Willfulness and Ignorance in Federal Criminal Law

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“WILLFULNESS” AND “IGNORANCE” IN FEDERAL CRIMINAL LAW

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My interest in this topic was piqued as I reread the oldest entrapment case in literature, that of Oedipus Rex. The Oedipus cycle consists of three plays, written at different parts of the poet’s life. He probably wrote Antigone first, then followed with King Oedipus more than a decade later, then Oedipus at Colonus toward the end of his life.1 In King Oedipus, Sophocles shows us Oedipus’s relationship with his mother, the killing of his father, and his being cast out of civilized society. It is quite clear that Oedipus did not know any of the facts that would have made his conduct a violation of secular or god-made law. Yet he is punished.

In Oedipus at Colonus, we see the old king near the end of his life. He meets Theseus, King of Athens, and rages about the injustice of punishing people who do not know or appreciate the wrongfulness of their conduct.

Was I the sinner?
Repaying wrong for wrong—that was no sin,
Even were it wittingly done, as it was not.
I did not know the way I went. They knew;
They, who devised this trap for me, they knew!2

Why the change from one play to another? George Thomson, the eminent classical scholar, suggests an answer in his book Aeschylus and Athens3 that I find persuasive: Greek philosophy, at the point somewhere between the authorship of these two plays, began to explore the difference between nature and norm, physis and nomos. Thomson ties the intro-

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2 Id. at 79.

duction of this distinction between norms we make up and the reality of the world around us to the introduction of money as the abstraction of commodities in the Greek economy.4

Whether or not one agrees with Thomson, the shift in emphasis between the plays is striking. Oedipus arraigns the system of punishment based upon whether it takes account of the supposed ability to choose between right and wrong courses of conduct. While there may be debate over the ability of people to choose the right, Oedipus's argument is that the system of justice must treat actors "as if" they could choose.5 A system that punishes without providing such an opportunity simply gives over the function of identifying targets of punishment to blind forces of fate or chance, or worse yet, to malign vengeance-seekers.

The debate found in the pages of Sophocles has continued through the centuries. Modern scholars and sages of the criminal law have sought to clarify its terms in the Model Penal Code.6

While the Code does not answer all the interpretive questions one might raise, its comforting symmetry makes the onlooker's life easier than the patchwork of federal criminal offenses. In confronting the system of federal crimes, no word has sown more confusion than "willfully." While the term appears in literally dozens of offenses in Titles 18 and 26 of the United States Code7, its meaning may vary considerably. Moreover, willfulness may be added to a statutory offense definition by judicial decision8 or to the indictments' allegations by prosecutorial practice.9 However, the absence of a unitary judicial and legislative definition of willfulness is

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4 G. Thomson, supra note 3, at 351-71.
6 Model Penal Code §§ 2.01-2.13 (1985). However, the language of particular offenses may bedevil courts in trying to identify which element should be modified by a particular intent. See Alvarado v. State, 841 F.2d 394 (5th Cir. 1988), cert. denied, 109 S. Ct. 125 (1988). See also infra notes 78-115 and accompanying discussion.
8 See, e.g., Screws v. United States, 325 U.S. 91 (1945), infra notes 54-59 and accompanying text.
9 Indictments often contain the word "willfully" even though that term is not in the definition of the statutory offense. If one concludes that the term is unnecessary, the solution is not to strike it out. Amending an indictment, even to delete arguable surplusage, is fraught with peril. Federal Rule of Criminal Procedure 7(d) permits surplusage to be deleted only on motion of a defendant, and the Advisory Committee Notes cite Ex parte Bain, 121 U.S. 1 (1887) for the proposition that amending an indictment is forbidden without the accused's consent. Amendment cases in the Fifth Circuit include United States v. Salinas, 601 F.2d 1279 (5th Cir. 1979).

One conclusion of this essay, however, is that pattern jury instructions should not provide a single, separate definition of "willfully," but should separately define the intent element of each offense. This view has been adopted in the draft of revised pattern jury instructions for the Fifth Circuit, for which I served as Reporter. See Federal Criminal Jury Instructions of the Fifth Circuit (Proposed Official Draft 1990) (available in the University of Texas at Austin School of Law Library).
not a reason for throwing over well-established rules about criminal intent. Precision and differentiation, and not any single categorical imperative, are the goals. All the slogans deployed in an effort to diminish the role of intent in federal criminal law turn out, on examination, to be seriously misleading.10

I. THE FAILURE OF ACADEMIC DISTINCTIONS BETWEEN GENERAL AND SPECIFIC INTENT

The old “hornbook” definition of intent distinguishes between the specific desire to accomplish an unlawful result (specific intent) and the voluntary commission of the act constituting the crime (general intent).11 Beyond these standards lie the so-called “strict liability” offenses, such

10 A draft of revised pattern jury instructions for the Fifth Circuit, Id., summarizes the confusion:

The word “willfully” is frequently included in the indictment, even when not required by statute or case law. This practice should be discouraged. The 1975 Fifth Circuit Criminal Pattern Jury Instructions inserted “willfully” as an element of almost every crime and then supplied this definition of that term: “The word ‘willfully,’ as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.”

Court decisions indicate, however, that this definition is not accurate in every situation. As stated in United States v. Granda, 565 F.2d 922, 924 (5th Cir. 1978), the term “willfully” has “defied any consistent interpretation by the courts.” In United States v. Bailey, 444 U.S. 394, 403 (1980), the Court stated that “[w]hile areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.” For example, in prosecutions under the Internal Revenue Code, “willfully” has generally been defined as “a voluntary, intentional violation of a known legal duty.” United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984). This definition is taken primarily from United States v. Pomponio, 429 U.S. 10 (1976). The Supreme Court has discussed the various meanings of the term “willfulness,” as used in the criminal tax statutes in United States v. Bishop, 412 U.S. 346, 93 S. Ct. 2008 (1973).

The notion that “willfully” requires a “bad purpose” derives from the opinion in United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223 (1933). Based on Murdock, the Fifth Circuit held in Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953), that “willfully” included an evil motive or bad purpose. Nevertheless, in McBride v. United States, 225 F.2d 249 (5th Cir. 1955), cert. denied, 350 U.S. 934 (1956), the Fifth Circuit distinguished Murdock and Wardlaw as being cases of alleged tax violations and held that “willful” had a different meaning in a prosecution for making false records under 18 U.S.C. § 1001. McBride approved an instruction specifically stating that proof of an evil intent was not required and that “willful means no more than that the forbidden act is done deliberately and with knowledge.” 225 F.2d at 253. This definition has subsequently been approved on several occasions in § 1001 prosecutions. United States v. Markham, 537 F.2d 187, 194 (5th Cir. 1976), cert. denied, 429 U.S. 1041, 97 S. Ct. 739 (1977).
In United States v. Kerley, 643 F.2d 299 (5th Cir. Unit B 1981), the court held that in a prosecution under 18 U.S.C. § 242, the failure to charge the jury that “willfully” means acting with bad purpose or evil motive was reversible error. The court again distinguished Pomponio as being limited to tax violations but concluded that the “bad purpose or evil motive” element was required because of Screws v. United States, 325 U.S. 91 (1945).

In United States v. Hunt, 794 F.2d 1095 (5th Cir. 1986), a prosecution for mail fraud under 18 U.S.C. § 1341, the court approved a definition that “willfully” meant an act “committed voluntarily and purposely, with the specific intent to disobey or disregard the law.” 794 F.2d at 1100. Hunt specifically rejected a contention that reversible error is avoided “only if the judge utters the magic words ‘with bad purpose.’” Id.

The Seventh and Ninth Circuits have recommended that “willfully” not be defined unless the word appears in the statute allegedly violated by the defendant. Federal Criminal Jury Instructions of the Seventh Circuit § 6.03 (West 1980); Manual of Model Jury Instructions for the Ninth Circuit § 5.07 (West 1985). See DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.06 (West 1968 Cum. Supp.). The Committee declines to go so far, because there are cases where the courts have engrafted an element of “willfulness” even when that term does not appear in the statute. For example, in United States v. Kent, 608 F.2d 542 (5th Cir. 1979), cert. denied, 446 U.S. 936 (1980), the court indicated that although the mail fraud statute, 18 U.S.C. § 1341, does not mention intent, an “implicit element of mail fraud is a specific intent to commit fraud.” 608 F.2d at 545, n.3. In United States v. Salinas-Garza, 803 F.2d 834 (5th Cir. 1986), the court considered the currency reporting statute, 31 U.S.C. § 5316(a)(1)(A). Although the statute only uses the term “knowingly,” the court held that the statute also requires the act be done “willfully,” that is, the defendant must be shown to have intentionally violated a known legal duty. 803 F.2d at 838. Although the general conspiracy statute, 18 U.S.C. §§ 371-373 (1982 & Supp. IV 1986), contains no express intent requirement, the Fifth Circuit held that a conviction under that statute requires proof of “at least the degree of criminal intent necessary for the substantive offense itself.” Ingram v. United States, 360 U.S. 672, 678 (1959), quoted in United States v. Harrelson, 754 F.2d 1153, 1172 (5th Cir. 1985), reh’g denied, 766 F.2d 186 (5th Cir. 1985), cert. denied, 474 U.S. 908 (1985).

The Supreme Court has cautioned that the required mental state may even be different for different elements of the same crime, and that the mental element encompasses more than just the two possibilities of “specific” and “general” intent. Liparota v. United States, 471 U.S. 419, 425 n.5 (1985). The Committee has therefore abandoned the indiscriminate use of the term “willfully” accompanied by an inflexible definition of that term. Instead, we have followed the lead of the Federal Judicial Center and have attempted to clearly define what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged. See Federal Judicial Center, Pattern Criminal Jury Instructions (1988).

We stress, however, that the judge will generally wish to make clear the meaning of offense definitions in the context of the case at hand by giving a “theory of the case” instruction based upon the parties’ submissions.


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as those involving public health and safety; generally, these are petty offenses or at most misdemeanors.\textsuperscript{12} The path to understanding is also strewn with a variety of other concepts designed to deal with such problems as the unintended result, or the proper treatment of the defendant who knew a given result was likely but did not affirmatively "desire" it, or the defendant who desired a particular harmful result but whose acts created only a negligible risk that it would occur.

These academic distinctions have, in my view, contributed far more confusion than clarity to the task of judges and lawyers who are trying to figure out what to tell juries about the elements of offenses.\textsuperscript{13} To take a common example of confusion, consider the cases in which the defendant claims that the government must prove not only that he intended a specific unlawful result, but that he also knew the result was unlawful: intentional violation of a known legal duty.

The prosecutor would probably respond that "ignorance of the law is no excuse," and would cite \textit{Lambert v. California}.\textsuperscript{14} A judge would agree with the prosecutor in many cases. For example, with respect to unlawful transportation of aliens, the Fifth Circuit has held that the government need not prove that the defendant knew or believed that the aliens were unlawfully in the United States.\textsuperscript{15} The Ninth Circuit has followed the Fifth Circuit, but there is some contrary authority.\textsuperscript{16}

As to many other federal offenses, however, the defense position would be upheld. For example, in the prosecution of a taxpayer under 26 U.S.C.

\textsuperscript{12} Indeed, the Supreme Court has suggested that serious constitutional questions would be raised by classifying strict liability offenses as felonies. In \textit{Morrissette v. United States}, 342 U.S. 246 (1952), Justice Jackson states:

\begin{quote}
The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.
\end{quote}

\textit{Id.} at 263.

\textsuperscript{13} George Fletcher reminds us that European systems focus more upon the risk created by the actor's conduct than upon her desire that an unlawful result obtain. G. Fletcher, \textit{supra} note 10, at §§ 6.5.1, 6.5.2. \textit{See also} \textsc{Model Penal Code} § 2.02 (Proposed Official Draft 1962), \textit{cited with approval} in Liparota v. United States, 471 U.S. 419, 424 n.5 (1985).

\textsuperscript{14} 355 U.S. 225 (1957).

\textsuperscript{15} United States v. Merkt, 764 F.2d 266 (5th Cir. 1985) (Rubin, J., concurring in part, dissenting in part); United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), \textit{cert. denied}, 480 U.S. 948 (1987). Judge Rubin's dissent on this issue in \textit{Merkt I} is well reasoned.

§ 7201 for income tax evasion, or under 26 U.S.C. § 7206(1) for making a false statement on a return, "willfulness" means the intentional violation of a known legal duty. Therefore, a taxpayer on trial for evasion is entitled to present evidence that she intended to comply with the law as she understood it. If such evidence raises a reasonable doubt, the jury should acquit.

However, a taxpayer will not be heard to say that he believed the entire system of imposing taxes to be unconstitutional, and that he therefore lacked specific intent. For the sake of completeness, one must also note the Fifth Circuit’s en banc opinion in United States v. Garber, which holds that if a taxpaying requirement is sufficiently confusing that a reasonable onlooker would be unable to decipher it, the taxpayer may present evidence of that confusion as bearing upon the issue of intent.

Moreover, it is one of the curiosities of criminal jurisprudence that courts and lawyers continue to say that ignorance of the law will not excuse, and to cite Lambert for that proposition when the result in that case points in just the opposite direction. Lambert struck down a felony registration statute because it did not require proof that the defendant knew she was required to register, and there was no evidence making it probable that she knew of her obligation.

Nor, of course, does Lambert stand alone. For example, the Fifth Circuit has held that a defendant may not be convicted of failing to report importation of currency in an amount greater than $5,000 without proof that she knew of the reporting obligation and intended not to comply with it.

These observations, coupled with the discussion below, should make one hesitate before telling a jury that "ignorance of the law is not an

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18 United States v. Burton, 737 F.2d 439 (5th Cir. 1984). On the same basis, an "advice of counsel" defense may be sustained. See also United States v. Cox, 348 F.2d 294 (6th Cir. 1965); United States v. Phillips, 217 F.2d 435 (7th Cir. 1954).


20 607 F.2d 92 (5th Cir. 1979). Garber sold her blood, which was of a rare type, to a blood bank and did not report the money she received. She was convicted of evading income tax. The Fifth Circuit held that the question of whether a sale of blood constitutes a taxable event (as opposed to an exchange of equivalents) was sufficiently recondivite that Garber should have been permitted to adduce expert testimony on the confusion among tax experts. This testimony could not possibly have related to her state of mind, because the expert she wanted to call had no knowledge of her actual mental state. Rather, the court reasoned that when taxability is problematic as a matter of law, legal ambiguity is relevant to show that the defendant herself may not have been aware of an obligation to report. The opinion is justifiable in part because the criminal sanction for tax evasion rests at the apex of a pyramid of civil, administrative, and penal provisions and ought therefore to be narrowly drawn.

21 United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978). However, it may be appropriate to give an "ostrich" instruction when knowledge is an element of the offense. United States v. de Luna, 815 F.2d 301 (5th Cir. 1987).
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excuse." Indeed, although the Devitt & Blackmar treatise includes a standard instruction to this effect, the 1988 supplement lists at least as many cases holding the instruction (or one like it) to have been improper as those upholding it. A jury instruction that has only a 50-50 chance of being right is not a particularly good bet.

Of course, the prosecution must prove specific intent to violate a known legal duty as an element of every conspiracy case, even if the underlying offense-object is a so-called "general intent" crime. Conspiracy and attempt are, as the Supreme Court has said, paradigmatic specific intent offenses.

It might even be that specific intent would mean different things with respect to the same offense in different settings. For example, a mail fraud scheme based upon false statements would require the government to prove that the accused acted with the intent to defraud or cheat, and with knowledge of the falsity of his statements or reckless disregard of whether he spoke the truth.

Suppose, however, that the scheme were the type at issue in Carpenter v. United States, where the defendant Winans violated his fiduciary duty to maintain the secrecy of proprietary information belonging to his employer. Winans, it will be recalled, was a reporter for the Wall Street Journal. He used his column in the Journal to promote stocks in which he had invested or about which he had tipped his cohorts. In such a case, the scheme to defraud does not necessarily involve falsehood: The government must prove that the accused sought to obtain money or property through the willful violation of a legal duty that he knew he owed to his employer. While the Court's earlier decision in McNally v. United States has cut back on the number of mail fraud cases based upon this kind of violation of duty, Carpenter makes clear that such theories are viable if the defendant plans to impose financial harm on the victim.

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26 See, e.g., United States v. Hunt, 794 F.2d 1095 (5th Cir. 1986); United States v. Foshee, 569 F.2d 401 (5th Cir. 1978), modified, 578 F.2d 629 (5th Cir. 1978), appeal after remand, 606 F.2d 111 (5th Cir. 1980), cert. denied, 444 U.S. 1082 (1980).
29 It is entirely possible that mail frauds based upon violation of a regulatory or statutory duty will continue to be prosecutable even in the wake of McNally and Carpenter. If this is so, then such cases as United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981), cert. denied sub nom. Crude Co. v. United States, 455 U.S. 908 (1982), are still good law. In Uni Oil, the scheme to defraud consisted in part of a plan to violate the oil price control statutes and regulations. To survive McNally, the indictment in such a case would have to allege more than a simple plan to defraud the agency of its right to have its regulations obeyed. Rather, the end object would have to involve taking money or property. Cf. Tigar, Mail Fraud, Morals and U.S. Attorneys, 11 LITIGATION 22 (Fall 1984).
As a final illustration of the confusion that would attend an attempt to craft a unitary definition of willfulness, consider *Keegan v. United States.* In *Keegan,* the defendants were activists in the German-American Fund and were charged under the Selective Service Laws with conspiracy to counsel draft evasion. Their convictions were reversed by the Supreme Court. The plurality faulted the trial judge's instructions as having withdrawn from the jury critical issues concerning the defendants' intent. The district court told the jury that innocent motives and a desire to test the law were not defenses.

Following what it believed to be *Keegan's* teaching, the Tenth Circuit reversed convictions of Japanese-Americans charged under the same statute in *Okamoto v. United States.* In *Okamoto,* the district judge refused a defense request to instruct the jury that the defendants' belief—that the obligation of Japanese-Americans in relocation camps to compelled military service was open to serious question—could be considered as bearing upon their intent to disobey a known legal duty. The court of appeals held this refusal was error.

*Keegan* and *Okamoto* could be read to suggest that every defendant who believes a legal duty to be unconstitutional may not have the specific intent to violate that legal duty. A more sensible reading would simply harmonize these cases with the cases holding that the defendant must act with knowledge of his duty, and that his genuine uncertainty about that duty may negate a finding of knowledge.

The Model Penal Code has attempted to clarify the confusion by identifying four types of mental elements: intention, knowledge, recklessness and negligence. The Model Penal Code also provides a means to determine which mental state attaches to which nonmental element of a crime.

The Code has been the basis for penal law changes in most of the states, but has not had much influence on federal law. Congress has not been consistent in salting the criminal code with *mens rea* requirements, nor has it established any test for determining what a given element means in a particular statute. For the sake of present-day clarity, therefore, one must backtrack a bit to the cases on which current federal intent law has been built.

The result in *Carpenter* could be sustained on the basis that Winans was "stealing" his employer's confidential information, rather than simply violating a fiduciary duty. Such an analysis is subject to criticism, see Tigar, *The Right of Property and the Law of Theft,* 62 TEX. L. REV. 1443 (1984). Morissette principles, discussed below, require a finding of specific intent in the sense of knowledge and desire.

30 325 U.S. 478 (1945).
31 325 U.S. at 493-94.
32 152 F.2d 905 (10th Cir. 1945).
33 MODEL PENAL CODE § 2.02(2) (1985), discussed in W. LAFAVE & A. SCOTT, supra note 11, at § 3.4(c).
34 MODEL PENAL CODE § 2.02(4) (1985), discussed in W. LAFAVE & A. SCOTT, supra note 11, at § 3.4(c).
II. Morissette: Justice Jackson's Basic Text on Intent in Federal Criminal Law

Morissette went deer hunting on a disused government bombing range. He didn't get a deer, but thought to pay for the trip by loading spent bomb casings on his truck, crushing them and selling them as scrap. He realized a profit of $84.00. He was convicted under 18 U.S.C. § 641 of converting government property. The trial judge instructed the jury that if Morissette knew he was on government land and intended to take the shell casings, he was guilty.

In an opinion by Justice Jackson, the Supreme Court reversed. Jackson began with a disclaimer:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and those that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.

The Court then held: First, the absence of an intent requirement in a felony statute is not dispositive. Second, when a federal crime is derived from the common law, one will presume that Congress intended to adopt the common law intent requirement as well. This rule of construction will be applied even to an offense such as "conversion," which has no precise common law antecedent but reflects an evident congressional intention to fill in gaps in the common law of theft. Third, even with respect to "an offense new to general law, for whose definition the courts have no guidance except the Act," the Court will not lightly presume that Congress intended to omit an intent requirement, for to do so would "change the weights and balances in the scales of justice."

Of course, none of this tells us precisely how to define the intent requirement in any given case. The Court simply acknowledges that Congress "has at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common law intent to do injury." In Morissette's case, the jury was to be told that the government must prove that the defendant took the property intending to "wrongfully" deprive the government of it. If the jury formed a reasonable doubt based on Morissette's contention that he thought the casings were abandoned, it should acquit.

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35 "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . ." shall be guilty of an offense. Morissette v. United States, 342 U.S. 246, 248 (1962) (quoting 18 U.S.C. § 641 (1962)).

36 342 U.S. at 260.

37 Id. at 262.

38 Id. at 263.

39 Id. at 264-65, 265 n.25 (citing 18 U.S.C. § 242; Screws v. United States, 325 U.S. 91 (1945)).

40 Id. U.S. at 275-76.
That is, Morissette had to know that he was taking the property of someone else, for his own benefit or the benefit of someone else other than the true owner. The government would not have to prove that Morissette knew that taking somebody else's property was wrong, nor would it be a defense for him to say that he did not think stealing was a crime.

Morissette is regarded as a basic text on the federal law of criminal intent, particularly in its insistence that the jury's function not be invaded, and its recognition that some intent requirement presumptively attaches to all federal crimes.

III. A COHERENT APPROACH TO DEFINING "WILLFULLY"

Every criminal statute requires the government to prove that the defendant committed a criminal act or acts. Even a conspiracy charge requires the act of agreement, and, in the traditional 18 U.S.C. § 371 case, also requires (by someone acting intentionally during and in furtherance of the conspiracy) an overt act. Each of these acts is an "element" of the offense. The Model Penal Code calls these "material elements," to distinguish them from such things as jurisdiction and venue, and states in effect that a mens rea requirement will attach only to such elements. This definition is not entirely satisfactory for federal crimes, because often the federal jurisdictional element is of sufficient importance that some mental state must exist with respect to it. For example, to convict of mail fraud, it must at least be reasonably contemplated that the mails would be used in furtherance of the scheme. For this reason, one must consider federal crimes one at a time to determine the mental state intended by Congress or imposed by judicial decision.

A. Intentional Violation of Known Legal Duty: The Most Stringent Test

1. Income Tax Cases

As mentioned above, income tax felony cases require "specific intent" in its most traditional sense. This requirement is reaffirmed in a line of cases most commonly thought to have begun with Spies v. United States. In Spies, the Court was principally concerned with marking off the distinction between willful attempts to evade tax under the predecessor to 26 U.S.C. § 7201, and the misdemeanor (now § 7203) of willfully failing to file a return or pay a tax. The Court held that the attempt to evade

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42 Model Penal Code §§ 2.02(4), 1.13(10) (1985), cited in W. LaFave & A. Scott, supra note 11, at § 3.4(c).
43 United States v. Toney, 598 F.2d 1349 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980).
44 317 U.S. 492 (1943).
had to include some positive act of evasion, a requirement most often met today by proof that the accused filed a false return.\(^{45}\) In addition, the government must prove a tax deficiency.\(^{46}\)

However, the Court also reaffirmed the holding in *United States v. Murdock*,\(^{47}\) that

He whose conduct is defined as criminal is one who "willfully" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. 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. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.\(^{48}\)

Indeed, Justice Jackson expressed the *Murdock* standard in somewhat different language, and said that in an attempt to evade case, "We would expect willfulness ... to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."\(^{49}\)

*Murdock* had said that willfulness would include "bad faith or evil intent."\(^{50}\)

The Court clarified matters in *United States v. Pomponio*,\(^{51}\) holding that the *Spies/Murdock* glosses were ornamental but not strictly necessary. An intent charge in a tax case satisfied the statute if the jury was told that the government must prove the defendant intentionally violated a known legal duty.\(^{52}\) While this is "all" the trial judge must do, dozens of cases make clear that she may not do less.\(^{53}\)

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\(^{45}\) It must be borne in mind, however, that the evasion offense can be committed by engaging in other overt fraudulent conduct, such as maintaining false books or trying to deceive IRS agents—in which case the statute of limitations would run from that act and not from the date of filing the return. In a false return evasion case, the felony offense under section 7201 may be identical with the misdemeanor offense under section 7207. In such a situation, the defendant charged under section 7201 will not be entitled to a lesser-included offense instruction. Sansone v. United States, 380 U.S. 343 (1965). Willfulness means the same thing in misdemeanor as in felony tax cases. To the same effect is Bishop v. United States, 412 U.S. 346 (1972).

\(^{46}\) See *Sansone*, 380 U.S. at 351 (citing Lawn v. United States, 355 U.S. 339, 361 (1958)).

\(^{47}\) 290 U.S. 389 (1933).

\(^{48}\) Id. at 396.

\(^{49}\) 317 U.S. at 498.

\(^{50}\) 290 U.S. at 398.

\(^{51}\) 429 U.S. 10 (1976).

\(^{52}\) Id. at 12.

\(^{53}\) See, e.g., cases cited *supra* at notes 12-14, and *infra* at notes 78-89. *But see* United States v. Kerley, 643 F.2d 299 (5th Cir. Unit B 1981), discussed *supra* note 10.
2. Civil Rights Cases

In *Screws v. United States*, a sheriff, a local policeman and a special deputy beat a black prisoner to death on the courthouse steps. They were found guilty by a jury under the predecessor provision to 18 U.S.C. § 242. The defendants claimed that the statute was unconstitutionally vague. To this, the plurality opinion replied that a vague criminal statute may be saved from due process infirmity by requiring the prosecution to prove that the accused acted with knowledge that his conduct was forbidden.

The plurality therefore held that "willfully" in the statute means a "specific intent." One searches the opinion in vain for a concise definition of this term, but the Court is clearly requiring purposeful conduct directed at violating a known legal duty. It could be argued that the Court merely requires that the defendant knowingly violate a federal right that has been clearly and authoritatively declared. However, such a formulation would either invade the jury's function of determining knowledge or render the knowledge requirement otiose.

A more sensible reading of *Screws* gives weight to the plurality's conclusion that the specific intent requirement in civil rights cases ensures that the accused "is aware that what he does is precisely that which the statute forbids." This reading is reinforced by the plurality's reference to *Spies* and *Murdock*, and has been preferred by the courts that have construed these statutes. One can only add that the plurality concedes that "willful" is a word of many meanings, thus robbing the case of most generative effect that it might have.

3. Intent and the First Amendment

In *Spock v. United States*, the defendants were charged with conspiracy to obstruct the selective service military draft during the Vietnam

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54 325 U.S. 91 (1945).
55 325 U.S. at 104.
56 325 U.S. at 101. The Court contrasted its holding with what is termed the "general rule": "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." 325 U.S. at 96 (quoting Ellis v. United States, 206 U.S. 246, 257 (1907)). Obviously, the Ellis formulation is too broad, but it at least captures the essence of what is sometimes called "general intent."
57 See Leonard v. City of Frankfort Electric and Water Plant Bd., 752 F.2d 189 (6th Cir. 1985); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983); Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983).
58 325 U.S. at 101.
59 The *Screws* method of saving statutes has been applied to a Tennessee law forbidding the crime against nature. A defendant who engaged in consensual cunnilingus was held to have had fair warning that such dietary practices are unlawful because of consistent judicial interpretations to that effect. Rose v. Locke, 423 U.S. 48 (1975).
war era. The court of appeals reversed their convictions, holding that the trial judge's definition of conspiracy violated the first amendment.

The defendants had made a bifarious agreement, embracing both lawful and unlawful goals. However, their lawful activity consisted of protected speech, so that the dividing line between "lawful" and "unlawful" was the same as that between "protected" and "unprotected." The judge who draws lines under such circumstances must take special care to avoid overbroad definitions of criminal conduct. The narrowing function is performed, the court held, by insisting that the government prove that the defendant intended to embrace the unlawful conspiratorial objectives, and that the proof be made by evidence more reliable than that found adequate in the ordinary case.

This narrowing function of specific intent may also be found in other contexts. In *Falcone v. United States*, the Court insisted upon proof that the indicted sellers intended to join the distillers' conspiracy. The case insulates "ordinary business behavior" from prosecutorial scrutiny. In *United States v. United States Gypsum Co.*, discussed in depth below, the Court used a knowledge of potential harm requirement to prevent criminalization of procompetitive pricing information in an antitrust case.

4. Hand Grenades and Other Obvious Devices

In *United States v. Freed*, the Court held that the 18 U.S.C. § 5861(d) prohibition on possessing an unregistered firearm did not include a "scienter" requirement. The government was not required to plead or prove that Freed and his friend knew that the hand grenades they had were unregistered, much less that Congress had enacted a registration requirement. All the government had to plead and prove was that Freed and his friend knew that hand grenades are firearms.

While the Court's opinion juggles some cases to support its holding, its rationale is hard to identify. In a footnote explaining that the "no specific intent" holding applies as well to a conspiracy to violate § 5861(d), the Court offers this explanation:

We need not decide whether a criminal conspiracy to do an act "innocent in itself" and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offenses satisfies on these special facts the requirements for a conspiracy.  

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66 401 U.S. at 609 n.14.
The Supreme Court and the lower courts continue to cite Freed, usually to distinguish it.\textsuperscript{67} It is difficult to see how the Court’s conspiracy rationale survives such cases as United States v. Bailey,\textsuperscript{68} which identifies conspiracy as emphatically a specific intent crime. The Court appears to have confused the ease of proving that a possessor of hand grenades was up to something with the legal definition of the alleged malefactor’s state of mind. A similar confusion existed for a time with respect to misapplication of bank funds under 18 U.S.C. § 656: The jury was, under some older cases, authorized to convict if it found that the defendant recklessly disregarded the bank’s interest.\textsuperscript{59} The courts of appeals have come to reject that standard, insisting instead that the government prove that the defendant intended to injure or defraud the bank. To be sure, evidence of indifference or reckless disregard may be admissible as tending to show the forbidden intent.\textsuperscript{70}

The point is that even when the evidence casts powerful doubt on the innocence of the defendant’s motives, the definition of the mental element remains unchanged. The bank misapplication statute presents at least as strong a case as Freed for a lesser standard of intent. After all, the statute is directed only at the “officer, director, agent or employee” of federal or federally-insured banks, or others in a position to know their responsibilities towards the bank’s funds. It would not seem unfair to impose on such persons a special duty to know the rules and follow them.\textsuperscript{71}

Weighing against such arguments, however, is the consistent concern of federal courts that those subjected to the many and complex duties imposed by federal regulation should not be criminally liable for a violation except when they meant to do wrong. The vulnerability of Freed to such an argument is illustrated by the Ninth Circuit’s decision in United States v. Herbert\textsuperscript{72} and the Fifth Circuit’s decision in United States v. Anderson.\textsuperscript{73} Both cases involved possession of weapons bearing no outward evidence that they were of the automatic firing type defined as “firearms” by the statute.

\textsuperscript{68} 444 U.S. 394 (1980).
\textsuperscript{70} See id.; United States v. Cauble 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005.
\textsuperscript{71} A similar argument could be made in the Liparota situation if the food stamp statute were limited to those involved on a day-to-day basis in handling food stamps as an incident of their employment. See infra text accompanying notes 79-84.
\textsuperscript{72} 698 F.2d 981 (9th Cir. 1983), cert. denied, 464 U.S. 821 (1983) (construing 26 U.S.C. § 5861(d) and (e) (1982)).
\textsuperscript{73} 853 F.2d 313 (5th Cir. 1988), reh’g en banc pending.
Herbert distinguished Freed and required proof that the defendant knew the guns met the statutory definition of an unregistered firearm.\textsuperscript{74} The panel in Anderson refused to follow Herbert, feeling itself bound by prior Fifth Circuit authority.\textsuperscript{75} However, the panel urged en banc reconsideration of the issue, noting that applying Freed to weapons that appear "innocent" may fall afoul of Lambert \textit{v.} California\textsuperscript{76} and Liparota \textit{v.} United States.\textsuperscript{77}

The Freed majority's failure to have and express a reasoned basis for its decision, and the Court's more recent treatment of the mental element of federal offenses, undermines Freed's vitality on all sets of facts outside its narrow reach. Issue-by-issue parsing of categories of cases yields fair but not unerring predictability. Can we, however, sketch a more comprehensive view of federal law on this subject?

\textbf{B. How to Define the Intent Element of Federal Crimes}

The Murdock-Spies-Screws-Morissette formulation couples intention or purpose to do an act with knowledge of facts that should tell him the act is in some sense wrongful. It is not, however, possible to classify all cases involving such an intent and such knowledge under a single standard. Nor, as the discussion above suggests, will the presence or absence of the word "willfully" in the statute be a talismanic guide. In my view, the only valid means of defining the intent requirement for any given federal crime combines the "element-by-element" approach, devised by the Model Penal Code and used by the Supreme Court in Liparota \textit{v.} United States,\textsuperscript{78} with the definitional approach taken by the Court in United States \textit{v.} United States Gypsum Co.\textsuperscript{79}

\textbf{1. The Liparota Approach: Parsing the Statute}

In Liparota \textit{v.} United States,\textsuperscript{80} the defendant restaurant owner bought food stamps from an undercover Department of Agriculture inspector for less than the stamps' face value. The defendant's restaurant was not authorized to accept food stamps. A federal statute provides "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is guilty of a felony if the value involved is $100 or more.\textsuperscript{81}

Liparota's counsel requested the trial judge to instruct that the gov-

\textsuperscript{74} Herbert, 698 F.2d at 986-87.
\textsuperscript{75} United States \textit{v.} Vasquez, 476 F.2d 730 (5th Cir. 1973), cert. denied, 414 U.S. 836 (1973).
\textsuperscript{76} 355 U.S. 225 (1957).
\textsuperscript{77} 471 U.S. 419 (1985).
\textsuperscript{78} Liparota \textit{v.} United States, 471 U.S. 419 (1985), \textit{discussed in} United States \textit{v.} Merkt, 764 F.2d 266, 275 (5th Cir. 1985) (Rubin, J., concurring in part, dissenting in part).
\textsuperscript{79} 438 U.S. 422 (1978).
\textsuperscript{80} 471 U.S. 419 (1985).
\textsuperscript{81} 7 U.S.C. § 2024(b)(1)(1982).
ernment must prove that "the defendant knowingly did an act which the law forbids, purposely intending to violate the law." The trial judge refused this request, and instead instructed that "knowingly... means that the Defendant realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident."

The question was one of statutory interpretation and the Court reverted to the Morissette presumption that some intent is required. The government's view, that no mens rea was required, would have criminalized the conduct of a food stamp "recipient who... used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants."

The Court held that the defendant must be proven to have acted intentionally and with knowledge that the acquisition, possession or transfer of the stamp was not authorized. In reaching this result, the majority counselled that each element of the crime should be separately analyzed to determine what if any mental element should exist with respect to it. This approach, when coupled with the presumption that there be some intent requirement greater than proof the defendant did not act accidentally, is a powerful analytical tool in determining when a statute requires the government to prove that the defendant intentionally violated a known legal duty.

On the way to its result, the Court disposed of two arguments that are often raised but are most often inapt. First, the Court rejected that analogy to non-mens rea "public welfare" offenses, resting on the Morissette treatment of that subject. The Court also reminded us that the principle of lenity in construction of criminal statutes counsels inferring an intent requirement.

Second, the Court rejected the contention that its formulation creates a "mistake of law" defense, which is often also encapsulated in the misleading statement that "ignorance of the law is no excuse." The federal criminal law is planted thick with offenses that require proof that the accused knew his conduct was unlawful in some sense. The Court's reasoning on this point is worth noting:

Our holding today no more creates a "mistake of law" defense than does a statute making knowing receipt of stolen goods unlawful... In both cases, there is a legal element in the definition of the offense. In the case of a receipt-of-stolen-goods

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82 471 U.S. at 422.
83 Id. Three courts of appeals had reached a contrary result. Id. at 423 n.4 (citing United States v. Pollard, 724 F.2d 1438 (6th Cir. 1984); United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982), cert. denied, 460 U.S. 1081 (1983); United States v. Faltico, 687 F.2d 273 (8th Cir. 1982), cert. denied, 460 U.S. 1088 (1983); United States v. O'Brien, 686 F.2d 850 (10th Cir. 1982)).
84 Liparota, 471 U.S. at 426.
85 Id. at 425.
statute, the legal element is that the goods were stolen; in this case, the legal element is that the "use, transfer, acquisition," etc., were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense [in this case] . . . that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It is, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to [this] charge . . . that one did not know that one's possession was unauthorized.87

This is the same distinction drawn above between the tax evasion defendant who says he did not know of a particular reporting requirement and one who claims that he believed that one did not have to pay the taxes exacted even under a proper reading of Title 26.

Once one has parsed the statute into its constituent elements, one must assign the appropriate mental state to each element.

2. The Gypsum Approach

*United States v. United States Gypsum*88 was a Sherman Act section 1 criminal case. The defendant corporations and individuals were charged with forming a "combination" and with conspiracy to restrain competition in the wallboard industry, principally by the exchange of price information.

The trial judge managed to embody several misconceptions in a single paragraph when he told the jury:

The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.89

The judge courted reversal in this criminal case by freighting the charge with a burden-shifting presumption, then underscoring his solecism with "as a matter of law." To put such words in an intent instruction violated the precepts of *Morissette*. Chief Justice Burger, in rejecting the government's defense of the instruction, trod familiar pathways in the law of *mens rea*.

The hard question was what standard of intent or knowledge is required in a criminal antitrust case. Would the prosecutor be required to prove that a defendant desired anticompetitive effects, or rather, that he acted volitionally in the knowledge that his conduct would probably have such

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89 *Id.* at 430.
effects? The answer turns on the "act" element that is at issue. If, as in Gypsum, the defendants are charged with producing anticompetitive effects, it may be enough to prove that they acted with knowledge that these effects were probable. If, however, the charge is construed as more akin to a traditional conspiracy, and rests upon an unlawful agreement, then the defendant will be guilty only if he had the "purpose of producing anticompetitive effects . . . even if such effects did not come to pass."\(^9^0\)

The choice between "purpose" and "knowledge" will be familiar to students of the Model Penal Code.\(^9^1\) The Gypsum Court's decision to choose the lower of these two standards for the particular case before it is defensible on a number of levels. First, the offense as charged in the indictment required proof that a harm occurred: the defendants were charged not only with agreement, but with a "concert of action" to fix prices and other terms of sale.\(^9^2\) Moreover, the harm is one that the typical antitrust defendant is very likely to recognize as embodying impermissible conduct. Also, as the Court noted, the typical antitrust case involves entrepreneurial calculations of opportunity and risk by a business person already engaged in a deliberate course of profit-maximization.\(^9^3\) Under such circumstances, the risks of overcriminalization are acceptably low.

A similar analysis has been used to uphold a kind of "displaced intent" analysis in a number of federal cases. For example, if the defendant assaults a federal officer, he need not be shown to have known of his victim's status.\(^9^4\) The conduct is clearly harmful, and the defendant's intent with respect to the physical harm element makes him a worthy candidate for the criminal sanction without regard to any knowledge of the victim's status.

In United States v. Yermian,\(^9^5\) a 5-4 majority held that in a prosecution under 18 U.S.C. section 1001 for making a false statement, the government need not prove that the accused knew that the statement was "in any matter within the jurisdiction of any department or agency of the United States." There is a textual argument for this result, since the statutory words "knowingly and willfully" follow the reference to agency jurisdiction.

Moreover, the "act" elements require that the statement be false and material, and in that sense that it cause harm.\(^9^6\) In addition, the defendant

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\(^{90}\) Id. at 444 n. 21.

\(^{91}\) MODEL PENAL CODE § 2.02 (1985).

\(^{92}\) 438 U.S. at 427-28.

\(^{93}\) Id. at 446-46.


\(^{96}\) Query, however, whether the defendant is sufficiently on notice of the harmful nature of his conduct when the statement is not made directly to a federal official, but to a third person who may in turn convey it to such an official. This prospect would exist, for example, in a federal program requiring sellers of crude oil to certify to their purchasers the provenance of the oil. That certification could, if false, be the subject of the section 1001 prosecution. See generally United States v. Uni Oil Co., Inc., 646 F.2d 946 (5th Cir. 1981), cert. denied sub nom. Crude Co. v. United States, 455 U.S. 908 (1982).
must know the statement to be false and must have intended to deceive. 97

One might argue that the federal agency element is trivial, in the sense that it is simply a means of conferring federal jurisdiction upon lying that would otherwise be punishable under state law. Such an analysis, while questionable, would support not attaching any mental state to that element.

Too, the Yermian Court expressly reserved the question whether some intent must exist with respect to agency jurisdiction. 98 It would be consistent with Yermian, therefore, to hold (by analogy to mail fraud cases) 99 that the defendant must reasonably have contemplated that the statement would be used by a federal agency. Such a requirement might seem unnecessary in the typical section 1001 case, which involves submission of a written falsehood directly to a federal agency or federally regulated entity. Prosecutable oral statements are typically made to a federal agent who identifies himself as such. The contours of section 1001 are limited in some circuits by cases holding that statements in an oral interview, 100 and written ones constituting exculpatory denials, 101 are not within the statute.

There remains the case, illustrated by United States v. Uni Oil, Inc., 102 in which the defendant provides a certification or statement to a non-governmental entity under circumstances raising a genuine doubt whether he knew it would be submitted to or relied upon by a governmental entity. In Uni Oil, the defendants certified the provenance or official classification of crude oil they sold to private purchasers. An improper certification was itself punishable, but could it also be a violation of section 1001? If one concludes that the application of section 1001 is not made inappropriate by the availability of more specific statutes, 103 then liability would turn on whether the statement bore a close enough relation to agency functions. As to that element, and on those facts, some intent requirement would be appropriate, and such a result is consistent with Yermian.

The analysis of intent will, however, be very different when the "act" element of the offense does not involve infliction of some demonstrable harm. As I have noted in an earlier essay, 104 a specific intent requirement

97 United States v. Godwin, 566 F.2d 975, 976 (5th Cir. 1978) (per curiam).
98 468 U.S. at 75 n.14.
99 United States v. Massey, 827 F.2d 995, 1000 (5th Cir. 1987).
103 See United States v. Rose, 570 F.2d 1355, 1363 (9th Cir. 1978) (catch-all § 1001 is not to be used to pyramid penalties with other more specific statutes).
104 Tigar, supra note 11, at 131-34.
that includes both knowledge and purpose often fulfills the function of making otherwise vague statutes certain, of expressing a legislative intention to reserve for the felony sanction only a small slice of ostensibly similar conduct, or of protecting against over-criminalization of arguably protected behavior.

Something more basic is going on here, however: punishing intentions unaccompanied by harmful result is usually, and ought more generally to be, a task approached with diffidence. If, as is commonly asserted,¹⁰⁵ punishing inchoate crime is legitimate because we have something to fear from those who desire unlawful results, it is not unreasonable to formulate an intent standard that clearly—and narrowly—reflects that preference.

As the standard jury charge has it, knowledge and purpose can seldom be proved directly.¹⁰⁶ The prosecutor is compelled to build up inferences from conduct that, because the standard is so precise, strongly corroborates the forbidden intent. By this measure, an intent requirement is a price the government should expect to pay for criminalizing conduct that falls far short of wreaking palpable harm.

The patchwork of federal intent law, when viewed with perspective, may seem to have a pattern. It becomes easier to reject a simplistic formulaic approach when one surveys a number of judicial constructions of federal criminal statutes.

For example, in United States v. Winston,¹⁰⁷ a case arising under the Railway Labor Act, the court insisted that the government prove the defendant-employers knew they were violating a legal duty because the conduct consisted of anti-union speech. That intent requirement served the statutory purpose and helped ensure that arguably protected activity was shielded from criminal liability. The trial court had, as the court of appeals held, wrongly given a variant of the "ignorance of the law" instruction.

In Bland v. United States,¹⁰⁸ the Fifth Circuit reversed a conviction for bringing in Cuban emigres without presenting them for inspection. The district court had failed, in its supplemental instruction, to stress that "violation without knowledge or intent would not constitute the offense charged."¹¹⁰

To the same effect is United States v. Fierros,¹¹⁰ in which the court held that "ignorance of the law" will often be a defense when "an independently determined legal status or condition . . . is one of the operative facts of the crime."¹¹¹ In Fierros, the defendant acknowledged that he knew the

¹⁰⁵ Id. at 138-50.
¹⁰⁷ 558 F.2d 105 (2nd Cir. 1977).
¹⁰⁸ 299 F.2d 105 (5th Cir. 1962).
¹⁰⁹ 299 F.2d at 108.
¹¹⁰ 692 F.2d 1291 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983).
¹¹¹ 692 F.2d at 1294. "The second category of cases in which a defense of ignorance of the law has been read into criminal statutes involves prosecution under complex regulatory schemes that have the potential of snaring unwitting violators." 692 F.2d at 1295. Cf. United States v. Merkt, 764 F.2d 266 (5th Cir. 1985) (Rubin, J., concurring in part, dissenting in part), discussed supra note 15 and accompanying text.
aliens he was transporting were in the United States illegally, so his conviction was upheld.

In United States v. Golitschek,112 the defendant was charged with violating the Arms Export Control Act. The trial court gave a standard variation of the "ignorance of the law" instruction as found in Devitt & Blackmar,113 while at the same time telling the jury that knowledge of the unlawfulness of exporting the arms at issue was an element of the offense. The Second Circuit, which had previously and uncritically repeated the "ignorance of the law" dictum,114 explained Liparota and its own decisions as follows:

When we say that ignorance of the law is no excuse, or, as was said in this case, that everyone is presumed to know the law, we mean only the law that makes the offense punishable, not the law that in some circumstances sets out legal requirements that must be known in order to have committed the offense. . . . [W]hen the law makes knowledge of some requirement an element of the offense, it is totally incorrect to say that ignorance of such law is no excuse or that everyone is presumed to know such law. Establishing an element of an offense concerning a requisite state of mind by a presumption relieves the prosecution of its burden of proof, contrary to the requirements of due process.115

The Fifth Circuit, in a case arising under 18 U.S.C. section 1001, has said that if the defendant was "ignorant of the law or was ill-informed, and if the trier of fact believed this, he could not be convicted."116

These cases, involving very different statutory provisions, have a common theme. In each of them we are unsure whether to identify the defendant's conduct as harmful. Our uncertainty may take either of two forms.

First, some "acts" so clearly violate protected areas that we all recognize them as invasive: theft, wounding, and invasion of domicile are of this sort. Other acts may be demonstrably harmful, but their definition is less the subject of shared values and more clearly the province of legislative rules. In such cases, we have a lingering uncertainty about the seriousness of the harm and we deploy an intent requirement as the means of identifying those actors worthy of punishment. In the second category of cases, the actor has taken only ambiguous steps towards the consummation of her or his purpose. The intent requirement is thought to justify punishing the inchoate behavior.117

112 808 F.2d 195 (2nd Cir. 1986).
113 808 F.2d at 201. The instruction was evidently based upon 1 E. DEVITT & C. BLACKMAR, supra note 22, § 14:10.
115 808 F.2d at 202-03 (relying on Sandstrom v. Montana, 442 U.S. 510, 524 (1979)).
117 For my critical view of this approach to intent, see Tigar, supra note 11, at
IV. Concluding Observations

George Fletcher, typically discerning, has wondered whether a defendant's desire that someone die could ever be so strong that we would dispense with proof that he did anything that created a palpable risk of death. As I have written elsewhere, the intent requirement of inchoate offenses is sometimes deliberately set high, so that we can tell that the defendant really means to cause a harm. Or, the legislature insists that intent be joined with the forbidden desires of others, as in the case of conspiracy.

As Fletcher also points out, punishing the desire that forbidden consequences ensue is almost entirely an Anglo-American phenomenon. Most other legal systems like to see more concrete and provable risk of harm before they unleash the criminal sanction. I have suggested—and still believe—that our Anglo-American preoccupation with the defendant's willingness is rooted in the Star Chamber's preoccupation with the inchoate crimes.

However that may be, there are many reasons to prefer offense definitions that punish risk-creators to the exclusion of wishful thinkers, and the cases discussed above reflect that preference. One way to validate the preference is to consider that legal duties deemed serious enough to warrant criminal sanction define harms that the legislature wants to prevent. We impose duties on people in order to shape the way in which people behave toward each other and toward the state. To say that an individual must act "knowingly" with respect to his legal duty is simply to say concretely that she must understand that her conduct is harmful.

Of course, that insistence that knowledge be proven occurs against a background assumption that all persons are sufficiently socialized to understand that duties imposed by law, if understood as such, must be obeyed. This background assumption is the basis for cases holding that a claim of unconstitutionality may not vitiate otherwise proven "knowledge" of the challenged legal duty.

Moreover, some conduct so clearly violates shared notions that the knowledge requirement is foreshortened. Morissette had merely to know the shell casings he took were the property of another, and not the further "fact" that he had a legal duty not to take such property. The robber must know what she is doing, for we make the background assumption that socialized beings know the wrongfulness of such conduct if they know what they are doing. To some extent, these assumptions are artificial.

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118 G. Fletcher, supra note 11, at § 6.5 ("Can the lust for death compensate for a low risk of harm?").
119 Tigar, supra note 11, at 127-50.
120 G. Fletcher, supra note 11, at § 6.5.
121 Tigar, supra note 11, at 144-47.
122 I have discussed this point in Tigar, supra note 11, at 147-50. See also Quiros Pirez, El Pensamiento Juridico - Penal Burgues: Exposicion y Critica, 8 REVISTA JURIDICA 5 (1985), cited in Tigar, supra note 11, at 103 n.20.
and may not in every case accurately embody what we know about human consciousness. But that problem, when it arises, may be confronted by defining the burden of proof with respect to the mental element, and the range of defenses based on mental condition.123

We may rightly despair of making the criminal law a sensible, coherent whole. We ought, however, to understand some of its inherent limitations. When we say that the defendant need not have known she was violating a legal duty, or when we limit her right to argue that she did not, we thereby assimilate the offense we are discussing to the "general intent" crimes. We are either assuming that everybody knows their duties and we can dispense with proof in particular cases, or we are saying we do not care.

The latter position is justifiable only on a "round up the usual suspects" view of criminal law, that places greatest emphasis on a social control model. Whatever may be said by adherents of this view, it is at odds with the teaching of Morissette, which limits its valid reach to social regulation minor offenses.

The former position elevates the judges' notions of what are shared assumptions to a standard for all, and fails to recognize that legal rules are structural creations that define as well as embody perceived necessity. Dispensing with a specific intent requirement assumes, without the slight rational basis, that all citizens have internalized the rules so as to eliminate the need to prove that they knew them on a particular occasion.

Alternatively, the willingness to dispense with specific intent bespeaks impatience with defendants who seem to be thumbing their noses at the judges' views of their duties. This was clearly true of the taxpayer who claimed that he thought wages were not income, and wanted to say that to the jury. Judge Higginbotham rightly said that if the argument was silly, the jury would not believe it.124

But there is another side to this. Maybe there will be a case in which the argument is not silly, but rather raises a question about the relative legitimacy of the defendant's and the prosecutor's views of the world. For example, in Winston,125 the insistence that the government prove the defendant-employers knew they were violating the law, as opposed to just engaging in protected antunion speech, alerts the jury to its role as monitor of the criminal process. If, in an alien-transporting case, the government is required to prove that the defendants knew the aliens were unlawfully in the United States, as against a contention that they were refugees entitled to remain, the jury must be given fuller rein to make the important value choices on the way to conviction or acquittal.

Empowerment of the jury by insisting on an intent requirement, as against invading its function by judicial instruction, is—one will recall—the linchpin of Justice Jackson's opinion in Morissette. This tension is also central to our debate about the jury system in American criminal law.126


124 United States v. Burton, 737 F.2d 439 (5th Cir. 1984), discussed in text at note 12, supra.

125 supra note 233, at 86, supra.

126 See generally Tigar, supra note 11, at 113-27.