The Willfulness Requirement: A Chameleon in the Legal Arena

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I. INTRODUCTION

The term willful, deeply rooted in the common law, is a culpability requirement employed by most states in criminal statutory language. Yet, it has a perplexing characteristic, specifically that it takes on different meanings in different contexts. When drafting the Model Penal Code, the drafters included four "kinds of culpability": purposely, knowingly, recklessly, and negligently, while deliberately excluding the term willfulness as a mental state because of its "unusually ambiguous" nature.

Willfulness is defined by the Model Penal Code solely because of its "currency and existence" in offenses outside of the Code, which creates the need and "desirability" for "clarification." Section 2.02 (8) provides that "an offense [is] committed willfully \ldots [when] a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." The explanatory note states that this definition is often deviated from in circumstances when the courts have interpreted the willfulness requirement to interject a supplementary prerequisite "of motive or of purpose" or to establish the foundation for a specific defense grounded on the accused's mental state. To adjust to these particular circumstances, in which judicial interpretation of the requirement has imposed different meanings, the definition in Section 2.02(8) of the Model Penal Code may not be applicable. Yet, the Model Penal Code recognizes this as a possibility, unlike many pattern jury instructions and courts that try to apply one inflexible definition.

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9. Id.
11. Id.
12. See generally Pattern Crim. Jury Instr. 5th Cir. § 1.38 (West ed. 1997) (which discusses this problematic approach taken by previous pattern jury instructions and courts). See infra text accompanying notes 73-82.
Moreover, the term willfully has "defied any consistent interpretation by the courts." One commentator stated, "[No] word has shown more confusion than 'willfully.'" However, it remains "one of the most common terms in statutory crimes to designate a culpability requirement." Although the current Louisiana Criminal Statutes use "willful" throughout, they do not define the term, "presumably because of the imprecision in the concept." This article explores the historical jurisprudence of "willfully" in the United States Supreme Court, the United States Fifth Circuit Court of Appeals, and Louisiana courts, the present interpretations of the term in particular contexts, possible implications of recent decisions, and the validity of the term in the criminal context in Louisiana.

II. UNITED STATES SUPREME COURT CASES

A. "Willfully" and Its Amorphous Form

As early as 1933 in United States v. Murdock, the United States Supreme Court confronted this inherently elusive term, noting that an "[a]mid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used." Moreover, in Spies v. United States, the Court noted the same proposition, stating that willful "is a word of many meanings, its construction often being influenced by its context." The Court in Murdock explored the different connotations that the word has taken, stating that ordinarily it means "intentional, or knowing, or voluntarily" as opposed to "accidental." However, it acknowledged previous United States Supreme Court decisions that adopted Chief

20. 317 U.S. 492, 63 S. Ct. 364 (1943). This case involved the willful attempt to evade or defeat taxes. The Court stated that nonpayment of a tax when applied to failure to make a return, when "voluntary and purposeful as distinguished from accidental, omission to make a timely return might meet the test of willfulness." Id. at 497-98, 63 S. Ct. at 367. Furthermore, the majority declared that tax laws were not to be imposed "to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." Id. at 496, 63 S. Ct. at 367.
21. Id. at 497, 63 S. Ct. at 367.
22. 290 U.S. at 394, 54 S. Ct. at 225.
Justice Shaw's view in a criminal context when it stated that "[willful] generally means an act done with a bad purpose." In the 1998 decision *Bryan v. United States*, the Court purportedly accepted this view, stating that "in criminal law it... typically refers to a culpable state of mind.". Furthermore, it is commonly understood as a term manifesting an "evil intent without justifiable excuse." The Court has noted on several occasions that the term has a knowledge component and connotes an act done with the belief that it is unlawful. This knowledge requirement is currently strictly enforced by federal courts for willful infractions of some federal criminal tax laws and, structuring of currency transaction statutes. Thus, it is clear that the term willful has a peculiar, chameleon-like nature having different meanings in different contexts.

In *Bryan*, the defendant was prohibited by law from dealing in firearms because he had not met the federal requirement of obtaining a license. Nonetheless, the defendant used "straw purchasers" to acquire firearms. He assured these purchasers that he would remove the serial numbers from the firearms before he sold them on Brooklyn street corners. The United States Supreme Court found that there was sufficient evidence to prove the defendant knew that his conduct was unlawful. Federal law forbids anyone from "willfully" violating a provision of chapter forty-four of the United States Code, which criminalizes certain conduct involving firearms. The accused in *Bryan* was charged with "willfully" violating a provision that prohibits selling firearms
without a federal license.  However, he maintained that he could not be convicted because the term "willfully" does not merely require that a defendant know his conduct is unlawful in a general sense, but it also contains the more stringent requirement of specific knowledge of the law. Under this requirement, the government would have to prove that he knew of the federal licensing requirement.

The Court rejected the defendant's argument and held the term "willfully" in Section 924 (a)(1)(D) requires only that the defendant has "knowledge that the conduct is unlawful", further proof that he also knew of the federal licensing requirement is not required. The majority stated that willful is a "word of many meanings." Furthermore, Justice Scalia dissented in Bryan, acknowledging the troublesome nature of statutes that contain a willfulness requirement. He noted that the word "willfully" is "notoriously malleable." Generally, purposeful lawbreakers violate the law with a "bad purpose" or "evil motive," knowing that they are breaking the law; therefore, "it does not matter what meaning of 'wilful' is applied." Nonetheless, sometimes the variance in the definitions of the term is critical. For instance, in United States v. Murdock, the defendant declared what he thought to be his constitutional right against self incrimination by not answering questions posed to him by a governmental official. The constitutional privilege was not applicable in that given situation, and he was arrested for "willfully" declining to respond to questions.

If the definition of willful is simply intentional, the defendant in Murdock was guilty of the crime by reason of his intentional refusal to answer questions. However, if the definition of willful was that of an intentional "act done with a bad purpose," the defendant was not guilty because he lacked the requisite evil motive. The Court held that since the defendant based his actions on the erroneous

36. 18 U.S.C.S. § 922(a)(1)(A)(1996): § 922. Unlawful Acts. (a) It shall be unlawful— (1) for any person— (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce;

37. The accused argues that the term "willfully" in 18 U.S.C.S. § 924(a)(1)(D) (1996) should be construed in the same manner as it is in tax statutes. See infra text accompanying notes 48-74.


40. Bryan, 524 U.S. at 201, 118 S. Ct. at 1950 (Scalia, J., dissenting).

41. Joshua Dressler, Understanding Criminal Law § 10.04(C) (2d ed. 1995).

42. Id.


44. Murdock, 290 U.S. at 395, 54 S. Ct. at 225.

45. Id. at 394, 54 S. Ct. at 225 (citing Felton v. United States, 96 U.S. (6 Otto) 399 (1877); Potter v. United States, 155 U.S. 438, 15 S. Ct. 144 (1894); Spurr v. United States, 174 U.S. 728, 19 S. Ct. 812 (1899)).
assumption that he had a constitutional right to decline to answer, he was without evil motive and acted without the expectation of violating the law. Therefore, he was not guilty. In cases such as the latter where such a definition is employed for willful, there is an exception to the general rule that ignorance of the law is no excuse. Since the Murdock decision, the courts have found an increasing number of cases where the difference in meanings for the term willful is significant as to the outcome of the case, such as tax and structuring transactions.

B. Tax and Structuring Transactions Cases—A League of Their Own

In Bryan, the defendant’s argument that the term “willfully” in 18 U.S.C. § 924(a)(1)(D) requires special knowledge of the law was borrowed from the Court’s comparable constructions in willful violations of the tax law cases and the willfulness requirement in the structuring of currency transactions to evade a bank reporting obligation. In essence, the defendant in Bryan claimed that the prosecution must prove that he desired a particular unlawful outcome and that he knew the result was illegal: “intentional violation of a known legal duty,” much like the requirement in tax and transaction structuring cases.

In Cheek v. United States, the defendant acknowledged that he had not filed his taxes, but stated that he did not believe this constituted willful conduct because he honestly theorized that the federal tax laws were unconstitutional, based on his instruction by a group that adhered to this belief. The United States Supreme Court stated that “willfully” attempting to evade income taxes and failing to file income tax returns . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. The Court stated that the defendant’s belief that tax laws were invalid was unrelated to willfulness and distinguished the case from that in which innocent oversights or misunderstandings originate due to the intricacy of the tax laws.

46. Dressler, supra note 41.
50. The defendant argued that the willfulness requirement in his situation was analogous to that in Cheek v. United States, 498 U.S. 192, 111 S. Ct. 604 (1991), a tax case. 524 U.S. at 193, 118 S. Ct. at 1946.
52. Id.
53. Id. at 201, 111 S. Ct. at 610.
54. Id. at 205-06, 111 S. Ct. at 612-13. Therefore, the Court carved “out an exception to the traditional rule” that “ignorance of the law is no excuse” because the typical citizen has trouble understanding the magnitude of the responsibilities and liabilities imposed by the tax laws; “[c]ongress has accordingly softened the impact . . . by making specific intent to violate the law an element of certain federal criminal tax offenses.” Id. at 199-200, 111 S. Ct. at 609.
The Court held that if an accused honestly concluded that he was not involved in unlawful activities, he should not be convicted, despite the fact that his belief was not "objectively reasonable." Thus, Cheek established that an accused's subjective awareness of the law decides whether he is guilty for willfully violating the requirement of filing income taxes. This conclusion was primarily a policy decision exacted by the Court to prevent innocent citizens from being punished when they had no knowledge that they were engaged in activities which were unlawful.

Similarly, in Ratzlaf v. United States, a structuring transaction case, the United States Supreme Court held that the government must prove three conditions: (1) a defendant had knowledge that a financial establishment must report monetary dealings in excess of ten thousand dollars, (2) defendant's intention to evade such reporting, and (3) the defendant knew the structuring in which he engaged in was illegal. In Ratzlaf, the accused incurred a debt of $160,000 at a casino. He was told by casino executives that a currency exchange of more than $10,000 was required to be reported by banks as per state and federal law. The casino executive told the defendant he could avoid the requirement by purchasing cashier's checks for less than $10,000 at different banks to pay his debt.

The defendant contended that he could not be found guilty of "willfully violating" the antistructuring offense only by reason of his knowledge that a commercial economic establishment must inform and give documentation of monetary transactions above $10,000. To obtain a conviction, he maintained, the prosecution must prove he had knowledge of the unlawfulness of the structuring which he undertook. The United States Supreme Court agreed. The Court stressed in its analysis that structuring is not intrinsically corrupt. The Court appeared to be influenced by the principle that penalizing a person for an action without a determination of whether a choice was made to engage in unlawful

57. Cheek, 498 U.S. at 199, 111 S. Ct. at 609. The Court made the distinction between subjective belief and an objectively reasonable awareness, opting not to hold people to the stricter objectively reasonable standard. Undoubtedly, this decision protects more defendants.
59. Id. at 138, 114 S. Ct. at 657-58 (emphasis added).
60. Id. at 137, 114 S. Ct. at 657.
61. Id.
62. Id.
63. Id. at 146, 114 S. Ct. at 662. "[W]e are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of the structuring." The Court was impressed with the fact that the defendant subjectively believed that the structuring which he undertook was not unlawful and that this belief was objectively reasonable. This made for a stronger case for the defendant than in Cheek, 498 U.S. 192, 111 S. Ct. 604 (1991).
activity disregards the standard inherent in due process: that a choice to break the law must precede punishment.64

The Court was influenced by the rule of lenity.65 This rule is based on dual notions:66 "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"; secondly, the "legislature and not courts should define criminal activity."67 The rule directs courts "to construe ambiguous penal statutes strictly in favor of the accused."68

The majority in Bryan freely distinguished these types of cases because they involve very complex laws that risk one's conviction when "engaged in apparently innocent conduct."69 The Court reasoned in Bryan that "willfully" in 18 United States Code section 924 (a)(1)(D) required a different standard because this statute did not jeopardize any innocent persons, since firearm transactions conducted by unlicensed firearms dealers is not mere innocent conduct and involves a bad purpose.70 Although the tax and structuring cases rationale was not extended to the federal licensing requirement in Bryan, there is no reason why this logic should not be applied to other statutes when equity demands a more just outcome. For example, the definition of willful should not be confined to "intentional" in those statutes where there is a possibility that such reasoning could jeopardize merely innocent conduct. It seems necessary for the courts to individually interpret each statute that contains the terms willful or willfully to determine whether the legislature intended that the defendant have an evil motive or knowledge that his or her action is illegal when violating the law.

III. THE FIFTH CIRCUIT: A MINORITY APPROACH

As early as 1955, the Fifth Circuit acknowledged the United States Supreme Court's Murdock decision,71 which states that in advancing toward an interpretation of the term "willfully," courts should take guidance from the context in which the term is used.72 A 1978 decision stated that the term "defied any consistent

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65. See id. at 400.


70. Id.


interpretation[s] by the courts." Despite the court's recognition of willfully's chameleon-like characteristics, the Fifth Circuit Criminal Pattern Jury Instructions for 1978 deviated from these cases and included "willfully" as a component of nearly all offenses.74 Furthermore, the pattern jury instructions assigned one definition for the term for every offense: "The word 'willfully,' as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."75

However, the 1992 Federal Jury Practice and Instructions stated that although the term is commonly used as an essential requirement in criminal statutes, it has "eluded precise definition."76 Yet, even though the 1978 instructions have been criticized, the standard definition in the 1978 instructions has left lingering effects; the term is recurrently inserted in indictments even though it may not be in the particular criminal statute that the accused is charged with violating.77 This standard makes elements of crimes harder to satisfy. Nevertheless, this practice should be strongly discouraged78 because the term willfulness should only be used "where the statute makes it an element of the offense" in order for the "Congressional purpose . . . to be accomplished,"79 and because the immutable definition of the term "is not accurate in every situation."80

As early as 1980 the Seventh Circuit Committee on Federal Jury Instructions recognized a similar dilemma. The committee suggested that an instruction defining the term willfully should not be conveyed, except in those cases where the word appears in the statute that the defendant is accused of violating.81 Furthermore, the committee stated, "[I]t is rarely desirable to give a general definition of 'willfully.'"82 Yet, the recent 1997 Pattern Jury Instructions for

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73. United States v. Granda, 565 F.2d 922, 924 (5th Cir. 1978).
74. See Pattern Crim. Jury Instr. 5th Cir., supra note 12.
75. Id.
77. "The word 'willfully' is frequently included in the indictment, even when not required by statute or case law." Pattern Crim. Jury Instr. 5th Cir., supra note 12, at § 1.38.
78. Id.
79. Model Crim. Jury Instr. 9th Cir. § 5.5 (West ed. 1997). Indictments and instructions should follow "the relevant statutory definition of the offense . . . for the purpose of accomplishing what the statute prohibits."
80. Pattern Crim. Jury Instr. 5th Cir., supra note 12, at § 1.38 (stating that the United States Supreme Court has corroborated this position stating that "'[f]ew areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.'" (quoting United States v. Bailey, 444 U.S. 394, 403, 100 S. Ct. 624, 631 (1980)). Furthermore, "'[i]n Ratzlaf v. United States, 510 U.S. 135, 141, 114 S. Ct. 655, 659 (1994), the Supreme Court, quoting from Spies v. United States, 317 U.S. 492, 497, 63 S. Ct. 364, 367 (1943), recognized that 'willful is a word of many meanings,' and 'its construction is often . . . influenced by its context.'"
81. Devitt et al., supra note 76, at § 17.05.
82. "If the statute uses the term and it must be defined, it should be defined in a manner tailoring it to the details of the particular offense charged." Fed. Crim. Jury Instr. 7th Cir. § 4.09 (West ed. 1999).
criminal cases of the Fifth Circuit expressly declined to adopt the Seventh Circuit’s recommendation in many circumstances.83

IV. LOUISIANA: AN ATTEMPT TO ACCOMPLISH A MORE REASONABLE WILLFULNESS REQUIREMENT

A. In General

In State of Louisiana v. D.L.,84 a juvenile was charged with six counts of negligent injuring.85 The petition and affidavit charged the accused with “wilfully and unlawfully” inflicting, by criminal negligence, injury on another person.86 The minor claimed he was prejudiced by the erroneous inclusion of the term willfully. The Louisiana Second Circuit Court of Appeal reasoned that there was no prejudice because a petition’s purpose is to give notice to a juvenile and an opportunity to defend.87 Furthermore, at the close of the trial, the juvenile court specifically referred to the error and stated that no intent was required as per statute.88 Many times when the term is indiscriminately inserted, it confuses the law, but often times will not prejudice the defendant because it imposes a stringent mental requirement which must be met.

This error is by no means a new problem in Louisiana. In State v. Vinzant,89 the Louisiana Supreme Court was confronted with a similar problem. The defendant was charged with involuntary homicide, a crime in Louisiana in 1942. At the time the involuntary homicide statute read: “[A]ny person who, by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes the death of another person, shall be guilty of the crime of involuntary homicide. . . .”90 Yet, the accused’s bill of information defining this offense included the additional terms “wilfully, maliciously, feloniously and unlawfully,” immediately preceding the charge.91 Nevertheless, the court held these words were mere surplusage and should be regarded as such.92

In dictum, the Louisiana Supreme Court did attempt to define willfully in Vinzant, stating:

83. The Fifth Circuit Pattern Jury Instructions authors reasoned that the Fifth Circuit has “engrafted an element of ‘willfulness’ even when that term does not appear in the statute.” Pattern Crim. Jury Instr. 5th Cir., supra note 12, at § 1.38.
84. 697 So. 2d 706 (La. App. 2d Cir. 1997).
85. La. R.S. 14:39 (1997). This statute does not include intent or willfulness in the definition of negligent injuring.
86. 697 So. 2d at 710.
87. Id.
88. Id.
89. 7 So. 2d 917 (La. 1942).
90. 1930 La. Acts No. 64, § 1.
91. 7 So. 2d at 920. See also State v. Hudgens, 179 So. 57 (La. 1938). The defendant was charged with involuntary homicide; written into the bill were the words “unlawfully, wilfully and feloniously.” The court held the words “must be rejected as surplusage.”
92. 7 So. 2d at 920. Similar situations in Louisiana jurisprudence have resulted in similar outcomes.
As used in statutes denouncing crimes, the word "willfully" means or implies a purpose or willingness to commit the act. It implies a criminal intent, a deliberate intention or set purpose to commit the act, or a deliberate intention or purpose to injure or to do wrong, an evil design or evil intent.93

B. Tax Cases

Recent Louisiana jurisprudence, however, has interpreted State v. Vinzant narrowly, reasoning "in the context of a criminal charge 'willfully' and 'intentionally' have the same connotation."94 In State v. Neumeyer,95 a sales tax case, the fourth circuit court argued that since willfully was the equivalent of intentionally, and since "in the absence of qualifying provisions in a criminal statute the terms 'intent' and 'intentional' have reference to general criminal intent,"96 statutes that contain the word willfully, without qualifying provisions, are general criminal intent crimes.97 Therefore, the court opined that willfully failing to pay state sales taxes was only a general criminal intent crime,98 requiring an objective test.99

This approach is directly opposed to that one adopted by the federal courts. The United States Supreme Court has adopted the standard of specific intent to violate the law as an element of most federal criminal tax offenses, which is a subjective test,100 since tax laws are "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct."101 Moreover, the Court has stated that for the purpose of federal criminal tax laws, "willfulness" requires that the defendant desired an unlawful outcome, and he knew that the result was illegal, not just that he intentionally acted in derogation of the law; essentially, the Court made an exception to the general rule that "ignorance of the law is no excuse" for federal tax crimes.102

94. State v. Clark, 140 So. 2d 1 (La. 1962); State v. Neumeyer, 561 So. 2d 944, 945 (La. App. 4th Cir.), writ denied, 567 So. 2d 100 (1990).
95. 561 So. 2d 944 (La. App.4th Cir.), writ denied, 567 So. 2d 100 (1990).
97. 561 So. 2d at 945.
98. Id. See also Hebert v. Talbot, 713 So. 2d 647 (La. App. 2d Cir. 1998). The Second Circuit interpreted the "willful violation of a penal statute or ordinance" committed by or with the knowledge or consent of any insured to require nothing more than general criminal intent.
99. La. R.S. 14:10(2)(1997) states: "General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act."
A “willing” failure to file an income tax return presents a scenario where there could be differing results, depending on the definition of willful. Assume A, B, and C failed to file income tax returns for these reasons: A planned to file an income tax return but was overcome with other matters and incidentally forgot to file; B cautiously went over whether he had any tax consequences and erroneously concluded that no income tax return was due; therefore, he intentionally missed the final day in which to file income tax returns because he honestly believed that no filing was required; and C intentionally did not file his income tax return, knowing that he was required to do so in his given circumstance. Under federal revenue law, all three would have engendered a sanctioned penalty (not a crime), but only C would be guilty of the crime of failing to file an income tax return. Though B intentionally failed to file his income tax return, because he had no evil motive or bad purpose, he would not be guilty of the crime of failing to file his tax return. For example, in Yarborough v. United States, even though the court did not conclude that there was lack of knowledge, it found that a failure to file income tax returns is not willful if a defendant was not aware of his duty to file. By contrast, C intended to deprive the government of taxes and consequently acted with a bad purpose under the meaning of willful in federal tax revenue law, and is in violation of that law.

However, under Louisiana law the same equitable result might not occur since in State v. Neumeyer the court stated, in broad language, that in the context of a criminal charge, willfully is the equivalent of intentionally. Under this rationale, B could also be convicted because he did intentionally fail to file an income tax return even though he had a bona fide belief that there was no need to file. Could the Louisiana Legislature have meant this result? It seems absurd and harsh, especially since the Louisiana Supreme Court has acknowledged that many of Louisiana’s criminal tax statutes are “comparable” to those of the criminal federal

104. See Rollin M. Perkins & Ronald M. Boyce, Criminal Law, § 4, at 876 (3d ed. 1982).
105. Id. at 874.
106. It is well settled in federal law that willfully attempting to evade income tax “means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation,” would result in an acquittal. Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953).
107. 230 F.2d 56 (4th Cir. 1956).
108. Perkins & Boyce, supra note 104, § 4, at 878 n.36.
110. 561 So. 2d 944 (La. App. 4th Cir.), writ denied, 567 So. 2d 100 (La. 1990).
111. The United States Supreme Court has stated even unambiguous statutes should not be construed to result in “injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.” United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869).
tax statutes in the United States Code. Furthermore, in *State v. DeJesus*, the Louisiana Supreme Court looked to the federal tax definition of the term "person" and applied that definition to an analogous Louisiana tax provision. The federal interpretation should also be applied when interpreting the term willful.

In *State v. Main Motors, Inc.*, a prosecution for the willful failure to collect or truthfully account for or pay state sales tax, the Louisiana Supreme Court held that proof of willful behavior "requires that the mind of the defendant be probed." Undoubtedly, the court excluded negligence; however, it is not clear whether the court required general criminal intent or specific intent. If Louisiana adopted the clear federal standard developed by the United States Supreme Court, one would have to probe the mind of the defendant to find if he knew of the duty to collect and truthfully account for or pay state sales tax, and also whether he "actively desired" to violate this duty. Presumably, the federal standard mandates something more than a specific intent requirement because it also requires knowledge of the legal duty. For policy reasons, this standard would effectuate favorable results and solve much of the vagueness problem in the Louisiana tax statutes that have a willfulness requirement, because more must be proven under this interpretation of the requirement.

When considering Louisiana Revised Statutes 47:1641 and Louisiana Revised Statutes 47:1642, which contain the phrases "willfully fails to collect or truthfully account for" and "willfully fails to file any return or report," respectively, the court should interpret the willfulness requirement to mean more than just

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113. *Id.* at 856.
114. *Id.*
115. 383 So. 2d 327 (La. 1980).
117. 383 So. 2d at 329.
118. *Hargrave*, supra note 17, at 544.
119. La. R.S. 14:10(1) (1997) states: "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."
120. In addition to proving the defendant "actively desired" an unlawful result, which is the specific intent standard in Louisiana, one must prove that the defendant knew of the duty.
121. La. R.S. 47:1641 (1990) states:
Any person required under this subtitle to collect, account for, or pay over any tax, penalty, or interest imposed by this subtitle, who willfully fails to collect or truthfully account for or pay over such tax, penalty, or interest, shall in addition to other penalties provided by law, be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both.
122. La. R.S. 47:1642 (1990) states:
Any person who willfully fails to file any return or report required to be filed by the provisions of this Sub-title, or who willfully files or causes to be filed, with the collector, any false or fraudulent return, report, or statement or who willfully aids or abets another in the filing with the collector of any false or fraudulent return, report or statement, with the intent to defraud the state or evade the payment of any tax, fee, penalty or interest, or any part thereof, which shall be due pursuant to the provisions of this Sub-title, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for more than one year, or both.
general intent or specific intent. The Louisiana courts should require a finding that the accused knew of the duty to collect or file. Otherwise, these statutes would punish almost all failures to collect or file returns because any failure could be considered willful. This result can be analogized to statutes that punish for certain omissions. For instance, the hit-and-run driving statute of the Louisiana Criminal Statutes punishes those for intentional failure to report an accident. In such a statute almost any failure would be considered intentional. Presumably, a better outcome would require the defendant to know that he has a legal duty to report but then not to report, much like in Cheek and Ratzlaf. Perhaps Louisiana Revised Statutes 47:1641 and Louisiana Revised Statutes 47:1642 are preferred statutes because they use willfully instead of intentionally to modify failures, and the term “willfully” “typically [also] refers to a culpable state of mind” in criminal statutes.

Furthermore, the United States Supreme Court made it clear in Cheek that it would entertain claims in the federal system of good faith mistakes and sincere beliefs. Such defenses should be entertained in the state tax system as well, to obtain more equitable results. Louisiana should adhere to the federal tax law concept that one must know when he is in violation of a tax statute for his act to be considered criminal.

Moreover, State v. Neumeyer could cause future complications in other areas due to the fact that its broad language can be construed to mean that all statutes that contain willfully, absent qualifying provisions, require only general criminal intent, thereby making willfully synonymous with intentionally. This reasoning should be rejected because there are some statutes that contain the “general intent formulation” where courts have relied on sound policy reasons to import a more rigorous mental element. Louisiana should now follow the United

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123. La. R.S. 14:100 (Supp. 1999) states:
   A. Hit and run driving is the intentional failure of the driver of a vehicle involved in or causing any accident, to stop such vehicle at the scene of the accident, to give his identity, and to render reasonable aid.

   * * *

   B.(1) “To give his identity”, means that the driver of any vehicle involved in any accident shall give his name, and the license number of his vehicle, or shall report the accident to the police.

   (emphasis added).


125. The United States Fifth Circuit Court of Appeals, in a recent well-reasoned opinion, determined the requirement of willfulness in federal tax laws regarding failure to file is pertinent in interpreting the willfulness requirement of the Child Support Recovery Act. Although the Child Support Recovery Act’s legislative history expressly stated that the willfulness requirement should be interpreted in the same way as in federal tax statutes, the court and the legislature seemed to base this interpretation on the “similarity between” these statutes. United States v. Mathes, 151 F.3d 251 (5th Cir. 1998); Louisiana should also analogize its tax laws to similar federal tax laws and interpret these statutes like the United States Supreme Court does because it will lead to more equitable results.

126. 561 So. 2d 944 (La. App. 4th Cir.)

States Supreme Court's Cheek decision, making the well-reasoned policy choice that if an accused honestly believes that he was not involved in unlawful activities at the time of the alleged violation, he should not be convicted of willfully failing to file income taxes. Moreover, Louisiana courts should not apply an inflexible definition to willfully, making it strictly equivalent to intentionally in criminal statutes, because willfully takes on different meanings in different contexts and such a confined meaning could cause innocent mistakes to be criminally punished.

C. Contempt Cases

The Louisiana courts have also struggled with both civil\textsuperscript{128} and criminal\textsuperscript{129} contempt of court statutes that include the willfulness requirement. In \textit{New Orleans Fire Fighters Ass'n Local 632 v. City of New Orleans},\textsuperscript{130} the court stated that "willful disobedience" is a prerequisite to a violation of contempt of court under Louisiana Code of Civil Procedure article 224; without such a finding, there is no constructive contempt.\textsuperscript{131} The court also noted the struggle it had in determining what the term "willful" meant in constructive contempt of court matters, concluding that willful means "an act or failure to act that is done intentionally, knowingly and purposely, without justifiable excuse."\textsuperscript{132} The court stated that if the accused makes an erroneous interpretation of the law—for example, if the accused believes that he is in compliance with the law—there is no willful disobedience.\textsuperscript{133}

There is a noticeable similarity between the Louisiana Fourth Circuit Court of Appeal's discussion of willful disobedience in constructive contempt matters and the United States Supreme Court's holdings in \textit{Cheek} and \textit{Ratzlaf}. Much like the United States Supreme Court in \textit{Cheek}, the Louisiana Fourth Circuit Court of Appeal seems to make the logical proposition that if an accused honestly believes that he was not in violation of the court's orders or laws, he should not be

\begin{itemize}
\item \textsuperscript{128} La. Code Crim. P. art. 224 defines a "constructive contempt of court" as "any contempt other than a direct one" and lists ten specific acts which constitute a contempt of court. "Willful disobedience of any lawful judgment, order, mandate, writ or process of the court" is second on that list.
\item \textsuperscript{129} La. Code. Crim. P. art. 23 provides in pertinent part:
  A constructive contempt of court is any contempt other than a direct one.
  A constructive contempt includes, but is not limited to any of the following acts:
  (1) Willful neglect or violation of duty by a clerk, sheriff, or person elected, appointed, or employed to assist the court in the administration of justice;
  (2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of court;
  (3) Willful disobedience by an inferior court, judge, or other official thereof, of the lawful judgment, order, mandate, writ, or process of an appellate court, rendered in connection with an appeal from a judgment or order of the inferior court, or in connection with a review of such judgment or order under a supervisory writ.
\item \textsuperscript{130} 260 So. 2d 779 (La. App. 4th Cir.), aff'd, 269 So. 2d 194 (La. 1972), cert. denied, 411 U.S. 933, 93 S. Ct. 1902 (1973).
\item \textsuperscript{131} \textit{New Orleans Fire Fighters Ass'n Local 632}, 260 S. 2d at 786.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\end{itemize}
convicted. Presumably, this is a subjective test. This is certainly a reasonable approach because the state should not punish those that do not realize they are in violation of a court order. However, the Louisiana Fourth Circuit Court of Appeal seems to have deviated from this reasonable approach in tax situations, potentially subjecting innocent mistakes to criminal prosecution. The fourth circuit's analysis in contempt cases seems more correct.

Several courts in civil contempt cases have adopted a similar rule. Although the decision in *New Orleans Fire Fighters Ass'n Local 632* appears to be sound when attaching such a definition with the term willful, there is a risk that a court will interpret the contempt of court statute as requiring only general criminal intent such as the court did in *State v. Neumeyer*. However, one can infer that the court in *New Orleans Fire Fighters Ass'n Local 632* intended a subjective test in order to preclude apparently faultless actions or inactions from being penalized.

In *State in the Interest of R.J.S., D.F.S., and J.A.G.*, the Louisiana Supreme Court stated:

> Willful disobedience of a court order requires a consciousness of the duty to obey the order and the intent to disregard that duty. The purpose of charging and convicting a defendant for criminal contempt is vindication of the public interest by punishment of contemptuous conduct. Therefore, in order to constitute willful disobedience necessary for criminal contempt, the act or refusal to act must be done with an intent to defy the authority of the court.

Such a definition is more precise and consistent with policy decisions the courts appear to invoke.

**D. Possession**

The jurisprudential rule regarding joint possession of narcotics could also cause further confusion and punish those involved in seemingly innocent conduct. In *State v. Sweeney*, the Louisiana Supreme Court held that a person may be deemed to be in joint possession if he willfully and knowingly shares with a companion the right to control the narcotic. This vague, obscure language has caused confusion, and as some courts have reasoned, "[t]he jurisprudence has not established precise guidelines as to what constitutes 'possession' of drugs under

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136. *Neumeyer*, 561 So. 2d 944.
137. 493 So. 2d 1199 (La. 1986).
138. *Id.* at 1202 (citations omitted).
139. 443 So. 2d 522, 529 (La. 1983). See also State v. Trahan, 425 So. 2d 1222 (La. 1983); State v. Knight, 298 So. 2d 726 (La. 1974). This is not in the statute but is a jurisprudential rule established by the courts of Louisiana.
narcotics law." Does the term "willfully" actually aid the courts in finding whether or not a defendant had joint possession? Presumably, this language is unnecessary, or perhaps the courts desired to insert a requirement of moral blameworthiness through the term. Conceivably, Louisiana's only aid in the matter is its jurisprudential rules on constructive possession, which do not contain this imprecise term and the "beyond a reasonable doubt" standard for criminal cases.

E. What Is or Is Not Willfulness

In State v. Vinzant, the court also defined what willfully is not. The court stated:

Accurately speaking, the terms "negligence" and "willfulness" are incompatible, and signify the opposites of each other, in that absence of intent is a distinguishing characteristic of negligence, whereas willfulness cannot exist without purpose or design, and a willful injury will not be inferred when the result may be reasonably attributed to negligence or inattention.

Furthermore, in State v. Feltus, the court reiterated the same line of reasoning, stating that in cases where these words are used in the same context, the term willfully should be regarded as mere surplusage. Moreover, in State v. D.L., the court made the assumption that willful always refers to either specific or general criminal intent and therefore should not be used in the same context as criminal negligence. While all of these cases dealt with the erroneous inclusion of the term willful in a bill of information, or petition and affidavit in the case of the minor, the courts seem to extend their analysis to what willfulness is not. Such broad language is not totally correct, at least in the eyes of the legislature. For instance, Louisiana Revised Statutes 47:1604 provides for a negligence penalty in

140. Trahan, 425 So. 2d at 1226; State v. Gordon, 646 So. 2d 995 (La. App. 1st Cir. 1994).
141. A defendant may be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. See State v. Edwards, 354 So. 2d 1322, 1327 (La. 1978); State v. Tasker, 448 So. 2d 1311, 1314 (La. App. 1st Cir.), writ denied, 450 So. 2d 644 (La. 1984). Several factors may be considered in determining whether or not a defendant exercised "dominion and control" over a drug, including: a defendant's knowledge that controlled dangerous substances are in the area; the defendant's relationship with the person found to be in actual possession; the defendant's access to the area where the drugs were; prior drug use by the defendant; the defendant's physical proximity to the narcotics; and any evidence that the particular area was a haven for drug users. State v. Tasker, 448 So. 2d at 1314. See also State v. Love, 527 So. 2d 62, 64 (La. App. 3d Cir. 1988).
143. 7 So. 2d 917 (La. 1942).
144. Id. at 922 (citing 45 C.J. 672).
145. 101 So. 2d 682 (La. 1958).
146. But see Potter v. United States, 155 U.S. 438, 15 S. Ct. 144 (1894); cf. text accompanying infra notes 153 and 154 (willful should not be regarded as mere surplusage when interpreting a statute).
147. 697 So. 2d 706, 709 (La. App. 2d Cir. 1997).
tax situations when the taxpayer's actions indicate "willful negligence or intentional disregard of rules and regulations." Negligence assumes a risk that an offender should have known; presumably, in many statutes that describe this in terms of an omission or a failure to act, intentional seems a somewhat illogical term to modify these words and phrases. A more correct term to use might be willful. This proves the chameleon-like nature of the term. In the struggle for precision, it becomes obvious that "there are inherent limitations in the use of language; few words [such as willful] possess the precision of mathematical symbols."

V. A COMMON SENSE INQUIRY

In the theft of goods provision found in Louisiana Revised Statutes Title 14, the statute states that a violation of this offense occurs, inter alia, "when a person willfully causes the cash register or other sales recording device to reflect less than the actual retail price." A determination of what willfully means here is virtually impossible. The term does not establish a mental element because theft is currently a specific intent crime in Louisiana. It is required that there be "[a]n intent to deprive the other person permanently of whatever may be the subject of the misappropriation or taking..." Therefore, if willfully was included because the legislature sought to draft a statute where one could not be prosecuted for

148. La. R.S. 47:1604.1 (1990), entitled "Negligence Penalty," provides in pertinent part: "If any taxpayer fails to make any return required by this Sub-title or makes an incorrect return, and the circumstances indicate willful negligence or intentional disregard of rules and regulations..." (emphasis added).

149. But see La. R.S. 14:111 (1997), entitled "Assisting Escape," which provides in pertinent part: "Assisting escape is the: (1) Permitting, by any public officer, of the escape of any prisoner in his custody, by virtue of his active assistance or intentional failure to act." See also La. R.S. 30:2246(B), which provides in pertinent part:

Upon the failure of a disposer or generator to file the contribution report by October 1, 1984, or upon the timely filing of an incorrect report with the circumstances indicating negligence or intentional disregard of the requirement of this charter or the requirements and rules and regulations of the secretary... .

150. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 2.3 (2d ed. 1986) (citing Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294 (1972)).


A. Theft of goods is the misappropriation or taking of anything of value which is held for sale by a merchant, either without the consent of the merchant to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the merchant permanently of whatever may be the subject of the misappropriation or taking is essential and may be inferred when a person:

* * *

(4) Willfully causes the cash register or other sales device to reflect less than the actual retail price of the goods... .

152. La. R.S. 14:67 (1997), entitled "Theft," provides in pertinent part:

(A) Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive permanently of whatever may be the subject of the misappropriation or taking is essential.
accidentally causing the cash register or recording device to reflect less, it was unnecessary because an essential requirement of theft is the intent to deprive.

Does willful mean anything in this statute? In *Potter v. United States*, the United States Supreme Court stated that the inclusion of the term “willful” should not be omitted from a statute when interpreting it; it should not “be regarded as mere surplusage; it means something.” Maybe the only thing this term means in the theft of goods statute is that the legislature desired to be cautious.

VI. A PROPOSED SOLUTION—ACHIEVING AN EQUITABLE OUTCOME

As a policy matter, courts should interpret the willfulness requirement embodied in some of the Louisiana criminal statutes to render more predictable results. If a criminal statute contains the term willfully but leaves its meaning ambiguous and susceptible to several interpretations, a specific intent standard could accommodate the vagueness problem. If a court refuses to make a determination as to the meaning of the willfulness requirement in certain ambiguous criminal statutes, it should opt for strict construction of the criminal statute. “As the United States Supreme Court has put it, ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” In addition, the Supreme Court has stated that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court’s] duty is to adopt the latter.” If any of the aforementioned options were adopted, they would lead to more favorable results in Louisiana.

VII. CONCLUSION: IS WILLFULNESS WORTH IT?

If the term willfully must be used in criminal statutes, its ambiguity and vagueness in those statutes that contain no ascertainable definitions should prompt the court to rule for the defendant. The Federal Jury Practice and Instructions chapter on mental states began its exploration of determining how to interpret the term willfully by stating that one must examine the underlying policy considerations and analyze the grammatical structure to ascertain which words are

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153. 155 U.S. 438, 15 S. Ct. 144 (1894).
154. Id. at 446, 15 S. Ct. at 147.
155. Notice a similar approach taken by the Louisiana Legislature in the stalking statute, which is also a specific intent crime. See La. R.S. 14:40.2 (1997).
modified by the term. However, as Justice Rehnquist stated in his dissent in *United States v. Yermian*,[159] "[i]t is quite impossible to tell which phrases the term ‘knowingly and willfully’ modify, and the magic wand of ipse dixit does nothing to resolve the ambiguity." Consequently, Justice Rehnquist would have opted for the rule of lenity in *Yermian*. Furthermore, the Federal Jury Practice and Instructions have concluded that although knowingly does not have an easily ascertainable interpretation in statutes, the term willfully is "even more ambiguous."[161]

In the Supreme Court of Louisiana, Justice Dennis expressed his anxiety over the vagueness of a state sales tax statute with the willfulness requirement.[162] In *Bryan*, Justice Scalia stated in his dissent that the federal licensing requirement was inherently ambiguous due to the term willfully, and that such "doubts . . . [should be] resolved in favor of the defendant."[163] Imposing liability on a defendant when there are serious concerns about the uncertainty and vagueness of willful in criminal statutes conflicts with our notions of due process, particularly the requirement of notice.[164] These are issues that should be further explored by the courts as well as the legislature when drafting statutes.

The courts have not been alone in their concern with the term and their struggle to define it. The Senate Judiciary Committee confirmed the perplexity of the term when discussing the "intentional" culpability requirement and the subsequent varying interpretations of "willfulness" covered under the "intentional" mental element.[165]

Perhaps the legislature could define the term willfully to prevent future uncertainty in the applicable Louisiana Criminal Statutes. One option could be to adopt the Model Penal Code statute or one similar to it which defines willfully. Model Penal Code Section 2.02(8) states, "A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." To ensure that the definition will not be immutable in every given circumstance, which will often lead to poor results, the Model Penal Code drafters

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158. Devitt et al., *supra* note 76.
160. Id. at 69, 104 S. Ct. at 2939.
161. Devitt et al., *supra* note 76 at § 17.01.
164. "It is possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed." LaFave & Scott, *supra* note 150, § 2.3, at 131. *But see* Screws v. United States, 325 U.S. 91, 101-02, 65 S. Ct. 1031, 1036 (1945) (Douglas, J. concurring) where the concurring opinion stated:

A statutory requirement that an act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused is unaware.

attached the phrase “unless a purpose to impose further requirements appears.” This phrase limits the definition to only those statutes where the legislature has not assigned a different interpretation. As desirable as a definition like the Model Penal Code’s may be, it may be of little use in many Louisiana criminal statutes where the legislature seems to impose other meanings. Moreover, the drafters of the Model Penal Code stated that the term is “unusually ambiguous.”166 Furthermore, the commentators for the Code did not even contemplate utilizing it as a culpability requirement in the Code.167 If the Model Penal Code will not even use the term and its ensuing definition, should Louisiana? Presumably, no. This is evident from a conversation between Judge Learned Hand and Herbert Wechsler, drafter of the Code, discussing the use of “willful” in the Code:

Judge Hand: Do you use . . . [willfully] throughout? How often do you use it? It’s a dreadful word.

Mr. Wechsler: We will never use it in the Code, but we are superimposing this on offenses outside the Code. It was for this purpose that I thought that this was useful. I would never use it.

Judge Hand: Maybe it is useful. 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, “willful” 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. . . .168

Due to the almost universal recognition of the troublesome nature of the willfulness requirement in many criminal statutes, when courts are faced with this dilemma, as an equitable decision, they should analogize to the federal requirements of tax offenses and structuring transactions. Policy demands just outcomes, especially in those highly specialized areas such as tax. Until the legislature defines the term or abolishes it in statutes in Louisiana, or the Louisiana

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166. Model Penal Code, explanatory note to § 2.02 (8), at 228.
167. ALI Proceedings 160 (1955). The Model Penal Code explanatory note to § 2.02 states that “the term ‘willfully’ is not used in the definitions of crimes contained in the Code . . . ;” it is only defined because of “its currency and existence in offenses outside the criminal code suggest the desirability of clarification.”
168. ALI Proceedings 160 (1955). But see American Sur. Co. of New York v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925), where in Judge Learned Hand’s earlier years he had a simpler view of the term as opposed to his perceptive ideas of the problems of the term when speaking with Mr. Herbert Wechsler. Judge Learned Hand had stated: “The word ‘wilful,’ even in criminal statutes, means no more than the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.”
courts resort to sound policy decisions, innocent defendants in these cases will continue to be actual victims of our justice system.

*Misty D. Shannon*