tries to simplify the tax laws and even provides free assistance to those who request it.²²⁹ The tax law is not complex enough to justify a departure from one of the oldest and most sensible principles of common law. Ignorance should not be rewarded; it should be punished. Ignorance should not be bliss; it should be perilous.

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²²⁹ Yochum, *supra* note 12, at 223.