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THE JURISPRUDENCE OF WILLFULNESS: AN EVOLVING THEORY OF EXCUSABLE IGNORANCE

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ABSTRACT

Ignorantia legis non excusat—*ignorance of the law does not excuse—is a centuries-old criminal law maxim familiar to lawyer and layperson alike. Under the doctrine, an accused finds little protection in the claim "But, I did not know the law," for all are presumed either to be familiar with the law's commands or to proceed in ignorance at their own peril. The ignorant must be punished along with the knowing, the maxim teaches, to achieve a better educated and more law-abiding populace and to avoid the easy-to-assert and difficult-to-dispute claim of ignorance that would otherwise flow from the lips of any person facing criminal punishment.*

Despite this country's long-standing allegiance to the hoary maxim, over the last century, and in particular over the last decade, the courts have seriously eroded the ignorantia legis *principle by frequently con-*

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struing the mens rea *term "willfully" to require proof of an accused's knowledge of the law. The erosive effect that these constructions have had on the* ignorantia legis *maxim is referred to in this Article as the "jurisprudence of willfulness." Professor Davies demonstrates that, contrary to the maxim, the number of federal criminal statutes that have been construed to impose such a heightened* mens rea *requirement is already quite large. The Article reveals that, if the courts continue to employ their current interpretive approach to the term "willfully," at least 160 additional federal statutes containing the term are at risk of similar treatment.*

The author argues that contemporary constructions of the troublesome scienter term to impose a knowledge of the law element have been grounded on doubtful, unchallenged logic and have bequeathed a legacy of grave interpretive confusion. Professor Davies maintains that much of the "jurisprudence of willfulness" is inimical to congressional judgments and, therefore, violative of rule of law and separation of powers principles. The Article urges a return to the ignorantia legis *principle in all cases in which a clear legislative intent to abandon the maxim when employing the term "willfully" is missing.*

> Ignorance of the law excuses no man;
> not that all men know the law,
> but because 'tis an excuse every man will plead,
> and no man can tell how to refute him.[1]

INTRODUCTION

The principle of *ignorantia legis non excusat*[2]—ignorance of the law does not excuse—is perhaps the most well-rooted maxim in the Anglo-American criminal law. It has been recognized by courts[3] and legal thinkers[4] for centuries, it has been enacted into law,[5] and it is

1. JOHN SELDEN, *Law*, *in* TABLE-TALK (1689), *quoted in* THE QUOTABLE LAWYER 133 (David S. Shrager & Elizabeth Frost eds., 1986) [hereinafter QUOTABLE LAWYER].

2. The principle's terminology has varied slightly over the centuries, but its core idea has not. *See* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 n.1 (1908) (noting that the maxim has been variously stated as "*ignorantia legis neminem excusat*," "*ignorantia eorum, quae quis scire tenetur, non excusat*," " *ignorantia juris, quod quisque tenetur scire, neminem excusat*," and "*ignorantia juris haud excusat*").

3. For the principle's Roman origins and English case authorities, see *id.* at 77-80; *infra* notes 37-55 and accompanying text. For early American case authority, see *infra* notes 56, 68.

4. Numerous excellent books and articles discussing the maxim are available. *See, e.g.*, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 360-414 (2d ed. 1960); OLIVER WENDELL HOLMES, THE COMMON LAW 47-48 (1881); GLANVILLE WILLIAMS, TEXTBOOK OF

familiar to jurist and layperson alike.[6] Under the maxim, individuals can be criminally punished when they engage in prohibited conduct even when they are not familiar with, or do not fully understand, the law's commands. Citizens are compelled either to know the law or to proceed in ignorance at their own peril. While sometimes harsh, the gains secured by the maxim—a better educated and more law-abiding citizenry, and the avoidance of pervasive mistake of law claims—are thought to outweigh any individual injustice resulting from its application.

Despite its familiarity and wide usage, the *ignorantia legis* principle has been seriously eroded over the last century,[7] and in recent years, this erosion has threatened to become a landslide.[8] At one time the list of exceptions to the maxim was quite short, but the courts of the twentieth century have quietly expanded it. The number of federal criminal statutes under which courts have abandoned the maxim is now particularly large, and challenges based on ignorance or mis-

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CRIMINAL LAW 405-15 (1978); Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 INDIANA L.J. 1 (1957); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641 (1941); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Keedy, *supra* note 2; Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

5. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-204 (West 1989) (declaring that "ignorance of the law does not relieve a person of criminal responsibility"); GA. CODE ANN. § 1-3-6 (1990) (stating that "[i]gnorance of the law excuses no one"); OKLA. STAT. ANN. tit. 21, § 152 (West 1983) (declaring that "ignorance of the law does not excuse from punishment for its violation"); S.D. CODIFIED LAWS § 22-3-1 (Michie 1998) (stating that "ignorance of the law does not excuse a person from punishment for its violation").

6. As one legal scholar put it, "Almost the only knowledge of law possessed by many people is that ignorance of it is no excuse . . . ." WILLIAMS, *supra* note 4, at 405.

7. This Article limits its discussion of the departure from the maxim primarily to the federal context, but this erosion is observable in state criminal justice systems as well. A recent, highly publicized ignorance of the law question involves Linda Tripp. Tripp is alleged to have surreptitiously taped private conversations with former White House intern Monica Lewinsky. A Maryland statute prohibits the "willful" electronic interception of such private communications without the consent of all parties. *See* MD. CODE ANN., Cts. & Jud. Proc. § 10-402 (1998). However, the statute has been construed to require proof of actual or constructive knowledge of the prohibition to support a conviction. *See* Petric v. State, 504 A.2d 1168 (Md. App. 1986) (approving a jury instruction requiring proof that the defendant knew or should have known he was violating state law by secretly recording his conversations). To convict Tripp of violating the state statute, therefore, the prosecutor would have to show that Tripp knew or should have known about the state law that she was violating when she recorded her conversations with Lewinsky—a difficult burden to meet.

8. *See infra* notes 10-26 and accompanying text (listing cases that have construed a variety of federal statutes to require knowledge that the proscribed conduct was unlawful).

take of law[9] grounds in the federal courts are both common and frequently successful. "Knowledge of illegality" has now been construed to be an element in a wide variety of statutory and regulatory criminal provisions, including the federal tax provisions,[10] the federal false statement provisions,[11] the federal anti-structuring provisions,[12] the

9. Although often used interchangeably, "ignorance" of the law and "mistake" of law denote two different concepts. A person who acts in ignorance of the law acts in a state of unawareness as to the law's existence. A person who acts under a mistake of law is aware of the existence of a law controlling her behavior but misunderstands what the law prohibits or commands. Despite the conceptual differences between the terms, courts and commentators frequently use the terms interchangeably and consider both states of mind subject to the *ignorantia legis* maxim. *See, e.g.*, Perkins, *supra* note 4, at 36-37 (applying the maxim to examples of ignorance and mistake); *but see* Keedy, *supra* note 2, at 90-92 (describing the difference and arguing that mistakes, but not ignorance, should be excused). Although important, the debate about whether the maxim should be applied only in cases involving ignorance of, but not a mistake about, the law is beyond the scope of this Article. In this Article I adopt the practice of those who use the terms interchangeably.

10. The term "willfully" has been defined to require a showing that the defendant voluntarily and intentionally violated a "known legal duty" under a number of tax provisions. *See* Cheek v. United States, 498 U.S. 192, 201 (1991) (holding that the "willfully" in I.R.C. § 7201 (1994), proscribing federal tax evasion, requires showing that defendant voluntarily and intentionally violated a "known legal duty"); United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam) (requiring the same showing to establish willful conduct under I.R.C. § 7206(1) (1994), prohibiting willful filing of false federal income tax returns); United States v. Bishop, 412 U.S. 346, 361 (1973) (same); United States v. Murdock, 290 U.S. 389, 396 (1933) (requiring a showing of "evil intent" to establish willful failure to pay federal tax under I.R.C. § 1265(a) (West 1928) (current version at I.R.C. § 7203 (1994)); United States v. Gurary, 860 F.2d 521, 523 (2d Cir. 1988) (requiring a showing of intentional violation of "known legal duty" to support conviction under I.R.C. § 7206(2) (1994) for willfully aiding and assisting the filing of false federal corporate income tax returns), *cert. denied*, 490 U.S. 1035 (1989); United States v. Wellendorf, 574 F.2d 1289 (5th Cir. 1978) (requiring knowledge of law to prove defendant willfully filed false income tax withholding forms, in violation of I.R.C. § 7205 (1994)).

11. *See* United States v. Curran, 20 F.3d 560 (3d Cir. 1994) (requiring knowledge that conduct was unlawful to support a conviction for causing campaign treasurers to submit false reports to the Federal Election Commission, in violation of 18 U.S.C. § 1001 (1994)); United States v. Gross, 961 F.2d 1097 (3d Cir. 1992) (holding that the district court properly precluded a good-faith defense in instructing the jury on the willfulness element of a conviction for making false statements to the Securities and Exchange Commission, in violation of 15 U.S.C. § 78m(a) (1994)).

12. *See* Ratzlaf v. United States, 510 U.S. 135 (1994) (holding that violation of 31 U.S.C. § 5322 (1994), which prohibits structuring of transactions to avoid bank reporting requirements, requires knowledge that the act was unlawful); United States v. Simon, 85 F.3d 906, 908-09 (2d Cir. 1996) (same); Peck v. United States, 73 F.3d 1220 (2d Cir. 1995) (reversing a conviction under § 5322 because the judge erroneously instructed the jury regarding the "willfully" requirement); United States v. Rogers, 18 F.3d 265, 267 (4th Cir. 1994) (requiring knowledge of conduct's illegality for conviction under I.R.C. § 6050I (1994) for evading business receipts reporting requirements); United States v. Reguer, 901 F. Supp. 515, 518 (E.D.N.Y. 1995) (applying *Ratzlaf* retroactively to reverse § 5322 conviction). After *Ratzlaf* was decided, Congress amended the structuring provision to eliminate the "knowledge of illegality" requirement. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L.

federal firearms provisions,[13] the Medicare and Medicaid anti-kickback provisions,[14] the Occupational Safety and Health Act,[15] the Child Support Recovery Act,[16] and the Trading With the Enemy Act.[17] Proof of knowledge of illegality has also been required to support a conviction for willfully misapplying student loan funds,[18] willfully exporting an aircraft,[19] willfully attempting to export weapons or ammunition,[20] willfully transporting monetary instruments in excess

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No. 103-325, § 411(b), 108 Stat. 2160, 2253 (1994) (codified at 31 U.S.C. § 5321(a)(4)(A) (1994)).

13. *See* Bryan v. United States, 118 S. Ct. 1939, 1946-47 (1998) (holding that to convict defendant charged with willfully violating 18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D) (1994), which prohibit dealing firearms without a federal license, proof must be offered that the defendant knew that his conduct was unlawful, although proof that he was aware of the federal licensing requirement is not necessary).

14. *See* Hanlester Network v. Shalala, 51 F.3d 1390 (9th Cir. 1995) (reading "willfully" in the Medicare and Medicaid anti-kickback provision, 42 U.S.C. § 1320a-7b(b) (1994), to impose a knowledge of the law requirement).

15. *See* United States v. Ladish Malting Co., 135 F.3d 484, 487 (7th Cir. 1998) (upholding determination by magistrate judge that criminal violation of workplace safety regulations under Occupational Safety and Health Act § 17(e), 29 U.S.C. § 666(e) (1994), requires proof the defendant had "basic legal information"); McLaughlin v. Union Oil Co., 869 F.2d 1039, 1047 (7th Cir. 1989) (holding that a violation of OSHA "is not willful when it is based on a nonfrivolous interpretation of OSHA's regulations").

16. *See* United States v. Williams, 121 F.3d 615, 621 (11th Cir. 1997) (holding that proving a willful failure to pay child support under the Child Support Recovery Act, 18 U.S.C. § 228 (1994), requires the government to show that the law imposed a duty on the defendant, the defendant knew about that legal duty, and the defendant voluntarily and intentionally violated that known legal duty).

17. *See* United States v. Macko, 994 F.2d 1526, 1532-33 (11th Cir. 1993) (holding that "willfully" in the Trading With the Enemy Act, 50 U.S.C. app. § 16 (1994), requires proof that the defendants knew of and intentionally violated an embargo); United States v. Frade, 709 F.2d 1387, 1391 (11th Cir. 1993) (requiring a showing of specific intent to prove violation of the Act).

18. *See* United States v. Bates, 96 F.3d 964, 970 (7th Cir. 1996) (construing 20 U.S.C. § 1097(a) (1994), which makes it a crime to knowingly and willfully misapply federally insured student loan funds, to require proof that an accused exercised unauthorized control over such funds with knowledge that such an exercise was a violation of the law), *aff'd*, 118 S. Ct. 285, 291 & n.7 (1997) (noting, however, that the question of whether a defendant had to have knowledge of illegality was not before the Court).

19. *See* Etheridge v. United States, 380 F.2d 804, 807 (5th Cir. 1967) (approving a conviction under 22 U.S.C. § 1934 (1964) (repealed 1976) (superseded by 22 U.S.C. § 2778 (1994 & Supp. II 1996)), where the government offered proof that "each of the defendants knew it was unlawful to export from the United States to Haiti the aircraft").

20. *See* United States v. Hernandez, 662 F.2d 289, 291-92 (5th Cir. 1981) (construing "with intent" as used in 18 U.S.C. § 924(b) (1976) and "willful" as used in 22 U.S.C. § 2778(c) (1976 & Supp. 1978) to require specific intent); United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978) (construing "willfully" as used in 22 U.S.C. § 1934 (1970) (repealed 1976) (superseded by 22 U.S.C. § 2778 (1994 & Supp. II 1996)) to require specific intent); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828 (9th Cir. 1976) (construing "willfully" as used in 22 U.S.C. § 1934

of $5,000 into the United States,[21] willfully neglecting to submit for induction into the Army,[22] intentionally using the contents of telephone conversations recorded in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[23] and knowingly acquiring or possessing food coupons in a manner not authorized by law.[24] Conspiring[25] or causing another[26] to commit one of these substantive offenses has also been found to require proof that the accused knew that he was violating the law. These constructions establish that, contrary to the *ignorantia legis* principle, ignorance or mistake of law has already become an acceptable excuse in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of "willful" conduct on the part of the ac-

(1970) (repealed 1976) (superseded by 22 U.S.C. § 2778 (1994 & Supp. II 1996)), and 22 C.F.R. pt. 121 (1970) to require proof that defendant knew his conduct was violative of the law).

21. *See* United States v. Warren, 612 F.2d 887, 889-91 (5th Cir. 1980) (holding that willful transportation of cash in excess of $5,000 into the country in violation of 31 U.S.C. §§ 1058, 1101(a)(1)(A) (1970) required proof of knowledge of the law forbidding that conduct); United States v. Schnaiderman, 568 F.2d 1208, 1211 (5th Cir. 1978) (same); United States v. Granda, 565 F.2d 922, 923-26 (5th Cir. 1978) (same); United States v. San Juan, 545 F.2d 314, 319-20 (2d Cir. 1976) (same).

22. *See* United States v. Krosky, 418 F.2d 65, 67 (6th Cir. 1969) (finding insufficient a jury charge that failed to advise that "willfully" required proof that the accused failure was done "with the specific intent to do that which the law forbids . . . with bad purpose either to disobey or to disregard the law").

23. *See* United States v. Wuliger, 981 F.2d 1497, 1502-03 (6th Cir. 1992) (holding that knowledge of the illegality of the wire interception is an element of the offense described in 18 U.S.C. § 2511(1)(d) (1988)).

24. *See* Liparota v. United States, 471 U.S. 419, 425 (1985) (holding that a person accused of knowing possession of food stamps in manner unauthorized by 7 U.S.C. § 2024(b)(1) (1982) must be shown to have known the possession was unlawful); United States v. Marvin, 687 F.2d 1221, 1227-28 (8th Cir. 1982) (same).

25. *See* Ingram v. United States, 360 U.S. 672, 681-82 (1959) (Harlan, J., concurring in part and dissenting in part) (stating that conspiracy to evade taxes under 18 U.S.C. § 371 (1952) required showing of specific intent); United States v. Alston, 77 F.3d 713, 718 (3d Cir. 1996) (holding that conspiracy to structure transactions under 31 U.S.C. § 5322(a) (1988) required showing of specific intent); United States v. Kim, 65 F.3d 123, 126 (9th Cir. 1995) (same); United States v. Davis, 583 F.2d 190, 192-93 (5th Cir. 1978) (holding that conspiracy to export weapons without requisite license or approval under 22 U.S.C. § 1934 (1970) (repealed 1970) (superseded by 22 U.S.C. § 2778 (1994 & Supp. II 1996)) required showing of specific intent); United States v. Schilleci, 545 F.2d 519, 523-24 (5th Cir. 1976) (holding that conspiracy to intercept wire or oral communications under 18 U.S.C. §§ 2, 371, 2511 (1970) required showing of specific intent).

26. *See, e.g.*, United States v. Reguer, 901 F. Supp 515, 518-19 (E.D.N.Y. 1995) (requiring the prosecution to prove the defendant had "knowledge of the illegality of the act" when causing a bank to fail to file a currency transaction report under 18 U.S.C. § 2(b) (1994)).

cused.[27] Under the reasoning employed in these cases, at least 160 additional federal statutes, collected in Tables 1 and 2 in the Appendix, are at risk of similar treatment.

Although the shift away from the *ignorantia legis* maxim in cases of willfulness is unprecedented in scope, the academy has yet to either confront the breadth of the trend or critically examine the rationales underlying it. This Article assumes that task, first, by taking stock of the erosive forces that have transformed the *ignorantia legis* maxim over the last century; second, by critically examining the justi-

27. Requests for mistake of law jury instructions have been made in numerous prosecutions brought under statutes containing a related, but importantly different *mens rea* requirement, the requirement of a "knowing violation" of some federal provision. On the whole, courts have resisted reading the phrase to require proof of knowledge of illegality. Most read the phrase to require proof that the accused had actual knowledge of the facts prohibited by the statute, but not that the accused had actual knowledge that her conduct violated the statute, particularly where the statute or regulation concerned an industry responsible for the handling of "dangerous or deleterious devices or products or obnoxious waste materials." United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (holding that 18 U.S.C. § 834(a) (1964), which authorized the Interstate Commerce Commission (ICC) to promulgate regulations governing the transportation of certain corrosive liquids and imposed criminal penalties on those who "knowingly violated" those regulations, required proof that defendant knew the nature of his acts, not proof that he knew his acts violated the regulations). In such a heavily regulatory context, "the probability of regulation is so great" that the phrase "knowingly violates" carries a presumption that the accused is aware of the regulation, and that Congress intended the phrase to be a "shorthand" method of referencing the acts or omissions prohibited elsewhere. *Id.* at 560-65. Thus, the government did not have to show that an accused prosecuted for "knowingly violat[ing]" ICC regulations governing the interstate transportation of corrosives knew that his method of transportation violated the regulations. *See id.* Similarly, a defendant charged with "knowingly violat[ing]" the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993), which imposes criminal penalties on any person who "knowingly treats, stores, or disposes of any hazardous waste identified in [RCRA] . . . without a permit," 42 U.S.C. § 6928(d)(2), must be shown to have known the nature of the hazardous matter treated, stored or disposed. He need not have known that the waste matter had been identified or listed among the RCRA provisions or that he lacked a requisite permit. *See* United States v. Hopkins, 53 F.3d 533, 538 (2d Cir. 1995) (collecting cases). For the same reason, one accused of "knowingly violat[ing]" the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), which requires any person in charge of a facility who has knowledge of an excess discharge of a hazardous substance to notify the Environmental Protection Agency "as soon as he has knowledge" of the prohibited release, *see* 42 U.S.C. § 9603(a), need only be shown to have been aware of his acts, not the regulatory requirements. *See* United States v. Laughlin, 10 F.3d 961, 964-67 (2d Cir. 1993). In each of these cases, courts have adhered to the *ignorantia legis* maxim, and declined to attribute to Congress the view that the phrase "knowingly violates" requires "proof of knowledge of the law, as well as the facts." *International Minerals*, 402 U.S. at 563. *Liparota v. United States*, 471 U.S. 419 (1985), is an important, but largely lonely departure from this interpretive trend. In *Liparota*, the Supreme Court construed the phrase "knowingly violates" to require proof of an accused's knowledge of the law. *See id.* at 426.

fications that have been offered for the movement away from the maxim; and third, by reconceptualizing the maxim's proper scope.

Part I of this Article reviews the maxim's venerable ancestry, the principal exceptions to the maxim and the doctrine's primary rationales. Although the maxim is many centuries old, interests of individuated justice have always curbed an overly rigid application of the principle. The most rapid development of exceptions to the maxim, however, has occurred during the last century, especially the last decade. This development has been unaccompanied by significant academic scrutiny and has not been supported by a consistent and coherent justification.

Part II assesses and critiques the maxim's current condition. This assessment shows that mistake of law claims in prosecutions requiring proof of "willful" conduct are copious, and although the maxim retains some force,[28] courts side with parties advancing such claims with surprising frequency.[29] Because collectively the cases emphasize the pivotal role played by the *mens rea* term "willfully" in decisions deviating from the maxim, this Part refers to the trend as the "jurisprudence of willfulness." This body of case law, generated by the United States Supreme Court and lower federal courts over the last century, dramatically accelerated the pace of the trend away from the *ignorantia legis* maxim, and two of the most recent of these decisions—*Ratzlaf v. United States*[30] and *Bryan v. United States*[31]—employed interpretive techniques certain to encourage additional future departures from the principle. Especially disturbing in this jurisprudence is the willingness of courts to construe "willfully" to warrant a departure from the maxim without first consulting legislative history to determine the congressional intent underlying the use of the term.[32] This Part concludes that, to date, the judicial shift away from the maxim has been grounded on doubtful, unchallenged logic and has bequeathed a legacy of grave interpretive confusion.

Part III of the Article argues for a reinvigoration of the maxim, rejecting much of the "jurisprudence of willfulness" as inimical to congressional judgments, and therefore inconsistent with the rule of

28. *See infra* Part II.B.2 (discussing *Bryan v. United States*, 118 S. Ct. 1939 (1998)).

29. *See supra* notes 10-26 and accompanying text.

30. 510 U.S. 135 (1994).

31. 118 S. Ct. 1939 (1998).

32. The proffered justification for donning such interpretive "blinders" is that the meaning of the term is so unambiguous as to make resort to such legislative history wholly unnecessary. *See, e.g.*, *Ratzlaf*, 510 U.S. at 147-48.

law and with separation of powers principles. Despite the rising number of decisions construing "willfully" to exhibit a congressional intent to make knowledge of the law an element, evidence of Congress's disenchantment with the maxim is scarce. Indeed, there is plain evidence to the contrary. Various legislative indicators suggest that Congress continues to enact criminal statutes with the expectation that the maxim remains a fundamental presumption (albeit a rebuttable one) in the interpretation of criminal statutes.[33] These indicators flatly contradict the conclusion reached by a number of courts that Congress intends to make knowledge of the law an element each time it employs the term "willfully" in a federal criminal statute.

The *ignorantia legis* maxim is grounded on sound, if competing, rationales and centuries of experience. At minimum, any trend that disregards this canon of interpretation should first withstand rigorous scrutiny. The "jurisprudence of willfulness" fails to do so. Part III contains a tripartite proposal that should be used to determine whether a criminal statute containing language of willfulness should be construed to permit an ignorance or mistake of law claim. The first prong of the proposal requires recognition that genuine searches for evidence of the intended meaning of "willfully" will often require the courts to go beyond statutory text. Although anathema to textualists,[34] this is necessary, as "willfully" is rarely textually defined in federal criminal statutes.[35] Second, the maxim itself makes it appropriate to *presume* that Congress did not intend ignorance or mistakes of law to be a defense. Thus, unless plain evidence of a contrary design can be located either in the text of a criminal statute or in its legislative history, the nation's longstanding devotion to the maxim requires the preclusion of such a defense. Finally, a categorical exception from the presumption is appropriate for tax prosecutions in light of Congress's demonstrated acquiescence to mistake of law claims in that context. In short, this Part proposes a return to the presumption that "[i]gnorance of the law excuses no man"[36] in the absence of a clear signal indicating a legislative desire to deviate from the maxim.

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33. *See infra* Part III.B.1 (discussing the legislative overruling of the *Ratzlaf* decision, in which the Court interpreted "willfully" to require proof of knowledge of the federal anti-structuring law).

34. *See infra* note 255.

35. *See infra* Part III.B.

36. QUOTABLE LAWYER, *supra* note 1, at 133.

I. IGNORANCE OF THE LAW DOES NOT EXCUSE, EXCEPT WHEN IT DOES

A. The Roman Experience

The *ignorantia legis* maxim is of ancient vintage, dating back at least as far as the days of the Roman Empire.[37] Legal scholars have described the Roman maxim primarily as a concept of civil law, which was founded on the straightforward (if fictitious) rationale that the law was "certain and capable of being ascertained."[38] Thus, in litigation, positive proof of a citizen's knowledge of the law's requirements or proscriptions was not required. Rather, citizens were presumed to be familiar with the law, for it was not the function of the Roman law "to aid the fools."[39]

Even from these early beginnings, however, application of the maxim was subject to important, if limited, exceptions when the law was not, in fact, definite and knowable.[40] Despite widespread acceptance of the maxim, Roman law permitted certain groups of persons to claim ignorance of the law as a defense. The very young, for example, were considered to be incapable of comprehending important aspects of the law and thus were permitted to excuse their deviant behavior by claiming ignorance of the law's requirements or re-

37. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *25 (Charles M. Haar ed., Beacon Press 1962). Other writers claim that the doctrine descends from Norman or possibly pre-Norman absolute liability rules. *See* Hall & Seligman, *supra* note 4, at 643-46.

38. Keedy, *supra* note 2, at 78. Although this rationale is roundly recognized today to be a legal fiction, *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.01[B], at 141-42 (1987), the laws of the Roman Empire were reasonably well integrated with the community mores of the time. *See* Hall & Seligman, *supra* note 4, at 644 ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"). For this reason, the claim that the law was "definite and knowable" would have been more easily defended then than it would be today. *See* DRESSLER, *supra*, at 141 ("At common law this claim was at least partially plausible. Few crimes existed and all of them involved conduct *malum in se*."). Nevertheless, even under the common law it is likely that the original rationale for the maxim was largely fictitious. As put by Professor Dressler, under the common law, "laws were not enacted by legislatures and published. Rather, courts created and shaped law on a case-by-case basis," *id.* at 142, which meant that the criminal law changed incrementally every time a new decision was handed down. This makes any claim that the law (even early Roman law) was "definite and knowable" doubtful, at best. *See id.*

39. Vera Bolgar, *The Present Function of the Maxim Ignorantia Juris Neminem Excusat—A Comparative Study*, 52 IOWA L. REV. 626, 631 (1967).

40. *See id*. at 627-32; Hall, *supra* note 4, at 16.

straints.[41] So too might disenfranchised women, soldiers away from home, and "peasants and other persons of small intelligence"[42] escape penalty by claiming unfamiliarity with certain of the law's commands. The common link between these disparate groups appears to be that they were all thought to lack some essential quality that would enable them to appraise or know the law, such as aptitude (women and members of the underclass), maturity (children) or notice of the law's enactment (absent soldiers). Latitude for error was accorded these people so as not to penalize them for failing to meet legal obligations that were, to them, either unknown or unknowable.

The Roman reprieve extended only so far, however. Although these disparate groups of Roman citizens were considered to be incapable of knowing the *jus civile* (the body of civil law that governed Roman relations), they were expected to know and comply with the *jus gentium* (the system of laws that "natural reason" had settled among all persons everywhere).[43] As generously put much later by legal commentator John Austin, because these persons did not fall within the state of "general imbecility,"[44] they could be expected to know the *jus gentium*, which was based on principles of natural reason presumptively understood by all.[45]

B. The Maxim in England

In England, the maxim took on a less forgiving cast. Although it appears that the maxim originated in civil actions under Roman law,[46] the English courts permitted it to control the outcome of criminal actions as well.[47] In addition, the English common law courts defined

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41. *See* Keedy, *supra* note 2, at 80.

42. *Id*.

43. *See id.* at 80; Bolgar, *supra* note 39, at 630 & n.10.

44. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 500 (Robert Campbell ed., 4th ed. 1873) (1861).

45. *See id.* at 501. The Roman distinction between the *jus gentium* and the *jus civile* parallels contemporary arguments made in the criminal context that mistakes of law should excuse *mala prohibita* but not *mala in se* offenses. *See infra* Part II.C.3.

46. *See* Keedy, *supra* note 2, at 77-78.

47. Cases beginning as early as the eleventh century firmly established the maxim in both civil and criminal proceedings:

> For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat,* is as well the maxim of our own law, as it was of the Roman.

4 BLACKSTONE, *supra* note 37, at *27; *see also* Keedy, *supra* note 2, at 78-80 (citing cases dating back to the early thirteenth century). The earliest English case of record, decided in 1231, in-

the distinction between claims of ignorance or mistakes of law and mistakes of fact.[48] Mistakes of pertinent fact were generally considered to provide a defense, while mistakes of law generally were not.[49]

Early commentators on the English maxim defended it on the same rationale that the Romans had employed: the law was "definite and knowable" so it was fair to demand the compliance of anyone who possessed sufficient capacity to know it.[50] While the very young and the mentally incompetent were afforded some latitude for error under this rationale, all other subjects of the realm were obligated to know the law, and presumed to do so.[51] Later, however, as reflected by the passage at the start of this Article,[52] British legal theorists began to offer utilitarian rationales for the principle—the fear that

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volved a defendant who attempted to defend against a charge of trespass on the ground that he had wrongfully been advised by counsel that the land was his own. The court held that this was no defense. *See id.* at 78.

48. *See* Hall & Seligman, *supra* note 4, at 643 ("The clear-cut distinction which has existed for centuries in the English law between the effect of a mistake of fact and a mistake of law does not come from the Roman law.").

49. The distinction was emphasized in CHRISTOPHER ST. GERMAIN, DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND (Robert Clarke & Co., 1886) (1518):

> Ignorance of the law (though it be invincible) doth not excuse as to the law but in few cases; for every man is bound at his peril to take knowledge what the law of the realm is . . . but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases.

Id. at 248-49. Although the distinction may thus be critical to an accused's defense, attempts to differentiate between mistakes of law and fact have frequently been fraught with difficulty. A classic example involves a bigamy prosecution of a man who remarries, believing in error that his first marriage is no longer binding. Is the man's error one of fact or law? Courts striving to elude the harsh effect of the maxim may tend to call it a mistake of fact, *see, e.g.*, Long v. State, 65 A.2d 489, 498-499 (Del. 1949) (holding that a factual error about the dissolution of marriage provides a defense), while others may find it a mistake of law, *see, e.g.*, Staley v. State, 131 N.W. 1028 (Neb. 1911) (holding that the defense is not available even where defendant had been advised by three different lawyers that his former marriage was incestuous and void); State v. Woods, 179 A. 1 (Vt. 1935) (holding that an error about the validity of a divorce is no defense). The Model Penal Code proposed that the distinction between mistake of law and mistake of fact claims be abolished, on the theory that both kinds of error eliminate culpability equally. *See* MODEL PENAL CODE § 2.04 cmt. 1 at 270 n.2 (1985). The debate about the wisdom of the law and fact distinction is beyond the scope of this Article.

50. This sentiment appears in myriad early sources. *See* ST. GERMAIN, *supra* note 49, at 248 ("[E]very man is bound at his peril to take knowledge what the law of the realm is . . . ."); 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 42 (London, E. Rider 1800) (1680).

51. *See* 1 HALE, *supra* note 50, at 42:

> Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do . . . .

52. *See supra* text accompanying note 1.

without the maxim the defense of ignorance of the law would be abused (all would claim ignorance to avoid punishment) and the concern that feigned claims would be impossible to refute.[53]

Despite the English devotion to the *ignorantia legis* maxim, important (though limited) exceptions to the maxim existed under English law, just as they had under Roman law. One scholar noted: "In both [the Roman and English] systems considerations of equity induced the courts to deviate from the rule if arising cases did not expressly warrant its application."[54] Departures were also granted in criminal cases when the doctrine of *mens rea* required that they be, such as when particular specific intent crimes required proof of an intent that was negatived by the accused's lack of knowledge of his culpability.[55]

C. The Maxim in the United States

The *ignorantia juris* maxim currently in place in the United States grew out of this venerable ancestry. Broad and early acceptance of the maxim is found in numerous cases.[56] As with the Roman

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53. John Austin, for example, proposed that the maxim was justified by the utilitarian need to avoid the intractable problems of proof that would otherwise accompany every criminal prosecution. *See* 1 AUSTIN, *supra* note 44, at 498 ("Whether the party was *really* ignorant of the law, and was *so* ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others."). Under this view, were it possible to plead ignorance of the law as a defense, there would be nothing to prevent every accused from claiming it—"But, I did not know the law!"—and conferring upon the hapless prosecutor the difficult task of disproving a negative—"You did!"

54. Bolgar, *supra* note 39, at 636; *see also* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 182, at 180 (Little, Brown, and Co. 14th ed. 1918) (1835) ("Equity always relieves against a mistake of law when the surrounding facts raise an independent equity in behalf of one suffering through the mistake.").

55. *See* Bolgar, *supra* note 39, at 633. An exception might also be made where the accused "could not possibly have known of [the criminal statute's] existence." Peter Brett, *Mistake of Law as a Criminal Defence*, 5 MELB. U. L. REV. 179, 187 (1966).

56. *See, e.g.*, Respublica v. Negro Betsey, 1 U.S. (1 Dall.) 469 (1789) (Bryan, J.) (granting a writ of habeas corpus and holding that a slave owner who failed to register the name of child slave by the statutory cut-off date was not excused by his ignorance of the law that set the date); The Cotton Planter, 6 F. Cas. 620 (C.C.D.N.Y. 1810) (No. 3270) (holding that ignorance of an act laying an embargo was not an excuse once the act was made known to the local customs collector); The Ann, 1 F. Cas. 926, (C.C.D. Mass. 1812) (No. 397) (holding that ignorance of an act laying an embargo was not an excuse from the time of the act's passage); United States v. Smith, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting) (arguing that while no one may allege ignorance of the criminal code under which they live, one may allege an ignorance of the law of nations, with its many writers, different languages, and often differing views); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) (holding that a mistake of law does not excuse forfeiture of sugars which were believed to be refined sugars under the

and British versions, the American version of the principle was frequently articulated in lofty terms: every man "of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports," and "it is culpable negligence in him to do an act . . . and then to set up his ignorance of law as a defence."[57]

Legal theorists continued to study the maxim and proposed three additional rationales in its support. Rejecting Austin's argument that problems of proof justified the maxim,[58] Oliver Wendell Holmes proposed an alternative utilitarian rationale: "[T]o 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."[59] In Holmes's view, punishing offenders who acted in ignorance of the law would achieve optimal societal knowledge of, and compliance with, the law. Thus, adherence to the maxim would promote a culture of legal literacy, while a retreat from it, even if in the interests of individuated justice, would give rise to a community of legal simpletons.

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statute, but were not); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) ("[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse."); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . ."). State courts were in accord. *See, e.g.*, Ryan v. State, 30 S.E. 678, 680 (Ga. 1898) (holding that while an accused's ignorance of the law does not excuse, an accused can also not use the victim's ignorance of the law as a defense).

57. 1 STORY, *supra* note 54, § 209, at 212; *see also* Letter from Thomas Jefferson to Andre Limozin (Dec. 22, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 451 (Julian P. Boyd ed., 1955) ("[I]gnorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended.").

58. Holmes challenged the suggestion that an accused's ignorance of the law would be more difficult to establish than other required elements, and argued that any proof problems could be remedied simply by shifting the burden to establish such ignorance to the accused. *See* HOLMES, *supra* note 4, at 48.

59. *Id.* In the modern administrative state, of course, the Holmesian view would have to be broadened to take stock of the vast complex of lawmakers at work today—the state and federal legislatures that enact laws, the administrative agencies that implement those laws and promulgate governing regulations of their own, and the courts that interpret and add meaning to those statutes and regulations. Viewed in this light, an updated version of the Holmesian justification might look something like this: To admit the ignorance of law excuse at all would be to encourage ignorance when a host of state and federal legislatures, administrative agencies and courts have determined (although not always consistently with each other) to make us know and obey. For an excellent refutation of the Holmes justification, see Dan M. Kahan, *Ignorance of Law* Is *an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

Professor Jerome Hall later challenged Holmes's view[60] and proposed that the maxim was justified by a more fundamental rationale—the rationale of legality. Hall contended that ignorance of the law claims could not be permitted for to do so would contradict the principle of legality, elevating offenders' perceptions of the law above the law itself.[61] Under the legality principle, when an accused fails to know that her conduct violates a law, whether because she failed to inform herself of the law's existence or its application to her behavior, or because she misunderstood or disagreed with its prescribed meaning, the law should be unforgiving.[62]

Finally, Professor Henry M. Hart postulated that the "essential rationale" of the "much misunderstood" maxim is that any member of the community who engages in intrinsically wrongful, prohibited acts "without knowing that they are criminal is blameworthy, as much

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60. Hall rejected the suggestion that the maxim was either designed to, or capable of "stimulat[ing] legal education." Hall, *supra* note 4, at 17. As he put it, "[T]here is not the slightest evidence that the generality of men study the criminal law in order 'to know and obey it.' The deterrent theory . . . reflects an over-simple, intellectualistic psychology that hardly comes into contact with the actual springs of moral conduct and conformity with penal law." *Id.* at 18. Hall also refuted Austin's argument that difficulties associated with disproving claims of ignorance necessitated the rule, though somewhat less vehemently. *See id.* at 16-17 (writing that, while Austin's theory "ha[d] much to recommend it," in many cases it would be possible to disprove a claim of ignorance simply by establishing the accused's access to the law, by, for example, establishing that the accused had subscribed to a newspaper that published the law governing his conduct).

61. *See id.* at 18-19. As Professor Hall so eloquently put the point:

> Now comes a defendant who truthfully pleads that he did not know that his conduct was criminal, implying that he thought it was legal. This may be because he did not know that any relevant legal prohibition existed (ignorance) or, if he did know any potentially relevant rule, that he decided it did not include his intended situation or conduct (mistake). . . . If that plea were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e., the law actually is thus and so*. But such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality.

Id. at 19. Hall explained the legality rationale in several steps. First, because penal rules are "unavoidably vague," Hall reasoned that it would be possible to "disagree indefinitely" about what the law requires. *Id.* at 18. Second, the interest in legal order requires that the meaning of penal rules be resolved one way or the other to allow or proscribe certain conduct. Third, once "competent officials" after a "prescribed procedure" declare what the meaning of a law is, "the debate must end." *Id.* at 19. "[T]hese, and only these interpretations are binding, *i.e.*, only these meanings of the rules *are the law*." *Id.* (emphasis added).

62. *See id.* at 19:

> [T]here is a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting, also, that those officials *must* declare it to be . . . what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction.

for his lack of knowledge as for his actual conduct."[63] Using murder as an example of such an inherently wrongful act, Hart argued that even if an offender somehow lacked knowledge that the murderous act violated a specific criminal law, her conduct would still be blameworthy and deserving of criminal punishment as much because she did not know that murder was wrong as because she took another's life.[64] Hart warned, however, that the maxim should only be applied to rules that adequately reflect community attitudes or needs; it should not be applied to an individual who offends a statute that punishes conduct that is *malum prohibitum* (conduct that is wrong only because it is illegal) rather than conduct that is *malum in se* (conduct that is intrinsically wrongful).[65]

American courts have never agreed on a single rationale for the maxim. Some courts have applied the maxim to preclude mistake of law claims on the ground that such claims would arrest the administration of justice and provide a "shield for the guilty."[66] Other jurists have cited the Holmesian view that the maxim is needed to promote knowledge and compliance with the law.[67] Still others have espoused Hall's principle of legality rationale, arguing that departures from the doctrine would undermine "core standards of criminal behavior" that

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63. Hart, *supra* note 4, at 413.

64. *See id.*

65. *See id.* at 419:

> If . . . the criminal law adheres to this maxim when it moves from the condemnation of those things which are *mala in se* to the condemnation of those things which are merely *mala prohibita*, it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books.

Some scholars disagree. Professor Kahan has argued that even a person who violates in ignorance a *malum prohibitum* offense, may properly be punished provided that "her conduct reveals that she is insufficiently committed to the moral values that the law reflects." Kahan, *supra* note 59, at 146; *see also* Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (challenging the assertion that regulatory crimes are morally neutral or less culpable than *mala in se* crimes). While Professor Hart acknowledged that in some circumstances a failure to determine the legality of one's conduct prior to acting might be culpable in and of itself, this was a culpability of "a very distinctive kind" which could be treated and punished as a separate crime—"the crime of ignorance of the statutes or of their interpretation." Hart, *supra* note 4, at 419.

66. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1, at 586 (1986) (citing cases).

67. *See, e.g.*, People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987).

the criminal law strives to secure.[68] It is also not uncommon for combinations of the various rationales to appear in a single judicial opinion.[69]

The inability of American jurists and commentators to agree on a single rationale for the maxim has not precluded its application in the United States, but it may help to explain the growing number of cases that have departed from the maxim over time. Notwithstanding the wide variety of rationales that have been used to support the application of the maxim in the United States, courts have also deviated from the maxim, just as their forebears had done, when evidence of bona fide ignorance or mistake has made criminal conviction (to them) unfathomable, or the law itself has required forgiveness of an accused's legal error. Thus, the courts have sometimes (though not uniformly) held that an accused's ignorance of or mistake about a law is excusable if she fairly relied on some erroneous advice from an official responsible for interpreting or enforcing that law.[70] Ignorance or

68. United States v. Barker, 546 F.2d 940, 972 (D.C. Cir. 1976) (Leventhal, J., dissenting). The principle of legality rationale is detectable in early American case law as well. *See, e.g.*, United States v. Learned, 26 F. Cas. 893, 896 (E.D. Mich. 1870) (No. 15,580) ("No man has a right to set up a construction of the law for himself, and then plead it in justification of his violation of the law."); The Sarah B. Harris, 21 F. Cas. 441, 442 (D. Me. 1867) (No. 12,344) (holding that a defendant's ignorance "as to the true construction of the law, cannot change the law and make an act legal and valid, which otherwise would be invalid").

69. For example, a blend of the Austinian and Holmesian rationales is detectable in Barlow v. United States, 32 U.S. (7 Pet.) 404 (1833), an opinion crafted by Justice Story. "There is scarcely any law which does not admit of some ingenious doubt," wrote the Justice, "and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them." *Id.* at 411. This statement reflects both the Austinian fear that, if permitted, mistake of law claims would clog the courts, and the Holmesian concern that a rule permitting mistake of law claims would encourage law-breaching rather than law-abiding behavior.

70. A classic example of an unexcused act of reliance on mistaken official advice can be found in Hopkins v. State, 69 A.2d 456 (Md. 1950). Reverend Hopkins sought and obtained the advice of a local prosecutor regarding a sign he wished to erect which advertised, among other things, his parish and notary public services. A state statute forbade the erection of any sign "intended to aid in the solicitation or performance of marriages." *Id.* at 458. The reverend erected the sign after the state's attorney advised him that it would not violate the statute. Subsequently, however, Hopkins was prosecuted and convicted under the provision. On appeal, Hopkins argued unsuccessfully that he had reasonably relied on the state's official interpretation of the law. The appellate court rejected the defense, holding that "advice given by a public official, even a State's Attorney, that a contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did amount to a violation of the law. . . . [I]gnorance of the law will not excuse its violation." *Id.* at 460. *But see* Cox v. Louisiana, 379 U.S. 559, 571 (1965) (holding that an accused's due process rights may be violated if he is convicted "'for exercising a privilege which the State had clearly told him was available to him'" (quoting Raley v. Ohio, 360 U.S. 423, 426 (1959))).

mistakes of law might also be forgiven if it is determined that the accused reasonably relied on a statute or judicial precedent later repealed or overturned,[71] or if the legislature failed to make the law adequately known or knowable.[72]

A number of jurisdictions have expressly provided that ignorance of the law will excuse if the actor acted in reasonable reliance upon an official interpretation of the official or agency charged by law with the responsibility of interpreting the law defining the offense. *See, e.g.*, ARK. CODE ANN. § 5-2-206 (Michie 1997); COLO. REV. STAT. § 18-1-504 (1998); CONN. GEN. STAT. ANN. § 53a-6 (West 1994); HAW. REV. STAT. ANN. § 702-220 (Michie 1994); 720 ILL. COMP. STAT. ANN. 5/4-8 (West 1993); KAN. STAT. ANN. § 21-3203 (1995); KY. REV. STAT. ANN. § 501.070 (Banks-Baldwin 1995); ME. REV. STAT. ANN. tit. 17-A, § 36 (West 1983); MO. ANN. STAT. § 562.031 (West 1979); N.J. STAT. ANN. § 2C:2-4 (West 1995); N.Y. PENAL LAW § 15.20 (McKinney 1998); TEX. PENAL CODE ANN. § 8.03 (West 1994); UTAH CODE ANN. § 76-2-304 (1995); *see also* MODEL PENAL CODE § 2.04(3)(b) (1985); 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 183, at 386 (1984 & Supp. 1999) (citing cases and statutes). For an excellent discussion of the defense of reasonable reliance on official interpretations of the law, see John T. Parry, *Culpability, Mistake and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

Reliance on the advice of one's own counsel or private counsel has not received similar treatment. An accused will not normally be excused for violating a law on the ground that she relied on her own erroneous interpretation of the governing statute, even if that interpretation is reasonable. *See, e.g.*, People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987) (denying a mistake of law claim raised by a corrections officer charged with possessing a loaded weapon without a permit, despite evidence that the officer erroneously believed peace officers were exempt from liability under the statute). Reliance on advice of private counsel is generally viewed with equal suspicion. *See* DRESSLER, *supra* note 38, § 13.02[B][3], at 152.

71. A number of jurisdictions provide that ignorance of the law will excuse if the actor acted in reasonable reliance upon a statute, afterward determined to be invalid, or a judicial decision decided by the highest state or federal court that was later reversed or overruled. *See, e.g.*, ALA. CODE § 13A-2-6 (1994); ARK. CODE ANN. § 5-2-206 (Michie 1997); COLO. REV. STAT. § 18-1-504 (1998); CONN. GEN. STAT. ANN. § 53a-6 (West 1994); HAW. REV. STAT. ANN. § 702-220 (Michie 1994); 720 ILL. COMP. STAT. ANN. 5/4-8 (West 1993); KAN. STAT. ANN. § 21-3203 (1995); KY. REV. STAT. ANN. § 501.070 (Banks-Baldwin 1995); ME. REV. STAT. ANN. tit. 17-A, § 36 (West 1983); MO. ANN. STAT. § 562.031 (West 1979); N.J. STAT. ANN. § 2C:2-4 (West 1995); N.Y. PENAL LAW § 15.20 (McKinney 1998); *see also* MODEL PENAL CODE § 2.04(3)(b) (1985). Similar sentiments can be found in early case law. *See, e.g.*, United States v. Bergner & Engel Brewing Co., 260 F. 764, 765 (E.D. Pa. 1919) (stating that although "[t]he principle of law, voiced in the legal maxim that 'ignorance of the law excuses no one,' is a necessary doctrine . . . no one possessing any degree of intellectual honesty can deny that all doubts of what is the law should be authoritatively settled, in order that the law may be obeyed"). An accused's reliance on an erroneous administrative decision, however, may lead to less satisfactory results. *See, e.g.*, Rothman v. United States, 270 F. 31, 37 (2d Cir. 1920) (holding that the defendant's reliance on an erroneous decision issued by the Treasury Department provided him no excuse).

72. Several states recognize a mistake of law defense if the law was unavailable to the accused at the time of the offense conduct. *See* 2 ROBINSON, *supra* note 70, § 182(c), at 383 n.7 (1984) (collecting statutes). The drafters of the Model Penal Code also proposed such a provision. *See* MODEL PENAL CODE § 2.04(3)(a) (1985). This type of mistake claim may also have constitutional dimensions. *See* Lambert v. California, 355 U.S. 225, 229 (1957) (holding that a conviction under a *malum prohibitum* municipal ordinance violated the defendant's due proc-

An additional important subset of cases deviating from the maxim—and indeed, the cases with which this Article is primarily concerned—consists of decisions in which courts countenance ignorance or mistake of law claims because the claims disprove an element of the offense the prosecution is obligated to establish.[73] These cases make clear that ignorance of the law *will* excuse if the law itself permits it to do so. Put another way, the law itself may impose upon a prosecutor the obligation to prove an accused's knowledge of the law as a specific element of a particular offense before a conviction may stand for its violation.[74] For this reason, the statement "ignorance of the law does not excuse" is decidedly deceptive. A more precise statement of the maxim would be: "ignorance of the law is no defense *unless the law under which an accused is prosecuted makes knowledge of the law an element of the offense*."[75]

Determining when the law does this can be a formidable task. As a matter of democratic theory, because Congress, rather than the judiciary, makes the laws, Congress must decide whether an offender's ignorance of the law will or will not provide a defense for each federal criminal enactment. When Congress makes its intentions clear, the task of interpreting the statute should be relatively straightforward. Problems arise when congressional intent is less evident. The less clear Congress's intent, the more daunting the courts' interpretive task becomes. In such situations, however, the maxim itself can

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ess rights where the government could show neither that defendant had knowledge nor probability of knowledge of the ordinance). Although some commentators hoped that cases like *Lambert* would expand the situations in which mistake of law claims could be made, *see, e.g.*, Bruce Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1402 (1986), the courts have confined the decision to its facts, perhaps proving correct Justice Felix Frankfurter's famous quip that the majority's opinion would become "a derelict on the waters of the law." *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting).

73. *See, e.g.*, United States v. Golitschek, 808 F.2d 195, 203 (2d Cir. 1986) ("[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.").

74. *See generally* 1 LAFAVE & SCOTT, *supra* note 66, § 5.1, at 575 ("[I]gnorance or mistake as to a matter of fact or law is a defense if it negatives a mental state required to establish a material element of the crime . . . .").

75. The term "defense" in this context quite loosely refers to the establishment of the prosecution's failure of proof. Although the defendant would bear the burden of producing evidence of his purported mistake of law, and thus in this sense is properly referred to as a defense, that burden is minimal since the prosecution is never relieved of the burden of persuading the finder of fact that the prescribed culpability of all elements of the offense have been established beyond a reasonable doubt. *See* MODEL PENAL CODE § 2.02(4) (1985). For a helpful discussion of the operation of the burden of production for failure of proof defenses and mistakes of law that negate offense elements, see 1 ROBINSON, *supra* note 70, §§ 4(a)(2), at 62.

be thought of as a helpful rule of construction that favors a particular outcome (that knowledge of illegality will not be an element) in the absence of evidence that Congress desired a different result.

To illustrate, when a court is called upon to interpret a statute, it faces three distinct possibilities: (1) that Congress intended that an accused's lack of knowledge of the law would not be an excuse; (2) that Congress intended that an accused's lack of knowledge of the law would be an excuse; and (3) that Congress did not decide whether an accused's lack of knowledge of the law would be an excuse. Given the centrality of the *ignorantia legis* maxim to American criminal jurisprudence,[76] one would expect the vast majority of federal criminal statutes to fall into the first category. Put slightly differently, unless a criminal statute's language or legislative history plainly reflects a congressional intent that knowledge of that law is an element of the crime, one must presume the opposite intent—a congressional desire to adhere to the maxim.[77] By contrast, an express statement (either on a statute's face or in its legislative history) that knowledge of the law is an element of the offense would plainly put a statute into the second category.[78] Finally, in rare situations, Congress might prohibit (or require) certain conduct without deciding or

76. One of the Model Penal Code's provisions on mistakes of law illustrates this centrality: "Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides." MODEL PENAL CODE § 2.02(9) (1985).

77. *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) (holding that the statute authorizing the Interstate Commerce Commission to promulgate regulations governing the transportation of certain corrosive liquids and to impose criminal penalties on those who "knowingly violated" those regulations required proof that the defendant knew the nature of his acts, not proof that he knew his acts violated the regulations).

78. One example is found in a provision of the federal firearm laws that prohibits the sale of firearms by a licensed dealer of one state to residents of another state unless the dealer complies with the laws and published ordinances of both states. *See* 18 U.S.C. § 922(b)(3) (1994). The statute provides an affirmative defense based on the accused's lack of knowledge of a state's laws. *See id.* (stating that dealers "shall be presumed . . . *in the absence of evidence to the contrary* to have had actual knowledge of the State laws and published ordinances of both States") (emphasis added). Other statutes allow conviction without proof of knowledge of the law, but prohibit the accused's imprisonment if she can establish that she lacked such knowledge. An example is provided by a section of the Federal Securities Exchange Act which specifies that "no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." 15 U.S.C. § 78ff (1994). Still other statutes, although facially silent, reflect congressional intent to provide a mistake of law defense in their legislative histories. *See infra* Part III.B.2 (discussing the legislative history of the Child Support Recovery Act).

reaching a consensus as to whether ignorance of the statute or regulation governing the conduct would provide an excuse.[79]

Surprisingly, the cases reviewed in Part II reveal that courts have increasingly read criminal statutes containing the term "willfully" to evidence a congressional intent that knowledge of that law must be proved.[80] While in theory the maxim should discourage such a construction without clear evidence of congressional intent, even in the absence of such evidence (and, in some cases, despite plain evidence to the contrary) courts have "found" such intent lurking in a host of criminal statutes. In short, although many consider the maxim to be the dominant rule, recent case law suggests that, even if this is true for now, it may not be for long, particularly in prosecutions brought under statutes containing language of willfulness.

II. THE "JURISPRUDENCE OF WILLFULNESS"

This Part considers the Supreme Court's treatment of the maxim in early tax evasion cases, as well as in three cases decided in the last

79. In such situations, it might be appropriate for the courts to construe the statute in favor of such a defense under other rules of construction such as the rule of lenity, but not always. Why? Because sometimes the legislative history of a statute will both make it clear that Congress included a particular *mens rea* term without reaching agreement on its meaning, and that Congress intended the term to be interpreted under "general principles" of statutory construction, such as the *ignorantia legis* maxim. It would be error to apply the rule of lenity to favor a mistake of law defense in such a case. For example, in a slightly different context, when Congress passed the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1994), it prohibited the "knowing" transportation, treatment, storage or disposal of any "hazardous waste." 42 U.S.C. § 6928(d) (1994). No provision in the RCRA defined the term "knowing" and legislative history of the Act made it clear that this was an intentional omission. The Senate Report discussing the term forthrightly acknowledged that Congress had "not sought to define 'knowing,'" but rather that it preferred to leave "that process . . . to the courts *under general principles*." S. REP. NO. 96-172, at 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038 (emphasis added). Courts that have construed the same word in the Clean Water Act, *see* 33 U.S.C. § 1319(c)(2)(A) (1994), have repeatedly rejected arguments that the language requires proof that a violator acted with knowledge of the particular regulation or law offended. *See, e.g.*, United States v. Wilson, 133 F.3d 251, 261-62 (4th Cir. 1997); United States v. Sinskey, 119 F.3d 712, 715-16 (8th Cir. 1997); United States v. Hopkins, 53 F.3d 533, 537-40 (2d Cir. 1995); United States v. Weitzenhoff, 35 F.3d 1275, 1283-86 (9th Cir. 1993); *see also Int'l Minerals & Chem. Corp.*, 402 U.S. at 563 (holding that the same language contained in the Interstate Commerce Commission regulations would not be interpreted to require proof of knowledge of the law because it was "too much to conclude" that by employing the *mens rea* language Congress intended to "carv[e] out an exception to the general rule that ignorance of the law is no excuse").

80. A smaller number of courts have reached the same result by construing other *mens rea* language, particularly the phrase "knowingly violates." *See supra* note 27.

decade—*Cheek v. United States*,[81] *Ratzlaf v. United States*[82] and *Bryan v. United States*[83]—all of which depart from the maxim. Each case centered on the proper construction of the scienter term "willfully" in a criminal statute. In each case, the Court construed the term to require proof of the accused's knowledge of the law. This Part also examines the decisions of lower federal courts in the wake of these recent Supreme Court holdings.

Through these decisions the courts have created a series of factors that they now routinely use to construe the term "willfully" to make knowledge of the law an element of a crime.[84] The decisions make clear that, in a statute requiring "willfulness," the presence of any one of the factors can trump the old maxim. Indeed, the factors are so powerful that courts have used them to justify outright refusals to consider legislative history in construing the *mens rea* term.[85] Collectively, the cases establish that "willfully" may impose a knowledge of the law requirement:

1. when the term appears in a statutory scheme the court finds extremely "complex" or "technical";[86]
2. when the term appears in a statute that the court finds could punish persons with "non-nefarious" motives;[87]
3. when the term appears in a statute that contains more than one *mens rea* term, which compels the knowledge of the law construction to avoid "surplusage";[88] or
4. (less often) when the term appears in a *malum prohibitum* criminal statute.[89]

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81. 498 U.S. 192 (1991).

82. 510 U.S. 135 (1994).

83. 118 S. Ct. 1939 (1998).

84. These "factors" are conceptually different from the "exceptions" described in Part I of this Article. As discussed above in text, the American courts sometimes made an exception to the maxim in cases charging crimes that required proof of an accused's specific intent. Contrary to the maxim, a specific intent to violate the law might have to be established in such a case. Depending on their construction, criminal statutes employing the *mens rea* term "willfully" may or may not impose a burden on the prosecutor to prove that specific intent. This Part describes the factors that courts have developed to help decide whether "willfully" should be so construed in individual cases.

85. *See Ratzlaf*, 510 U.S. at 147-48 (finding it unnecessary to consider legislative history to determine the meaning of "willfully"); United States v. Obiechie, 38 F.3d 309, 312-14 (7th Cir. 1994) (choosing to focus on statutory text rather than on inconclusive legislative history).

86. *See infra* Parts II.A, II.B.2.

87. *See infra* Part II.B.1.

88. *See infra* Part II.C.1.

89. *See infra* Part II.C.3.

Some courts have gone further and suggested that the term should be read to impose a knowledge of the law requirement whenever it appears in a criminal statute.[90]

The combined force of these judicially created factors has deeply wounded the *ignorantia legis* maxim. A careful review of these cases reveals that while these factors may appear objective, singly and collectively they establish no consistent, principled standards for determining when Congress intended ignorance or mistake of law to provide an excuse. Instead, the word "willfully" has become an open invitation for courts to impose their own subjective judgments about when knowledge of the law should or should not have to be proved.

A. The Presence or Absence of Statutory Complexity

1. *The Tax Cases.* In a long line of cases beginning in 1933 with *United States v. Murdock*,[91] the Supreme Court repeatedly rejected arguments by the government that the maxim should preclude violators of the federal tax code from claiming that their ignorance or misunderstanding of the tax provisions excused their violations. In *Murdock*, Harry Murdock had refused to answer the questions of a suspicious Internal Revenue Service (IRS) agent about deductions that Murdock had claimed on his tax returns, on the ground that answering would tend to incriminate him under state law. He was later prosecuted for the misdemeanor of "willfully" refusing to give testimony and supply information to the IRS relating to his claimed deductions.[92] Although Murdock's invocation of the privilege was improper (because the Fifth Amendment privilege against self-incrimination did not then protect against probable incrimination under state law), his error in asserting it was also reasonable, as the law regarding the assertion of privilege was not well settled at the time of the invocation. Nonetheless, the trial court refused to instruct the jury that it could decide whether Murdock had acted willfully by considering whether he had invoked the privilege "in good faith and based upon his actual [mistaken] belief" that he was entitled to do so.[93] The jury convicted, and that verdict was upheld on appeal.

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90. *See infra* Part II.C.2.

91. 290 U.S. 389 (1933).

92. *See id.* at 391.

93. *Id.* at 393. Instead of giving this instruction, the trial judge told the jury that he believed that the government had proven Murdock's guilt beyond a reasonable doubt.

Prior to *Murdock*, in civil contexts, courts had often construed the term "willfully" to mean "intentionally, knowingly, or voluntarily" and not applicable to an act performed by accident or mistake.[94] Proof that the accused had engaged in the conduct purposely and with knowledge of the physical facts of her prohibited behavior normally satisfied this standard. In criminal contexts, however, some courts had placed additional qualifiers on the term, variously defining it to require proof of an act done with "bad purpose,"[95] without valid excuse,[96] stubbornly,[97] or less often, without cause to believe in its legality.[98]

On a grant of certiorari, Murdock argued that the trial court erred in its charge on the meaning of the statute's scienter requirement. Murdock contended that the term "willfully" implicitly created a mistake of law defense, and that his mistake (his erroneous but reasonable belief that the Fifth Amendment entitled him to refuse to answer the agent's questions) prevented any conclusion that he had "willfully" failed to supply the requested information to the agent. Despite the strikingly different ways in which the term had been defined over time, the *Murdock* Court agreed with Murdock's claim, finding it implausible that Congress would have inserted the word "willfully" into the tax statute unless it had meant to exempt genuine mistakes about the law's requirements. As the majority wrote:

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94. *See, e.g.*, Humbrid Cheese Co. v. Fristad, 242 N.W. 158, 161 (Wis. 1932); Hiatt v. Tomlinson, 158 N.W. 383, 385 (Neb. 1916); Chicago, St. L. & P. R. Co. v. Nash, 27 N.E. 564, 564 (Ind. App. 1891).

95. Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 220 (1838) *quoted in* Spurr v. United States, 174 U.S. 728, 734 (1899); Potter v. United States, 155 U.S. 438, 446 (1894); Felton v. United States, 96 U.S. 699, 702 (1877).

96. *See, e.g.*, *Felton*, 96 U.S. at 702; Williams v. People, 57 P. 701, 702 (Colo. 1899); People v. Jewell, 101 N.W. 835, 836 (Mich. 1904).

97. *See* State v. Harwell, 40 S.E. 48, 48 (N.C. 1901).

98. *See, e.g.*, Hateley v. State, 118 Ga. 79, 81 (1904) (holding that "willfully" in a penal statute generally means with a bad or evil purpose or without ground for believing the act to be lawful). Under this early definition, the law might forgive a defendant who acted in reasonable error about some legal privilege, particularly if the mistake could be characterized as a mistake of fact, as opposed to a mistake of law. For example, in *State v. Savre*, 129 Iowa 122 (1905), the court held that an accused could plead mistake in a prosecution that charged him with "willfully" voting in a precinct other than that in which he resided if he believed in error that he was entitled to vote in that precinct. *See id.* at 131. The court stressed, however, that if the mistake of the accused "was one of law solely" the mistake would provide no excuse for "every one is presumed to be as familiar with the election laws as with others." *Id.* But because "[t]he determination of a person's place of residence is often difficult, and frequently depends upon nice distinctions and complicated questions of law and fact," *id.* at 134, a mistake claim could be offered by an accused, particularly where his mistake about his entitlement to vote was based in part on erroneous advice received from three attorneys.

> 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.[99]

The same was held to be true for the separate offense of failing to supply information to the IRS.[100] To be willful, such omissions required proof that the accused acted with an "evil motive,"[101] which prevented the conviction of any person who failed to comply with the requirements of the tax code due to ignorance or a genuine mistake about his liabilities or obligations under the code.[102] Thus, contrary to the trial court's charge, a mistaken but genuine belief that the law did not require him to supply information to the IRS should have prevented Murdock from being convicted.

The *Murdock* exception to the *ignorantia legis* maxim emanated from the concern that errant, but sincerely perplexed, taxpayers could be branded criminals if the maxim precluded their mistake of law claims. The tax provisions were simply too voluminous and complex to justify imposing criminal liability upon every person who might in good faith miscalculate her tax obligations.[103] The sheer size of the group that would be affected by a more severe reading—virtually every wage earner in the country—demanded a policy more forgiving of innocent error. Based on this reasoning, the Court construed the word "willfully" to limit the number of convictions of alleged tax offenders. As the Court later held, the errors of "the well-meaning but easily confused, mass of taxpayers" would not be "willful," whereas the errors of the "purposeful tax violator" would.[104] Finders of fact were to separate the "good guys" from the "bad guys" by determining whether an accused's failure to comply with the tax code was driven by an "evil motive."[105]

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99. *Murdock*, 290 U.S. at 396.

100. *See id.*

101. *Id.*

102. *See id.*

103. *See id.* Although the Court appears to have toyed with the idea of construing "willfully" in the misdemeanor tax provisions to require proof of something slightly less than the proof of "evil motive" or "bad purpose" required in felony tax prosecutions, *see* Spies v. United States, 317 U.S. 492, 497 (1943), it ultimately rejected the idea. *See* United States v. Bishop, 412 U.S. 346, 353-56 (1973).

104. *Bishop*, 412 U.S. at 361.

105. The "evil motive" formulation resurfaced in later tax cases. *See, e.g., id.*

Murdock's "evil motive" or "bad purpose" formulation was no model of clarity. What kind of evidence was needed to show that a tax defendant's conduct was driven by an "evil motive" rather than innocent error?[106] Through a series of cases, the Court gradually answered this question by shifting from the "bad purpose" formulation of *Murdock* to a "voluntary and intentional violation of a known legal duty" test.[107] Throughout the tax decisions that followed *Murdock*, the Court repeatedly stressed the complexity of the tax code as the basis for its construction of the willfulness term.[108]

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106. One possible answer was that proof of "positive knowledge of violation" was required. *See* Mark D. Yochum, *Ignorance of the Law is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 225 (1989). A nonexhaustive list supplied in a later decision suggested that the Court's standard would be satisfied by evidence of a wide array of deceptive behavior, including keeping two sets of books, making false entries, creating false invoices or other documents, or concealing or destroying incriminating evidence. *See Spies*, 317 U.S. at 499. Thus it appeared that the requisite evil motive could be demonstrated with any proof, direct or circumstantial, establishing that the accused knew of his obligation to supply certain information to the IRS but purposefully failed to do so. Put slightly differently, the "evil motive" test required proof both that an accused was aware of his tax obligations and that he intentionally failed to meet them.

107. The Court construed the word "willfully" in the tax evasion statute to connote a "voluntary, intentional violation of a known legal duty" for the first time in *United States v. Bishop*, 412 U.S. 346, 360 (1973). Even in *Bishop*, however, the Court continued to employ the *Murdock* "evil motive" formulation. Still later, in *United States v. Pomponio*, 429 U.S. 10 (1976), the Court moved even further away from the "evil motive" or "bad purpose" formulation in favor of the "voluntary and intentional violation of a known legal duty" test. In a *per curiam* opinion, the *Pomponio* Court emphatically denied that willfulness in the tax statutes "require[d] proof of any motive other than an intentional violation of a known legal duty." *Id.* at 12. It was not until 1991, however, in *Cheek v. United States*, 498 U.S. 192 (1991), that the Court seemed fully to cast off the "evil motive" construction. *See id.* at 200 (noting that the *Bishop* decision had "refined" the *Murdock* "bad purpose" formulation). *See also* Yochum, *supra* note 106, at 225 n.19.

108. This point was made most clearly in *Spies v. United States*, 317 U.S. 492 (1943), in which Justice Jackson wrote:

> [T]he [tax] law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay.

Id. at 496 (footnote and citation omitted). *See also Cheek*, 498 U.S. at 199-200:

> 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 [that every person knew the law] by making specific intent to violate the law an element of certain federal criminal tax offenses.

See also Bishop, 412 U.S. at 360-61:

> In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. . . . The Court's consistent interpretation of the word

An important issue raised by the complexity rationale remained unresolved, however, until late in the century—does a tax defendant's claim of ignorance or error have to be *objectively* reasonable to entitle her to an acquittal? If not, the government is presented with two potential problems—the tax evader and the tax protester. The tax evader could avoid punishment by feigning ignorance of the law, and the government would have to prove knowledge of a complex statute, a potentially difficult task. The tax protester, who is acutely aware that the government expects her to pay taxes, but who believes that the government lacks legitimate authority to compel her to do so, could defend herself in a tax prosecution simply by expressing her honest belief.[109] One way to limit the ramifications of the relaxation of the maxim would be to require citizens to make at least minimally reasonable efforts to know the law. Unreasonable mistakes of law would be punishable while reasonable mistakes would not. A later decision adding to the Court's "jurisprudence of willfulness," however, foreclosed this possible limitation on what was widely perceived at the time to be a special tax exception.

In *Cheek v. United States*,[110] the Court rejected the government's argument that a tax protestor's purported mistake about his tax duties had to be reasonable to provide a defense. The case involved the noncompliant conduct of John Cheek, a pilot for American Airlines, who, after years of faithfully filing tax returns, suddenly refused to file them. At his trial for willful tax evasion, Cheek claimed that he had sincerely, though mistakenly, come to believe that his wages were not considered taxable income under the Internal Revenue Code, and therefore he had no duty to declare them.[111] Cheek further

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'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.

109. This example highlights the double hardship the tax exception imposes on the *ignorantia legis* principle. The force of the maxim is not only erased in such cases, it is positively reversed. Why? Because whenever knowledge of illegality is construed to be an element of an offense, the government is at once deprived of the traditional conclusive presumption that all citizens know the law and simultaneously saddled with a presumption that the defendant did not, which it must then rebut beyond a reasonable doubt. This is due to the presumption of innocence that adheres in all criminal prosecutions. Thus, in any criminal tax case, with knowledge of illegality as an element to be proved, the prosecutor must overcome a presumption that the accused did *not* know of her tax obligations or liabilities to win a conviction.

110. 498 U.S. 192 (1991).

111. There was ample evidence in the record to belie Cheek's mistake claims. The evidence at trial revealed that Cheek had become a seasoned tax protestor. On several occasions prior to his indictment, Cheek had sued his employer and the IRS for withholding and failing to refund

claimed to believe that, even if the code declared wages to be income, any such declaration was unconstitutional. Over the defendant's objection, the trial court instructed the jury that Cheek's purported beliefs had to be reasonable to constitute a valid mistake of law defense.[112] Cheek was convicted on all counts.

On a grant of certiorari, the Supreme Court found the trial court's "willfulness" instruction deficient, and remanded the case for a new trial. The Court reaffirmed that the tax evasion statute's element of "willfulness" required proof of a "voluntary, intentional violation of a known legal duty,"[113] but held further that an honest but unreasonable mistake about one's tax obligations or liabilities was sufficient to preclude conviction.[114] In the Court's view, even an objectively unreasonable belief about the tax code might impermissibly cloud an accused's understanding of his legal duty to declare wages as income.[115] In reaching this conclusion, the Court emphasized yet

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taxes on his wages, respectively. *See id.* at 195 n.3. The claims were disallowed by the IRS and the private suits for damages dismissed as frivolous. Cheek was required to pay costs and attorneys fees ($1,500) and Rule 11 sanctions ($10,000). *See id.* Although the amount of the district court's sanction was later reduced to $5,000, the Court of Appeals agreed that the claim was frivolous, and imposed an additional sanction of $1,500. *See id.*

112. The district court instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." *Id.* at 197.

113. *Id.* at 201. Under this definition, two types of delinquent taxpayers could elude criminal conviction—those who accidentally failed to comply with the tax code due to mistake or other innocent reason (i.e., those who did not *intentionally* violate the provisions) and those who intentionally failed to file a return or supply required information to the IRS, due to an erroneous belief that they had no duty to do so (i.e., those who could not be said to have intentionally violated *a known legal duty*). A person who planned to pay her taxes but who inadvertently failed to notice that the deadline for filing a return had come and gone, would fall into the former category. A person who believed in error that she was not required to declare wages as income would fall into the latter. In both cases, the individuals would be allowed to assert an ignorance of the law defense to a criminal prosecution for willful evasion of the payment of taxes, although they both might be subject to civil penalties.

114. *See id.* at 202.

115. The Court was less forgiving of Cheek's purported belief that provisions of the tax code were unconstitutional as applied to him and thus could not validly impose upon him a duty to file returns. *See id.* at 204-06. That mistake, wrote the majority, arose not from an "innocent mistake[] caused by the complexity of the Internal Revenue Code," but from Cheek's "full knowledge of the provisions" and his "studied conclusion, however wrong, that those provisions [were] invalid and unenforceable." *Id.* at 205-06. Because this second claim merely expressed Cheek's personal disagreement with (not lack of understanding of) the Code's demands, it was "irrelevant to the issue of willfulness and need not be heard by the jury." *Id.* at 206.

again that the basis of the willfulness construction lay with the complexity of the tax laws.[116]

In summary, *Murdock* and its progeny established a special exception from the maxim for tax cases based on complexity. In this limited form, the tax exception provided a consistent and straightforward rule upon which Congress could rely when including "willfulness" language in other criminal tax provisions: because of the complexity of the Internal Revenue Code, the term would be construed to require proof of knowledge of the law violated. Throughout the tax decisions, however, the Court continued to stress the importance of the *ignorantia legis* maxim to the criminal law.[117] These maxim-affirming statements sent a powerful message: they emphasized the narrowness of the tax exception. In effect, the tax cases were the exception that proved the maxim and thereby reassured Congress that the maxim would continue to govern statutes that penalized willful misconduct unrelated to taxation.

2. *The Complexity Genie Escapes the Tax Bottle.* Even after the Court carved the tax exception out of the maxim, the general public—and many others better versed in the law—continued to believe that the courts remained faithful to the *ignorantia legis* principle.[118] The historical lore surrounding the maxim continued

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116. *See id.* at 199-200. Justice Blackmun strongly disagreed that complexity supplied a reason to overturn Cheek's conviction, arguing Cheek's claim of error related to "the income tax in its most elementary and basic aspect: Is a wage earner a taxpayer and are wages income?" *Id.* at 209 (Blackmun, J., dissenting). Professor Yochum has made a similar, colorful argument:

> In the Jazz Age there was a sense that, in the bustle of more significant enterprise, an otherwise honest citizen or, perhaps, even a jurist, could just forget to pay his tax. Here, in the late twentieth century, it is impossible to believe that anyone with income of any significance does not know the government will take some share, and even aliens must know April 15 is our day of reckoning.

Yochum, *supra* note 106, at 226.

117. *See, e.g.*, *Cheek*, 498 U.S. at 199 ("The general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

118. Professor Meir Dan-Cohen has argued that the public's belief that the maxim accurately states a firm legal principle, despite evidence that the courts have often managed to avoid the "harsh results that strict adherence to the maxim would entail," results from the processes of "acoustic separation" and "selective transmission." Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 646 (1984). Professor Dan-Cohen argues that where the achievement of one goal of the criminal law (for example, "encourag[ing] people to be diligent in their efforts to know the law"), *id.* at 648, is "severely compromised" by widespread public knowledge of a second goal (for example, the judicial policy of permitting legal ignorance as an excuse out of "considerations of justice"),

unabated as one generation dutifully passed it on to the next. Courts routinely depicted the tax exception as extremely narrow in scope, and rejected efforts to extend the reasoning of *Murdock* and *Cheek* beyond the tax arena.[119] They reemphasized statutory complexity, and in particular the complexity of the tax code, as the basis for construing "willfully" to require proof of knowledge of the law. The Supreme Court's pro-maxim rhetoric also fueled the belief that, outside the tax context, the maxim was a fundamental (if not inviolate) and binding principle of the criminal law. One court wrote, when rejecting a mistake of law claim in a non-tax case, that the Court "crafted a narrow exception, limited to tax cases, in which subjective mistake of law can constitute an absolute defense,"[120] and that "[n]owhere in *Cheek*, or the Court's earlier opinions involving criminal prosecutions under the tax laws is there any indication that courts should use a purely subjective standard in evaluating state-of-mind defenses under other federal statutes."[121]

Contrary to the popular belief that the tax cases represented the only crack in the *ignorantia legis* edifice, however, careful inspection of judicial decisions occurring between *Murdock* and *Cheek* reveals

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the law may seek to achieve both goals though a complimentary process of "acoustic separation." *Id.* Professor Dan-Cohen explains:

> Absent acoustic separation, these rules would be in conflict: the force of the duty to know the law would probably be severely compromised by public knowledge of the existence of a decision rule that excused offenses committed in ignorance of the law. In a world of partial acoustic separation, however, the law might try to serve the policies of both the conduct rule and the decision rule by approximating as closely as possible the imaginary world's complete acoustic separation. It would do so by attempting to convey to the general public a firm duty to know the law and by simultaneously instructing decisionmakers to excuse violations in ignorance of the law if fairness so required. It would also attempt to keep those two messages separate by employing a strategy of selective transmission.

Id. at 648; *see also* Yochum, *supra*, note 106, at 222-23 ("[P]eople know (because all know the maxim) that shady behavior may lead to jail in spite of the cry, 'I didn't know it was against the law.'").

119. *See, e.g.*, United States v. Lorenzo, 995 F.2d 1448, 1455 (9th Cir. 1993) (holding that *Cheek* does not apply to willfulness element of the false statement statute, 18 U.S.C. § 1001 (1988)); United States v. Aversa, 984 F.2d 493, 500 (1st Cir. 1993) (refusing to apply *Cheek* to currency transaction report provisions); United States v. Caming, 968 F.2d 232, 240-41 (2d Cir. 1992) (rejecting argument that all crimes requiring proof of willfulness require proof of knowledge of illegality, and reading *Cheek* to control only tax prosecutions); United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992) (refusing to apply *Cheek* to mail and property fraud charges); United States v. Chaney, 964 F.2d 437, 446 n.25 (5th Cir. 1992) (refusing to apply *Cheek* to making false statements on bank records); *see also* Michael L. Travers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1304 n. 23 (1995) (citing cases refusing to extend *Cheek* into areas other than federal tax crimes).

120. *Aversa*, 984 F.2d at 500.

121. *Id.* (citations omitted).

signs of the maxim's slow but certain decay.[122] Citing the tax decisions as support, some lower courts began to construe "willfully" to authorize a departure from the maxim on the basis of statutory complexity in non-tax cases as well.[123] Even the courts that rejected such mistake claims reinforced the idea that complexity *could* provide the basis for a mistake of law defense outside the tax field, by denying the claims on the ground that the violated statute was not sufficiently complex,[124] rather than on the ground that the complexity exemption was confined to tax prosecutions. These decisions expanded the tax precedents (which had provided a consistent and uncomplicated rule upon which Congress could rely in drafting statutes) to create a rule that turned on the complexity of the statute in question, as opposed to the inclusion of the term "willfully" in a tax provision.[125]

This expansion of the *Murdock* and *Cheek* tax exception might have been tolerable had "complexity" actually meant something, but none of the tax decisions had given content to the term. Perhaps this was because the complexity of the tax law was deemed too obvious to

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122. *See, e.g.*, United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828 (9th Cir. 1976) (reversing conviction for willfully exporting ammunition where the trial court did not require the government to prove that the defendant knew that his conduct violated the law). The Supreme Court itself held in a civil, non-tax case decided only five years after *Murdock* that "willfully" "'means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.'" United States v. Illinois Cent. R. Co., 303 U.S. 239, 243 (1938) (quoting St. Louis & S.F.R. Co. v. United States, 169 Fed. 69, 71 (8th Cir. 1909)); *see also* Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983), (holding that civil liability for allegations of unlawful wiretapping demanded the same level of proof required in criminal proceedings, i.e., proof of a voluntary and intentional violation of a known legal duty); Malouche v. JH Mgmt. Co., Inc., 839 F.2d 1024, 1026 (4th Cir. 1988) (holding that liability for unlawful wiretapping requires proof of criminal willfulness). Although scholars have failed to note the especially dramatic change in the courts' approach to constructions of "willfully," a few legal writers have taken note of the courts' steady, if hushed, movement away from the *ignorantia legis* principle in tax and non-tax prosecutions. *See* Dan-Cohen, *supra* note 118, at 646-47 (noting that, in order to avoid harsh results, courts do not strictly adhere to the maxim "ignorance of the law is no excuse"); Bolgar, *supra* note 39, at 640 (recognizing *ignorantia legis* as "more a means for balancing considerations of equity than a basis for strict judicial interpretation"); Brett, *supra* note 55, at 197 (noting that "mistake of law" cannot be applied indiscriminately to every situation).

123. *See, e.g.*, *Lizarraga-Lizarraga*, 541 F.2d at 828 ("Rely[ing] upon the interpretation by the courts of the term 'willful' in the Revenue Acts.").

124. *See* United States v. Gabriel, 125 F.3d 89, 102 (2d Cir. 1997) (holding that the aiding and abetting provisions in 18 U.S.C. § 2(b) (1994) are "quite uncomplicated" and thus knowledge of illegality need not be proved); *see also infra* notes 127-30 and accompanying text (discussing other examples).

125. *See, e.g.*, *Lizarraga-Lizarraga*, 541 F.2d at 828 (holding that a defendant must understand that his action is unlawful, and that mere negligence with regard to statutory interpretation does not constitute "willfulness").

require explanation. More likely, the lack of explanation was due to the fact that, when created, the complexity exception was really just a special tax exception, so an explanation of what made a statute complex was not necessary.[126] Whatever the reason, "complexity" was a hollow formulation, and lower courts that considered complexity challenges in later non-tax prosecutions were left without guidance as to what made a statute sufficiently complex to warrant departure from the *ignorantia legis* maxim.

Without sufficient guidance to cabin the application of the factor, judicial perceptions of "complexity" were certain to vary, and indeed a body of law soon emerged that displayed no consistent or principled basis for calling one statutory scheme "complex" and another not. For example, one court declared "quite simple" the provisions of a federal statutory scheme that prohibited large-scale distributions of contraband cigarettes, despite the fact that the statute made reference to state regulations that were not reproduced in the body of the federal criminal statute but were relevant to a finding of federal criminality.[127] Another found that a criminal provision in the Employee Retirement Income Security Act (ERISA)—a statute that has sent shivers of fear and uncertainty up many a practitioner's

126. The notion that the *Murdock* exception was really a tax exception and not a broader "complexity" exception is supported by later cases which applied the exception even to fairly straightforward claims of error. *Cheek* is a good example.

127. *See* United States v. Baker, 63 F.3d 1478, 1492 (9th Cir. 1995). The Contraband Cigarette Trafficking Act (CCTA) made it unlawful "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a) (1994). The term "contraband cigarettes" was defined in a separate convoluted provision to include quantities of cigarettes "in excess of 60,000" which bore "no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes" were found, "if such State require[d] a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than" a person defined by the CCTA as being exempt from the provision. *Id.* § 2341(2). Although the language of section 2342 appears to require only that the shipment or transportation or other distribution be "knowing," the court declared without explanation that "the statute requires willfulness," *Baker*, 63 F.3d at 1491, and proceeded to consider whether the complexity of the state cigarette tax provisions in combination with the federal contraband cigarette prohibition made the scheme so complex that proof of knowledge of illegality was required. *See id.* After simply paraphrasing the federal statutory language, and neglecting entirely the language of the state cigarette tax provisions which interfaced with the federal law, the court concluded that the statute was not sufficiently complicated to warrant a departure from the maxim. *See id.* at 1492 ("The law is quite simple. All cigarettes in quantities exceeding 60,000 which are brought into the state must either be stamped or preapproved by the state's Department of Revenue.").

spine—contained no inherent complexity.[128] Yet another court held that proof of knowledge of the law was required in a prosecution brought under a federal statute that prohibited the "willful" exportation of certain ammunition,[129] because the types of ammunition controlled by the statute were listed not in the statute itself, but in a regulation published in the Code of Federal Regulations (CFR).[130]

These rather inconsistent decisions demonstrate that the "complexity" genie, once released from the tax bottle, would grant or withhold the mistake of law defense based solely on the desires of the court before which the issue appeared. "Complexity" would be found to exist or not depending on the result each court wanted to reach. Thus, in the contraband cigarette prosecution, it made no difference that criminality derived from the intersection of two separate provisions located in two different statutory or regulatory sources. That fact did not render the criminal statute so complex as to require proof of knowledge of the law. Yet in the criminal exportation case, the same fact made conviction impossible without proof of the accused's knowledge of the law. Neither of these decisions reflect a genuine search for legislative intent underlying the word "willfully." "Complexity," it seems, is in the eye of the judicial beholder.

B. Concern for the "Non-Nefarious" Actor

In a recent case, the Supreme Court confirmed that even outside tax cases, the word "willfulness" could require knowledge of the law. Without offering any guidance to the federal courts still struggling with the question of complexity, the Court conjured up a second

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128. *See* United States v. Phillips, 19 F.3d 1565, 1584 (11th Cir. 1994) (holding that there is nothing inherently complex about the criminal enforcement provision of ERISA, 29 U.S.C. § 1131 (1994)).

129. *See* 22 U.S.C. § 1934(c) (1994).

130. *See Lizarraga-Lizarraga*, 541 F.2d at 828; *accord* United States v. Hernandez, 662 F.2d 289, 292 (5th Cir. 1981) (holding that the willfulness term in 22 U.S.C. § 1934(c) required proof that defendant violated a known legal duty because the weapons covered by the statute were "spelled out in administrative regulations"); United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978) (following the *Lizarraga-Lizarraga* analysis of "willfulness" in the same statute). These decisions do not explain why it should matter that the prohibited items were enumerated in the CFR rather than the United States Code, but they implicitly suggest that the physical separation of mutually dependent provisions make an accused's knowledge of the law less likely, and thus the chance of innocent error more likely. This reasoning is curiously reminiscent of the legal fiction that the law is "definite and knowable." *See supra* note 38 and accompanying text. It suggests that had the listed items been enumerated in the statute itself, as opposed to in the plainly referenced regulation, the defendant's violation would have been "willfully" committed and rightfully punished.

quasi-objective factor that could be used to construe "willfully" to provide a mistake of law defense—concern for the non-nefarious actor.

1. Ratzlaf v. United States. In *Ratzlaf v. United States*,[131] a case brought under the federal anti-structuring rules,[132] the Supreme Court applied a *Cheek*-like construction of willfulness in a non-tax setting for the first time. Under federal law, financial institutions are required to report cash transactions exceeding $10,000.[133] To discourage private individuals from attempting to frustrate the reporting requirements imposed on financial institutions, Congress passed a separate provision, 31 U.S.C. § 5324, which prohibits any person from structuring a financial transaction for the purpose of evading those reporting obligations.[134] At the time of Ratzlaf's prosecution, a related penalty provision (since amended) in the same title authorized the imposition of a jail term and a criminal fine upon anyone who "willfully violate[d]" section 5324.[135]

As in *Cheek*, the issue before the *Ratzlaf* Court was whether the trial judge had properly instructed the jury on the meaning of "willfully." Rejecting Ratzlaf's proffered instruction,[136] the trial court had charged the jury that "willfully" required the government to prove that Ratzlaf had known about the reporting obligations and had attempted to evade them, but not that he had been aware that efforts to evade the requirements were unlawful. Because there was no

131. 510 U.S. 135 (1994).

132. *See* 31 U.S.C. §§ 5311-5324 (1988 & Supp. V 1993).

133. *See* 31 U.S.C. § 5313(a) (1994) (requiring reporting of transactions exceeding an amount set by regulation); 31 C.F.R. § 103.22 (1998) (setting the reporting requirement at $10,000).

134. At the time of the alleged offense, the section provided: "No person shall for the purpose of evading the reporting requirements of section 5313(a) . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." 31 U.S.C. § 5324 (1988) (amended 1994). Section 5322(a) further provided: "A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than 5 years, or both." 31 U.S.C. § 5322(a) (1988). After the *Ratzlaf* decision, Congress amended the law to require only an intent to avoid reporting a transaction. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253, 2253 (1994) (codified at 31 U.S.C. §§ 5322(a), 5324(c)(1) (1994)). *See also infra* Part III.B.1.

135. 31 U.S.C. § 5322(c) (1988 & Supp. V 1993) (amended 1994).

136. Ratzlaf asked the trial court to instruct the jury that a willful violation of the structuring law required the government to prove both that he had known of the federal reporting requirements imposed on financial institutions, and that he had known it was unlawful for him to try to evade those reporting obligations. *See Ratzlaf*, 510 U.S. at 138.

question that Ratzlaf had known of the reporting rules and had purposely acted to elude them,[137] the instruction doomed any chance of an acquittal.

Had the Court applied the rule of the tax cases—"willfully" in *tax* statutes requires proof of knowledge of the law—then Ratzlaf would have lost because the anti-structuring statute in question had nothing to do with taxes. On the other hand, had the Court applied the rule of "complexity" developed through the lower courts' expansion of the tax cases—"willfully" in *complex* statutes requires proof of knowledge of the law—then Ratzlaf still would have lost because the anti-structuring statute was not complex.[138] The Court did neither, however, and Ratzlaf won. In a 5-4 decision written by Justice Ginsburg, the Court held that proof of Ratzlaf's knowledge of the anti-structuring prohibition was required to convict.

The Court offered two initial reasons for its decision—avoiding "surplusage" and the construction that other courts had given the word "willfully." Neither of these provides persuasive support for the Court's result. As to surplusage, the Court reasoned that the trial judge's instruction reduced the phrase "willfully violating" to "words of no consequence"[139] because the charge required no more than proof of the other scienter requirement contained in the statute—a "purpose to evade" the reporting requirement.[140] This rationale is dis-

137. Ratzlaf admitted as much. *See id*. at 140. Ratzlaf had offered over $100,000 in cash to a Nevada casino to pay off a gambling debt and was advised by a casino official that the casino would have to report the payment because it was in excess of $10,000. *See id.* at 137. This news caused Ratzlaf to revise his method of payment. In a limousine on loan from the casino, Ratzlaf engaged in a process known as "smurfing." *See* Sarah Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 288 (1989). He toured the local banks where he purchased a number of cashiers' checks, each just shy of $10,000. *See Ratzlaf*, 510 U.S. at 137. He then used those checks to pay off the gambling debt. *See id.*

138. As put by one Justice, the exception from the maxim for tax prosecutions was '"largely due to the complexity of the tax laws."' *Ratzlaf*, 510 U.S. at 156 (Blackmun, J., dissenting) (quoting Cheek v. United States, 498 U.S. 192, 200 (1991)). Therefore, the exception was "inapplicable" to the anti-structuring prohibitions, which, "far from being complex" were "perhaps among the simplest in the United States Code." *Id.* Indeed the *Ratzlaf* majority made no suggestion that complexity was either central to its decision or a prerequisite to finding that knowledge of the law was required. Late in the 1998 Term, however, the Court reemphasized the centrality of complexity to constructions of willfulness. *See infra* Part II.B.2 (*discussing* Bryan v. United States, 118 S. Ct. 1939 (1998)).

139. *Ratzlaf*, 510 U.S. at 140. *Ratzlaf*'s mention of surplusage supports a third justification for construing "willfully" to require proof of knowledge of the law. *See infra* Part II.C.2.

140. Despite its facial appeal, there is good reason to question the correctness of this conclusion. Professor Eskridge has observed that the legislative history of the anti-structuring provision "strongly suggests that Congress did not notice the 'double scienter' language, and did

cussed separately below.[141] As to the other rationale—the lower courts' collective judicial understanding of the term—the Court claimed that, within the particular context of the anti-structuring statute, the U.S. Courts of Appeals had "consistently" construed the willfulness requirement under analogous provisions of the anti-structuring laws to require proof of both a defendant's knowledge of and purpose to disobey the law.[142] This conclusion is highly debatable. Although the federal circuit courts had construed the "willfulness" term in a number of analogous anti-structuring provisions to require "proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime," they had not done so with respect to the precise provision under which Ratzlaf had been charged.[143] Moreover, a closer reading of the holdings of the cases on which the majority relied would have revealed the inherent ambiguity in the federal courts' prior constructions of the term "willfulness." This formulation of the government's burden could be understood in one of two ways: (1) the government had to prove that the defendant was aware of the reporting rules and acted with a purpose to evade those rules—in which case Ratzlaf was likely guilty; or (2) the government had to prove that the defendant knew about the reporting rules, acted with purpose to evade them, and additionally knew that attempts to evade the reporting rules were unlawful—in which case Ratzlaf might not be guilty. Thus, contrary to the majority's opinion, the pre-*Ratzlaf* decisions had not clarified whether a defendant merely had to know about the reporting requirements imposed on financial institutions before attempting to evade them, or whether, in addition, the defendant had to know that his efforts to maneuver around those requirements were prohibited. The *Ratzlaf* majority ignored the very real possibility that at least some of the federal circuit courts had meant to require only the former showing, and construed the willfulness term to require proof that Ratzlaf had known of both the institution's reporting requirement and of the law that prohibited him from trying to evade that requirement.

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not intend a double scienter requirement." William N. Eskridge & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreward: Law as Equilibrium*, 108 HARV. L. REV. 26, 58 n.142 (1994) (citing *Drug Money Seizure Act and The Bank Secrecy Act Amendments: Hearing on S. 571 and S. 2306 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 141-42 (1986) (colloquy between Senator Alfonse D'Amato and a representative of the Department of Justice at a hearing prior to the adoption of the anti-structuring provision).

141. *See infra* text accompanying notes 147-51.

142. *See Ratzlaf*, 510 U.S. at 140 (citing cases).

143. *Id.* at 153-54 n.4 (Blackmun, J., dissenting) (citing cases).

More importantly, if the views of the lower courts mattered at all, then the Court ignored more relevant views than those courts' general constructions of "willfulness" under the anti-structuring laws. In considering the precise provision under which Ratzlaf was prosecuted, ten of the eleven U.S. Courts of Appeals had rejected claims that the term "willfully" made knowledge of the reporting requirements an element of the offense.[144]

The real reason for the Court's rejection of the trial court's instruction lay elsewhere. The majority openly worried in its opinion that the government's preferred construction of the *mens rea* term could lead to the punishment of "non-nefarious" as well as "obviously evil" or "inherently bad" actors.[145] For example, an estranged spouse wishing to conceal her assets might structure her transactions, claimed the majority, and thereby unwittingly expose herself to a structuring prosecution;[146] the suggestion being that only with specific knowledge of the anti-structuring prohibitions could such a "non-nefarious" actor choose to avoid criminal liability. The Court was particularly patient with and empathetic toward persons who might "unexpectedly" find themselves under the purview of a statutory or regulatory scheme that the Court concluded Congress intended for more diabolic actors.[147] Yet, as pointed out by the dissent, the majority's concern for the vulnerability of the imaginary spouse to prosecution seems misguided, and its description of the spouse's conduct too generous. Even assuming that the spouse's conduct is not worthy of condemnation,[148] prosecution of the spouse for structuring

144. *See id.* at 153-54 & n.3 (Blackmun, J., dissenting) (citing cases). The majority dodged the force of this near unanimous agreement among the circuits by finding that any such construction would render section 5322(a)'s willfulness requirement superfluous. *See id.* (Blackmun, J., dissenting).

145. *See id.* at 146.

146. *See id.* at 145.

147. The same concern appears in *Liparota v. United States*, 471 U.S. 419 (1985), a case involving the meaning of a separate *mens rea* term "knowingly." There, the Court held that a charge of knowing possession of food stamps "in a manner not authorized" by applicable federal regulations required proof that the accused knew his possession was unlawful. *Id.* at 426. The Court reached this result on the ground that any other construction would "criminalize a broad range of apparently innocent conduct." *Id.*

148. This is a big assumption. Four dissenting Justices in *Ratzlaf* seemed to believe an intentional attempt to hide one's assets from an ex-spouse would involve morally reprehensible or "nefarious" conduct. *See Ratzlaf*, 510 U.S. at 155 (Blackmun, J., dissenting) ("[T]he anti-structuring provision targets those who knowingly act to deprive the Government of information to which it is entitled. . . . [T]hat is not so plainly innocent a purpose as to justify reading into the statute the additional element of knowledge of illegality.").

would fail on the facts of the majority's hypothetical because the prosecutor would not be able to establish that the defendant structured the transaction "with the purpose to evade" the reporting obligations of a financial institution. Indeed, the hypothesized purpose of the secretive spouse would have been quite different from that which Congress contemplated and proscribed. She would have structured her transactions with the purpose to prevent information about her financial affairs reaching her estranged spouse, not the federal government. Because financial institutions owe no reporting obligations to warring spouses, at least within the meaning of the criminal structuring statute, the hypothetical spouse would have committed no crime.[149]

The Court's new factor—non-nefariousness—which justified construing "willfully" to protect innocent actors, exhibited stark deficiencies even in the case that saw its birth. That is, it was plain that the factor would permit ignorance of the law claims to be advanced even by actors who fell outside the group of good citizens that the Court was striving to protect. Ratzlaf's own bank-hopping behavior, for example, betrayed his non-innocent goal of concealing from governmental authorities the money that he had used to pay off gambling losses. The record even reveals his motive for doing so: he had previously been audited by the IRS and continued to be under investigation for tax evasion.[150] A suspected tax evader would have an excellent reason to hide his gambling debts—to hide the reportable income used to pay off those debts. Despite the fact that the government's proof at trial fully evidenced Ratzlaf's awareness of the casino's reporting obligations, his purpose to circumvent those obligations, and his motive for doing so, the *Ratzlaf* majority remained concerned that the statute could be used to overreach, to subject to criminal prosecution more "innocent" transgressors of the structuring rule.[151] This groundless fear that the provision could potentially ensnare an unwitting "non-nefarious" actor thus permitted an actor with patently "nefarious" motives to go free. Put another way, even those whom the statute was plainly designed to reach—gamblers,

149. The Court's proffered justifications for the structuring conduct of its imagined "non-nefarious" actors do not, however, persuade one that Congress would have agreed with the Court's assessment.

150. *See Ratzlaf*, 510 U.S. at 144 n.11.

151. The Court thought it important that the government brought no tax charges against Ratzlaf. *See id*.

racketeers and drug dealers—would stand to benefit from the majority's creation of an ignorance of the law defense.

Not only did the *Ratzlaf* Court confirm that the willfulness exception was not limited to tax cases, it created a new factor that would permit courts to decide cases subjectively,[152] and without reference to sources evidencing legislative intent. According to the Court, the mere inclusion of the term "willfully" in the text of the federal anti-structuring law so unambiguously expressed Congress's intent to make knowledge of the law an element of the crime, that consultation of the statute's legislative history was entirely unnecessary. Writing for the majority, Justice Ginsburg declared, "[W]e do not resort to legislative history to cloud a statutory text that is clear."[153] Im-

152. Very little consensus is detectable in the courts' "feelings" about nefarious versus non-nefarious conduct. For a case construing a statute to punish non-nefarious conduct, see United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994) ("We see little difference between breaking a cash transaction into segments of less than $10,000 [Ratzlaf's offense conduct] and making a [campaign] contribution in the name of another."); *cf.* United States v. Macko, 994 F.2d 1526, 1532 (11th Cir. 1993) (holding that because regulations governing commercial transactions with Cuba or Cuban nationals "proscribe activity that is not generally perceived to be wrong . . . 'willfulness' . . . requires a finding of specific intent to violate the trade provisions"); United States v. Frade, 709 F.2d 1387, 1391-92 (11th Cir. 1983) (holding that an activity which is "not generally criminal—travel to, from and within Cuba—[requires] an intentional violation of a known criminal duty"). For cases construing statutes to punish only "inevitably" or "inherently" nefarious conduct, see United States v. English, 92 F.3d 909, 915-16 (9th Cir. 1996) (holding that proof the defendant knew the law was not required because defendant's scheme to defraud was inherently nefarious); United States v. Gabriel, 125 F.3d 89, 102 (2d Cir. 1997) (concluding that a defendant prosecuted under 18 U.S.C. § 2(b) (1994), establishing accomplice liability for any crime committed against the United States, engaged in inevitably nefarious conduct because he could have been convicted only if the government had proven that he had the guilty mental state necessary to violate the underlying criminal statute); United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995) (holding that unlike the anti-structuring provision, the federal prohibition of the transportation or distribution of contraband cigarettes is not a trap for the unwary innocent).

The *Curran* reasoning is the more problematic because the court substitutes its own perception of wrongdoing for that of Congress. The *Curran* court concluded that a statute that prohibited any person from causing a campaign treasurer to file a false report with the Federal Election Commission might be used to punish non-nefarious actors unless it was read to have a knowledge of the law element. *See Curran*, 20 F.2d at 568-69. The government alleged that Curran had asked his employees to contribute to the campaign chests of various candidates, and then had reimbursed them for the contributions. *See id.* at 562. By doing so, Curran exceeded the $1,000 limitation individual campaign contribution limit imposed by federal law. Curran was charged with causing the employees to file false reports with the FEC. *See id.* Curran argued that the government had to show he knew his actions were unlawful. *See id.* at 563. Relying on *Ratzlaf*, the Third Circuit agreed, finding that the campaign contribution disclosure obligations paralleled the obligations of financial institutions to disclose deposits exceeding $10,000, the statute criminalized conduct that was not "inherently evil," and the statute was regulatory. *See id.* at 567-69.

153. *Ratzlaf*, 510 U.S. at 147-48.

plicit in this statement is the astonishing suggestion that the meaning of the phrase "willfully violated" is somehow apparent on its face,[154] yet rarely, if ever, had any previous court found the meaning of the term "willfully" to be so obvious. Indeed, quite the contrary is true.[155] By the time of the *Ratzlaf* decision, case reporters were brimming with passages bemoaning the inherent obscurity of the word, particularly as it had been used in criminal statutes.[156]

Neither did the Court's alternative justification—the rule of lenity[157]—strengthen its interpretive position. As a rule of statutory construction, courts will normally employ the rule of lenity only when both a statute and its legislative history leave the law's meaning ambiguous.[158] Yet the *Ratzlaf* majority refused to give any weight to the legislative history of the structuring provision, even while conceding

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154. *See* Eskridge & Frickey, *supra* note 140, at 73 (describing the *Ratzlaf* Court's plain meaning analysis as "underwhelming").

155. As might be expected of a term whose meaning appears to vary depending on the context in which it appears, and whose underlying rationale has never won a judicial consensus, the chameleon-like properties of "willfully" have sorely tested the courts' interpretive skills.

156. A colloquy between Judge Learned Hand and Model Penal Code Reporter Herbert Wechsler regarding the inclusion of the *mens rea* term in the proposed Model Penal Code provisions epitomizes the opinion of the term held by many jurists and academics:

> JUDGE HAND: It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, "wilful" would lead all the rest in spite of its being at the end of the alphabet.
>
> MR. WECHSLER: I agree with you, Judge Hand, and I promise you unequivocally that the word will never be used in the definition of any offense in the Code. But because it is such a dreadful word and so common in the regulatory statutes, it seemed to me useful to superimpose some norm of meaning on it . . . .

MODEL PENAL CODE § 2.02(8) cmt. 10 at 249 n.47 (1985) (citing A.L.I. PROC. 160 (1955)); *see also infra* notes 226-35 and accompanying text (discussing the *Model Penal Code* treatment of "willfulness" in greater detail); United States v. Ladish Malting Co., 135 F.3d 484, 487 (7th Cir. 1998) ("Willfully is a notoriously slippery term . . . ."); Perkins, *supra* note 4, at 49 (describing the term as "elastic"). Indeed, Volume 45 of *Words and Phrases*, including the pocketpart, devotes 169 pages to cases variously employing the term. 45 WORDS AND PHRASES (perm. ed. 1970 & Supp. 1998).

157. The rule of lenity requires ambiguities within criminal statutes to be resolved in the defendant's favor. *See* United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); BLACK'S LAW DICTIONARY 902, 1332 (6th ed. 1990). The *Ratzlaf* majority wrote that even if it had found the willfulness requirement ambiguous, the rule of lenity would have demanded resolution of any doubt about the term's meaning in the defendant's favor. *See Ratzlaf*, 510 U.S. at 148.

158. *Ratzlaf*, 510 U.S. at 148; *see also* Bifulco v. United States, 447 U.S. 381, 387 (1980) ("[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" (quoting Lewis v. United States, 445 U.S. 55, 65 (1980))).

that "contrary indications"—language that expressly contradicted the Court's preferred construction—appeared in the statute's history.[159]

Although the full impact of *Ratzlaf* would only be felt later, as courts applied its reasoning to a variety of other federal criminal laws, the decision made additional departures from the maxim inevitable. The majority's reasoning made the *mens rea* term "willfully" a loaded one. First, the decision confirmed that, even outside the tax code, the term could be construed to embrace a knowledge of illegality element and to elude the maxim's application. At minimum, the inclusion of the term in a criminal statute would appear to trigger an inquiry into whether knowledge of the law had to be proved. Second, the decision indicated that statutory complexity was not a condition precedent to this construction of "willfully"; a showing that the statute might condemn non-nefarious conduct, *as evaluated by the courts, not Congress*, would also suffice. Finally, the decision raised fundamental questions about institutional competency: who is to decide whether particular conduct is worthy of criminal punishment? As a matter of democratic theory, Congress enjoys this authority. Barring constitutional error, once Congress deliberates upon and chooses to outlaw particular acts, that legislative determination should be respected by the courts. The concern for the non-nefarious actor established in *Ratzlaf* allows courts to second-guess such legislative determinations and thereby undermines legislative primacy.

2. Bryan v. United States. The Supreme Court dished up additional fodder on the questions of statutory complexity and non-nefarious actors in its 1998 decision *Bryan v. United States*.[160] In *Bryan* the Court once again considered the meaning of the term "willfully," which appeared in a statute that prohibited the sale of firearms by

159. In dissent, Justice Blackmun observed that statements in the provision's legislative history plainly revealed Congress's intent that knowledge of illegality would not be an element. *See Ratzlaf*, 510 U.S. at 158-160 (Blackmun, J., dissenting) (citing H.R. Rep. No. 99-746, at 18-19 & n.1 (1986) and S. Rep. No. 99-433, at 22 (1986)). Statements included in the Senate Report that accompanied a bill resulting in the passage of a parallel anti-structuring provision rendered further support for the view that the *Ratzlaf* provision was not intended to require proof of knowledge of illegality. *See id.* at 158 (citing S. Rep. No. 99-433, at 7 (1986)). The House Report addressing the parallel provision explained: "As is the case presently for structuring cases involving currency transaction reports, the government would have to prove that the defendant knew of the . . . reporting requirement, *but would not have to prove that the defendant knew that structuring itself had been made illegal.*" *Id.* at 161 (quoting H.R. Rep. No. 102-28, pt.1, at 45 (1991)).

160. 118 S. Ct. 1939 (1998).

any person who lacked a federal license.[161] Bryan had been convicted after a jury trial on charges of dealing in firearms without a federal license and conspiracy to do the same.[162] Although there was no question that Bryan had in fact sold weapons without a valid license,[163] the government had no proof that he had known of the federal licensing requirement.[164]

Relying on *Ratzlaf*, Bryan urged the Court to vacate his conviction on the ground that the government should have been required to prove that he knew he needed a federal license in order to sell the weapons.[165] The government conceded that the term "willfulness" in section 924(a)(1)(D) required some proof that Bryan had known his conduct was unlawful,[166] making the issue before the Court narrow: did the "willfulness" term require proof that Bryan knew his conduct

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161. *See* 18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D) (1994 & Supp. II 1996). Congress amended the firearms provisions when it passed the Firearms Owners' Protection Act of 1986 (FOPA), Pub. L. No. 99-308, 100 Stat. 449, 456, which added *mens rea* requirements to the provisions. FOPA amended the penalty provisions in 18 U.S.C. § 924(a)(1) by adding the *mens rea* requirements to punish certain acts or violations if committed "knowingly," 18 U.S.C. § 924(a)(1)(A)-(C), and all other violations if committed "willfully," *id.* § 924(a)(1)(D). The catchall provision in section 924(a)(1)(D) was applicable to the offense for which Bryan was convicted—dealing firearms without a federal license in violation of 18 U.S.C. § 922(a)(1)(A).

162. *See Bryan*, 118 S. Ct. at 1944.

163. The trial evidence definitively established that "straw purchasers" bought firearms in Ohio for Bryan, that Bryan was not entitled to purchase the guns in Ohio himself, that Bryan agreed to file off the serial numbers of the guns (presumably to prevent authorities from identifying their source), and that he later resold the guns on Brooklyn street corners without a federal license. *See id.* at 1944 & n.8.

164. *See id.*

165. The trial court had instructed the jury: "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids." *Id.* at 1944. Provided the defendant acts with "the bad purpose to disobey or to disregard the law," he need not be shown to have been "aware of the specific law or rule that his conduct" violated. *Id.* This construction of the law conflicted with the constructions of several federal circuit courts. The Eleventh Circuit had applied the "intentional violation of a known legal duty" test, which demanded proof that the accused had known about the federal licensing requirement and had intentionally failed to comply with it in order to convict. *See* United States v. Sanchez-Corcino, 85 F.3d 549, 553 (11th Cir. 1996). Several other circuits had reached similar results. *See* United States v. Rodriquez, 132 F.3d 208, 211 (5th Cir. 1997) (holding that proof that a defendant acted with knowledge of the licensing requirement is necessary for conviction); United States v. Obiechie, 38 F.3d 309, 315 (7th Cir. 1994) (holding that "willfully" requires knowledge of the law); United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988) (concluding that an "unknowing" act cannot violate 18 U.S.C. § 922(g)).

166. Rather than argue that the willfulness genie be put back in the tax bottle, the government settled on a less ambitious goal: to reduce its burden of proof as to knowledge of the law elements.

was unlawful generally, or did it require proof that he knew of the specific federal licensing requirement?[167]

In a noticeable move away from the "intentional violation of a known legal duty" test favored in *Cheek*, the *Bryan* majority re-embraced the *Murdock* definition of willfulness. "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose,'" [168] wrote Justice Stevens for the majority. This required proof that the defendant had "acted with an evil-meaning mind,"[169] which the Court defined as acting "with knowledge that his conduct was unlawful."[170] The government did not, however, need to show that the defendant knew of the specific licensing requirement he was charged with violating; proof that Bryan knew generally that his conduct was unlawful was sufficient.[171]

This holding seemed at odds with the rules of *Cheek*—which required proof that the defendant had known about and understood the specific tax-related duty he was accused of violating[172]—and *Ratzlaf*—which required proof that the defendant had been specifically aware of the anti-structuring prohibition.[173] Why would "willfully" in the sale of firearms context require proof only of knowledge of general illegality if "willfully" in the tax and anti-structuring contexts requires proof of knowledge of a specific legal duty or prohibition? All three statutes contained the troublesome *mens rea* term without defining it. Thus, no textual basis existed to support the distinction. What, then, could be the basis for the different interpretations?

The Court attempted to reconcile the holdings of the three important cases by once again highlighting the importance of statutory complexity and non-nefarious conduct to constructions of "willfulness." *Cheek* and *Ratzlaf* were "readily distinguishable" from *Bryan*, the Court wrote, because they "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct" and thus justified "'an exception to the traditional rule' that ignorance of the law is no excuse."[174] The sale of

167. *See Bryan*, 118 S. Ct. at 1942.

168. *Id.* at 1945 (quoting United States v. Murdock, 290 U.S. 389, 394 (1933)).

169. *Id.* at 1946.

170. *Id.* at 1945 (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

171. *See id.* at 1949.

172. *See supra* notes 113-15 and accompanying text.

173. *See supra* notes 131-38 and accompanying text.

174. *Bryan*, 118 S. Ct. at 1946-47 (quoting Cheek v. United States, 498 U.S. 192, 200 (1991)).

firearms provision, however, warranted no similar exception because it presented no danger of convicting "a defendant with an innocent state of mind" once the jury found that Bryan knew that his conduct was unlawful.[175]

These assertions are puzzling.[176] While it is true that the Court in *Cheek* and *Ratzlaf* had worried that the tax code and anti-structuring provisions could be used to penalize actors who unwittingly failed to heed legal duties or proscriptions, neither opinion suggested that the behavior of John Cheek or Waldemar Ratzlaf was "innocent."[177] Rather, in both cases the Court's concern was elsewhere—with the possibility that other morally innocent actors might be ensnared by the complex (*Cheek*) or relatively unknown (*Ratzlaf*) provisions in the absence of a mistake of law defense.[178] In addition, contrary to the suggestion in *Bryan*, the *Ratzlaf* majority did not premise its holding that the anti-structuring provisions required proof of knowledge of the law on the ground that the provisions were so complex or "highly technical"[179] as to obscure understanding. As explained above, the fundamental concern in *Ratzlaf* was with the punishment of non-nefarious actors who simply had no clue that their conduct was unlawful.

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175. *Id.* at 1947 n.22.

176. Also bewildering is Justice Stevens' statement: "[T]he willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." *Id.* at 1947. This aspect of the Court's opinion curiously harkens back to the common law's "legal wrong" and "moral wrong" doctrines. Under these common law doctrines, claims of ignorance commanded no judicial sympathy if, despite the defendant's lack of cognizance of some fact or law, his conduct was in some important respect legally or morally repugnant. The classic case is *Regina v. Prince*, which involved a defendant who carried a girl out of the custody of her father while under the reasonable belief that she had reached the age of consent, provides a helpful example of the doctrines in operation. *See* 2 L.R.-Cr. Cas. Res. 154, 175-76 (U.K. 1875) (Bramwell, B., applying the moral wrong doctrine); *id.* at 160-62 (Brett, J., applying the legal wrong doctrine).

177. Indeed, the Court seemed openly skeptical of their innocence. "[T]he 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 . . . and will find that the Government has carried its burden of proving knowledge." Cheek v. United States, 498 U.S. 192, 203-04 (1991).

178. *See, e.g.*, *Cheek*, 498 U.S. at 199-200 ("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.") (emphasis added).

179. *Bryan*, 118 S. Ct. at 1946-47. The majority engages in a rhetorical sleight of hand by employing the term "highly technical" as opposed to "highly complex." This may evidence its desire to include the anti-structuring statute addressed in *Ratzlaf* within the complexity umbrella, a feat previously untried.

What, then, can explain the *Bryan* Court's surprising suggestion that *Ratzlaf* was grounded on complexity? One possibility is that as the Court was confronted with the pitfalls of the jurisprudence of willfulness, its sympathy toward mistake of law claims diminished. The inevitable drawback of any rule excusing criminal liability for a lack of knowledge of the law is that such a rule celebrates ignorance of the law while making knowledge of it the best and fastest ticket to a prison cell. The compromise struck in *Bryan*—requiring the government to prove only general knowledge of illegality—may reflect the Court's growing recognition of this drawback.

It is possible, of course, that a more pragmatic concern might also have prompted the *Bryan* majority's abrupt reversion to the *Murdock* "bad purpose" formulation—a reluctance to put an admitted gun runner back on the streets. Under *Cheek's* "voluntary and intentional violation of a known legal duty" test, which forces the prosecutor to establish the accused's awareness of the specific duty that provides the basis of the charge, Bryan most assuredly would have gone free.[180] The government had no hope of proving this specific knowledge in *Bryan* since it had no evidence that he knew of the licensing requirement. The Court's decision to employ the "bad purpose" test instead of the "voluntary and intentional violation of a known legal duty" test, although understandable in light of the defendant's flouting of other firearms rules, underscores the freewheeling and inherently contradictory nature of contemporary constructions of "willfulness." Moreover, even if Congress had intended the term to impose a knowledge of the law requirement in such prosecutions, there is simply no support—in the text of the statute or in the legislative history—for the majority's conclusion that this requirement would be satisfied with proof of the accused's knowledge that he was violating *some* law, as opposed to the law under which he was charged.[181] This fact led the dissenting justices to conclude that

180. In *Ratzlaf*, the *Cheek* test would have necessitated proof that the defendant knew about the statute that prohibited his structuring conduct. In *Bryan*, it would have necessitated proof that Bryan knew about the (unsatisfied) license requirement that made his sales unlawful.

181. In dissent, Justice Scalia chided the majority for suggesting that proof of knowledge of general illegality was sufficient to sustain a conviction under the firearms provisions. *See Bryan*, 118 S. Ct. at 1950 (Scalia, J., dissenting). Justice Scalia argued that under the majority's reasoning a defendant would be guilty of the offense of selling firearms without a license even if he had never heard of the license requirement, provided the government could show that he knew that some aspect of his conduct was unlawful. That could include anything from knowing that the law prohibited him from filing the serial numbers off of the guns he sold to knowing that he was unlawfully double-parked while he sold them. *See id.* at 1950-51.

the statute required even more—proof of Bryan's knowledge of the specific licensing requirement.

In summary, the *Bryan* decision continues the modern judicial trend of defining criminal willfulness to require proof of knowledge of illegality, but simultaneously reduces the rigorousness of the prosecutor's burden of proof.[182] Having thus handed both the government and the criminal defense bar weapons that can be used in future battles over mistake of law claims, the Court has now only to step back and watch the bloodbath that is bound to ensue. Although the government technically "won" in *Bryan* (the defendant's conviction was upheld), in the long run it can scarcely be pleased with the weapon with which it has been left. True, the government need now only prove knowledge of *general* illegality in the run-of-the-mill willfulness case, but this is a burden the *ignorantia legis* maxim never thrust upon it. Moreover, in prosecutions brought under "highly technical" statutes—whatever that phrase may turn out to mean—the government's burden will be significantly heavier. In the aftermath of

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The majority opinion suggests that the term "willfully" will automatically trigger an inquiry into whether knowledge of illegality is an element. *See id.* at 1945-47. It multiplies by two the questions that a court reviewing a criminal statute with language of willfulness must resolve. First, a court will have to decide whether the term is included in a "highly technical" statute. *See id.* at 1946-47. Assuming that it is not (under the Court's analysis, this should be the larger group of cases), the reviewing court will then have to consider whether the government has offered sufficient evidence of the defendant's knowledge of general illegality. *See id.* at 1947. This requirement will inevitably raise additional questions about the quality of evidence needed to satisfy such a burden of proof. What does it mean to say that a defendant was generally aware of the unlawfulness of her conduct?

182. Proof of the accused's knowledge of *general* illegality will suffice unless the willfulness term appears in a "highly technical" statute, that is, a statute likely to ensnare the nonnefarious (such as the tax code or, now, the anti-structuring provisions). By contrast, in cases brought under the tax and anti-structuring laws (and similar hypertechnical laws that have yet to be identified) proof of the accused's knowledge and intentional disregard of a *specific* legal duty will have to be offered. With this ruling, the Court moved even further away from any genuine effort to divine the legislative intent underlying the inclusion of "willfully" in the sale of firearms statute.

The Federal Courts of Appeals have developed another method to dilute the rule that willfulness requires proof of a defendant's knowledge of the law. Several courts have held that an accused's knowledge of the law can be proved by evidence that the defendant engaged in the offense conduct with "reckless disregard of the law." *See, e.g.*, United States v. Briscoe, 65 F.3d 576, 587 (7th Cir. 1995) (holding that evidence that defendant failed to make a reasonable effort to ascertain whether his conduct would violate the law might suffice). One commentator has suggested another possible method of softening the impact through redefinition of the mental state. If courts employed a requisite mental state of "acceptance," then the government could prove either that the defendant knew the law or that he was so indifferent to it that he would still have acted had he known. *See* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 961-63 (1998).

Bryan, it is uncertain whether the Court will, over time, further broaden the class of criminal statutes placing this heightened burden on the government. The defense bar is likely to be more content with its weapon. Bryan himself may have lost, but he secured for others accused of willful criminal conduct a broad judicial statement that "willfulness" generally will be construed to require proof of knowledge of the law. This statement reflects the judiciary's continued disaffection with the *ignorantia legis* principle.

C. Other Rationales for Subverting the Maxim

1. *The Problem of Surplusage.* An additional factor offered in support of the *Ratzlaf* decision has provided a third basis for construing language of willfulness to require proof of knowledge of the law—the problem of surplusage. The *Ratzlaf* Court advised that, to avoid superfluity, courts might have to construe "willfully" to confer a mistake of law defense if the term appeared in close proximity to another scienter term.[183] As then written, the penalty provision of the anti-structuring statute specified penalties for any person who "willfully violated" section 5324.[184] Elsewhere, though, section 5324 prohibited any person from structuring her transactions with a "purpose of evading the reporting requirements" imposed on a financial institution.[185] The Court held that by instructing the jury that the government had to prove only that Ratzlaf had acted with purpose, the trial court treated the separate willfulness requirement "essentially as surplusage" or as "words of no consequence."[186]

This dislike of surplusage has provoked a number of decisions in which the mere presence of both the word "knowingly" and the word "willfully" in a single criminal provision has caused courts to infer knowledge of illegality as an element,[187] particularly in cases in which one of the other factors, complexity or non-nefariousness, is also present. Although the concern over surplusage has some force, a rule of

183. *See supra* text accompanying notes 139-40.

184. 31 U.S.C. § 5322(a) (1988) (amended 1994).

185. 31 U.S.C. § 5324(a), (b) (1994).

186. Ratzlaf v. United States, 510 U.S. 135, 140 (1994).

187. *See, e.g.*, United States v. Hayden, 64 F.3d 126, 130 (3d Cir. 1995) (holding that Congress intended to distinguish between different levels of scienter when it employed both "willfully" and "knowingly" in the firearms statute); United States v. Obiechie, 38 F.3d 309, 315 (7th Cir. 1994) (holding that "willfully" must demand proof of knowledge of the law to avoid being duplicative of the demands of "knowingly").

construction that automatically inserts such an element into every criminal statute that pairs "willfully" with one or more other scienter terms is fundamentally flawed. To get a full sense of the toll that such a rule of construction would exact, it may be useful to consider the panoply of federal criminal statutes that employ the two *mens rea* terms in close proximity. Table 1 of the Appendix sets forth the results of a search of the United States Code for provisions containing both "willfully" and "knowingly" as scienter terms.[188] Even a swift look through the table reveals the folly of interpreting all statutory unions of "knowingly" and "willfully" to require proof of knowledge of the law.

Suppose, for example, that a person is accused of violating 18 U.S.C. § 879(a), which makes it a crime to knowingly and willfully threaten to inflict bodily harm on the President or a member of the first family (past or present). Suppose further that the accused sent a note to the President threatening his life but then claimed that she believed (erroneously but honestly) that the law allowed her to do so. Surely the linking of the two scienter terms in a single statute should not automatically be construed to require proof that the accused knew that she was violating the law, at least in the absence of some clear legislative signal making such knowledge of the law an element. The accused in this example is just as dangerous not knowing the law as she is knowing the law. A much more plausible construction of the term "willfully" in this context would require proof that the accused acted purposively, and not by accident, mistake or other innocent reason.

Some courts have recognized the difficulties that would be presented if they were to construe "willfully" to require proof of knowledge of the law every time the term appeared in a statute in conjunction with another *mens rea* term. For example, one court has held that a surplusage problem is presented only where "willfully" modifies the word "violat[es]"[189] as it did in *Ratzlaf*. This reasoning is specious for many of the reasons set out above. Table 2 of the Appendix

188. Using Westlaw, a May 1998 computer search of the "United States Code" database for the phrase "knowingly and willfully" yielded 160 citations. Of these 160 uses of the clause "knowing and willfully," 89 related to civil provisions while the remaining 71 related to criminal provisions. The search did not include other *mens rea* terms with which "willfully" may be closely linked.

189. *See* United States v. Daughtry, 48 F.3d 829, 831 (4th Cir. 1995) (holding that where "willfully" modifies the word "falsifies," as in 18 U.S.C.A. § 1001, no proof of knowledge of the law is necessary).

sets forth the results of a comprehensive search of the United States Code for provisions containing the phrase "willfully violates" or "willfully violating."[190] The search revealed dozens of criminal provisions employing the two terms in tandem. To be sure, Congress may have intended the phrase to make knowledge of the law an element in some of these statutes. Without a close examination of the legislative history of each of these statutes, however, any such conclusion will be no better than judicial guesswork. Moreover, an approach that simply assumes that the phrase is always used to exhibit such an intent is poor judicial guesswork at that.[191] Were the courts to apply this logic to all of the provisions in Table 2, they would have to conclude that Congress has been routinely overriding the *ignorantia legis* maxim for years without fanfare.

2. *Mechanical Constructions of "Willfully."* Even more troublesome are perfunctory rulings implying that "willfully" must *always* be read to demand proof that a defendant intentionally violated a known legal duty.[192] Several courts have suggested that knowledge of illegality or wrongdoing is an element whenever the term "willfully" appears in a criminal provision. With little or no analysis, for example, the term has been so construed under the Medicare and Medicaid anti-kickback statute[193] and provisions

190. Using Westlaw, a May 1998 computer search of the "United States Code" database for the phrase "willfully violates" or "willfully violating" yielded 137 citations. Of these statutes, 48 related to civil provisions; the remaining 89 related to criminal provisions and are listed in Appendix, Table 2.

191. The phrase "willfully violating" appeared in the anti-structuring statute that the government used to prosecute Ratzlaf. *See* 31 U.S.C. § 5322 (1994). Congress has made clear that it did not intend the phrase to require proof of knowledge of the law. *See infra* Part III.B.1.

192. *See* United States v. Garcia, 751 F.2d 1033, 1035 (9th Cir. 1985) ("In a criminal statute, 'willfully' generally means a voluntary, intentional violation of a known legal duty in bad faith or with evil purpose.").

193. *See* Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995). This decision illustrates the mechanistic reasoning of some courts when construing the willfulness term and the confusion generated by the Supreme Court's willfulness constructions. The anti-kickback provisions prohibit anyone from "knowingly and willfully" offering, paying, soliciting, or receiving remuneration (e.g., bribes or kickbacks) in exchange for referrals of Medicare or Medicaid patients or business. *See* 42 U.S.C. § 1320a-7b(b)(1) and (2) (1994). Relying on *Ratzlaf*, the *Hanlester* court interpreted the willfulness term in the anti-kickback provisions to require proof that an accused health care provider or supplier knew that the law prohibited its financial dealings, and that the provider or supplier acted with the specific intent to disobey the law's commands. *See Hanlester*, 51 F.3d at 1400. However, a second federal circuit court rejected this construction and held that the term requires proof only that the accused knew his conduct to be "wrongful." *See* United States v. Jain, 93 F.3d 436, 440-41 (8th Cir. 1996) ("[The] mens rea standard should only require proof that [the defendant] knew that his conduct was wrongful,

prohibiting the willful misapplication of federally guaranteed student loan funds.[194] Although *Bryan* should put to rest the view that "willfulness" always means knowledge of the particular law at issue, the decision's broad language may validate the mechanistic view that "willfully" requires proof of knowledge of some law. Justice Stevens's open-ended suggestion that whenever "willfulness" appears in a "criminal context" it requires proof that an accused knew her conduct was unlawful invites the argument that, even if the term does not appear in close proximity to another scienter requirement, and even if it does not modify the verb "violates," it should be read to make knowledge of the law an element.[195]

3. *Inclusion of "Willfully" in a Regulatory or* Malum Prohibitum *Statute.* A number of federal courts have suggested a final basis for construing "willfully" to require knowledge of the law—the inclusion of the term in a regulatory or *malum prohibitum*, as opposed to a *malum in se*, provision. The difference between the two often seems deceptively straightforward. *Mala in se* offenses are generally considered to criminalize inherently wrongful conduct.[196] By

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rather than proof that he knew it violated 'a known legal duty.'"); *see also* United States v. Neufeld, 908 F. Supp. 491, 497 (S.D. Ohio 1995) (declining to follow *Hanlester* by holding that "willful" should be formulated as "the purpose to commit a wrongful act"); Medical Dev. Network, Inc. v. Professional Respiratory Care/Home Med. Equip. Servs., Inc., 673 So. 2d 565, 567 (Fla. Dist. Ct. App. 1996) (distinguishing banking statutes of *Ratzlaf* from anti-kickback statutes since the latter punish those who perform specific acts without requiring specific intent to violate the statute). A third federal circuit court later affirmed jury instructions that defined "willfully" to mean that the accused's act "was committed voluntarily and purposely with the specific intent to do something the law forbids . . . with bad purpose either to disobey or disregard the law." United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998) (noting that *Hanlester* requires mere knowledge of unlawfulness rather than specific knowledge of a particular statutory violation).

194. *See* United States v. Bates, 96 F.3d 964, 970 (7th Cir. 1996) ("[W]illful misapplication under [the provision] requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over [student loan] funds . . . while knowing that such an exercise of control or dominion over the funds was a violation of the law."), *aff'd*, 118 S. Ct. 285 (1997).

195. Justice Stevens wrote for the majority: "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.'" Bryan v. United States, 118 S. Ct. 1939, 1945 (1998) (citations omitted) (quoting Heikkinen v. United States, 355 U.S. 273, 279 (1958) and Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

196. The paradigm example would be an intentional act of killing. Absent a socially acceptable justification or excuse, killing is universally considered to be morally wrongful, even in the absence of legislative confirmation. Because *mala in se* crimes prohibit deviations from generally agreed upon norms of behavior, the offender is more likely to be aware that the conduct is

contrast, *mala prohibita* offenses are generally considered to criminalize conduct that is wrongful only because the legislature has declared it to be so.[197] Many argue that because *mala prohibita* crimes are not inherently morally wrongful, they may also not be self-evident.[198] For this reason, the argument goes, the imposition of criminal punishment for a *malum prohibitum* offense is just only if the offender is shown to have had actual knowledge (or at minimum, good reason to know) of the law violated. Without such knowledge the offender is denied the opportunity to choose between rightful and wrongful conduct.[199]

Based on this reasoning, some courts have been especially willing to construe "willfully" to require proof of a defendant's knowledge of the law in cases involving individuals accused of regulatory or *mala prohibita* offenses,[200] particularly when the offense statute proscribes activity "not known generally to be controlled by the government,"[201] or when the items or activities covered by the proscriptions

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wrongful, even if he is not aware that some provision in the penal code declares his conduct criminal. The crime is in this sense self-notifying, and it is of no consequence that the killer is unaware that the legislature has declared the conduct a crime. The offender can fairly be said to have engaged knowingly (and perhaps even willfully) in inherently wrongful conduct because all members of the community would recognize the conduct to be wrong. Accordingly, it is just to penalize him for choosing to engage in it.

197. An example might be a traffic law that makes it a crime (probably a misdemeanor) for any person to drive on the "wrong side" of the road. Inherently, of course, there is no "right side" of the road. The legislature simply chooses one side over the other, and declares it to be so. Once the legislature has acted, however, the interest in vehicular and pedestrian safety make it eminently fair and necessary to expect all drivers in the community to learn which side of the road the legislature has deemed to be the "right side" and to abide by that rule. When a driver fails to do so, she has committed the crime of driving on the wrong side of the road (or, perhaps more popularly, negligent operation of a motor vehicle). Again, this is criminal behavior not because driving on that side of the road was the *inherently* wrongful choice, but because driving on that side of the road had previously been declared wrongful by a legislative body charged with the responsibility of enacting such rules.

198. Numerous legal writers have made this claim. *See, e.g.*, Hall & Seligman, *supra* note 4, at 642; Grace, Note, *supra* note 72, at 1413; Travers, Comment, *supra* note 119, at 1324.

199. *See* Michael E. Tigar, *'Willfulness' and 'Ignorance' in Federal Criminal Law*, 37 CLEV. ST. L. REV. 525, 526 (1989) (arguing that a system of criminal justice that metes out punishment without providing individuals the opportunity to choose between right and wrong, "gives over the function of identifying targets of punishment to blind forces of fate or chance, or worse yet, to malign vengeance-seekers").

200. *See, e.g.*, United States v. Curran, 20 F.3d 560, 570-71 (3d Cir. 1994) (holding that to prove that a defendant willfully caused election campaign treasurers to submit false reports to the Federal Election Commission, a regulatory crime, the prosecution must prove defendant knew of the treasurers' reporting obligations, acted to circumvent those obligations, and knew that his conduct was unlawful).

201. United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978).

are set forth in an administrative regulation as opposed to a criminal statute.[202] As with the judiciary's other justifications for construing "willfully" to signify a congressional desire to depart from the maxim, however, any conclusion that such a construction is appropriate simply because the term appears in a *malum prohibitum* statute is fundamentally flawed for several reasons. First, the line between *malum in se* conduct and *malum prohibitum* conduct is itself quite nebulous.[203] Thus, it is unlikely to provide a sound basis for determining when to construe "willfully" to impose a knowledge of the law element. Second, as in the "complexity" and "non-nefarious actor" cases, the courts' invocation of the *malum prohibitum* rationale has been "selectively"[204] employed, at best. This practice will inevitably lead to a lack of uniformity in the treatment of defendants, and to a basic incoherence in the law itself.

Third, there is little valid reason to believe that Congress intends violations of *mala prohibita* statutes to be prosecuted less vigorously than violations of *mala in se* statutes. Given the large number of *mala*

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202. *See, e.g., id.* & n.2 (holding that a conviction for the willful exportation of a weapon on the munitions list without an export license or written approval of the State Department requires proof that the defendant voluntarily and intentionally violated a known legal duty). *But see* United States v. Weitzenhopp, 35 F.3d 1275, 1286 (9th Cir. 1993) (holding that knowledge of illegality is not required under the Clean Water Act because it defines a public welfare offense). Courts have exhibited far less sympathy toward individuals who handle dangerous instrumentalities. By and large, knowledge of the law has not been required of persons who routinely handle dangerous devices, products or waste materials. *See, e.g.*, United States v. Balint, 258 U.S. 250, 254 (1922) (concerning drugs); United States v. Freed, 401 U.S. 601, 609 (1971) (dealing with hand grenades); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1970) (concerning sulfuric acid); *see also id.* ("Pencils, dental floss, paper clips may . . . be the type of products which might raise substantial due process questions if Congress did not require, as in Murdock, 'mens rea' as to each ingredient of the offense."). Courts reason that the nature of the dangerous instrumentality makes it so likely that the government will have acted to regulate its possession, handling, or distribution that anyone in possession of such an instrumentality may fairly be presumed to be aware of the regulation. *See, e.g., id.* at 565.

203. Stuart Green has argued for the abandonment of the distinction between *mala in se* and *mala prohibita* offenses. As put by Professor Green, "[T]he most persistent criticism of the *malum in se/malum prohibitum* distinction has been that it is notoriously difficult to determine the category into which many crimes fit." Green, *supra* note 65, at 1577. He argues further that, even if we could agree that a particular crime was *malum prohibitum*, the violation of *malum prohibitum* statutes often involves moral wrongfulness. *See id.* at 1572-79; *see also* Kahan, *supra* note 59, at 150-51 (arguing the same). For both of these reasons, in a heavily regulated society it may be easier to agree that conduct is immoral because it has been declared illegal, than to agree that conduct is illegal because it is immoral.

204. Kahan, *supra* note 59, at 150 ("[I]t takes no real detective work to find cases that say just the opposite—that ignorance of the law is no excuse 'whether the crime charged is *malum prohibitum* or *malum in se*.'" (quoting Blumenthal v. United States, 88 F.2d 522, 530 (8th Cir. 1937))).

prohibita statutes now on the books, acceptance of this notion would require one to believe that Congress had envisioned, but not bothered to broadcast, that scores of departures from the maxim would occur under these statutes. Without stronger evidence of Congress's disenchantment with the maxim, this notion is unsupportable.

Moreover, although the application of a *malum prohibitum* statute without proof of an accused's knowledge of it may be harsh when considered on an individual basis, broader social objectives secured by the maxim's application would seem to justify such a result. If one applies the Holmesian rationale,[205] for example, there is little reason to conclude that Congress desires the citizenry to know less about its duties under *mala prohibita* statutes than under *mala in se* statutes. To reach this conclusion would essentially relegate *mala prohibita* crimes to second-class status and make societal knowledge of such statutes far less likely than if they were applied harshly in individual cases. Application of such a statute to an unwitting citizen would at least serve the utilitarian purpose of educating others about their duties under the law, whereas a failure to mandate compliance with the statute would lead only to more confusion about the same.

Such an application would also satisfy the Austinian rationale for the maxim—the avoidance of nettlesome mistake of law claims.[206] If *mala prohibita* statutes are as obscure as their critics claim, and if proof of their knowledge were required, every person prosecuted for their violation would have a winning defense. The facts of *Bryan* illustrate this well. Had the government been forced to prove Bryan's actual awareness of the licensing requirement—a *malum prohibitum* requirement—not only would the prosecution of Bryan have failed, but the vast majority of prosecutions brought under that provision would have suffered the same fate, for, as Selden put it, "'tis an excuse every man will plead, and no man can tell how to refute him."[207]

Proponents of Hall's rationale[208] would no doubt concur with this result, although for a different reason: any other result would violate the principle of legality by elevating the accused's erroneous under-

205. *See supra* notes 58-59 and accompanying text (discussing Holmes's utilitarian argument that the maxim is justified by the societal goal of promoting a national fluency in the law).

206. *See supra* note 53 and accompanying text (discussing Austin's argument that the maxim is justified by the need to avoid the rampant mistake of law claims that would inevitably be made in its absence).

207. QUOTABLE LAWYER, *supra* note 1, at 133.

208. *See supra* notes 60-62 and accompanying text (discussing Hall's argument that the maxim is justified by the principle of legality).

standing of his duties under the law to a position above the law itself. Again using the *malum prohibitum* facts of *Bryan* as an example, even if one accepts as true that Bryan was ignorant of the federal licensing requirement, the law itself is, in fact, otherwise. Thus, to accept Bryan's defense of ignorance would permit him to carve out his own personal code of conduct that he could then use to shield himself from punishment for his violations of Congress's contrary decrees.

Congress can, of course, eliminate the harshness that results from the application of the maxim in individual cases if it wishes to do so. In our system of governance, however, the ultimate responsibility for drawing the line between acceptable and unacceptable behavior lies with the legislature. Although the courts may not always like those legislative choices, if the choices are constitutionally sound, important separation of powers principles are infringed when courts read into criminal statutes a mental state element that was outside the contemplation of the legislature.

D. Conclusion

To recap, the courts have invented a number of factors which they frequently use to construe "willfully" to require proof of knowledge of the law. Although in theory these factors could have provided both coherence to constructions of willfulness and greater predictability to the process of making the criminal law, they have done the opposite in practice.

There are two possible ways to explain the courts' continued movement away from the *ignorantia legis* doctrine in the face of the confusion and inconsistency generated by these decisions. First, the courts may simply be unaware both of the dramatic injury the decisions have collectively inflicted on the maxim and of how incoherent the bases for those decisions have become over time. To this day, jurists tend to profess devotion to the maxim even as they are carving out exceptions to it.[209] If these statements are taken seriously, the judiciary itself may simply be oblivious to the radical change that the jurisprudence of willfulness has already wrought and the number of statutes now in danger of similar construction.[210]

A second possibility is that with the proliferation of the criminal law, and in particular the federal criminal law, the courts have be-

209. *See infra* note 224.

210. *See infra* Appendix, Tables 1 & 2.

come increasingly hostile to the *ignorantia legis* maxim. This may explain the courts' willingness to adopt an interpretive approach that so clearly hinders legislative prerogatives. Put slightly differently, the courts' concerns about "overcriminalization"[211] and the federalization of crime[212] may best explain the attack on the maxim.

Criminal law, and in particular federal criminal law, has experienced explosive growth over the last century. Legal writers estimate that over 300,000 federal regulations are now enforced through the use of criminal penalties.[213] Substantive federal criminal provisions have also experienced dramatic growth.[214] At the same time, Congress has increased the criminal sentences that may be imposed upon offenders by attaching mandatory minimum provisions[215] and "three strikes" penalties[216] to many crimes. Critics of federalization argue

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211. A number of excellent books and articles addressing this concern are available. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 277-82 (1968); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878-82 (1992); Hart, *supra* note 4, at 417-22; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

212. Perhaps the most prestigious public figure to voice this concern is Chief Justice William H. Rehnquist. At a meeting of the American Law Institute in May 1998, Chief Justice Rehnquist questioned the wisdom of legislation that made federal offenses of matters once prosecuted solely by the states. Apart from federalism concerns raised by such legislation, Rehnquist warned that the explosion in federal criminal statutes severely burdened the federal judiciary. *See Chief Justice Criticizes Trend Toward Federalization of Crime*, 66 U.S.L.W. 2722 (May 26, 1998); *see also* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277 (1995); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995); Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2416 (1998) (arguing that federalism concerns may covertly "animate the Court's federal mens rea jurisprudence").

213. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 & n.94 (1991).

214. For an overview of the use of criminal penalties to influence business behavior, *see* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 43-45 (2d ed. 1993) (describing "a continuing pattern of expansion" in federal provisions); *see also* KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS (2d ed. 1995) (addressing white collar and business crimes); PAMELA H. BUCY, WHITE COLLAR CRIME: CASES AND MATERIALS (2d ed. 1998) (same).

215. For a comment on the increasing use of mandatory minimums, see William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992).

216. For an article criticizing the recent growth in "three strikes" provisions as "nonreasoned, knee-jerk approaches to fighting crime," see Nkechi Taifa, *"Three-Strikes-and-You're-Out"—Mandatory Life Imprisonment for Third Time Felons*, 20 U. DAYTON L. REV. 717, 717 (1995).

that the swell in federal prosecutorial authority to reach beyond areas of exclusive federal concern is misguided.[217] Critics of overcriminalization add the concern that as the criminal law expands to cover an extensive range of human behavior, prosecutorial resources will be strained to the limit,[218] leading both to underenforcement of the laws and to the danger of selective prosecution.[219] These critics also urge that when the criminal law begins to intrude into areas individuals do not expect to be governed, the consent of the governed will be lost and the power of the criminal sanction diluted.[220]

Even assuming the validity of these concerns, the Court's chosen remedy—fabricating factors that can be used to construe "willfully" to support a departure from the maxim—can have little effect on the problem of overcriminalization and the federalization of crime. Because the courts are confined to deciding cases and controversies that come before them, no systematic assault on these problems is waged by the "jurisprudence of willfulness." Moreover, far from representing a united front, the poorly reasoned decisions have created a body of haphazard constructions of "willfully" as courts have substituted legislative judgments with their own subjective conceptions of "complex" and "not complex," "nefarious" and "non-nefarious" conduct. The difficulty that the courts have already had in defining "complex" statutes and "non-nefarious" conduct demonstrates how subjective these conceptions remain. Moreover, statutory complexity and non-nefariousness are poor proxies for overcriminalization and unwarranted federalization. For this reason, even when the "willfulness" decisions narrow the scope of the federal criminal law, they will not eliminate these problems, if problems they be.

III. CONGRESSIONAL DEVOTION TO THE MAXIM

Despite the venerable pedigree of the *ignorantia legis* maxim, the movement away from the doctrine depicted in Part II has met with surprisingly little reproach. This is surely due in part to the fact that as the courts have moved away from the maxim, they have care-

217. *See supra* note 212.

218. *See, e.g.*, Kadish, *The Crisis of Overcriminalization*, *supra* note 211, at 165-67 (discussing the use of criminal prosecution as a substitute for more appropriate intervention by other state agencies).

219. *See, e.g.*, *id.* at 168 (discussing selective enforcement of vagrancy and disorderly conduct laws).

220. *See, e.g.*, *id.* at 160; PACKER, *supra* note 211, at 359.

fully cloaked their decisions in language loyal to the maxim. These rhetorical devices have created a (mis)impression, in both Congress and the public, that the maxim continues to preclude the bulk of mistake of law claims.[221]

This Part argues that contemporary constructions of criminal "willfulness" are supported by scant evidence of congressional intent to depart from the maxim. If anything, the swift and disapproving congressional reaction to the *Ratzlaf* decision supports the opposite conclusion. Although recent "willfulness" decisions display a judicial

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221. Indeed, many first year law students are specifically instructed that the construction of willfulness in *Cheek v. United States*, 498 U.S. 192 (1991), is aberrational. The authors of one widely used criminal law casebook state broadly that "[m]ost courts have refused to extend *Cheek* to other types of statutes." JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 294 (3d ed. 1996). Although the authors note *Ratzlaf* as an important exception, *see id.*, this passage leaves the erroneous impression that "willfully" is rarely construed to require proof of knowledge of the law. As the cases discussed in Part II of this Article demonstrate, that is incorrect.

The impression is exacerbated by the view of some jurists and criminal law theorists that decisions that construe a *mens rea* term to make knowledge of the law an element do not implicate the maxim at all. *See, e.g.*, LAFAVE & SCOTT, *supra* note 66, § 5.1(a), at 575. Under this view, the decisions need not be considered "exceptions" to the maxim at all; they simply address the elements the prosecution is expected to establish to secure a conviction. It is, of course, true as a descriptive matter that knowledge of the law is an element of an offense only when it is expressly defined as an element of an offense. *See* MODEL PENAL CODE § 2.02(3) (1985) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."). Thus, if knowledge of the law is not an express element of the offense, knowledge of the law is not required; instead, recklessness with respect to the law's existence suffices to establish culpability. This basic point is important to bear in mind, so that when the legislature expressly makes knowledge of the law an element, the government will have to prove it. However, this logical truth—that if knowledge is not an element then it need not be proved—is irrelevant. Whether considered as an exception to the maxim or not the crux of the accused's claim is the same—the accused argues that her ignorance of or mistake about the law takes her out of the statute's coverage. Consideration of the claims in the three major Supreme Court decisions on the question during the last decade illustrate the point. In *Cheek*, 498 U.S. at 196, the defendant's claim was that he did not understand (i.e., he was ignorant of the fact) that the tax code required him to declare his wages as income. In *Ratzlaf*, 510 U.S. 135, 138 (1994), the defendant's claim was that he was ignorant of the illegality of structuring his transactions to evade the bank's and the casino's reporting responsibilities. In *Bryan*, 118 S. Ct. 1939, 1944 (1998), the defendant claimed that he was unaware (or at least that the government failed to prove that he was aware) of the law that required him to possess a license before selling guns. Of course one can say that the maxim was not violated in each case because the Court construed knowledge to be an element of the offense, but saying this and no more disguises a significant substantive shift: the Court is "discovering" this element in statutes without express (or tacit) approval from Congress in cases where it used to be presumed that no such element existed. *See* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 17 & n.72 (1995) (arguing that these disclaimers are "largely semantic" and arise from the belief that the maxim is "virtually inviolable").

inclination to treat the *Ratzlaf* legislative history as "idle chatter,"[222] this is a dangerous inclination for both normative and process reasons.

A. Legislating Against the Backdrop of the Maxim

If the *ignorantia legis* maxim has any meaning at all, it is that ignorance of, or a mistake about, the law ordinarily will be of no help to the accused. While there are surely exceptions to the maxim, it seems prudent to bear in mind that they are precisely that—exceptions, not rules. Given the maxim's widespread familiarity and acceptance, it is reasonable to conclude that Congress legislates against a backdrop informed by the maxim. Put slightly differently, Congress legislates with the expectation that the maxim will guide judicial efforts to discern whether Congress intended in a particular statute to depart from the general rule or not.

The notion that Congress legislates against the backdrop of existing law—including both statutory and judge-made law—is no novel proposition. Congress is regularly presumed to be "reasonably attentive to and in agreement with the 'background of customs and understandings of the way things are done . . . .'"[223] Thus, it is reasonable to presume that when Congress remains silent about the meaning of a particular statutory term, it has done so with the expectation that the term will be construed in a fashion consistent with prevailing canons of statutory interpretation.

1. *Judicial Assurances of the Maxim's Vitality*. Repeated expressions by the Court of its allegiance to the *ignorantia legis* maxim throughout this century[224] have provided (apparently false) assurance to Congress that the maxim would guide judicial constructions of federal criminal provisions. Based on these

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222. *See generally* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 61-66 (1994) (defending the relevance of post-enactment congressional history to statutory construction).

223. *Id.* at 78-79 (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992)); *see also id.* at 943 (arguing that "the best reconstruction of what the drafters were trying and not trying to do" is obtained by applying canons of statutory construction to achieve continuity in the law); *cf.* Astoria Fed. Sav. & Loan Ass'n. v. Solimino, 501 U.S. 104, 108 (1991) (stating that Congress should be presumed to legislate with the understanding that the principle of preclusion will be applied); Johnson v. Home State Bank, 501 U.S. 78, 85-86 (1991) (stating that Congress is presumed to legislate with awareness of prior judicial constructions of a particular statutory term).

assurances, it was reasonable for Congress to proceed on the assumption that its criminal enactments would not be read to impose a knowledge of the law requirement unless Congress itself had expressed an intent to depart from the maxim. Although the tax cases marked an important departure, without an expression of congressional intent until after the fact, broad statements by the Court in the tax and other cases provided Congress with ample reason to believe that the maxim remained the dominant rule and that the construction of "willfully" in the tax statutes carved out a narrow, useful, and clearly delineated exception to it.

The Court's public reaffirmations of the maxim could have only bolstered congressional confidence that non-tax offenders would not be entitled to a mistake of law defense unless Congress had plainly expressed an intent to furnish such an excuse. With these and other judicial assurances, it is reasonable to conclude that Congress was legislating against a backdrop of the *ignorantia legis* maxim. Except in tax cases, Congress should have been able to insert the term "willfully" into a criminal statute with considerable confidence that the courts would construe the term consistently with the maxim. Effectively, the tax cases created a form of default rule for legislators. If Congress used "willfully" in a criminal tax statute without defining the term, the Court's default rule should have been to assume that Congress intended knowledge of illegality to be an element. In any other criminal statute, the opposite should have been true. The default construction should have been that Congress had drafted the statute against the backdrop of the maxim, and that therefore knowledge of illegality was not intended to be an element.[225]

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224. Even decisions that permitted mistake or ignorance of the law professed an enduring commitment to the maxim. *See Ratzlaf*, 510 U.S. at 149 ("We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge."); *Cheek*, 498 U.S. at 199 ("The general rule that ignorance of the law or a mistake of the law is no defense to criminal prosecution is deeply rooted in the American legal system.").

225. Of course, even in the absence of evidence indicating congressional intent to make knowledge of the law an element in crimes of willfulness, the rule of lenity could support such a construction. When faced with an ambiguous term in a criminal statute, the rule of lenity counsels an interpretation in favor of the accused. *See* United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); BLACK'S LAW DICTIONARY 902, 1332 (6th ed. 1990). Thus, if "willfully" is inherently ambiguous, under the rule of lenity it might fairly be construed to require the accused's knowledge of the law.

There are at least two serious problems with the application of the rule of lenity to this situation, however. First, the Supreme Court has strongly suggested that the use of the term "willfully" does not make a criminal statute ambiguous. *See Ratzlaf*, 510 U.S. at 147-48. If the Court would have this "cake" (finding that the term is so unambiguous that resort to legislative

2. *Guidance from the Model Penal Code*. The American Law Institute's treatment of the term "willfully" in the drafting of the Model Penal Code (the Code) in 1955 supports the view that Congress has long enacted criminal statutes against the backdrop of the maxim. Indeed, the Code's study and treatment of the term flatly contradicts any suggestion that use of the term, by itself, sufficiently evidences congressional intent to depart from the maxim, and particularly that it does so with sufficient clarity to make resort to legislative history unnecessary.

In the first place, the drafters of the Code concluded that the term "willfully" had far too many different meanings to be used in the Code's precise hierarchy of *mens rea* definitions. In a famous exchange between two of the most eminent and experienced legal thinkers of the era, Judge Learned Hand and Professor Herbert Wechsler agreed that the term had been used in so many different ways that it would be best to dispense with it entirely,[226] and the term was indeed banished from the Code's definitions. Nonetheless, because of its widespread use, the Code's draftsmen felt that some definition of the term "willful" ought to be included.[227] They settled on a definition that paralleled the most common meaning that the state and federal legislators had given the term at the time.[228] Accordingly,

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history is unnecessary) it cannot then "eat it too" (finding that the term is so ambiguous to support a knowledge of the law construction in favor of the accused). Second, and more importantly, the term will only be ambiguous if the maxim is disregarded *prior* to efforts to construe it. If, however, the maxim is used as a starting point in the interpretive process, and thus it is presumed that the statute in which the term appears does not countenance a mistake of law claim, in the typical case there would be no call to resort to the rule of lenity. In a less typical case, the term might be ambiguous, not because the term is ambiguous in and of itself, but because of its special placement in a particular statute, or because of some indication on the face of the statute or its legislative history that plainly expresses the congressional desire to depart from the presumptive force of the maxim.

226. A colloquy between Judge Learned Hand and Model Penal Code Chief Reporter Herbert Wechsler regarding the inclusion of the *mens rea* term "willful" in the proposed Model Penal Code provisions epitomizes the opinion of the term held by many jurists and academics:

> JUDGE HAND: It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, "wilful" would lead all the rest in spite of its being at the end of the alphabet.
>
> MR. WECHSLER: I agree with you Judge Hand, and I promise you unequivocally that the word will never be used in the definition of any offense in the Code. But because it is such a dreadful word and so common in the regulatory statutes, it seemed to me useful to superimpose some norm of meaning on it . . . .

MODEL PENAL CODE § 2.02(8) cmt. 10 at 249 n.47 (1985) (quoting ALI Proceedings 160 (1955)) (ellipsis in original).

227. *See* MODEL PENAL CODE § 2.02(8) cmt. 10 (1985).

228. *See id.* & nn.44-45 (citing cases and statutes).

section 2.02(8) defined "willfully" to mean "knowingly," unless there was a demonstrated legislative purpose that it mean something more.[229] The Code also assumed as a default position that knowledge of the law defining an offense would not be a requirement for conviction.[230] Thus, in the closest thing to a restatement that the criminal law has known,[231] the country's leading criminal scholars concluded that the term "willful" had no set meaning and that the most popular meaning was simply "knowing," not knowledge of the law.

To be sure, the drafters left open the possibility that a legislature *could* use the term "willfully" to mean something more than mere knowledge, *if* "a purpose to impose further requirements appears."[232] However, the "something more" the drafters probably had in mind was the mental state of purpose, not a requirement that the state prove that the defendant knew the law.[233] More importantly, the Code's approach both supports and promotes the view that the use of the term "willful" is not a signal that the maxim is being abandoned—much less an unambiguous signal to that effect.[234] Of course, if the Code were being written today, the drafters' description of how state and federal courts had construed "willfully" would be quite different—certainly the Court offered a very different construction in *Bryan*.[235] Hosts of federal criminal statutes, however, were enacted against the background that the Code drafters saw at the time they wrote, and Congress should be understood to have made the same interpretive presumptions as they did. As to more recently drafted statutes, it seems entirely likely that Congress thought that the

229. *See id.* at 249 & n.46.

230. *See* MODEL PENAL CODE § 2.02(9).

231. Although in many sections the Code was more of a law reform effort than a restatement, it was designed to be a restatement with regard to the definition of "willfully." *See id.* § 2.02(8) cmt. 10 & nn. 44-47.

232. *Id.* § 2.02(8).

233. Indeed, the very next subsection of the Code, section 2.02(9), states that ignorance of the law is not an excuse unless the statute in question so provides. If mere inclusion of the term "willful" was thought to be enough to require knowledge of the law, the drafters of the Code certainly would have said so in section 2.02(9).

234. In light of the historical evidence collected by the Code's drafters that "willfully" had been used by most jurisdictions to mean "knowingly," even a textualist who was loathe to consult legislative history should read the term to require far less than proof of knowledge of the law. Under a textualist perspective, *see infra* note 255 (discussing this approach), it is proper to assume that Congress was aware of the prevailing definition of "willfully" portrayed by the Code's commentary and that Congress recognized that the only effective way to interject a knowledge of illegality requirement would be to do so expressly.

235. *See supra* Part II.B.2 (discussing *Bryan*).

maxim still governed—at least until the Court's decision in *Ratzlaf*. The bulk of the statutes listed in the Appendix, however, were enacted long before 1994, the year *Ratzlaf* was decided, and thus would have been enacted against the same backdrop.

B. Congressional Acceptance of the Maxim as a Default Rule

The increasing tendency toward reflexive interpretations of "willfully" to mandate proof of an accused's knowledge that the conduct at issue is unlawful[236] fails to credit clear evidence that Congress has accepted the maxim as a default rule. The central issue in all of the willfulness cases must be whether the legislature intended "willfully" to make knowledge of the law a part of the prosecution's burden of proof. If the legislature did intend this then an accused's ignorance of or mistake about the law should lead to an acquittal because the legislature had decided that an act performed in ignorance or mistake of the law should provide a defense. If the legislature did not intend this then the accused's ignorance of or mistake about the law should not lead to an acquittal because the legislature had not decreed ignorance or mistake of law to be a defense. The critical question, then, is what the legislature intended "willfully" to mean when it included the term in the statute.

1. Ratzlaf *Legislative Commentary*. Some of the most compelling evidence that Congress does not intend to create a mistake of law defense each time it includes the word "willfully" in a criminal statute comes from the congressional commentary to the *Ratzlaf* decision. Congress's response to the Court's decision in *Ratzlaf* was swift and disapproving. Within months of the decision, Congress legislatively overrode the Court's construction by exempting from the willfulness requirement cases brought under the federal structuring provision at issue in *Ratzlaf*.[237] In effecting this change, Congress left no doubt that its action was designed to remedy the error that it believed the *Ratzlaf* Court had made when it

236. The majority's broad statement in *Bryan v. United States*, 118 S. Ct. 1939, 1945 (1998), provides the most recent example of this interpretive position. *See supra* Part II.B.2.

237. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2253 (codified at 31 U.S.C. § 5321(a)(4)(A) (1994)); *see also* H.R. REP. NO. 103-438, at 22 (1994). The rapid congressional response vindicated Justice Blackmun, who had written in dissent in *Ratzlaf*, "[n]ow Congress must try again to fill a hole it rightly felt it had filled before." Ratzlaf v. United States, 510 U.S. 135, 162 (1994) (Blackmun, J., dissenting).

construed "willfully" to require proof of knowledge of the structuring prohibition. As reflected in both the report of the House Committee on Banking, Finance and Urban Affairs[238] and the House Conference Report,[239] the amendment was adopted "*to correct*" the majority's holding in *Ratzlaf* and to "*restore[] the clear Congressional intent* that a defendant need only have the intent to evade the reporting requirement" to commit a structuring offense.[240] Contrary to *Ratzlaf*'s interpretation of Congress's intent in using the word "willfully," the history of the amendment made clear that Congress had not intended to require the government to have to prove that a "defendant knew that structuring was illegal" in order to secure a conviction.[241]

Once under consideration, the speed with which Congress effected this statutory change underscores its displeasure with the Court's interpretation of "willfulness." Support for the amendment was apparently overwhelming: a mere five days separated the bill's successful passage through the House and the Senate, and the Senate's approval of the conference report was obtained by voice vote.[242]

Despite the clear congressional disapproval of the judicial interpretation of "willfulness" in this post-*Ratzlaf* amendment, Congress's decision to override the Court's construction has had no effect on later constructions of "willfulness" in other criminal statutory schemes. Rather, the courts have continued to treat the *Ratzlaf* construction of "willfully" as an accurate reading of congressional intent[243] and have used the same bases that led to the mistake, and the mistake itself, to determine what Congress meant in other statutes. Worse than mere obstinacy, this refusal to recognize the mistake undermines the legislative function and may violate separation of powers principles.

Critics of this view might argue that *Ratzlaf* was no mistake at all. By removing only the structuring offense set out in section 5324

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238. *See* H.R. REP. NO. 103-438, at 22 (1994).

239. *See* H.R. CONF. REP. NO. 103-652, at 194 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1881, 2024.

240. *Id.* (emphasis added).

241. *Id*.

242. *See* 140 CONG. REC. H6797 (daily ed. Aug. 4, 1994) (noting passage in the House with a vote of 410 to 12); 140 CONG. REC. S11,043 (daily ed. Aug. 9, 1994) (noting passage by voice vote); *see also Clinton to Sign New Law After Easy Passage*, MONEY LAUNDERING ALERT, Aug. 1994, at 1.

243. *See, e.g.*, Bryan v. United States, 118 S. Ct. 1939, 1945 (1998); Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995); United States v. Hayden, 64 F.3d 126, 130 (3d Cir. 1995).

from the willfulness requirement but allowing other related offenses to remain subject to that requirement, one might argue that Congress was signaling its agreement with the Court's construction of "willfully" and reaffirming its desire to make knowledge of the law an element of other structuring offenses to which the willfulness requirement of section 5322(a) continued to apply. After all, Congress could easily have taken the word "willfully" out of the statute altogether. Its decision to retain it while making the word inapplicable to the particular subsection under which Ratzlaf was prosecuted could indicate that it concurred with, or at least acquiesced in, the Court's interpretation of the term. Under this view, *Ratzlaf*-like structuring behavior would no longer be subject to an ignorance or mistake of law claim, but other structuring conduct falling under the reserved willfulness requirement would.

The difficulty with this view is that it completely ignores the best available source of information about Congress's view of the *Ratzlaf* construction of the term "willfully." The committee reports explain the impetus for the statutory change in no uncertain terms. As noted above, the reports roundly criticize the Court's construction and explain that the statutory change was intended to "correct" the error made by the *Ratzlaf* Court when it interpreted the term to impose a knowledge of the law requirement.[244] The reports also clarify the legislative intent behind the initial use of the term in the structuring provision: prosecutors were expected to prove an accused's intent to evade a financial institution's reporting obligations, but not the accused's knowledge that structuring was illegal.[245]

Moreover, even assuming that the structuring provisions which remain subject to the willfulness requirement after the amendment could be fairly construed to require proof of knowledge of the law, the legislative history overruling the *Ratzlaf* construction of section 5324 at least demonstrates the incorrectness of any claim that Congress equates "willfully" with knowledge of the law whenever it places the term in a criminal statute. The term was employed in section 5324, and Congress has denounced the suggestion that it used the word to make knowledge of the law an element of the offense. It is sensible to conclude from this congressional commentary that the use of the term "willfully" in other statutory contexts was not necessarily

244. *See* H.R. CONF. REP. NO. 103-652, at 194 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1881, 2024.

245. *See id*.

intended to provide a mistake of law defense. Finally, Congress's powerful repudiation of the Court's interpretation of "willfully" in *Ratzlaf* was also a repudiation of the Court's argument that conduct like Ratzlaf's evasions was not nefarious or that the crime of structuring was so technical that Congress must have wanted ignorance of the law to excuse. That repudiation should have led the Court to appreciate the gross subjectivity in such determinations and to hesitate before making them in the future. If *Bryan* is any indication, however, the Court is unbowed.

2. *The Child Support Recovery Act Provisions.* Statutes that do excuse mistakes of law reveal that Congress knows how to create a mistake of law defense when it so intends. Courts simply need to look beyond statutory text to ascertain whether Congress intends a departure from the maxim. A case brought under the Child Support Recovery Act (CSRA)[246] provides a helpful example. The CSRA makes it a crime for any person to "willfully fail[] to pay a past due support obligation" with respect to a child who resides in another State.[247] In *United States v. Williams*,[248] a federal court of appeals construing the willfulness requirement of the CSRA suggested that the term should be construed to require proof of the defendant's intentional violation of a known legal duty for two reasons. First, like the tax statutes, the CSRA criminalizes willful failures to pay a monetary obligation.[249] This similarity impressed the court as a basis for construing the intent requirement of the CSRA provision in the same way that the intent requirements of the tax provisions had been read.[250] Second, and more importantly, the legislative history of the provision plainly evidenced Congress's intent that knowledge of illegality be required for a conviction. The House Report on the CSRA specifically referred to the tax provisions and explained the significance of the case law construing the scienter requirements of those provisions to the CSRA: "The Committee intends that the

246. 18 U.S.C. § 228 (1994).

247. *Id.* at § 228(a). A "past due support obligation" is separately defined in the statute to include any child support or maintenance payment ordered pursuant to state law that either has remained unpaid for over one year or is in excess of $5,000. *See* 18 U.S.C. § 228(b) (1994).

248. 121 F.3d 615 (11th Cir. 1997).

249. *See id.* at 620-21.

250. *See id.* at 621.

willful failure standard of [the CSRA] be given similar effect as the willful failure standard contained in these tax felony provisions."[251]

This legislative history underscores two points. First, when Congress wishes to create a mistake of law defense, it knows how to say so explicitly.[252] Second, it is important for a court to plumb the legislative history of a statute that contains the term "willfully" to discover evidence of whether this was Congress's intent or not. In the case described above, the House Report illuminated the congressional intent to make knowledge of the law an element of the CSRA. Without the benefit of the report, the court might have concluded that such was Congress's intent, but the conclusion would have been no better than a lucky guess.[253] Only by examining the legislative history could the court have been confident in its assessment of the legislature's design in employing the term.[254]

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251. *See id.* (quoting H.R. Rep. No. 102-771, at 6 (1992) (alteration in original)).

252. Section 922(b)(3) of the federal firearms provisions provides another example. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 451 (1986) (codified at 18 U.S.C. § 922(b)(3) (1994 & Supp. II 1996)) (providing that dealers would be "presumed" to know the state laws and ordinances governing their trade "in the absence of evidence to the contrary").

253. Although the court offered an alternative basis for its conclusion—the parallel duties imposed by the tax provisions and the CSRA provisions, *see supra* text accompanying notes 249-50—that second basis alone would have provided insufficient basis for the case holding. The justification for requiring proof of knowledge of the law in tax prosecutions is not that the tax code imposes a duty to meet some monetary obligation owed to the government; rather, it derives from the sheer volume and complexity of the tax provisions which obscure our tax duties and liabilities. The same cannot seriously be said of a duty to pay child support.

254. By ignoring the legislative history of the anti-structuring statute, the *Ratzlaf* Court guessed wrong. *See supra* Part III.B.1. To avoid repeating this kind of error in construction it is incumbent upon the courts to search for evidence of congressional intent. A helpful illustration is provided by the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58 (1994 & Supp. II 1996). Section 54 of that law sets forth criminal penalties for any person who has "knowingly and willfully engage[d]" in certain kickback activity specified by another section the Act. The section fails to define the "knowingly and willfully" phrase, although the Act does define a number of its other critical terms. *See, e.g.*, 41 U.S.C. § 52(1)-(9) (defining "contracting agency," "kickback," "person," "prime contract," "prime contractor," "prime contractor employee," "subcontract," "subcontractor" and "subcontractor employee"). Courts attempting to determine the meaning of the Act's "willfulness" requirement can find guidance in the statute's legislative history. Statements by Senator Levin when introducing the bill on the Senate floor just before its passage are particularly helpful in illuminating the congressional intent underlying the phrase. As Senator Levin explained:

> The bill provides that, to be subject to criminal penalties, the wrongdoer must act "knowingly and willfully." The current Anti-Kickback act imposes its criminal penalties on those who act "knowingly." The addition in the bill of the word "willfully" is not, however, a change in current law but a reflection of the actual standard being used in kickback cases.

C. Costs of Ignoring Plain Congressional Commentary

Some might argue that the confusion emanating from the jurisprudence of willfulness is due more to legislative neglect than to judicial overreaching. Under this reasoning, if the courts have in fact misconstrued the *mens rea* term, they have done so as a result of Congress's failure to communicate effectively the line between lawful and unlawful (willful) conduct. To clear up the confusion, Congress could simply add the words "errors of law are no excuse" to every criminal statute with a *mens rea* of "willfully."

This Subpart argues, however, that federal courts undermine congressional rulemaking authority when they refuse to consult sources that would inform their constructions of criminal willfulness.[255] Each such refusal exacts significant "opportunity costs."[256] For example, Congress's lawmaking powers are diminished each time a court construes a federal statute in contravention of congressional intent. Although Congress may always correct an erroneous construction of an enacted law, doing so requires the commitment of finite time and resources. As one legislative scholar put it, "systematic judi-

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> The knowing element in the standard requires the Government to prove that the alleged wrongdoer knew what he or she was doing and was not acting through mistake, inadvertence or mere negligence. *The willful element in the standard requires the Government to prove that the alleged wrongdoer was acting on his or her own volition and not because he or she was being coerced. . . .*
>
> The knowing and willful standard does not require proof of a specific criminal intent such as an intent to defraud the Government. All that is required for criminal liability is proof that the alleged wrongdoer knew what he or she was doing and was acting on his or her own volition.

132 Cong. Rec. S16,307-01 (comments of Senator Levin) (emphasis added). This statement clearly indicates that Congress did not intend "willfully" in the context of this statute to require proof of an accused's knowledge of the law.

255. I am aware, of course, that textualists would argue that looking beyond the statutory text is inappropriate. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990) (detailing Justice Scalia's textualist approach). The nation's leading textualist, Justice Scalia, is likely to balk, therefore, at the suggestion that the courts consult legislative history to determine the meaning of "willfully." *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-30 (1997). Even those who favor a textualist approach, however, should find fault with the current trend to interpret statutes containing language of willfulness to require proof of knowledge of the law. In recognition of the fact that text is sometimes inconclusive, textualists frequently consult dictionaries to ascertain the meaning of statutory text. *See* David O. Stewart, *By the Book: Looking up the Law in the Dictionary*, A.B.A. J., July 1993, at 46 (reporting a rise in the number of times the Supreme Court has consulted dictionaries to define textual meaning); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438-39 (1994) (same). No dictionary defines "willfully" to mean an action done with knowledge of the law.

256. *See infra* notes 257 & 265-66 and accompanying text.

cial rejection or discounting of legislative signals . . . imposes significant costs on Congress," including a diminution of congressional productivity and dilution of congressional influence.[257] The statutes collected in Tables 1 and 2 in Appendix give some measure of the cost that would be exacted by such an interpretive policy. The word "willfully" appears in each of the 160 provisions cited in the Tables, either in conjunction with another *mens rea* term[258] or in conjunction with the term "violates" or "violating."[259] Moreover, "willfully" appears, not linked to another *mens rea* term or "violates" or "violating," in a great number of other criminal provisions.[260] Again, a better interpretive approach would be to accept the message the congressional commentary to *Ratzlaf* so plainly reveals: the Court's reading of "willfully" was in error, and when Congress employs the term in criminal statutes, it does so against the backdrop of the *ignorantia legis* maxim.[261]

While it is true that Congress at times chooses to leave its intent unclear, perhaps in an effort to achieve consensus on a controversial bill,[262] or at other times neglects to make its intent clear, perhaps because it is unable to anticipate all of the situations that may be governed by a statute,[263] these arguments are not pertinent here. There is no reason to believe that Congress's use of "willfully" has been driven by the need to obtain political consensus. The early default rule created by the Court (reading a knowledge of the law requirement into the term only in the tax context) refutes any suggestion that Congress has employed the term for that purpose. The post-*Ratzlaf* amendment underscores this point. Neither is there reason to conclude that Congress uses "willfully" because of its inability to predict the myriad scenarios in which a criminal provision might be

257. Brudney, *supra* note 222, at 69.

258. *See infra* Appendix, Table 1.

259. *See infra* Appendix, Table 2.

260. A broader computer search of Westlaw's United States Code database, using only the term "willfully," was intercepted because of the large number of documents that would have been retrieved. The broad statement in *Bryan* suggests that this category of statutes is also at risk of being found to require proof of knowledge of the law. *See supra* Part II.B.2.

261. *See supra* Part III.B.1.

262. *See* Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 187 (1986); Brudney, *supra* note 222, at 10.

263. *See Statutory Interpretation and the Uses of Legislative History: Hearing Before Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 1 (1990) (opening statement of Chairman Kastenmeier); *id.* at 88 (statement of Prof. William Eskridge, Jr.); Brudney, *supra* note 222, at 10.

put to use. The relevance of an individual's lack of knowledge or understanding of the law to prosecution is relatively simple to anticipate. The legislative history of the CSRA underscores this point. Therefore, a gap in legislative thinking is unlikely and there is no need for the Court to develop the law on the basis of the facts of particular cases.[264]

Given the prominence of "willfully" throughout the federal criminal code, the cost of a policy requiring Congress to clarify the intent underlying "willfully" in each of these statutes would be staggering:[265] it would negatively affect Congress's ability to control its legislative calendar, it would reduce Congress's ability to generate needed legislation, and it would dilute the effectiveness of the statutes that Congress managed to enact.[266]

D. Toward a Workable Construction of Criminal Willfulness

The question of whether a particular crime imposes a *mens rea* requirement, and if so what scienter is required, is foremost a question of statutory interpretation. The courts' proper task is to locate evidence of what Congress intended when it passed a statute and, subject to certain constitutional limitations, to apply that intent to the facts of particular cases. In this Subpart I propose a framework that would restructure, or more precisely, retrench the courts' current in-

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264. The meaning of the word "willfully" thus provides a sharp contrast with terms such as "pattern" or "fraud"—terms for which courts must develop meanings over time. *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 236-43 (1989) (attempting to develop a meaningful definition of the term "pattern" within the RICO statutory framework and stating that "[t]he development of these concepts [that define the term 'pattern'] must await future cases" because they "cannot be fixed in advance with [sufficient] clarity"); McNally v. United States, 483 U.S. 350, 358-60 (1987) (recognizing ambiguity in the meaning of the word "fraud" in the mail fraud statute and determining the word's meaning through an examination of previous judicial decisions). Those terms call out for case-by-case development because legislative anticipation of how "these rules will operate in the real world" is not entirely possible. Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 12-13 (1997). *But see* 18 U.S.C. § 1346 (1994) (redefining "fraud" in the mail fraud statute after seeing how the Supreme Court defined "fraud" in *McNally*); United States v. Stewart, 872 F.2d 957, 960 (1989) (recognizing legislative rejection of the Supreme Court's definition of "fraud" in *McNally*). By contrast, legislators consider the operation of the term "willfully" with respect to knowledge of the law to be readily foreseeable.

265. Professor Brudney argues that refusals to credit post-enactment legislative history diminish Congress's "institutional capability." Brudney, *supra* note 222, at 20. Each time Congress is required to clarify the meaning of statutory language, it expends time and resources in the effort. This reduces its ability to devote that time and those resources to other bills and matters of congressional concern.

266. *See id.* at 20-40.

terpretive approach to determining whether "willfully" in a criminal statute evidences congressional intent to abide by or depart from the maxim.

As a starting point, although courts must ever be mindful of Justice Frankfurter's three rules of statutory interpretation—"(1) [r]ead the statute; (2) read the statute; (3) read the statute"[267]—they must also recognize that statutory text alone will rarely state explicitly that knowledge of the law is an element. Neither will the mere inclusion in a statute of a term with as checkered a past (and present) as "willfully" reveal that term's intended meaning. Courts sincerely interested in uncovering this intent must dig deeper to discover it.[268] For the reasons given above, this search should include careful analysis of the legislative history of the statute at issue.

Second, when scrutinizing the variety of sources that might exhibit congressional intent, the *ignorantia legis* maxim itself should take center stage. In the absence of some proof that Congress intended to depart from the maxim by making knowledge of the law an element of an offense, it should be presumed to have done the opposite. This presumption would be rebuttable by a clear expression of congressional intent—on the face of the statute itself[269] or in the legislative history[270]—to make knowledge of the law an element. Put slightly differently, if judicial review of a statute and the legislative history of that statute fails to reveal the intended meaning of a particular word, Congress should be *presumed* to have legislated against the backdrop of the maxim consistent with the courts' continued assurances that it was free to do so.[271] In such a case, the term "willfully" could not properly be read to require proof of knowledge of the law.

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267. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* FELIX FRANKFURTER THE JUDGE 30, 36 (Wallace Mendelson ed., 1964).

268. Despite the arguments of textualists, *see supra* note 255, "[t]here has been no serious effort to limit . . . reliance" on legislative history. Brudney, *supra* note 222, at 40 n.161; *see also id.* at 42 n.172 (describing briefly three reasons courts use legislative history). Neither do textualists command a majority of the Justices on the Court. *See* Eskridge & Frickey, *supra* note 140, at 78 ("Only Justice Thomas shares Justice Scalia's zeal for text, the whole text, and nothing but the text.").

269. *See supra* note 255 and accompanying text.

270. *See, e.g.*, *supra* Part III.B.2 (describing the legislative history of CSRA provisions indicating congressional intent to make knowledge of the law an element).

271. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *accord* Staples v. United States, 511 U.S. 600, 622 n.3 (1994) (Ginsburg, J., concurring); Ratzlaf v. United States, 510 U.S. 135, 149 (1994).

This is no radical proposal. Thirty years ago the proposal would have seemed closer to restatement than reform. In that era, the Court followed this very practice in rejecting a mistake of law claim in a prosecution for the "knowing violation" of a federal regulation.[272] The fact that the statute in that case required proof of a "knowing violation" of the statute, rather than a willful one[273] compels no contrary result. As the mercurial history of the word "willfully" demonstrates, the term has no inherent maxim-devouring properties. It is only through the process of judicial interpretation that it has come recently, and without compelling justification, to signify a quasi-blanket exception to the maxim. As demonstrated above,[274] such interpretations of the term are suspect because they frequently ignore contrary indicia of legislative intent.

Third, tax cases constitute an important categorical exception to the foregoing principles. In prosecutions brought under the tax code it is appropriate to presume that knowledge of illegality is an element. The longstanding congressional acquiescence in the judiciary's construction of "willfully" in this context, as well as congressional statements affirming the construction in other contexts,[275] provides sufficient evidence of a legislative intent to create an exception to the maxim in tax crimes.

With the use of this tripartite structure, courts weighing the availability of mistake of law claims will avoid many of the pitfalls of the current jurisprudence of willfulness. A return to the maxim will reduce the confusion evident in modern constructions of willfulness

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272. *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971). The case involved a charge that International Minerals had "knowingly violated" a federal regulation that prohibited shipments of acid without proper documentation. The issue was whether that required the government to prove the company's knowledge of illegality (i.e., that it had known it was violating the regulation). Despite the fact that congressional statements about the *mens rea* requirement were inconclusive, the majority held that the maxim was so fundamental to the criminal law that it outweighed the ambiguity present in the statute's congressional history. *See id.* at 563 ("We conclude that the meager legislative history of the 1960 amendments makes unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained . . . .").

273. *See* 18 U.S.C. § 834(f) (1976) (repealed 1979) (specifying criminal penalties for whoever "knowingly violates" regulations governing the shipment of corrosive liquids).

274. *See supra* Part II.B.1 (discussing the Congressional response to *Ratzlaf*).

275. *See supra* Part II.B.2 (demonstrating that "willfully" in the CSRA provisions was to be given the same construction as "willfully" in the tax provisions).

while respecting legislative primacy and the maxim's primary rationales.[276]

Although respect for legislative primacy is, by itself, a sufficient reason for the general return to the maxim suggested here, it is not the only reason. As demonstrated in Part II, the gradual abandonment of the maxim has not led to the development of any rational or consistently applicable rule of decision. In its journey from the maxim to a new method of deciding ignorance of the law issues, the Court has stumbled from complexity, to worries about nefariousness, to "willful"-means-at-least-knowledge-of-general-illegality, as methods for deciding whether a statute requires proof of knowledge of the law. None of these approaches is workable. The Court's troubled path has left the lower courts with little useful guidance for how to decide such questions in the future and has made it difficult for Congress to predict how statutes will be interpreted. A general return to the maxim is one way, and perhaps the only sensible way, out of this thicket.

CONCLUSION

In this Article, I have documented the erosive forces that have transformed the principle *ignorantia legis non excusat* from a fundamental principle of the criminal law into, in many cases, a consideration that is either invoked but honored only in the breach or a "rule" that attracts no mention at all.[277] Contrary to the widely held view that the principle remains a fundamental cornerstone of criminal jurisprudence, over the last decade, courts have repeatedly construed the *mens rea* term "willfully" to make knowledge of the law a prerequisite to criminal liability. These decisions promise to affect dozens of other criminal statutes utilizing the troublesome scienter term.

Contrary to the suggestion found in many of the contemporary willfulness decisions, there is paltry support for the view that the use

276. Although few would argue that the law today is "definite and knowable," is also hard to deny that a policy allowing unlimited availability of the defense to all those accused of criminal wrongdoing would champion ignorance and undercut the goal to make all "know and obey." HOLMES, *supra* note 4, at 48. Even if most citizens take some pride in being knowledgeable about the law, when an accused's self-interest is plainly on the side of ignorance (say, to avoid jail), it seems fair to predict that "pride . . . goeth before the fall." *Proverbs* 16:18 (King James).

277. Many of the willfulness decisions neglect even to mention the maxim. *See, e.g.*, United States v. Murdock, 290 U.S. 389 (1933). Others mention it in passing while denying its relevance to the decision. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 149 (1994).

of "willfully" in a criminal statute reflects a legislative design to insert a knowledge of the law element. Indeed, a much more defensible interpretive approach would presume the opposite. In the normal case, a reviewing court should presume that Congress inserts the word "willfully" into a criminal statute against the backdrop of the maxim. This would mean that ignorance or mistake of law would not excuse, unless Congress manifested a contrary intent either on the face of the statute or in its history. Until late in this century, the Supreme Court essentially followed this approach by repeatedly reaffirming the maxim in all but tax prosecutions.[278] Today, rather than using the maxim as a starting point for statutory analysis, courts are apt to do the opposite. The decisions begin with the quasi-presumption that Congress intended "willfully" to make knowledge of the law an element to be proved by the prosecution. This presumption squarely undercuts the maxim and violates sound principles of statutory construction.

While critics of overcriminalization are surely justified in fearing that the force of the criminal sanction may be diluted if it loses the support of the criminal law's "most important constituents—the habitually law-abiding,"[279] the current constructional approach to criminal willfulness will not provide the solution these critics seek. To date, the jurisprudence of willfulness has generated wide uncertainty about the law's commands. It is now harder than ever to know whether knowledge of the law will or will not be an element, and if it will, precisely what the prosecutor's burden as to that element will be.[280]

At the very least, any trend undercutting the venerable maxim warrants consistent and compelling justification. To date, this has been lacking. Moreover, principles of legislative primacy, statutory interpretation, and judicial restraint all push toward the conclusion that the maxim continues to deserve the support that it has received for centuries across a huge range of legal systems in the absence of clearer legislative signals in favor of its abandonment.

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278. Even in *Ratzlaf* the Court emphasized that its construction of willfulness did not offend the *ignorantia legis* maxim, reasoning that Congress had indicated its intent to make an exception to the maxim by employing the willfulness term. *See Ratzlaf*, 510 U.S. at 149.

279. PACKER, *supra* note 211, at 69.

280. That is, whether the government will have to establish the accused's knowledge of the specific prohibition violated or the accused's knowledge of general illegality. *See* Bryan v. United States, 118 S. Ct. 1939, 1945-47 (1998).

APPENDIX

TABLE 1: FEDERAL CRIMINAL STATUTES EMPLOYING THE *MENS REA* TERMS "KNOWINGLY" AND "WILLFULLY"

STATUTE CITATION	SCIENTER LANGUAGE EMPLOYED
7 U.S.C. § 2028(d) (1994 & Supp. II 1996)	knowingly and willfully embezzles, steals or obtains by fraudulent means any funds financed under the Puerto Rico block grant
8 U.S.C. § 1160(b)(7)(A)(i) (1994 & Supp. II 1996)	knowingly and willfully falsifies or covers up material facts in an application for adjustment of alien resident status
8 U.S.C. § 1253(b) (1994 & Supp. II 1996)	willfully fails to comply with regulations or knowingly gives false information under alien supervision statute
14 U.S.C. § 88(c) (1994 & Supp. II 1996)	knowingly and willfully communicates a false distress message to the Coast Guard
15 U.S.C. § 1611 (1994)	willfully and knowingly gives false information or fails to comply with any requirement under the Consumer Credit Cost Disclosure subchapter
15 U.S.C. § 1681q (1994 & Supp. II 1996)	knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses
15 U.S.C. § 1681r (1994 & Supp. II 1996)	employee of a consumer reporting agency who knowingly and willfully provides unauthorized information concerning an individual from the agency's files
15 U.S.C. § 1693n(a) (1994)	knowingly and willfully gives false information or fails to comply with the requirements of the Electronic Fund Transfers subchapter
18 U.S.C. § 288 (1994 & Supp. II 1996)	knowingly and willfully makes a false claim for a postal loss
18 U.S.C. § 289 (1994)	knowingly and willfully makes false claims for pensions within the jurisdiction of the Department of Veterans Affairs

18 U.S.C. § 550 (1994)	knowingly and willfully files a false claim for refund of duties on the exportation of merchandise
18 U.S.C. § 665(a) (1994 & Supp. II 1996)	knowingly enrolls an ineligible participant or willfully misapplies funds under the Comprehensive Employment and Training Act
18 U.S.C. § 660 (1994)	officer or manager of common carrier who knowingly and willfully converts funds arising from interstate commerce to personal benefit
18 U.S.C. § 669(a) (Supp. II 1996)	knowingly and willfully embezzles or steals from a health care benefit program
18 U.S.C. § 798(a) (1994 & Supp. II 1998)	knowingly and willfully discloses classified information of the United States to an unauthorized person
18 U.S.C. § 878(a) (1994 & Supp. II 1996)	knowingly and willfully threatens a foreign official, official guest or internationally protected person
18 U.S.C. § 879(a) (1994)	knowingly and willfully threatens to kill, kidnap, or inflict bodily harm against the President and his family or a former President and his family
18 U.S.C. § 954 (1994)	willfully and knowingly makes any untrue statement to influence a foreign government to the injury of the United States
18 U.S.C. § 957 (1994)	knowingly and willfully possesses any property designed or intended for use in aid of foreign government in violating the laws of the United States
18 U.S.C. § 1035(a) (Supp. II 1996)	knowingly and willfully makes false statements in any matter involving a health care benefit program
18 U.S.C. § 1115 (1994)	employee on a sea vessel who knowingly and willfully causes or allows to be caused through his misconduct or negligence the death of any person
18 U.S.C. § 1158 (1994)	knowingly, willfully, and corruptly counterfeits the Indian Arts and Crafts Board trademark
18 U.S.C. § 1165 (1994)	willfully and knowingly, without lawful authority, goes upon Indian land for the purpose of hunting, fishing, or trapping

18 U.S.C. § 1347 (Supp. II 1996)	knowingly and willfully executes or attempts to execute a scheme to defraud any health care benefit program
18 U.S.C. § 1366(a)-(b) (1994)	knowingly and willfully damages or attempts to damage the property of an energy facility
18 U.S.C. § 1501 (1994)	knowingly and willfully obstructs, resists, or opposes a process server
18 U.S.C. § 1502 (1994)	knowingly and willfully obstructs, resists, or opposes an extradition agent of the United States in the execution of his duties
18 U.S.C. § 1508 (1994 & Supp. II 1996)	knowingly and willfully records or attempts to record, or listens to or observes, or attempts to listen to or observe the proceedings of a grand or petit jury
18 U.S.C. § 1541 (1994 & Supp. II 1996)	knowingly and willfully grants any passport to or for any person not owing allegiance to the United States
18 U.S.C. § 1542 (1994 & Supp. II 1996)	willfully and knowingly makes any false statement in an application for a passport
18 U.S.C. § 1543 (1994 & Supp. II 1996)	willfully and knowingly uses, or attempts to use, or furnishes to another for use a forged passport
18 U.S.C. § 1544 (1994 & Supp. II 1996)	willfully and knowingly misuses a passport
18 U.S.C. § 1584 (1994 & Supp. II 1996)	knowingly and willfully subjects another to involuntary servitude
18 U.S.C. § 1701 (1994)	knowingly and willfully obstructs the passage of mail
18 U.S.C. § 1721 (1994)	being a Postal Service employee, knowingly and willfully sells or uses stamps for personal benefit
18 U.S.C. § 1752(a)(1), (3), (4) (1994)	willfully and knowingly enter or obstruct the temporary offices and residences of the President and any other person protected by the Secret Service
18 U.S.C. § 1920 (1994 & Supp. II 1996)	knowingly and willfully make a false statement or fraud to obtain Federal employee's compensation

18 U.S.C. § 1922 (1994)	willfully fails to make any reports, or knowingly files a false report concerning Federal employees' compensation
18 U.S.C. § 2424(a) (1994 & Supp. II 1996)	knowingly and willfully states falsely or fails to disclose in such statement facts about an alien individual
19 U.S.C. § 1629(f)(2) (1994)	knowingly and willfully falsifies or conceals a material fact before a foreign customs official stationed in the United States
19 U.S.C. § 2349 (1994)	knowingly fails to disclose a material fact, or willfully overvalues any security in seeking relief from injury caused by import competition
20 U.S.C. § 1097 (1994)	knowingly and willfully embezzles, steals, misapplies, or obtains by fraud assets insured under the Student Assistance subchapter
22 U.S.C. § 2197(n) (1994)	knowingly makes any false statement, or willfully overvalues any land, property, or security for the purpose of influencing the Overseas Private Investment Corporation
26 U.S.C. § 7208(4)(B) (1994)	knowingly or willfully traffics any stamp after it has already been used
30 U.S.C. § 1463(a) (1994)	willfully and knowingly commit any act prohibited by section 1461 of the Mineral Lands and Mining title
33 U.S.C. § 931(a)(1), (c) (1994)	knowingly and willfully making a false statement or representation for the purpose of obtaining or reducing a benefit under the Longshore and Harbor Workers' Compensation Chapter
33 U.S.C. § 1318(b) (1994)	knowingly and willfully publishes, divulges, or discloses any confidential information
40 U.S.C. § 212a-2(d) (1994)	knowingly and willfully obstructing, resisting, or interfering with a member of the Capital Police engaged in the performance of their protective functions
41 U.S.C. § 54 (1994)	knowingly and willfully engaging in conduct prohibited by section 53 of the Public Contracts title

42 U.S.C. § 300e-17(h) (1994)	knowingly and willfully making or causing to made any misrepresentation concerning financial disclosures
42 U.S.C. § 300w-8(1) (1994)	knowingly and willfully making or causing to be made any false statement or representation of a material fact in connection with the Preventative Health and Health Services Block Grants
42 U.S.C. § 707(a)(1) (1994)	knowingly and willfully making false statements or representations under the Maternal and Child Health Services Block Grant subchapter
42 U.S.C. § 1761(o)(1) (1994 & Supp. 1998)	knowingly and willfully falsifies or conceals a material fact or makes a false statement in connection with School Lunch Programs
42 U.S.C. § 1973i(c) (1994)	knowingly or willfully gives false information or conceals a material fact in connection with voting
42 U.S.C. § 1973gg-10 (1994)	knowingly and willfully interfering with a person's right to vote
42 U.S.C. § 3544(c)(3)(A) (1994)	knowingly and willfully requesting information or disclosing information about a participant in housing and urban development programs
42 U.S.C. § 5420 (1994)	knowingly and willfully fails to report a violation of any construction or safety standard
42 U.S.C. § 6921(b)(3)(B)(ii)(II) (1994 & Supp. 1998)	knowingly and willfully discloses any information entitled to protection relating to inspections under the Hazardous Waste Management subchapter
42 U.S.C. § 6927(b)(2) (1994)	knowingly and willfully discloses any information entitled to protection relating to inspections under the Hazardous Waste Management subchapter.
42 U.S.C. § 6991d(b)(2) (1994)	knowingly and willfully disclosing any information entitled to protection concerning records obtained in connection with the regulation of underground storage tanks
42 U.S.C. § 9604(e)(7)(B) (1994)	knowingly and willfully discloses information entitled to protection concerning the Comprehensive Environmental Response, Compensation, and Liability chapter

47 U.S.C. § 501 (1994)	willfully and knowingly does or causes to be done any thing prohibited, or fails to do any act required to be done under the Wire or Radio Communication chapter
49 U.S.C. § 522 (1994)	knowingly and willfully makes a false report or record to the Secretary of Transportation
49 U.S.C. § 11903 (Supp. I 1995)	knowingly and willfully makes false entries or by other means falsifies the record required under the Transportation title
49 U.S.C. § 16102 (Supp. I 1995)	knowingly and willfully makes false entries or by other means falsifies the record required under chapter 157 of the Transportation title
49 U.S.C. § 30307(b) (1994)	knowingly and willfully requesting, or obtaining information under false pretenses
49 U.S.C. § 46311(a) (1994)	knowingly and willfully disclosing information in violation of the subtitle on Aviation Programs
49 U.S.C. § 46314 (1994)	knowingly and willfully entering aircraft or airport in violation of security requirements
49 U.S.C. § 46315(b)(1) (1994)	knowingly and willfully operates an aircraft in violation of requirements of the Administrator of the Federal Aviation Administration related to the display of lights
49 U.S.C. § 60123(b)-(d) (1994 & Supp. 1998)	knowingly and willfully damaging or destroying a facility or sign, or not heeding location information markings concerning pipelines
50 U.S.C. § 210 (1994)	willfully and knowingly engaging in unauthorized trading

TABLE 2: FEDERAL CRIMINAL STATUTES EMPLOYING THE *MENS REA* TERMS "WILLFULLY VIOLATES"

STATUTE CITATION	SCIENTER LANGUAGE EMPLOYED
2 U.S.C. § 437g(d)(1)(A) (1994)	knowingly and willfully violating any provision of the Disclosure of Federal Campaign Funds Act
7 U.S.C. § 13(f) (1994)	willfully and knowingly violate prohibition against insider trading
7 U.S.C. § 3806(a) (1994)	willfully violating any provision of the Swine Health Protection Act
7 U.S.C. § 4810(c) (1994)	willfully violating subsection (a)(1) or (b) of Pork Promotion, Research, and Consumer Information Act
7 U.S.C. § 6304(q)(4) (1994)	willfully violating the Soybean Promotion, Research, and Consumer Information Act
7 U.S.C. § 7104(m)(3)(E) (1994)	willfully violating the confidentiality requirement set forth in the Sheep Promotion, Research, and Information Act
7 U.S.C. § 7414(i)(4)(D) (1994 & Supp. II 1996)	willfully violating the recording requirements of for activities regarding agricultural commodities
7 U.S.C. § 7465(g)(3) (1994 & Supp. II)	willfully violating the confidentiality requirement set forth in the Kiwifruit subchapter
10 U.S.C. § 2507(c) (1994)	willfully performs any prohibited act or willfully fails to perform any required act required by data collection authority of the President to enforce the administration of the National Defense Technology and Industrial Base, Defense Act
10 U.S.C. § 2674(c)(3) (1994)	willfully violates any rule or regulation established by the Secretary of Defense to ensure the safe operation of the Pentagon Reservation

12 U.S.C. § 1956 (1994)	willfully violates any regulation under the Financial Recordkeeping chapter
12 U.S.C. § 1957 (1994)	willfully violates or willfully causes a violation of any regulation under the Financial Recordkeeping chapter in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year
12 U.S.C. § 2277a-14(a)(3) (1994)	willfully violates prohibitions on the use of the corporate name, "Farm Credit System Insurance corporation"
15 U.S.C. § 68h (1994)	willfully violates sections 68a, 68c, 68f or 68g(b) of the Commerce and Trade Act
15 U.S.C. § 69I(a) (1994)	willfully violates sections 69a, 69d, or 69h(b) of the Commerce and Trade Act
15 U.S.C. § 77x (1994)	willfully violates the rules or regulations promulgated by the Commerce Commission, or willfully makes false statements in a registration statement
15 U.S.C. § 77yyy (1994)	willfully violates any provision or rule under the Trust Indentures subchapter
15 U.S.C. § 78dd-2(g)(2)(A)-(2)(B) (1994)	willfully violates requirements of prohibited foreign trade practices by domestic concerns
15 U.S.C. § 78ff(a), (c)(2)(A), (c)(2)(B) (1994)	willfully violates any rule or regulation under the Securities Exchanges chapter
15 U.S.C. § 79z-3 (1994)	willfully violates any provision under the Public Utility Holding Companies chapter
15 U.S.C. § 80a-48 (1994)	willfully violates any provision of the Investment Companies subchapter
15 U.S.C. § 80b-17 (1994)	willfully violates any provision of the subchapter on Investment Advisers
15 U.S.C. § 330d (1994)	knowingly and willfully violates section 330a of the Commerce and Trade title

15 U.S.C. § 797(b)(3) (1994)	knowingly and willfully violates after having been subjected to a civil penalty for a prior violation of the same provision
15 U.S.C. § 1196 (1994)	willfully violates section 1192 or 1197(b) of the Commerce and Trade title
15 U.S.C. § 1717 (1994)	willfully violates any provisions of the Interstate Land Sales chapter
15 U.S.C. § 2070(a) (1994)	knowingly and willfully violates section 2068 of the Commerce and Trade title after having received notice of noncompliance
15 U.S.C. § 2615(b) (1994)	knowingly or willfully violates any provision of section 2614 or 2689 of the Commerce and Trade title
15 U.S.C. § 3414(c)(1) (1994)	knowingly and willfully violates any provision, except in paragraph (3) violations, of the Natural Gas Policy chapter
16 U.S.C. § 9a (1994)	knowingly and willfully violates any regulation prescribed by the Secretary of the Army to maintain the national military parks and miscellaneous memorials
16 U.S.C. § 1338(a)(1), (a)(6) (1994)	willfully removes or attempts to remove a wild horse from public lands without permission, or willfully violates a regulation issued pursuant to the Wild Horses and Burros chapter
16 U.S.C. § 1417(b)(2) (1994 & Supp. II 1996)	knowingly and willfully violates provision against assaulting, resisting, or interfering with any authorized officer in the conduct of any search of a vessel boarded by the authorized officer
18 U.S.C. § 924(a)(1)(D) (1994 & Supp. II 1996)	willfully violates any provision of the Firearms chapter, other than those already enumerated
18 U.S.C. § 1735 (1994)	willfully violates any regulations of the Board of Governors of the Postal Service prohibiting use of the mails for any sexually oriented advertisements

22 U.S.C. § 287c(b) (1994)	willfully violates or evades or attempts to violate any rule or regulation issued by the President pursuant to being called upon by United Nations Security Council
22 U.S.C. § 618(a) (1994 & Supp. II 1996)	willfully violates any provision of the Registration of Foreign Propagandists subchapter
22 U.S.C. § 1631n (1994)	willfully violate or knowingly participate in violation of settlement of international claims
22 U.S.C. § 2712(f)(1) (1994)	willfully violates any regulation under the authority to control certain terrorism-related services section
22 U.S.C. § 2778(c) (1994 & Supp. II 1996)	willfully violates any provision of the control of arms exports and imports section
22 U.S.C. § 2780(j) (1994 & Supp. II 1996)	willfully violates any provision of the section concerning transactions with countries supporting acts of international terrorism
22 U.S.C. § 3105(c) (1994)	willfully fails to submit required information or violates any rule or regulation of the International Investment and Trade in Services Survey chapter
25 U.S.C. § 500m (1994)	willfully violates any of the rules issued by the Secretary of the Interior to regulate the grazing of reindeer
26 U.S.C. § 5605 (1994)	willfully violates regulation relating to the return of materials used in the manufacture of distilled spirits, or from which distilled spirits may be recovered
26 U.S.C. § 9012(a)(2) (1994)	a political candidate, an authorized national political committee, or any officer of such committee who knowingly and willfully consents to violation of set spending limits for presidential campaigns
29 U.S.C. § 186(d)(2) (1994 & Supp. 1998)	willfully violates the section on restrictions on financial transactions between employers and employees
29 U.S.C. § 216(a) (1994 & Supp. 1998)	willfully violates any provisions of section 215 of the Labor title

29 U.S.C. § 439(a) (1994)	willfully violates the subchapter on Reporting by Labor Organizations, Officers and Employees of Labor Organizations, and Employers
29 U.S.C. § 461(c) (1994)	willfully violates the filing and contents requirements of a labor organization that has trusteeship over any subordinate labor organization
29 U.S.C. § 463(b) (1994)	willfully violates section concerning unlawful acts relating to labor organization under trusteeship
29 U.S.C. § 502(b) (1994)	willfully violates section on the bonding of officers and employees of labor organizations
29 U.S.C. § 503(c) (1994)	willfully violates the section prohibiting labor organizations from making loans to any officer or employee of such organization which results in a total indebtedness in excess of $2,000
29 U.S.C. § 504(b) (1994)	willfully violates section prohibiting any person convicted of certain felonies or a past or present member of the Communist Party from serving in a leadership role in a labor organization
29 U.S.C. § 522(b) (1994)	willfully violates section prohibiting a person form extortionate picketing
29 U.S.C. § 530 (1994)	willfully violates section prohibiting the deprivation of rights by violence of any member of a labor organization
29 U.S.C. § 666(a), (e) (1994)	willfully violates any regulation of the Occupational Safety and Health chapter
29 U.S.C. §1131 (1994)	willfully violates any provision of part 1 of the Regulatory Provisions subtitle within the subchapter concerning Employee Benefit Rights Protection
29 U.S.C. §1141 (1994)	willfully violates section prohibiting a person from engaging in coercive interference with a beneficiary of welfare
30 U.S.C. § 820(d) (1994)	willfully violates a mandatory health or safety standard in operation of a mine

31 U.S.C. § 1350 (1994)	knowingly and willfully violates section 1341(a) or 1342 of the Money and Finance title
31 U.S.C. § 1519 (1994)	knowingly and willfully violating section 1517(a) of the Money and Finance title
33 U.S.C. § 533(a) (1994)	willfully violates any provisions under the General Bridge Authority subchapter
33 U.S.C. § 601 (1994)	knowingly and willfully violating the regulations concerning the reservoirs at the headwaters of the Mississippi River
33 U.S.C. § 1481(a)(1) (1994)	willfully violates a provision of the Pollution Casualties on High Seas chapter
33 U.S.C. § 1514(a) (1994)	willfully violates any provision of the Deepwater Ports chapter
42 U.S.C. § 2272 (1994)	willfully violates any provisions of sections 2077, 2122, or 2131 of the Public Health and Welfare title
42 U.S.C. § 2273(a), (b) (1994)	willfully violates any provision of the Development and Control of Atomic Energy chapter
42 U.S.C. § 3537a(d) (1994)	willfully violates a prohibition of advance disclosure of funding decisions of the Department of Housing and Urban Development
42 U.S.C. § 5410(b) (1994)	knowingly and willfully violates section 5409 of the Public Health and Welfare title in a manner which threatens the health or safety of any purchaser
42 U.S.C. § 6395(c) (1994)	knowingly and willfully violates section 6394 of the Public Health and Welfare title, after having been subjected to a civil penalty for a prior violation of the section
42 U.S.C. § 7270b(b) (1994)	willfully violates a regulation relating to the entry upon or carrying of any dangerous weapon onto the Strategic Petroleum Reserve
42 U.S.C. § 8432 (1994)	willfully violates any provision of the Powerplant and Industrial Fuel Use chapter

43 U.S.C. § 1350(c) (1994)	knowingly and willfully violates any regulation designed to protect or conserve natural resources of outer continental shelf lands
43 U.S.C. § 1605(b) (1994)	willfully violates the provision prohibiting the use of the Alaska native fund for propaganda or political campaign for individuals
43 U.S.C. § 1733(a) (1994)	knowingly and willfully violates any regulation with respect to the management, use, and protection of public lands
46 U.S.C. § 3718(c) (1994 & Supp. 1998)	willfully and knowingly violating the chapter on the carriage of liquid bulk dangerous cargoes
47 U.S.C. § 553(b) (1994)	willfully violates subsection prohibiting unauthorized use of cable service
47 U.S.C. § 605(e)(1) (1994)	willfully violates subsection prohibiting unauthorized publication or use of communications
49 U.S.C. § 521(b)(6)(A)-(B) (1994 & Supp. 1998)	knowingly and willfully violates specified provisions or regulations under the Transportation title
49 U.S.C. § 11906 (1994 & Supp. I 1995)	willfully violates a specified provision when a specific penalty is not provided under the Rail—Civil and Criminal Penalties chapter
49 U.S.C. § 16105 (1994 & Supp. I 1995)	willfully violates a specified provision when a specific penalty is not provided under the Pipeline Carriers—Civil and Criminal Penalties chapter
49 U.S.C. § 32709(b) (1994)	knowingly and willfully violates a regulation or order under the Odometers chapter
49 U.S.C. § 46307 (1994)	knowingly or willfully violates section 40103(b)(3) of this title
49 U.S.C. § 46316(a) (1994 & Supp. 1998)	knowingly and willfully violates a specified provision for which there has been no specific penalty provided under the Air Commerce and Safety—Enforcement and Penalties—Penalties chapter
49 U.S.C. § 47306 (1994)	knowingly and willfully violates a regulation prescribed by the Secretary of Transportation

49 U.S.C. § 5124 (1994)	willfully violating the Transportation of Hazardous Material chapter
50 U.S.C. § 167k (1994)	willfully violates any provision of the Helium Gas chapter
50 U.S.C. § 855(a) (1994 & Supp. 1998)	willfully violates any provision of the subchapter on the registration of certain persons trained in foreign espionage systems
50 U.S.C. § 1705(b) (1994 & Supp. 1998)	willfully violates any license, order, or regulation under the International Emergency Economic Powers chapter
50 U.S.C. app. § 2410(b) (1994 & Supp. I 1995)	willfully violates any provision or regulation of the War and National Defense Export Regulation Act