

C. Willfulness, Mens Rea and the Guilty Mind.

Crimes in Anglo-American jurisprudence have generally required both an act deemed antisocial and a culpable mental state – often referred to as *mens rea*.²⁵ *Mens rea* is a broad concept that is far too complex for development in this course,²⁶ but students of federal tax crimes must be aware of the general concept and its specific implementation for tax and related crimes.

The *mens rea* element of federal tax and related crimes appears in the general requirement that the defendant act “willfully.”²⁷ In a leading tax case, United States v. Bishop, 412 U.S. 346, 361 (1973), the Supreme Court said:

The Court's consistent interpretation of the word “willfully” to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers. Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done “willfully,” the bad purpose or evil motive described in Murdock, supra.

Consider the following from the Supreme Court’s decision in Bryan v. United States, 524 U.S. 184 (1998), where the Supreme Court interpreted a federal firearm licensing statute which made it a crime to “willfully” deal in firearms without a federal license:

The word “willfully” is sometimes said to be “a word of many meanings” whose construction is often dependent on the context in which it appears. See, e.g., Spies v. United States, 317 U.S. 492, 497 (1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in United States v. Murdock, 290

²⁵ *Mens rea* – the guilty mind – is shorthand from the following Latin quote: “*actus non facit reum nisi mens sit rea*,” which means that “the act will not make a person guilty unless the mind is also guilty.” Wikipedia, http://en.wikipedia.org/wiki/Mens_rea (4/13/06). The Supreme Court described the dual requirements of act and mind colorfully as “an evil-meaning mind [and] an evil-doing hand.” Morissette v. United States, 342 U.S. 246, 251 (1952).

²⁶ One author has claimed, without much of an overstatement, that “there is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: *mens rea*.” George P. Fletcher, Rethinking Criminal Law 398 (1978). The general *mens rea* concept is embodied in various statutory formulations – such as willful in a tax context that I discuss in the text. One author has noted, however, that federal statutes provide over 100 formulations of the *mens rea* concept, of which willful is only one. Julie O’Sullivan, The Changing Face of White-Collar Crime: The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study, 96 J. Crim. L. & Criminology 643, 656 (2006), citing William S. Laufer, Culpability and Sentencing of Corporations, 71 Neb. L. Rev. 1049, 1065 (1994).

²⁷ E.g., § 7201 describing the crime of tax evasion requires that the actor “willfully attempt” to evade.

U.S. 389 (1933), a variety of phrases have been used to describe that concept.²⁸ As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.” In other words, in order to establish a “willful” violation of a statute, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.” Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

In response to Bryan’s argument that “willfully” should be interpreted consistently with the interpretation of the term used in the federal tax laws, the Court said:

In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, e.g., Cheek v. United States, 498 U.S. 192 (1991).²⁹ Similarly, in order to satisfy a willful violation in Ratzlaf, we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. See 510 U.S. at 138, 149. Those cases, however, are readily distinguishable. Both the tax cases³⁰ and Ratzlaf³¹ involved highly technical statutes that presented the danger of

²⁸ [Fn12 from Bryan] The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

²⁹ [Fn17 from Bryan] Even in tax cases, we have not always required this heightened *mens rea*. In United States v. Pomponio, 429 U.S. 10 (1976) (per curiam), for example, the jury was instructed that a willful act is one done “with [the] bad purpose either to disobey or to disregard the law.” *Id.*, at 11. We approved of this instruction, concluding that “the trial judge . . . adequately instructed the jury on willfulness.” *Id.*, at 13.

³⁰ [Fn18 from Bryan] As we stated in Cheek v. United States, 498 U.S. 192, 199-200 (1991),

“The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term ‘willfully’ as used in the federal criminal tax statutes as carving out an exception to the traditional rule [that every person is presumed to know the law]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.”

³¹ [Fn19 from Bryan] See Bates v. United States, 522 U.S. 23, 31, n. 6 (1997) (slip op., at 7, n. 6) (noting that Ratzlaf’s holding was based on the “particular statutory context of currency structuring”); Ratzlaf, 510 U.S. at 149 (Court’s holding based on “particular context” of currency structuring statute).

ensnaring individuals engaged in apparently innocent conduct.³² As a result, we held that these statutes “carve out an exception to the traditional rule” that ignorance of the law is no excuse³³ and require that the defendant have knowledge of the law.³⁴ The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in the tax cases and Ratzlaf is not present here because the jury found that this petitioner knew that his conduct was unlawful.³⁵

³² [Fn20 from Bryan] Id., at 144-145 (“Currency structuring is not inevitably nefarious Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark”; Government's construction of the statute would criminalize apparently innocent activity); Cheek, 498 U.S. at 205 (“In ‘our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law,’ and ‘it is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.’” United States v. Bishop, 412 U.S. 346, 360-361, 36 L. Ed. 2d 941, 93 S. Ct. 2008 (1973) (quoting Spies v. United States, 317 U.S. 492, 496, 87 L. Ed. 418, 63 S. Ct. 364 (1943))”); Murdock, 290 U.S. at 396 (“Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct”).

³³ [Fn21 from Bryan] Cheek, 498 U.S. at 200; see also Ratzlaf, 510 U.S. at 149 (noting the “venerable principle that ignorance of the law generally is no defense to a criminal charge,” but concluding that Congress intended otherwise in the “particular context” of the currency structuring statute).

³⁴ [Fn22 from Bryan] Even before Ratzlaf was decided, then Chief Judge Breyer explained why there was a need for specificity under those statutes that is inapplicable when there is no danger of conviction of a defendant with an innocent state of mind. He wrote:

“I believe that criminal prosecutions for 'currency law' violations, of the sort at issue here, very much resemble criminal prosecutions for tax law violations. Compare 26 U.S.C. §§ 6050I, 7203 with 31 U.S.C. §§ 5322, 5324. Both sets of laws are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally. Cheek v. United States, 498 U.S. 192 (1991), sets forth a legal standard that, by requiring proof that the defendant was subjectively aware of the duty at issue, would avoid such unfair results.” United States v. Aversa, 984 F.2d 493, 502 (CA1 1993) (concurring opinion).

He therefore concluded that the “same standards should apply in both” the tax cases and in cases such as Ratzlaf. 984 F.2d at 503.

³⁵ [Fn23 from Bryan] Moreover, requiring only knowledge that the conduct is unlawful is fully consistent with the purpose of FOIA, as FOIA was enacted to protect law-abiding citizens who might inadvertently violate the law.

The variant understandings of “willfulness” in a criminal context may be categorized as follows.³⁶

The first and broadest level - consistent with the Anglo American principle that ignorance of the law is no excuse –

is that committing an act, and having knowledge of that act, is criminal willfulness – provided that the actions fell within the category of actions defined as illegal under the applicable statute. In these cases, the defendant need not have known of the specific terms of the statute or even the existence of the statute. The defendant’s knowledge that he committed the act is sufficient.³⁷

The second, intermediate level –

requires the defendant to have known that his actions were in some way unlawful. [H]e need not have known of the specific statute, but rather he must have acted with the knowledge that he was doing a “bad” act under the general rules of law. Under this intermediate level of criminal common law willfulness, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.”

The third and strictest iteration of the willfulness rule:

requires that the defendant knew the terms of the statute and that he was violating the statute. The courts have reserved this category to limited types of statutory violations involving “complex” statutes – namely those governing federal tax law and anti-structuring transactions.

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Under this rare exception (which covers our third and “strictest” level of criminal willfulness), a defendant must know the specific law that he is violating in order to act willfully. The “highly technical” exceptional statutes to which the Court

³⁶ The following quotes in the text are from United States v. Kay, 513 F.3d 432, 447-448 (5th Cir. 2007), en banc and panel rehearing denied with clarification 513 F.3d 461 (5th Cir. 2008). Kay involved an appeal from a conviction under the Foreign Corrupt Practices Act, FCPA, 15 U.S.C. §§ 78dd-2, 78ff, which contain a willfulness requirement for improper payments made to foreign officials.

³⁷ The Court later illustrates the first category (p. 448):
For example, a defendant need only have known that he possessed a weapon with the characteristics that fit within the definition of “machine gun” in the relevant statute; he need not have been aware of the statute or that his possession of the gun violated the statute.

in Bryan refers are federal tax laws, for which the Court has explicitly “carv[ed] out an exception to the traditional rule” that ignorance of the law is no excuse. . . .

We will re-visit the willfulness element in more detail below, but here you should just keep in mind the general approaches. Please keep in mind that the foregoing is intended as an introduction to the issues and not as a definitive test of how the term “willfully” as used in tax and related crimes will be interpreted.