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REFLECTIONS ON *UNITED STATES V. LEONA HELMSLEY*: SHOULD 'IMPOSSIBILITY' BE A DEFENSE TO ATTEMPTED INCOME TAX EVASION?

*Ronald H. Jensen**

I. INTRODUCTION

On April 14, 1988, a federal grand jury indicted Leona Helmsley, her husband Harry, and two former Helmsley executives on 47 counts of attempted income tax evasion, filing false tax returns, extortion, mail fraud and conspiracy.¹ Among other things, the indictment alleged that the Helmsleys caused various Helmsley-controlled companies to pay for lavish improvements to Dunnellen Hall, their personal residence in Connecticut.² The indictment

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¹ Ransdell Pierson, *The Queen of Mean: The Unauthorized Biography of Leona Helmsley* 384-85 (1989); Indictment in *United States of America against Harry B. Helmsley, Leona M. Helmsley, Joseph V. Licari and Frank J. Turco*, No. 88 Crim. 0219 (JMW) (S.D.N.Y. filed April 14, 1988) [hereinafter the *Helmsley Indictment*]. Prior to the trial, the trial court found that Mr. Helmsley was incompetent to stand trial because of ill-health and granted his motion for a continuance sine die. *United States v. Helmsley*, 733 F.Supp. 600 (S.D.N.Y. 1989).

² *Helmsley Indictment*, supra note 1, charged that Helmsley-controlled companies made the following expenditures, among others, on Dunnellen Hall: more than \$1,000,000 spent on a brick, limestone, and marble enclosure of a swimming pool (this addition ultimately included a marble dance floor and a breakfast room) [para. 36]; \$500,000 for the purchase of jade art objects [para. 37]; more than \$130,000 for an indoor/outdoor stereo system [para. 38]; more than \$370,000 in gardening and landscaping costs [para. 39]; more than \$1,000,000 for furniture, antiques, artwork and other items [para. 40]. The *Helmsley Indictment* also charged that Mrs. Helmsley regularly caused Helmsley-controlled companies to pay for items of a purely personal nature (e.g., clothing, toiletries, and gifts), including \$45,000 for a silver clock designed in the shape of The Helmsley Building as a birthday present for Harry

charged the Helmsleys with attempting to evade their income taxes by willfully failing to report the value of these improvements as taxable income.³ Under the tax evasion statute, it is the "attempt" to evade tax, not the act of evasion itself, that constitutes the crime.⁴

During the six week trial that ensued, the government presented voluminous evidence showing that the defendants prepared, or caused to be prepared, "phony" invoices falsely showing work that had actually been performed at Dunnellen Hall as having been performed for various Helmsley-controlled companies.⁵ The defendants then caused the billed companies to pay the invoices.⁶

Upon completion of the government's case, the defense stunned the prosecution and the court by asserting that, far from cheating the government, the Helmsleys had in fact overpaid their income taxes for the years in question by \$696,000.⁷ This was after conced-

Helmsley. Id., para. 44.

³ Helmsley Indictment, *supra* note 1, para. 47-49 (counts 2-4).

⁴ I.R.C. § 7201 (prohibiting "attempts in any manner to evade or defeat" a tax); *Spies v. United States*, 317 U.S. 492, 499 (1943) ("Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt."). See discussion *infra* part III.A.

⁵ Mr. Olivieri, chief operating officer of Riverview Interiors, testified that Joseph Licari, a defendant and a Helmsley employee, directed him to prepare an invoice for the work his company performed in enclosing a pool at Dunnellen Hall falsely showing the work as having been done at the Helmsley-owned Graybar Building. Richard Hammer, *The Helmsleys: The Rise of Harry & Leona* 239-41 (Signet 1991). Jeremiah McCarthy, chief engineer of Helmsley-Spear, Inc., testified that when he refused to sign an invoice falsely describing work done at Dunnellen Hall as having been performed for several Helmsley hotels, Mrs. Helmsley bawled him out and told him, "You sign what you're told to sign." Id. at 243-44. John Struck, a Helmsley employee, testified that he falsified invoices for a swimming pool and enclosure at Dunnellen Hall showing such work as having been performed for other Helmsley-owned properties; Struck testified that he had been told by Licari and Frank J. Turco (another defendant and a Helmsley employee) that the orders to falsify the invoices came from the Helmsleys, and that he did not doubt this, since he helped prepare monthly reports to the Helmsleys detailing the work done at Dunnellen Hall and had seen invoices on which their initials appeared approving payment. Id. at 250-52. Steve Chang, who became a trouble-shooter on the Dunnellen Hall project in late 1984, testified that Mrs. Helmsley had him solicit a proposal from Audio Sound to provide music to the indoor pool. Audio Sound submitted a proposal falsely describing the music system as a security system for 230 Park Avenue. He testified that Mrs. Helmsley looked at the proposal and wrote "Okay. Leona Helmsley." Id. at 254-57.

⁶ See, e.g., id. at 241, 257.

⁷ The accounting firm of Touche, Ross made a quick analysis of the property owned by certain Helmsley real estate partnerships that showed that about 7.8 percent of the value of the partnerships' property consisted of personal rather than real property. Since the part-

ing arguing that payments made for the work done at Dunnellen Hall were taxable to the Helmsleys. The theory of the defense was that real estate partnerships in which the Helmsleys held interests had taken insufficient depreciation for the years in question. The defense asserted that if the correct amount of depreciation had been deducted by the partnerships, the Helmsleys' personal share of the increased deductions⁸ would more than offset the value of the Dunnellen Hall improvements paid for by the Helmsley companies.⁹ There was thus no underpayment of tax, but rather an overpayment.

The issue of whether the Helmsleys had overpaid their taxes was vigorously contested by the government and the defense.¹⁰ Ultimately, the jury rejected the contentions of the defense and found Leona guilty of 33 felonies, including conspiracy, attempted tax evasion, filing false tax returns and mail fraud.¹¹

The Court of Appeals for the Second Circuit affirmed Leona's

nerships had classified all of their property as real property, and since personal property can be written off for tax purpose at a faster rate than real property, Touche, Ross concluded that the partnerships (and consequently the Helmsleys) had claimed less depreciation than they were entitled to for the years in question. These findings were submitted to Gerald W. Padwe, a Touche, Ross senior partner, who calculated that the Helmsleys had overpaid their income taxes by \$696,000 for the prosecution years (1983-1985). *Id.* at 291-92. Padwe subsequently reduced his estimate of the alleged tax overpayment to \$602,000, and then to \$591,000. *Id.* at 297.

⁸ A partnership pays no federal income tax. Items of income flow through to the individual partners in proportion to their ownership interests. Likewise, partnership deductions flow through to the partners and reduce their taxable income. See I.R.C. §§ 701-704.

⁹ Hammer, *supra* note 5, at 291-92.

¹⁰ Gerald W. Padwe, who testified as an expert witness for Mrs. Helmsley on the issue of the alleged tax overpayment, was subjected to an intensive cross-examination by Assistant United States Attorney James DeVita. DeVita asked Padwe if Mr. Helmsley had taken insufficient depreciation on the partnership properties between 1983 and 1985, did that not mean he had taken too much depreciation in 1986, 1987 and 1988. Padwe answered that it was possible. *Id.* at 296-97. DeVita pointed out that Padwe had reduced his original estimate of the alleged tax overpayment of \$696,000 to \$602,000 and then to \$591,000 and asked: "If we give you another week, maybe it will be gone altogether." *Id.* at 297. DeVita pointed out that one Helmsley real estate partnership had reported a capital gain of \$23 million on the sale of a building at 225 Broadway in 1983, and that the partnership had classified all of the property in the sale as real property. DeVita asked if 7.8 percent of the property were personal property, which the Touche, Ross analysis showed was usually the case, would that not mean that there was depreciation recapture of \$364,353 on the sale, and that Mr. Helmsley's share of that, or \$218,612, would be taxable as ordinary income rather than capital gains as Mr. Helmsley had reported. Padwe had no answer, since he had not examined that transaction. *Id.* at 297-98.

¹¹ Pierson, *supra* note 1, at 387-88.

conviction for attempted income tax evasion in a split decision.¹² Chief Judge Oakes dissented on the ground that the government had failed to prove beyond a reasonable doubt that the Helmsleys owed any additional tax.¹³

Both the trial court and the circuit court agreed that a taxpayer cannot be convicted of attempted income tax evasion if no additional tax is due, even if the taxpayer intended to defraud the government of tax and took substantial steps toward that end.¹⁴ The *Helmsley* case thus raises the profound issue of whether a person who intentionally sets out to cheat the government of income tax and takes substantial steps toward that objective should nevertheless be acquitted of attempted income tax evasion merely because unrelated or unknown factors eliminate the tax deficiency and thereby frustrate the attempt to defraud the government. This defense will be referred to in this article as the "No-Tax-Due" defense.

The case law has answered this question in the affirmative.¹⁵

¹² *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), cert. den., 112 S.Ct. 1162 (1992).

¹³ *Id.* at 103-07. The court of appeals subsequently affirmed the trial court's denial of Mrs. Helmsley's motion for a new trial. *United States v. Helmsley*, No. 92-1202 (2d Cir. Feb. 16, 1993).

¹⁴ The trial court charged the jury that:

In order for the crime of income tax evasion to be proved, the government must establish beyond a reasonable doubt each of the following elements: First, that the defendant and her husband owed substantially more federal income tax for the calendar year than was declared due on their joint personal income tax return; second, that the defendant knew that she and her husband owed substantially more federal income tax than was declared due on their income tax return; third, that the defendant filed their joint tax return reflecting an income tax substantially lower than the full amount of income tax with the intention of defrauding the government of taxes owed.

Trial transcript at 7725-26. In other words, a defendant who files his or her income tax return with intent to defraud the government of income tax (the third element) may not be convicted of attempted income tax evasion unless there is also an actual tax deficiency (the first element).

The circuit court also agreed that to convict a defendant of attempted income tax evasion, the government must prove the existence of a tax deficiency in addition to proving willfulness. *Helmsley*, 941 F.2d at 83-84.

¹⁵ *Sansone v. United States*, 380 U.S. 343, 351 (1965) (dictum); *Lawn v. United States*, 355 U.S. 339, 361 (1958) (dictum); *United States v. Petti*, 448 F.2d 1257, 1258 (3d Cir. 1971); *United States v. Wilkins*, 385 F.2d 465, 468 (1967), cert. den., 390 U.S. 951 (1968); *Koontz v. United States*, 277 F.2d 53, 55 (5th Cir. 1960); *Small v. United States*, 255 F.2d 604 (1st Cir. 1958).

In *Helmsley*, the government in its brief to the circuit court argued that the No-Tax-Due defense should be restricted to cases where the unreported, offsetting deduction was related to the income on which the defendant attempted to evade tax, and added that "[i]t is,

This result is surprising because little, if anything, in the language of the statute¹⁶ or its legislative history¹⁷ supports the conclusion. There is virtually no reasoned analysis in the cases supporting this conclusion.¹⁸ This dearth of reasoned judicial analysis is surprising given the substantial learned commentary concerning the analogous impossibility defense in the law of attempt.¹⁹ In the context of income tax evasion, no court or commentator has noted this connection between the No-Tax-Due defense and the impossibility defense.

This Article analyzes the appropriateness of the No-Tax-Due defense, and the circumstances in which the No-Tax-Due defense should prevail against a charge of attempted income tax evasion. Part II poses, as a basis for analysis, a set of hypothetical cases in which the defense is potentially available. Part III reviews the background of this issue, including the statutory scheme of the federal tax crimes, relevant legislative history and the judicial development of the No-Tax-Due defense. Part IV reviews the impossibility defense in the law of attempt and points out its similarity to the No-Tax-Due defense. Part V proposes a revised, and greatly curtailed, No-Tax-Due defense. The formulation of this revised defense draws heavily on the learning developed in the controversy over the impossibility defense in the law of attempt. Finally, Part VI discusses various issues that would be raised if the revised No-Tax-Due defense were adopted.

II. VARIATIONS ON A THEME: THE NO-TAX-DUE DEFENSE IN DIFFERENT CONTEXTS

Defendants may employ the No-Tax-Due defense in a wide variety of settings. The following set of hypothetical cases demonstrates the diversity of circumstances in which the defense is potentially available and provides a basis for analysis:

moreover, open to question why an actual deficiency is even necessary for proof of an attempt to evade." Respondent's Brief at 50-51, 941 F.2d 71 (No. 90-1012). The circuit court declined these invitations to restrict, or reject, the No-Tax-Due defense and instead based its decision on the ground that there was sufficient evidence on which the jury could find that an actual deficiency existed. *Helmsley*, 941 F.2d at 83-89.

¹⁶ See analysis of language of I.R.C. § 7201, *infra* notes 30-34 and accompanying text.

¹⁷ See discussion *infra* part III.B.

¹⁸ See discussion *infra* part III.C.

¹⁹ See discussion *infra* part IV.

1. *The Unreported Gift.* D receives a \$100,000 gift from an uncle and believes it to be taxable income. Intending to defraud the government, D omits the \$100,000 from his income tax return. The Internal Revenue Code ("Code") expressly provides that gifts are nontaxable receipts.²⁰

2. *The Fictitious Dependent.* D, with intent to defraud the government, claims an exemption on his income tax return for a nonexistent child. In a separate item on his income tax return, D incorrectly treats an ordinary loss as a capital loss. If properly reported, this loss would eliminate the income tax deficiency created by the fictitious dependent.²¹

3. *The Hotel Baroness.* D, owner of a group of luxury hotels, charges personal expenses to her hotel corporations and does not report the resulting personal benefit as taxable income. D's intent is to defraud the government. On a separate item on her income tax return, D claims depreciation deductions on her business property. An audit of the depreciation schedules reveals that because of a mathematical error, she claimed less depreciation than she was entitled to. Had the proper amount of depreciation been taken, the increased deduction would have more than offset the income D failed to report; indeed, D would be entitled to a tax refund.²²

4. *Skimmed Funds.* D, sole owner of a corporation, "skims" funds from the corporation and does not report them as taxable income although he believes the funds to be taxable. A subsequent audit of the corporation reveals it did not have any "earnings and profits" at the time of the skimming and therefore the amounts skimmed

²⁰ I.R.C. § 102(a).

²¹ This hypothetical case is based upon the facts of *Koontz v. United States*, 277 F.2d 53 (5th Cir. 1960).

²² This hypothetical case is based on *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), cert. den., 112 S. Ct. 1162 (1992). The facts have been modified to provide that the failure to take adequate depreciation was due to a "mathematical error." In *Helmsley*, the majority found that the taxpayer's failure to segregate real and personal property (which caused the reduced depreciation deductions) was in effect an adoption of a method of accounting that could not be changed without the approval of the Commissioner; thus, it rejected Mrs. Helmsley's claim that she had overpaid her taxes. *Helmsley*, 941 F.2d at 87. However, this argument would not be available under the facts of the *Hotel Baroness* case, since the applicable regulation states that "correction of mathematical or posting errors" is not a change of an accounting method requiring the approval of the Commissioner. Treas. Reg. § 1.446-1(e)(2)(ii)(b).

by D were really nontaxable returns of capital.²³

5. *The Unrecognized Picasso*. D contributes a painting to the local museum. D, intending to defraud the government of tax revenue, claims a charitable contribution that vastly exceeds the value that D believes the painting to have. In fact, it turns out that the painting is a Picasso painted during his "Blue Period" and has a value far in excess of the amount claimed by D on his return.²⁴

²³ Under I.R.C. § 301(c), a distribution from a corporation to a shareholder is taxable as ordinary income only to the extent it is a "dividend." If the total distribution exceeds the portion constituting a dividend, the excess amount is first applied to reduce the shareholder's basis in his stock, and any amount remaining after his basis has been reduced to zero is treated as gain from the sale of the stock. I.R.C. § 316 defines a "dividend" as a distribution by a corporation to a shareholder that is made out of either current or accumulated "earnings and profits." As a result of the foregoing rules, a distribution made by a corporation that has no current or accumulated "earnings and profits" is not a "dividend," and is therefore not taxable as ordinary income. In the *Skimmed Funds* case posed in the text, it is assumed that the corporation has no current or accumulated "earnings and profits" and that the amount of the funds skimmed by D (i.e., the distribution) does not exceed D's basis in his stock so that no portion of the skimmed funds is taxable.

It is now relatively well established for *civil* tax purposes that funds diverted, or "skimmed," by a shareholder from his corporation, if not in fraud of creditors or other shareholders, are corporate distributions and thus are taxable, if at all, only pursuant to I.R.C. §§ 301, 316. *Truesdell v. Commissioner*, 89 T.C. 1280 (1987), acq. 1988-2 C.B. 1; *DiZenzo v. Commissioner*, 348 F.2d 122 (2d Cir. 1965); *Simon v. Commissioner*, 248 F.2d 869 (8th Cir. 1957). In *Truesdell*, the Tax Court overruled its earlier decision in *Benes v. Commissioner*, 42 T.C. 358 (1964), aff'd, 355 F.2d 929 (6th Cir. 1966), cert. den., 384 U.S. 961 (1966). In *Benes*, the Tax Court had held that although corporate diversions could not be taxed as "dividends" pursuant to I.R.C. § 301(c) and its statutory predecessors where the corporation had no earnings and profits, such diversions could nonetheless be taxed under the sweeping definition of "gross income" found in I.R.C. § 61 and its statutory predecessors, since the shareholder exercised complete control and dominion over the diverted funds. This approach was specifically rejected in *Truesdell* and the Commissioner has acquiesced to that portion of the decision. In *Weir v. Commissioner*, 283 F.2d 675, 684 (6th Cir. 1960), a civil tax case, the Sixth Circuit followed the position enunciated by the Tax Court in *Benes*; however, the continuing viability of *Weir* is doubtful in view of the Commissioner's acquiescence in *Truesdell*.

The criminal tax consequences of a shareholder's failure to report as taxable income funds which he diverted from his corporation are more problematic. See *infra* note 28.

²⁴ It is assumed in this example that a willing buyer or a willing seller of the painting could have ascertained that the painting was a Picasso with the exercise of reasonable diligence. Thus, the fair market value at the time of the gift, and the amount for which D was entitled to take a charitable deduction, would reflect the fact that it was a Picasso. Treas. Reg. § 1.170A-1(c).

"If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution The fair market value is the price at which the property would change hands between a willing buyer and a willing seller . . . both having reasonable knowledge of relevant facts."

6. *The Ten-Percenter*. W wins big at the racetrack. When collecting their prizes, big winners are required to fill out U.S. Treasury Form 1099 setting forth their names and social security numbers.²⁵ A custom has developed at the tracks where certain persons called "ten percenters" cash the winning tickets for the true winners and fill out the form setting forth their names and social security numbers rather than those of the true winners in exchange for 10 percent of the winnings. The ten percenter does this to shield the true winner from income tax liability on his winnings. Treasury Department agents observe D acting as a ten percenter for W. D is arrested for attempting to evade the income tax liability of W.²⁶ W, realizing that the Treasury Department knows of his winnings, dutifully reports the full amount of his winnings and does not therefore have any income tax deficiency.²⁷

Despite the factual differences in these six hypothetical cases, which might seemingly require different outcomes, under current law, D would be acquitted in every hypothetical case under the No-Tax-Due defense.²⁸ This Article endeavors to uncover the un-

Id.; 5 Boris I. Bittker, *Federal Taxation of Income, Estates and Gifts* (1984) § 132.1.2. Bittker states that:

[t]he standard definition of fair market value presupposes that the buyer and seller both have 'reasonable knowledge of relevant facts.' As a minimum, this evidently includes not only the facts that are publicly available, but also those that a reasonable buyer or seller would elicit by inquiry or investigation before coming to an agreement on the price.

Id. at 132-8 to 132-9. If, however, the parties could not have reasonably ascertained that the painting was a Picasso (for example, if the Picasso had been painted over by an inferior artist), then the Commissioner theoretically could argue that D had fraudulently overvalued the painting's *fair market value* at the time of the donation, since its fair market value at that time would not reflect the fact that it was a Picasso.

²⁵ I.R.C. § 6041.

²⁶ Under the tax evasion statute, one may be convicted for attempting to evade another's tax as well as one's own tax. See, e.g., *United States v. Troy*, 293 U.S. 58 (1934) (corporate president indictable for evading corporation's income tax by filing false corporate return).

²⁷ This hypothetical case is based on the facts of *United States v. Petti*, 448 F.2d 1257 (3d Cir. 1971).

²⁸ *Koontz v. United States*, 277 F.2d 53 (5th Cir. 1960), applied the No-Tax-Due defense to facts similar to those of the Fictitious Dependent case (case 2). *United States v. Petti*, 448 F.2d 1257 (3d Cir. 1971), applied the No-Tax-Due defense to facts similar to those of the Ten-Percenter case (case 6). In *Helmsley*, the Court of Appeals for the Second Circuit recognized, on facts similar to those of the Hotel Baroness case (case 3), that a defendant in those circumstances could not be convicted of attempted income tax evasion unless there was a tax deficiency. The Unreported Gift case (case 1) and the Unrecognized Picasso case (case 5) would be governed by the general rule that a conviction for attempted income tax evasion could only be sustained if there was a tax deficiency.

derlying policy considerations involved in this issue and to determine the proper outcomes in the above cases. Preliminarily, however, the Article will review the statutory scheme of the federal tax crimes, the legislative history of the income tax evasion statute and

The situation regarding the Skimmed Funds case (case 4) is muddled. All the appellate decisions involving a charge of attempted income tax evasion against a person diverting, or skimming, corporate funds have sustained a conviction, notwithstanding the absence of any "earnings and profits." Nonetheless, the author believes that, on the facts of the Skimmed Funds case, the defendant would be acquitted under the current state of the law.

In *Davis v. United States*, 226 F.2d 331 (6th Cir. 1955), cert. den., 350 U.S. 965 (1956), the Sixth Circuit affirmed a conviction of a person diverting corporate funds on the theory that such funds would be taxable by reason of the defendant's dominion and control over them even if they were not taxable as corporate distributions due to the lack of any "earnings and profits." *Id.* at 334-35. The court did not challenge the general rule that a conviction for attempted income tax evasion required the presence of a tax deficiency; rather, it asserted that there was a tax deficiency because the diversions would be taxable to the defendant regardless of whether there were any "earnings and profits." *Id.* at 335. This view, which was a tenable view of the civil tax law when the *Davis* case was decided in 1955, has now been largely discredited by subsequent cases. See discussion *supra* note 23. If the Sixth Circuit follows the *civil* tax rule as it has now evolved, it would presumably now acquit the defendant in the Skimmed Funds case.

In *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), cert. den., 430 U.S. 930 (1977), the court affirmed a conviction for attempted income tax evasion notwithstanding the defendant's assertion that the corporation from which he diverted the funds had no "earnings and profits," because it found that the diversion was in the nature of "salary" rather than a distribution by a corporation to its shareholder. A salary paid to an employee is, of course, fully taxable to the employee regardless of whether the corporate employer has any earnings and profits. I.R.C. § 61(a)(1). The defendant in *Miller* was hampered in his assertion that his diversions should be treated as corporate distributions to a shareholder because he was not listed on the books of the corporation as a shareholder. *Id.* at 1215. Thus, the *Miller* court would presumably find the presence or absence of "earnings and profits" relevant where the person skimming the corporation's funds was its sole shareholder, as in the Skimmed Funds case.

Nonetheless, dicta in the *Miller* case seemingly suggest that a defendant might be convicted of attempted income tax evasions even if there were no civil tax deficiency:

The difficulty in *automatically* applying the constructive distribution rules to his case is that it completely ignores one essential element of the crime charged: the willful intent to evade taxes, and concentrates solely on the issue of the nature of the funds diverted. The latter aspect is not the important element. Where the taxpayer has sought to conceal income by filing a false return, he has violated the tax evasion statutes.

Id. at 1214. This suggestion contradicts the general rule that the presence of a tax deficiency is a *sine qua non* for a conviction of attempted income tax evasion. It has not been followed by subsequent cases and has been criticized by the commentators. Harry G. Balter, *Tax Fraud and Evasion: A Guide to Civil and Criminal Practice Under Federal Law* ¶ 11.04[2][d][ii] n.213 (4th ed. Supp. 1981) (case is "of doubtful validity"). See also Ira L. Tilzer, *May IRS Ignore Character of Diverted Funds in Criminal Cases?*, 46 J. Tax'n 308 (1977).

the judicial development of the No-Tax-Due defense.

III. BACKGROUND

A. *The Statutory Scheme of Federal Tax Crimes*

The Code sets forth a comprehensive schedule of tax crimes. The most serious of these, "the capstone of [the] system,"²⁹ and the subject of this article, is the "tax evasion statute" found in section 7201. This section provides that, "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony"³⁰ This crime carries the harshest penalties of all tax crimes: a maximum fine of \$250,000 in the case of an individual (\$500,000 in the case of an organization)³¹ and a maximum prison sentence of five years.³²

The courts conventionally list the three elements necessary for a violation of this section: an affirmative act of evasion or attempted evasion, willfulness, and an additional tax due and owing.³³

The last of these three requirements is a judicial creation. The statute nowhere requires that any tax over and above that shown on the return be due and owing. Furthermore, the statute does not require the perpetrator to actually succeed in his attempt to evade or defeat the tax. Indeed, the completed act of tax evasion is not in itself a crime; it is the attempt that is criminal. As the Supreme Court observed:

This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can only be for the attempt.³⁴

Of course, a provision like section 7201, which is a part of a comprehensive statutory scheme, derives its meaning largely from its

²⁹ *Spies v. United States*, 317 U.S. 492, 497 (1943).

³⁰ I.R.C. § 7201.

³¹ 18 U.S.C. § 3571 (1988).

³² I.R.C. § 7201.

³³ *Sansone v. United States*, 380 U.S. 343, 351 (1965).

³⁴ *Spies v. United States*, 317 U.S. 492, 498-99 (1943).

relationship to the other parts of that scheme. Therefore, a brief review of the other serious tax crimes is set out below.

Filing a False and Fraudulent Return: Section 7206(1) makes it a crime to "willfully make[] and subscribe[] any return . . . which [the maker] does not believe to be true and correct as to every material matter."³⁵ Like the evasion statute, violation of section 7206(1) is a felony.³⁶ However, unlike section 7201, the maximum prison sentence for violation of section 7206(1) is three years rather than five.³⁷ The maximum fines are the same as in section 7201.³⁸ In contrast to the evasion statute, the government is not required to prove in a section 7206(1) case that the taxpayer owes any additional tax or even that the taxpayer intended to evade the payment of his taxes.³⁹

Failure to File a Return or Pay a Tax: Section 7203 provides that any person "who willfully fails to pay . . . [a] tax [or] make a return" is guilty of a misdemeanor.⁴⁰ The maximum fine is \$100,000 for an individual (\$200,000 in the case of an organization),⁴¹ and the maximum prison sentence is one year.⁴²

Miscellaneous Crimes: In addition to the foregoing, the government may assert a number of other crimes in a tax case, some of which are found in the Code while others are set forth in the general criminal statutes. These include aiding or assisting in the preparation of a materially false tax document,⁴³ impeding or obstructing the administration of the internal revenue laws,⁴⁴ conspiracy,⁴⁵ making false statements,⁴⁶ perjury,⁴⁷ and mail and wire

³⁵ I.R.C. § 7206(1).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 18 U.S.C. § 3571 (1988).

³⁹ E.g., *United States v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978), cert. den., 439 U.S. 893 (1978).

⁴⁰ I.R.C. § 7203.

⁴¹ A violation of § 7203 constitutes a Class A misdemeanor because the maximum term of imprisonment authorized is one year. I.R.C. § 7203; 18 U.S.C. § 3559(a)(6) (1988). Therefore, the maximum fine that may be imposed for its violation is \$100,000 in the case of an individual, pursuant to 18 U.S.C. § 3571(b)(5) (1988), and \$200,000 in the case of an organization, pursuant to 18 U.S.C. § 3571(c)(5) (1988).

⁴² I.R.C. § 7203.

⁴³ I.R.C. § 7206(2).

⁴⁴ I.R.C. § 7212.

⁴⁵ 18 U.S.C. § 371 (1988).

⁴⁶ 18 U.S.C. § 1001 (1988).

fraud.⁴⁸

B. Legislative History of the Tax Evasion Statute

The present income tax evasion statute has evolved in four stages. The first modern income tax act, the Income Tax Law of 1913, provided that one "who makes any false or fraudulent return . . . with intent to defeat or evade the assessment required by this section . . . shall be guilty of a misdemeanor."⁴⁹ The maximum fine for the offense was set at \$2000 and the maximum prison sentence at one year.⁵⁰

The statute entered its second stage with the enactment of the Revenue Act of 1917.⁵¹ It provided that anyone "who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act" would be guilty of a misdemeanor and subject to a maximum fine of \$1000 and a maximum prison sentence of one year.⁵² Structurally, the 1917 Act divided what had been described under the prior law as a single offense, making a "false or fraudulent return . . . with intent to defeat or evade" the tax, into two separate and discrete offenses: the making of a "false or fraudulent return," and the evasion or attempted evasion of a tax imposed under the Act.⁵³ The legislative history does not explain Congress's motivation behind this bifurcation; the House Committee Report merely stated that the new section "provide[d] penalties for failure to comply with the provisions thereof."⁵⁴ Presumably, Congress recognized that one could evade or attempt to evade the tax due under the Act even though one did

⁴⁷ 18 U.S.C. § 1621 (1988).

⁴⁸ 18 U.S.C. §§ 1341-1346 (1988).

⁴⁹ Income Tax Law of 1913, ch. 16, § II(F), Pub. L. No. 63-16, 38 Stat. 114, 161-81 (1913) reprinted in 93 U.S. Revenue Acts, 1909-1950: The Laws, Legislative Histories & Administrative Documents (Bernard D. Reams, Jr. ed. 1979). The language of this section appears to have been derived from The Corporation Excise Tax Law of 1909, ch. 6, § 38, Pub. L. No. 61-6, 36 Stat. 11, 112-17 (Eighth) (1909), which had imposed an excise tax on corporations and other entities for carrying on or doing business.

⁵⁰ Id. The language of § II(F) of the Income Tax Law of 1913 was reenacted without substantial change in the Revenue Act of 1916, ch. 463, § 18, Pub. L. No. 64-271, 39 Stat. 756 (1916) reprinted in 93 Reams, *supra* note 49.

⁵¹ Ch. 63, Pub. L. No. 65-50, 40 Stat. 300 (1917) reprinted in 94 Reams, *supra* note 49.

⁵² Id. § 1004.

⁵³ Id. These two offenses ultimately evolved into §§ 7206(1) and 7201, respectively, of the present Code.

⁵⁴ H.R. Rep. No. 45, 65th Cong., 1st Sess. 10 (1917) reprinted in 94 Reams, *supra* note 49.

not file a false or fraudulent return.⁵⁵

The language of the evasion statute was changed once again in the Revenue Act of 1918, which provided that one "who willfully attempts in any manner to defeat or evade the tax imposed" by the Act is guilty of a misdemeanor and subject to a maximum penalty of \$10,000 and a maximum prison sentence of one year.⁵⁶ This provision was notable because, for the first time, the statute dropped all mention of a completed act of evasion. Whereas the 1917 Act provided punishment for one who "evades or attempts to evade" any tax imposed by the Act,⁵⁷ the 1918 Act simply imposed punishment on one "who willfully attempts in any manner to defeat or evade" a tax imposed by the Act.⁵⁸ Possibly, Congress reasoned that any completed act of evasion would necessarily include an attempt, and because the statute prescribed the same punishment for the attempt as it did for the completed act, separate references to the attempt and the completed act were unnecessary. However, the legislative history is also silent on the motivation behind these changes.⁵⁹

The evasion statute underwent its final major revision in the Revenue Act of 1924.⁶⁰ Section 1017(b) of that Act provided:

[A]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or

⁵⁵ The division of the one offense into two separate offenses, willfully filing a false and fraudulent return *and* willfully attempting to evade tax liability, which was first effected by the Revenue Act of 1917, has made it possible to convict persons of the attempted evasion of the tax law, even though they had no direct involvement in the filing of a false return. See, e.g., *United States v. Johnson*, 319 U.S. 503 (1943) (defendants who held themselves out as the sole owners of gambling houses in which defendant Johnson had an interest to assist Johnson in evading his taxes, were guilty as aiders and abettors under evasion statute even though they did not prepare or file Johnson's fraudulent returns); *Imholte v. United States*, 226 F.2d 585 (8th Cir. 1955) (sales manager of automobile dealer who participated in plan to conceal dealer's profit on sale of cars was guilty of aiding dealer in its evasion of income tax even though he did not prepare or file dealer's fraudulent returns).

⁵⁶ Revenue Act of 1918, ch. 18, § 253, Pub. L. No. 65-254, 40 Stat. 1057 (1919) reprinted in 94 Reams, *supra* note 49.

⁵⁷ Revenue Act of 1917, ch. 63, § 1004, Pub. L. No. 65-50, 40 Stat. 300 (1917).

⁵⁸ Revenue Act of 1918, ch. 234, Pub. L. No. 68-175, 43 Stat. 253 (1924).

⁵⁹ See H.R. Rep. No. 767, 65th Cong., 2d Sess. 14-15 (1918) and S. Rep. No. 617, 65th Cong., 3d Sess. 9-10 (1918) reprinted in 94 Reams, *supra* note 49.

⁶⁰ Revenue Act of 1924, ch. 234, Pub. L. No. 68-175, 43 Stat. 253 (1924) reprinted in 96 Reams, *supra* note 49.

imprisoned for not more than five years, or both, together with the costs of prosecution.⁶¹

The 1924 Act introduced two major revisions. First, income tax evasion was upgraded from a misdemeanor to a felony and the maximum prison sentence increased from one year to five years. Second, the statute for the first time proscribed the attempted evasion of the actual payment of the tax⁶² in addition to the attempted evasion of the tax itself. These changes were added by the Senate to the House bill, but again, the legislative history did not reveal the reasons for these changes, except for the conclusion in the Senate Finance Committee Report that the changes "provide a more adequate system of penalties than was contained in the House bill."⁶³ The evasion statute has remained essentially unchanged from 1924 to the present, except for increases in the maximum fine.⁶⁴

⁶¹ *Id.* § 1017(b).

⁶² The courts have recognized that (1) an attempt to evade or defeat the tax and (2) an attempt to evade or defeat *payment* of the tax are separate and distinct offenses. In *Cohen v. United States*, 297 F.2d 760 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962), the taxpayer, Mickey Cohen, had previously been convicted for the years 1946, 1947, and 1948 of attempting to evade or defeat the income tax by filing false returns. Subsequently, he was convicted of attempting to evade or defeat the payment of tax for the years 1945 through 1950. The circuit court upheld the taxpayer's subsequent conviction against a claim of double jeopardy notwithstanding the overlap of the three years on the ground that the evasion statute "does define . . . two separate crimes, viz., attempt to evade or defeat tax and attempt to evade or defeat payment of tax." *Id.* at 770. See also *United States v. Mollet*, 290 F.2d 273 (2d Cir. 1961) (willfully attempting to evade payments of taxes).

⁶³ S. Rep. No. 398, 68th Cong., 1st Sess. 45-46 (1924) reprinted in 96 Reams, *supra* note 49. Discussion of the corresponding provision in the House bill is found in H.R. Rep. No. 179, 68th Cong., 1st Sess. 34 (1924) reprinted in 96 Reams, *supra* note 49.

⁶⁴ Section 1017(b) of the Revenue Act of 1924 was adopted without change as § 1114(b) of the Revenue Act of 1926, ch. 27, Pub. L. No. 69-20, 44 Stat. 9 (1926), reprinted in 97 Reams, *supra* note 49, and § 1114(b) in turn was adopted without change (except that the word "Act" was changed to "title") as § 145(b) of the Revenue Act of 1928, ch. 852, Pub. L. No. 70-562, 45 Stat. 791 (1928), reprinted in 71 Reams, *supra* note 49. Section 145(b) was adopted without change as § 145(b) of the Revenue Act of 1932, ch. 209, Pub. L. No. 72-154, 47 Stat. 169 (1932), reprinted in 73 Reams, *supra* note 49, and § 145(b) was adopted without change in the following successive Revenue Acts: Revenue Act of 1934, ch. 277, Pub. L. No. 73-216, 48 Stat. 680 (1934), reprinted in 75 Reams, *supra* note 49; Revenue Act of 1935, ch. 829, Pub. L. No. 74-407, 49 Stat. 1014 (1935), reprinted in 76 Reams, *supra* note 49; Revenue Act of 1936, ch. 690, Pub. L. No. 74-740, 49 Stat. 1648 (1936), reprinted in 78 Reams, *supra* note 49; Revenue Act of 1937, ch. 815, Pub. L. No. 75-377, 50 Stat. 813 (1937), reprinted in 79 Reams, *supra* note 49; Revenue Act of 1938, ch. 289, Pub. L. No. 75-664, 52 Stat. 447 (1938), reprinted in 81 Reams, *supra* note 49.

Section 145(b) was carried over without change (except that the word "title" was changed

Aside from what may be gleaned from the words of the statute itself, a question that will be addressed in the next section, the legislative record is devoid of any indication whether Congress intended the underpayment of tax to be a prerequisite for conviction under the evasion statute. As there is no explicit discussion or consideration of this issue in the record, it appears most likely that Congress never contemplated the issue.

C. Judicial Development of the No-Tax-Due Defense

1. Origin of the No-Tax-Due Defense

The requirement that an additional tax must be due and owing to sustain a conviction for attempted income tax evasion was established in *O'Brien v. United States*.⁶⁵ The case involved an individual taxpayer who had failed to file an income tax return for 1926.⁶⁶ The jury convicted the defendant of both a misdemeanor, willfully failing to file a return for 1926, and a felony, willfully attempting to evade and defeat the tax for 1926.⁶⁷ The conviction for willful attempted evasion was based solely on the defendant's failure to file a return for 1926; there was no showing that the defendant had engaged in any other culpable act.⁶⁸ The defendant argued

to "chapter") as § 145(b) of the Internal Revenue Code of 1939, Pub. L. No. 76-1, 53 Stat., Part 1, reprinted in 104 Reams, *supra* note 49.

The part of § 145(b) dealing with attempted evasion was continued without substantive change as § 7201 of the Internal Revenue Code of 1954. The following changes have been made in § 7201 since 1954:

(a) The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 329(a), 96 Stat. 324, 618, increased the maximum monetary penalty from \$10,000 to \$100,000 (\$500,000 in the case of a corporation).

(b) The Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 6(a), 98 Stat. 3134, 3137 enacted 18 U.S.C. § 3623, which increased the maximum monetary penalty to \$250,000 (\$500,000 in the case of an organization). This provision, although modified and renumbered, has remained unchanged with respect to its application to a conviction under I.R.C. § 7201.

⁶⁵ 51 F.2d 193 (7th Cir. 1931), cert. den., 284 U.S. 673 (1931).

⁶⁶ *Id.* at 194-95.

⁶⁷ *Id.* at 194, 196, 197-98. It appears from the court's statement of facts that the jury also convicted the defendant of these two offenses for 1927 and 1928, *id.* at 194, but the court only discusses the defendant's claim that he was being punished twice for the same offense with respect to 1926, *id.* at 196.

⁶⁸ See particularly Judge Alschuler's dissent, *id.* at 197. He stated, "[i]n each and all of the counts the only conduct of the defendant charged as constituting the offense is his willful failure to make a return for the income tax." *Id.* at 198.

that he was being punished twice for the same offense.⁶⁹ The majority rejected this claim by asserting that the elements of the two crimes were distinct, stating:

[a] prosecution for a willful failure to file a return might be maintained although there was in fact no tax due. *There could, however, be no such prosecution for a willful attempt to evade or defeat a tax unless there was some tax due from the taxpayer.*⁷⁰

The emphasized portion of the above statement, which appears to be the origin of the No-Tax-Due defense, constitutes the court's entire "analysis" of this issue. The cryptic nature of the court's remarks makes its rationale difficult to discern. Perhaps the court had in mind a situation somewhat like the following: Taxpayer T has wages of \$10,000 and bank interest of \$2000. T is also entitled to a deduction for moving expenses in the amount of \$2000.⁷¹ Assuming a flat 50% tax rate and no exemptions, T's tax liability is \$5000.⁷² In the situation where T omits his interest income in an attempt to defraud the government, but also mistakenly fails to claim the deduction for moving expenses through ignorance of the Code, T inadvertently reports and pays the correct amount of tax.

The evasion statute proscribes the willful "attempt[. . . to evade or defeat any tax imposed by this title."⁷³ Possibly, the court in *O'Brien* construed the phrase "any tax imposed by this title" as meaning the actual dollar amount of the tax liability. Under this reading the taxpayer in the above hypothetical could not be convicted of attempting to evade the tax, since he reported and paid the correct amount of tax due. He never attempted to report or pay less than the tax actually due. There are, however, two other equally persuasive constructions of the statute.

⁶⁹ Id. at 196

⁷⁰ Id. at 196 (emphasis added).

⁷¹ See I.R.C. § 217.

⁷² Wages	\$10,000
Interest	2,000
Gross income	12,000
Less:	
Moving expenses	2,000
Taxable income	10,000
Taxed at 50%	5,000

⁷³ I.R.C. § 7201. The relevant language of the statute in effect for the years involved in the *O'Brien* case was virtually identical. See *supra* note 64 and accompanying text.

First, Congress in using the phrase “any tax imposed by this title” may not have been referring to the dollar amount of tax owed, but rather to the *type* of tax imposed by “this title.” The title in question, Title 26 of the United States Code (Internal Revenue Title), imposes many different types of taxes: income taxes,⁷⁴ estate and gift taxes,⁷⁵ payroll taxes⁷⁶ and various excise taxes.⁷⁷ Under this construction of the statute, the taxpayer in the above hypothetical would be guilty of attempted evasion since he attempted to evade one of the *types* of taxes imposed by Title 26, namely the income tax. This reading of the statute is consistent with the idea that a taxpayer should not be exonerated from a charge of attempted tax evasion simply for failing to achieve his objective.

Furthermore, the tax liability of the taxpayer may be thought of not as a unitary or indivisible amount, but as the sum of separate taxes on each of the different components making up taxable income. Thus, in the above hypothetical, T’s total tax liability may thought of as consisting of three components: a tax on T’s salary income, a tax on T’s interest income and a reduction in tax attributable to T’s moving expenses. Under this construction of the statute, T would again be guilty under section 7201 because he evaded the tax on the interest component of his income. The failure to claim the moving expense deduction would not negate T’s willful omission of this interest income.

Clearly, linguistic analysis alone is inadequate to determine the correct construction of the statute, and resort to the underlying policies of the statute is necessary. This Article will argue that public policy strongly supports either of the latter two constructions of the statute over the one apparently adopted by the *O’Brien* court. For present purposes, suffice it to note that the *O’Brien* decision, the fountainhead of the No-Tax-Due defense, is deficient in *both* its linguistic and policy analysis.

The paucity of the court’s analysis of the No-Tax-Due defense in *O’Brien* is undoubtedly attributable to the context in which the issue arose. The case did not involve the assertion of the No-Tax-Due defense; that is, it was not a case where the defendant mistak-

⁷⁴ I.R.C. § 1.

⁷⁵ I.R.C. § 2001.

⁷⁶ I.R.C. § 3101.

⁷⁷ I.R.C. §§ 4001, 5001.

only believed additional tax was due and took steps to defeat the tax he thought he owed. In *O'Brien*, the defendant *did* owe additional tax.⁷⁸ Discussion of the No-Tax-Due defense was collateral to the main issue before the *O'Brien* court. Rather, the court was engaged in a theoretical exposition distinguishing the elements of the two crimes of willful failure to file and willful attempted evasion in response to the defendant's contention that he was being punished twice for the same offense. There is no evidence that the court considered a situation where a taxpayer willfully attempted to defeat a tax liability he believed to be owing but which in fact was not. *O'Brien* thus constitutes weak authority for any rule that purports to cover this factual situation.⁷⁹

2. *Subsequent Development of the No-Tax-Due Defense*

Despite its jurisprudential weakness as authority, the *O'Brien* principle that a conviction for willful attempted evasion of income tax requires proof that the defendant owed tax over and above that shown on his return quickly became black letter law, as it was consistently reiterated by the circuit courts. As the Second Circuit put it, to convict a defendant of attempted willful tax evasion, "the government must prove not only an attempt wilfully to defraud it but also that a tax in addition to what the taxpayer had already

⁷⁸ *O'Brien*, 51 F.2d at 195.

⁷⁹ The ultimate disposition of the issue involved in *O'Brien*—whether a conviction for willful evasion could be based *solely* on the willful failure to file a return—further undermines its authority. In *O'Brien*, the court sustained such a conviction on the ground that willful attempted evasion of the tax required proof of an additional element not required in the case of willful failure to file a return, that is, that some tax was due and owing. 51 F.2d at 197. In contrast, the Supreme Court ruled that a conviction for attempted income tax evasion based on a failure to file an income tax return could not be sustained unless there was some affirmative act of evasion *in addition to* the willful failure to file a tax return, such as keeping a double set of books, making false entries or documents, or destroying books or records. *Spies v. United States*, 317 U.S. 492, 499 (1943). The Supreme Court thus ignored the *O'Brien* court's purported distinction between willful failure to file and willful attempted income tax evasion. This does not mean that the *O'Brien* court was wrong in its assertion that conviction of willful attempted evasion could only be sustained where some tax was due and owing by the defendant; the Supreme Court did not address that issue. Nevertheless, the very reason for the *O'Brien* court's assertion that conviction of willful attempted evasion required proof that some tax was due and owing, that is, to justify a conviction of willful attempted evasion based solely on the defendant's willful failure to file, was rejected by the Supreme Court. This, combined with *O'Brien* court's lack of authority or analysis for its conclusion, renders the decision weak authority indeed.

paid remains due and owing.”⁸⁰ Yet even these black letter pronouncements were generally dicta; typically, ample proof that the defendant actually owed additional tax existed.⁸¹

Koontz v. United States,⁸² decided in 1960, appears to be the first case in which the No-Tax-Due defense was squarely presented to a court.⁸³ The government charged the defendant had willfully attempted to defeat the tax by claiming his deceased wife as an exemption. The defense argued that there could be no conviction, since no additional tax was due:

[T]he fact that the return is mistakenly filled out, *even willfully or knowingly*, alone does not constitute the offense. There must be some loss of revenue to the government in order to constitute the offense.⁸⁴

The defendant wished to argue that he had mistakenly reported an ordinary loss as a capital loss and that if he had correctly reported this loss it would have eliminated his tax deficiency.⁸⁵ The trial

⁸⁰ *United States v. Schenck*, 126 F.2d 702, 704 (2d Cir.), cert. den. sub nom. *Moskowitz v. United States*, 316 U.S. 705 (1942).

⁸¹ For example, in the following cases, the courts stated the rule that there could be no conviction for attempted income tax evasion without a tax deficiency, but sustained the convictions under review since they found sufficient evidence of a tax deficiency: *Elwert v. United States*, 231 F.2d 928, 932 (9th Cir. 1956); *United States v. Schenck*, 126 F.2d 702, 704 (2d Cir.), cert. den. sub nom. *Moskowitz v. United States*, 316 U.S. 705 (1942); *Gleckman v. United States*, 80 F.2d 394, 399 (8th Cir. 1935), cert. den., 297 U.S. 709 (1936); *Tinkoff v. United States*, 86 F.2d 868, 878 (7th Cir.), cert. den., 301 U.S. 689 (1937); *United States v. Miro*, 60 F.2d 58, 61 (2d Cir. 1932).

⁸² 277 F.2d 53 (5th Cir. 1960).

⁸³ *McClanahan v. United States*, 272 F.2d 663 (5th Cir. 1959), which was decided prior to *Koontz*, is sometimes cited for the proposition that a conviction for attempted income tax evasion can be sustained only if there is a tax deficiency. See, e.g., *Koontz*, 272 F.2d at 55 n.2. In *McClanahan*, the defendant had unreported gambling winnings that he asserted were more than offset by his unreported gambling losses. The court reversed his conviction because an answer given by the trial court to a question by the jury may have misled the jurors into believing that the defendant's mere failure to report his winnings was a sufficient ground for conviction. *McClanahan*, 272 F.2d at 666-67. It is not clear that the court was holding that a tax deficiency was an essential element for conviction for attempted tax evasion; it may simply have been holding that if the defendant's winnings were offset by his losses, this *could* negate a finding that defendant *intended* to defraud the Government of revenue. Intent to defraud is, of course, an essential element for conviction under the evasion statute. In its full blown form, the No-Tax-Due defense holds that *even where the defendant intends to defraud the government*, there must be a tax deficiency to sustain a conviction.

⁸⁴ *Koontz*, 277 F.2d at 54 (emphasis added).

⁸⁵ *Id.*

court refused to permit this defense to be presented to the jury.⁸⁶ On appeal, defendant's conviction was reversed and the case remanded to the trial court with instructions to allow this No-Tax-Due defense to be presented to the jury.⁸⁷

The appellate decision is disappointing because the court gave no analysis or reasoning justifying the No-Tax-Due defense. The court simply cited cases reiterating the oft-repeated statement that a conviction of attempted willful tax evasion required proof that some additional tax was due and owing.⁸⁸ It was in this manner that the No-Tax-Due defense was established: first it was stated by the *O'Brien* court without analysis or authority in a case in which the defense did not apply; then it was repeated as dicta in numerous cases; and finally it was accepted as the law in *Koontz* on the basis of the foregoing "authority."

3. *The Government's Reaction*

The first, albeit belated, government attack on the rationale of the No-Tax-Due defense occurred in *United States v. Wilkins*.⁸⁹ The case involved a defendant who sold real property in 1958 subject to his obligation to make improvements on the property.⁹⁰ These improvements were not completed until 1960.⁹¹ The defendant purportedly elected to report his gain on the transaction on the "completed contract" method of reporting gain.⁹² Under the law then in effect, this method allowed a taxpayer to delay reporting gains until the completion of the contract.⁹³

⁸⁶ Id. at 54-55.

⁸⁷ Id. at 55.

⁸⁸ The court relied on *Clark v. United States*, 211 F.2d 100 (8th Cir. 1954), cert. den., 348 U.S. 911 (1955), *United States v. Bender*, 218 F.2d 869 (7th Cir.), cert. den., 349 U.S. 920 (1955), *Elwert v. United States*, 231 F.2d 928 (9th Cir. 1956) and *McClanahan v. United States*, 272 F.2d 663 (5th Cir. 1959). *Koontz*, 277 F.2d at 55 n.2. The statements in *Clark*, *Bender*, and *Elwert* that a tax deficiency is essential for conviction under the evasion statute were dicta, since in each case the court sustained a finding that a tax deficiency existed. In *McClanahan*, the circuit court reversed a guilty verdict to a charge of tax evasion on the basis of an erroneous answer the trial judge gave to the jury. It is unclear whether the circuit court held that a deficiency was essential to a conviction under the evasion statute. See discussion of *McClanahan*, supra note 83.

⁸⁹ 385 F.2d 465 (4th Cir. 1967), cert. den., 390 U.S. 951 (1968).

⁹⁰ Id. at 467.

⁹¹ Id.

⁹² Id.

⁹³ Id. at 468. See also Treas. Reg. § 1.451-3 (1960).

The government proved that when the taxpayer reported his gain in 1960, he understated that gain by more than \$39,000.⁹⁴ In a three-step argument, the defendant asserted that he could not be convicted of willful attempted income tax evasion for 1960 because no additional tax was due and owing for that year. First, the defendant successfully argued that he had improperly elected the completed contract method of reporting gain.⁹⁵ Second, because the completed contract method of reporting was inappropriate, the defendant should have reported the gain on his sale of the property in 1958, not in 1960. As a result, the defendant's taxable income for 1960 was in fact overstated, not understated.⁹⁶ Finally, the defendant asserted that he could not be convicted for his failure to report the gain in 1958 because that year was barred by the statute of limitations.⁹⁷

The government argued that:

Wilkins is charged . . . with an attempt to evade taxes and that when he filed his return in 1960 if he was attempting to avoid what he felt were taxes due for that year a jury could find him guilty of violating . . . § 7201 irrespective of any civil liability [for unpaid taxes].⁹⁸

The court, in allowing the defendant to introduce the No-Tax-Due defense, held that the law was clearly to the contrary: "[T]he pronouncements of the courts make it clear that an essential element of the offense of attempting to evade taxes due in any given year is the existence of a deficiency for that year although the statute does not specifically so provide."⁹⁹

4. *The Supreme Court Speaks*

The Supreme Court added its imprimatur by way of dictum to the rule that a conviction for attempted income tax evasion could only be sustained where there was a tax deficiency for the year in question. In *Lawn v. United States*,¹⁰⁰ defendant Livorsi was

⁹⁴ *Wilkins*, 385 F.2d at 467.

⁹⁵ *Id.* at 469.

⁹⁶ *Id.*

⁹⁷ *Id.* at 468.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 355 U.S. 339 (1958).

charged with willfully attempting to evade the payment of income tax for 1946 for underreporting his income from Eatsum Food Products Co., Ltd., a partnership, and for understating his income from Tavern Fruit Juice Co.¹⁰¹ The issue with respect to Eatsum was complicated because Livorsi had held his interest in Eatsum for only a part of the partnership's taxable year.¹⁰² The trial judge simplified the situation by instructing the jury that in considering Livorsi's guilt or innocence for 1946, it was not to "consider Eatsum at all."¹⁰³ On appeal, Livorsi's attorney argued that the judge's charge in effect reduced Livorsi's taxable income for 1946 by the amount of income he had reported for Eatsum.¹⁰⁴ Thus, he argued, the jury could not find Livorsi guilty of income tax evasion because this "reduction" in his income for 1946 would more than offset the unreported income from Tavern.¹⁰⁵ The Court, per Justice Whittaker, rejected this contention:

*While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency, the court's charge did not create the credit claimed by Livorsi. It only withdrew from the jury's consideration the Government's claim that his income from Eatsum in that year was . . . more than he reported in his return.*¹⁰⁶

The Supreme Court's endorsement of the No-Tax-Due defense in the above quotation bears striking resemblance to the analysis of the lower courts: it made no reasoned analysis of the issue, cited no authority for the validity of its assertion, and its statement was dictum because the Court sustained the jury's finding that the taxpayer owed additional tax.

Lawn was followed by *Sansone v. United States*,¹⁰⁷ where the Supreme Court again stated in dictum that a conviction for willful attempted evasion of income tax could only be sustained where the defendant owed additional tax.¹⁰⁸ The Court, in illustrating how a

¹⁰¹ Id. at 360.

¹⁰² Id. at 360-61.

¹⁰³ Id. at 361.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id. (emphasis added).

¹⁰⁷ 380 U.S. 343 (1965).

¹⁰⁸ Id. at 351.

taxpayer could be guilty of willfully making a materially false and fraudulent statement on his return without also being guilty of attempted income tax evasion, stated:

This may be the case, for example, where a taxpayer understates his gross receipts and he offsets this by also understating his deductible expenses [I]f the jury believed that an understatement of deductible expenses had offset the understatement of gross receipts, while the defendant would have violated §7207 by willfully making a material false and fraudulent statement on his return, he would not have violated §7201 as there would not have been the requisite §7201 element of a tax deficiency.¹⁰⁹

The Court cited only *Lawn* and an earlier Supreme Court case, *Spies v. United States*,¹¹⁰ as authority for the proposition that a conviction under section 7201 required a tax deficiency.¹¹¹ However, *Lawn* only supported this proposition in dictum, and a review of *Spies* shows that the Supreme Court simply did not address the issue at all. Again, the Court did not offer any reasoning or analysis that supported the validity of the proposition.

The effect of these Supreme Court opinions on lower court decisions is illustrated by *United States v. Petti*.¹¹² In this case, the evidence showed that the defendant was a “ten-percenter,” that is, a person who cashes racetrack tickets for the true owner of the ticket and then signs Treasury Form 1099 identifying himself as the winner in exchange for a 10 percent commission.¹¹³ The “ten-percenter” then reports the winnings as his own, but typically offsets them with his own real losses, resulting in a net loss of tax revenue for the Treasury.¹¹⁴ In the case, Special Agents of the Treasury Department observed defendant approaching and speaking to people in the cashier’s line for “Big Exacta” pay offs, and discovered that the defendant had cashed a winning ticket and filled out the Treasury Department form listing himself as the winner. Later, the agents observed the defendant in the men’s room passing a large sum of money to a person later identified as McIn-

¹⁰⁹ Id. at 352-53.

¹¹⁰ 317 U.S. 492 (1942).

¹¹¹ *Sansone*, 380 U.S. at 351.

¹¹² 448 F.2d 1257 (3rd Cir. 1971).

¹¹³ Id. at 1257-58.

¹¹⁴ Id. at 1258.

tyre who correspondingly handed the defendant a smaller amount of money.¹¹⁵ While the ten-percenter was tried and convicted of violating section 7201 for having attempted to assist McIntyre in evading his tax liability,¹¹⁶ there was no evidence that McIntyre understated his income or had a tax deficiency for the year in question.¹¹⁷ One can surmise that McIntyre, aware of the arrest of the defendant, scrupulously reported in full his winnings from the race. The Court of Appeals for the Third Circuit reversed because of the absence of any proof of a tax deficiency:

Indeed, the Government concedes that there are numerous cases holding that proof of a tax deficiency is a prerequisite to conviction under the statute here involved. It points out, however, that the statute does not explicitly contain such a requirement. From this statement we infer that the Government disagrees with the holdings of the cited cases. But we are not legally free to disagree with such controlling Supreme Court precedents as *Sansone v. United States*

The Government's position is that defendant willfully attempted to evade and defeat the tax of McIntyre at the time he cashed the ticket in question and that the subsequent reporting of the proceeds for tax purposes by McIntyre is irrelevant. The Government relies on certain language of the Supreme Court in *Spies v. United States* . . . which notes that a prosecution under the statute can only be for the attempt and that the crime is complete "when the attempt is complete." The Government says the attempt was complete when the defendant cashed the ticket for McIntyre and completed the 1099 Form and met with McIntyre to pass the money. The short answer is that in *Sansone v. United States* . . . , the court cited *Spies* for the proposition that the existence of a tax deficiency is required for conviction under §7201.¹¹⁸

Importantly, the court did not attempt to justify its decision in terms of statutory language, history, policy or logic. It did not even endorse the Supreme Court's citation of *Spies* for the proposition that conviction under section 7201 requires proof of a tax defi-

¹¹⁵ *Id.*

¹¹⁶ Under the tax evasion statute, one can be convicted of attempting to evade another person's tax liability. See, e.g., *United States v. Troy*, 293 U.S. 58 (1934) (corporate president indictable for evading corporation's income tax by filing false corporate return under § 146 of the Internal Revenue Act of 1928).

¹¹⁷ *United States v. Petti*, 448 F.2d 1257, 1258 (3d Cir. 1971).

¹¹⁸ *Id.* (citations omitted).

ciency. Rather its decision rested solely on the compulsion of authority, particularly Supreme Court pronouncements. But as previously discussed, this weighty authority was grounded in a foundation of sand.

As this recital of the cases shows, the courts have been singularly deficient in analyzing the policy issues implicated by the No-Tax-Due defense. We will attempt to explore these issues below. To assist us in this endeavor, we will first review the analogous impossibility defense in the law of attempt.

IV. THE IMPOSSIBILITY DEFENSE IN THE LAW OF ATTEMPT AND ITS RELATIONSHIP TO THE NO-TAX-DUE DEFENSE

A. Preliminary Observations

An unsuccessful attempt to commit a crime was not fully recognized as a common law crime until the late eighteenth century.¹¹⁹ In early English jurisprudence, an unsuccessful attempt was not punished as a crime because no harm was done.¹²⁰ The courts gradually recognized that an attempt to commit a crime that came dangerously close to consummation posed a threat to public safety and required intervention by the criminal law.¹²¹

This original justification for the law of attempt has tended to set the boundaries for culpable actions. For example, because preliminary preparations for the commission of a crime do not come dangerously close to the actual commission of a crime, the doctrine

¹¹⁹ The modern law of attempt is usually traced back to *Rex v. Scofield*, 1784 Cald. 397, where Lord Mansfield held: "The *intent* may make an act, innocent in itself, criminal; nor is the *completion* of an act, criminal in itself, necessary to constitute criminality." *Id.* at 400 (quoted in Francis B. Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 835 (1928)). The evolution of the law of attempt is reviewed in Wayne R. Lafave & Austin W. Scott, Jr., *Criminal Law* § 6.2(a) (2d ed. 1986).

¹²⁰ See 2 Bracton, *On the Laws and Customs of England* 361 (George E. Woodbine ed. & Samuel E. Thorne trans., Belknap Press 1968). Bracton states "[W]hat harm was there in the attempt when the wrongful act produced no effect?"; 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 508 n.4 (2d ed. reissued 1968 & reprinted 1978). Professor Ryu has observed that recognition of the crime of attempt also occurred late in continental jurisprudence. Paul Kichyun Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. L. Rev. 1170, 1171-72 (1957).

¹²¹ Professor Ryu attributes the development of the law of attempt both in England and on the Continent to the "emergence of the strong centralized state, concerned not with reparation of private or public damage but with assertion of the state's authority in preserving public order." Ryu, *supra* note 120, at 1172.

developed that "mere preparation" does not constitute a criminal attempt.¹²² Likewise, some courts developed the rule that if successful completion of a crime was "impossible," there was no criminal attempt. Again, the notion is that the defendant's actions pose no danger to society because no harm will occur even if the defendant completes his actions.¹²³ As will be discussed below, the impossibility doctrine has had a long and contentious history.

The No-Tax-Due defense bears a striking similarity to the impossibility defense in the law of attempt. Consider the following case. D buys a substance he believes to be cocaine and then sells it to another. The substance is actually sugar. Although D cannot be convicted of selling cocaine, because he did not actually sell cocaine, the issue of whether D can be found guilty of *attempting* to sell cocaine remains. Some courts would acquit the defendant in these circumstances on the ground that successful completion of the substantive crime was impossible; even though D completed all of the acts he intended, he had not, and on these facts could not, commit the substantive crime of selling a controlled substance.¹²⁴ Compare this case with the fictitious dependent hypothetical described in Part II. In both situations, the defendants had the requisite mens rea and completed all of their intended acts, but never-

¹²² This concept of "proximate danger" was Holmes's explanation for why the law does not punish as an attempt every act done with the intent to bring about a crime:

Eminent judges have been puzzled where to draw the line [between mere preparation and criminal attempt] Public policy [is] . . . at the bottom of the matter; the considerations being . . . the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man . . . starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has . . . cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger becomes so great that the law steps in.

Oliver W. Holmes, *The Common Law* 56 (Mark DeWolfe Howe ed., MacMillan 1968) (1881).

¹²³ For an analysis of how the competing theories of the "impossibility" defense are based on different conceptions of danger, see R. J. Spjut, *When Is an Attempt to Commit an Impossible Crime a Criminal Act?*, 29 *Ariz. L. Rev.* 247, 249-71 (1987).

¹²⁴ Courts that recognize the Legal Impossibility II defense (see discussion *infra* part IV.B-C) would acquit the would-be cocaine seller. In *United States v. Oviedo*, the court acquitted, under a variation of the Legal Impossibility II defense, a defendant who sold a noncontrolled substance believing it to be heroin, 525 F.2d 881 (5th Cir. 1976). But see *People v. Siu*, 271 P.2d 575 (Cal. 1954) (defendant convicted of attempting to possess narcotics when he obtained possession of talcum believing it to be narcotics); *United States v. Roman*, 356 F. Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir.1973), *cert den.*, 415 U.S. 978 (1974) (defendant convicted of attempt to possess narcotics when he obtained soap powder believing it to be narcotics).

theless failed to commit a substantive offense. And in both cases, the defendant could be acquitted under either the rubric of impossibility, or the No-Tax-Due defense.

The similarity of the above cases suggests it would be worthwhile to examine the impossibility defense in the law of attempt in the effort to determine the proper scope of the No-Tax-Due defense.

B. The Different Species of Impossibility

To fully understand the impossibility defense, three different species of impossibility must be distinguished: factual impossibility, and two types of legal impossibility, a narrow version (Legal Impossibility I), and a broad version (Legal Impossibility II).

Factual impossibility describes the case where the objective sought by the defendant is a crime, but because of some *fact* unknown to the defendant the objective cannot physically be achieved.¹²⁵ The classic case is that of a defendant who, with intent to murder his victim, pulls the trigger of a gun he believes to be loaded, but that is fact unloaded.¹²⁶ Another involves a pickpocket who thrusts his hand into another's pocket only to find the pocket empty.¹²⁷ Traditionally, factual impossibility does not constitute a defense, and virtually all American courts convict defendants of attempt under these circumstances.¹²⁸

¹²⁵ Different formulations of factual impossibility may be found in Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. Rev. 1005, 1006-07 (1967); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 Va. L. Rev. 20, 21 (1968); Jerome Hall, *General Principles of Criminal Law* 586-87 (2d ed. 1960); Lafave & Scott, *supra* note 119, § 6.3, at 511.

¹²⁶ See *State v. Damms*, 100 N.W.2d 592 (Wis. 1960); *State v. Wiley*, 216 N.W. 866 (S.D. 1927).

¹²⁷ See *People v. Fiegelman*, 91 P.2d 156 (Cal. 1939); *State v. Wilson*, 30 Conn. 500 (1862); *People v. Moran*, 25 N.E. 412 (N.Y. 1890). See also authorities cited in Model Penal Code § 5.01 nn.33-34 (Proposed Official Draft 1962).

¹²⁸ Lafave & Scott, *supra* note 119, § 6.3(a)(2); Hall, *supra* note 125, at 586-87; Spjut, *supra* note 123, at 256-57; Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DePaul L. Rev. 231, 235 (1977).

One caveat must be made to the above generalization. There are a group of cases where the means chosen or used by the defendant are so obviously incapable of accomplishing the defendant's illegal end that one may be hesitant to convict. The classic case is that of a voodoo doctor who, with intent to kill, chants maledictions upon his intended victim, or sticks pins into a voodoo doll representing the victim. See *Commonwealth v. Johnson*, 167 A. 344, 347-50 (Pa. 1933) (Maxey, J., dissenting) and Pollock's opinion in *Attorney General v. Sillem*, 159 Eng. Rep. 178, 221 (1863). Jerome Hall has somewhat contemptuously labeled

Legal Impossibility I exists where the acts planned or perpetrated by the defendant are believed by the defendant to constitute a crime, but in fact do not constitute a crime as defined by law.¹²⁹ Some commentators use the expression "imaginary offenses" or "illusory crimes" to describe Legal Impossibility I cases.¹³⁰ A famous example involves Lady Eldon's attempt to smuggle expensive French lace into England the day after French lace has been removed from the list of dutiable articles.¹³¹

Commentators universally agree that defendants should not be convicted of attempt in Legal Impossibility I cases.¹³² To do otherwise would, according to Glanville Williams, violate the principle of legality, for then "the law of attempt would be used to manufacture a new crime, when the legislature has left the situation outside of the ambit of the law."¹³³

While the commentators and courts are in virtually unanimous agreement over the proper disposition of cases involving factual

this class of cases as cases from "Never-Never Land", Hall, *supra* note 125, at 593-94, since these supposed cases have never occurred, and probably never will occur, in actual litigation, but have arisen only as hypotheticals imagined by judges or commentators. His implication is that such cases should not be allowed to confuse analysis of real life cases.

Virtually all commentators would acquit in these cases. See, e.g., George Fletcher, *Rethinking Criminal Law* 149, 165-66 (1978); Hughes, *supra* note 125, at 1030, 1033. Even Professors Williams and Hall, who usually determine a defendant's guilt on the basis of his subjective perceptions, would probably acquit in these cases: Williams on the ground that such actions do not pose a "social danger," Glanville Williams, *Criminal Law: The General Part* § 207(f) (2d ed. 1961); Hall on the ground that such actions do not pose an "objective risk." Hall, *supra* note 125, at 591-94.

The Model Penal Code would disallow the impossibility defense even here, but would permit the court to reduce the degree of the crime, or in an extreme case, to dismiss the prosecution altogether where the "conduct charged . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger." Model Penal Code § 5.05(2) (Proposed Official Draft 1962).

¹²⁹ Legal Impossibility I (as defined in this article) is discussed in Hughes, *supra* note 125, at 1006; Weigend, *supra* note 128, at 235-36; Williams, *supra* note 128, § 205; Lafave & Scott, *supra* note 119, § 6.3(a)(3); Hall, *supra* note 125, at 586. Even the Reporters for the Model Penal Code, who purport to reject the impossibility defense, see Model Penal Code § 5.01 commentary at 307 (Proposed Official Draft 1962), recognize that conviction for attempt would be improper where "the result desired or intended is not a crime, . . . even though [the actor] firmly believes that his goal is criminal." *Id.* at 318.

¹³⁰ Weigend, *supra* note 128, at 235-36; Ryu, *supra* note 120, at 1186 (German theorists use the term *Wahnverbrechen* (illusory crime)).

¹³¹ Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 672-73 (5th ed. 1989).

¹³² See authorities cited *supra* note 129.

¹³³ Williams, *supra* note 128, § 205.

impossibility and Legal Impossibility I, they are split regarding Legal Impossibility II. Legal Impossibility II describes those cases where no substantive crime would be committed even if the defendant took all the *physical* steps he intended, and even though the *immediate physical result* he intended occurs, because an essential element of the legal definition of the substantive crime is missing.¹³⁴ An example would be the cocaine case previously described: D, with intent to violate the law, sold a substance he believed to be cocaine which turned out to be sugar. D took all the physical steps he intended, that is, he transferred the substance to the buyer. The immediate physical result he intended occurred, that is, the buyer purchased the substance. But, because of a fact that D was unaware of, specifically the fact that the substance was sugar and not cocaine, an essential element of the completed substantive crime is missing. Another example is found in *United States v. Berrigan*.¹³⁵ Father Berrigan, while imprisoned, smuggled letters out of a federal penitentiary.¹³⁶ Federal law criminalized the sending, or attempted sending, of letters out of a prison without the knowledge and consent of the warden.¹³⁷ In fact, the warden knew that Berrigan was transmitting the letters.¹³⁸ Father Berrigan had taken all the steps he intended when he entrusted the letters to a courier. The immediate physical result he intended occurred: the letters were taken out of the prison and delivered. Nonetheless, because of a fact that Father Berrigan was unaware of, namely the warden's knowledge that the letters were being sent, an essential element of the completed crime was missing.

Legal Impossibility II cases should be distinguished from Legal Impossibility I cases and factual impossibility cases. In a Legal Impossibility I case, the defendant has a misapprehension about the

¹³⁴ Legal Impossibility II is discussed in Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 Minn. L. Rev. 665, 667 (1969) (“[D]efendant has committed the forbidden act in its narrow sense—he has forcefully penetrated his intended rape victim, or he has secured possession of the forbidden goods—but one of the external elements of the substantive crime . . . is absent: the woman was his wife, or the goods were not in fact stolen.”); Weigend, *supra* note 128. Weigend stated, “one additional circumstance which is part of the legal definition of the offense is, without the actor’s knowledge, missing in fact.” *Id.* at 237.

¹³⁵ 482 F.2d 171 (3d Cir. 1973).

¹³⁶ *Id.* at 173.

¹³⁷ *Id.*

¹³⁸ *Id.* at 184.

law, while in a Legal Impossibility II case, the defendant is mistaken about the facts.¹³⁹ In factual impossibility cases, the physical result intended or desired by the defendant constitutes a criminal offense, whereas in Legal Impossibility II cases the immediately intended physical results are not criminal. While these classifications are not perfect and frequently prove difficult to apply in practice,¹⁴⁰ they are nevertheless useful in tracing the jurisprudential

¹³⁹ Professor Hughes gives an extended discussion of this distinction. Hughes, *supra* note 125, at 1016-23.

¹⁴⁰ The major classification problem seems to stem from the difficulty of defining the defendant's "intent" for the purpose of distinguishing between cases of factual impossibility and Legal Impossibility II. In the case of the would-be cocaine seller, did the defendant merely "intend" to sell the white powdered substance in his possession, a Legal Impossibility II case, or did he "intend" to sell cocaine, a factual impossibility case?

Professor Keedy attempts to solve this problem by distinguishing between "intent" and "motive, desire and expectation." Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 466-67 (1954). Thus, he would say that a person who took an umbrella believing it belonged to another, but that in fact is his own, did not "intend" to steal the umbrella, although his motive, desire and expectation may have been to take another's umbrella. Thus, Keedy would acquit him of attempted theft. *Id.* Keedy would presumably acquit the would-be cocaine seller because he did not "intend" to sell cocaine; rather he intended to sell the white powder in his hands which was sugar, although he desired and expected to sell cocaine.

Likewise, Professor Perkins distinguishes between "primary" and "secondary" intent to argue for acquittal in this type of case. Rollin M. Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A. L. Rev. 319, 330-32 (1955).

As Professor Hughes points out, the difficulty with these proposed tests is that they are unworkable in practice, do not conform to the general usage of the English language, and do not embody any sound principle of morality or public policy. Hughes, *supra* note 125, at 1012.

Professor Fletcher has succeeded in developing a more workable test of intent which he has referred to as the "rational motivation" test:

The only way to determine whether the actor is attempting an act that includes a particular circumstance, X, is to inquire: what would the actor do if he knew that X was not so? If he would behave in precisely the same way, we cannot say that his mistaken belief in X bears on his motivation; and if it does not, we cannot say that he is attempting to act with reference to X.

Fletcher, *supra* note 128, § 3.3.4. Thus, in the case of the would-be cocaine seller, he would ask whether the accused would have sold the substance if he knew it was sugar. If the answer is "yes," then Professor Fletcher would say it was not the defendant's "intent" to sell cocaine, because whether the substance was or was not cocaine had no bearing on the defendant's actions. Professor Fletcher suggests that the accused's answer to this hypothetical question would probably be "yes," since the "seller . . . is interested in getting the going price for . . . [cocaine] and presumably would be pleased to learn that he was not parting with the real stuff." George P. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 *Crim. Just. Ethics* 53, 62-63 (1986).

In the author's view, Professor Fletcher's test, though superficially attractive, still lacks workability. For example, the would-be seller of cocaine might well be concerned with

development of the impossibility defense.

C. *Evolving Rationales of the Impossibility Defense*

Commentators and jurists originally viewed the problem of impossibility as a matter of logic. An attempt was thought of as the commencement of a crime. It seemed to follow as a logical corollary that there could be no attempt if the completion of the defendant's actions would not result in a crime.¹⁴¹ At one time, the English courts applied this principle to hold that a pickpocket who thrust his hands into an empty pocket could not be convicted of attempted theft because the defendant could not have stolen any property.¹⁴² This doctrine never became a part of American law, and it is now universally established that factual impossibility is not a defense to a charge of attempt.¹⁴³

The battle next shifted to Legal Impossibility II cases, where it has remained ever since. Possibly the most famous American case sustaining Legal Impossibility II as a defense is *People v. Jaffe*.¹⁴⁴ Jaffe had several times before bought and received goods stolen by an employee of a dry goods store.¹⁴⁵ On the occasion in question,

whether the substance was cocaine or not; if it were sugar, it might adversely affect his "business reputation" with his "clientele." Thus, the "rational motivation" test does not give clear answers to the question of the defendant's intent, but merely invites further factual inquiry. Moreover, it is unclear why the answer to this question should, as a matter of policy, have any bearing on whether the defendant is convicted or not. See Hughes, *supra* note 125, at 1013-16.

¹⁴¹ See Ryu, *supra* note 120, at 1183.

¹⁴² *Regina v. Collins*, 169 Eng. Rep. 1477 (1864). *Collins* was thought to have been overruled in *Regina v. Ring*, 17 Cox C.C. 491 (1892), reprinted in Cox, 17 Criminal Law Cases 491 (1895). However, the House of Lords shook the seemingly settled state of the law in 1973 when it suggested that *Collins*, not *Ring*, was a correct statement of the law. *Haughton v. Smith* [1973] 3 All E.R. 1109. Lord Hailsham LC, stated in his comment, "[I]n general I regard the reasoning in . . . [Collins] as sound and . . . the purported overruling of [Collins] needs further consideration." *Id.* at 1117. See also Lord Reid's comment, where he stated, "[T]he reasoning of the learned judges who took part in [Collins] appears to me to be convincing." *Id.* at 1120. In *Anderton v. Ryan*, [1985] 2 All E.R. 355, their Lordships expressed the view in dicta that the Criminal Attempts Act, 1981, ch. 47 (Eng.), had the effect of making a pickpocket who put his hand in an empty pocket with intent to steal guilty of attempted theft. Lord Roskill, in his comment, stated, "[Criminal Attempts Act] [s]ubsection (2) has at least removed the viability of what became known as the pick-pocket's defence." *Anderton*, [1985] 2 All E.R. at 364.

¹⁴³ See authorities cited *supra* note 128.

¹⁴⁴ 78 N.E. 169, reh'g den., 79 N.E. 113 (N.Y. 1906)

¹⁴⁵ *Id.* at 170.

the store discovered that the employee had stolen a quantity of Italian cloth to sell to Jaffe, and repossessed the stolen cloth.¹⁴⁶ To snare Jaffe, it was arranged for the employee to take the cloth to Jaffe and to sell it to him as previously agreed.¹⁴⁷ Jaffe paid about half the normal price for the cloth.¹⁴⁸ Jaffe, of course, could not be convicted of the substantive crime of receiving stolen goods as the goods were no longer stolen; they had been returned to the possession of the owner and were sold by the owner's employee to Jaffe with its permission. Jaffe was, however, convicted of *attempting* to receive stolen goods.¹⁴⁹ On appeal, the New York Court of Appeals reversed, on the ground that the defendant's actions, even if carried to their intended completion, would not result in a crime, but only in the purchase or receipt of unstolen cloth.¹⁵⁰ The court distinguished the "empty pocket cases" on the ground that in those cases, the result intended or desired by the defendant-pickpocket, namely, the removal of property from the intended victim's pocket, was a crime. In contrast, in *Jaffe* the result intended by the defendant, the purchase of Italian cloth, was not a crime.¹⁵¹

The result in *Jaffe* was, and continues to be, vigorously criticized. These critics, sometimes called "subjectivists,"¹⁵² argue as follows: Jaffe, like other defendants in Legal Impossibility II cases, was just as morally culpable as if the cloth had been stolen, since he believed it to be stolen. Moreover, Jaffe demonstrated his dangerousness to society, that is, his propensity to commit crime, since

¹⁴⁶ Id. at 170-71.

¹⁴⁷ Id. at 171.

¹⁴⁸ Id.

¹⁴⁹ Id. at 169.

¹⁵⁰ Id. at 170.

¹⁵¹ Id. at 169. The House of Lords reached the same result as in *Jaffe* on similar facts in *Haughton v. Smith*, [1973] 3 All E.R. 1109. Thereafter, Parliament passed the Criminal Attempts Act, 1981, ch. 47 (Eng.), which provided that the actor's guilt was to be determined as "if the facts of the case had been as he believed them to be." Id. § 1(3). Notwithstanding this Act, the House of Lords held in *Anderton v. Ryan*, [1985] 2 All E.R. 355, that a person who brought goods she thought to be stolen was not guilty of attempted receipt of stolen property unless the prosecution could prove that the goods were stolen. However, the House of Lords overruled the *Ryan* decision the following year in *R. v. Shivpuri*, [1986] 2 All E.R. 334. For other decisions on this issue, see Model Penal Code § 5.01 commentary at 307 n.28 (Proposed Official Draft 1962).

¹⁵² This is the term used by Professor Fletcher, and is derived from the fact that "subjectivists" would judge a defendant's guilt on the basis of his subjective perceptions. See George P. Fletcher, *Constructing a Theory of Impossibility Attempts*, 5 *Crim. Just. Ethics* 53, 54-55.

he undertook all steps within his power to bring about the criminal act.

Subjectivists argue that it is contrary to morality and sound social policy to acquit a defendant in this position just because some fortuitous fact, of which the defendant was unaware, renders completion of the substantive crime legally impossible.¹⁵³ Subjectivists therefore reject Legal Impossibility II as a defense and would restrict the impossibility defense solely to cases of Legal Impossibility I.

This position has enjoyed substantial support among academic commentators and, over time, has won increasing support from legislators. Professor Fletcher, writing in 1986, described the apparent demise of the Legal Impossibility II defense: "The overwhelming weight of authority, the Model Penal Code, the trend in State legislation, in the courts, and in the academic literature, requires the facts to be assessed as the defendant believes them to be."¹⁵⁴ Likewise, the English Parliament in the comprehensive 1981 Criminal Attempts Act rejected the Legal Impossibility II defense by requiring that a defendant's guilt be judged on the basis of the "facts . . . as he believed them to be."¹⁵⁵ Even New York, home of the *Jaffe* decision, legislatively overruled that decision in 1967.¹⁵⁶

And yet, despite this seemingly irresistible trend, the Legal Impossibility II defense seems to have recently gained new adherents, "neo-objectivists," both academic and judicial. These proponents of the defense base their arguments not on the supposedly inexorable dictates of logic, but on their concerns about the fundamental nature of the criminal legal system: the relationship of the ordinary citizen to the state; the danger of unlimited, or at least, insufficiently limited, police and prosecutorial discretion; and judicial resort to inherently unreliable and prejudicial evidence.¹⁵⁷

¹⁵³ See Model Penal Code § 5.01 commentary at 315-20 (Proposed Official Draft 1962); Williams, *supra* note 128, § 207(b) ("[T]here is danger to the public in leaving uncorrected a man who is bent on murder") and § 207(f) ("[F]or one who administers salt thinking salt to be poisonous is somewhat dangerous; when he fails with salt he may hit on weedkiller"); Hall, *supra* note 125, 591-94 (stressing objective risks posed by those who attempt to commit a crime based on their subjective perceptions). See also summary of subjectivists' arguments in Fletcher, *supra* note 152, at 54-55.

¹⁵⁴ Fletcher, *supra* note 152, at 54 (footnotes omitted).

¹⁵⁵ Criminal Attempts Act, 1981, ch. 47, § 1(3) (Eng.).

¹⁵⁶ N.Y. Penal Law § 110.10 (McKinney 1987).

¹⁵⁷ See, e.g., Enker, *supra* note 134.

According to the neo-objectivists, the problem with eliminating the Legal Impossibility II defense is that it creates the danger of convicting a defendant on the basis of his beliefs alone. This is because the acts that a defendant commits in a Legal Impossibility II case are objectively innocent. For example, Jaffe bought unstolen merchandise and the would-be cocaine seller sold only sugar. Thus, convictions in these cases can only be sustained on the basis of what the defendant believed, not what he did. The neo-objectivists argue that this gives rise to a number of dangers.

First, the elimination of a requirement of objectively guilty behavior vastly enhances the discretion of the prosecutor for bringing charges, and thereby increases the danger of selective and discriminatory prosecution. Actions that are completely lawful and innocent in an objective sense can now be prosecuted by alleging that the actor subjectively intended to commit a crime. Of course, a prosecutor is unlikely to bring such a charge against main-line "respectable" members of society; rather, it is the unpopular and weaker members of society, so-called "undesirables," who are the likely targets of such prosecutions.¹⁵⁸

In addition, elimination of the requirement that the defendant's

¹⁵⁸ See Enker, *supra* note 134, at 687-90. Also, consider Stanley E. Crawford Jr.'s defense of the decision in *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976), where the court refused to convict a defendant who sold a substance he believed to be heroin that turned out to be a noncontrolled substance. The court found that defendant's actions were objectively innocent, i.e., the selling of a noncontrolled substance, and refused to convict in the absence of conduct that clearly and unequivocally marked the defendant's criminal intent. Mr. Crawford defended the court's decision by pointing out that the absence of such a rule might give rise to selective and discriminatory prosecutions:

Assume, for example, that a package of marijuana-like substance is hidden in a gas station restroom. Narcotics agents are notified and establish a stake-out. If a well-dressed, affluent businessman comes out with the package, and calmly responds to polite questioning that he was about to turn the package in to the police because he assumed it was either illegal or lost, then probably that will end the affair. But if a lower-class black man brings out the package and, upon arrest, angrily or fearfully stammers that he accidentally found it, these circumstances might well justify conviction under the rule established by the Model Penal Code [for conviction of attempts]. The *Oviedo* threshold would not be crossed, however, for the suspect's objective behavior would be so commonplace that persons not in violation of the law might have acted in the same fashion. For this reason alone the test adopted by the Fifth Circuit is the better course to follow in defining punishable criminal attempts: it does not permit the weaving of suspicious circumstances and casual comments by a defendant into the whole cloth of liability for a criminal attempt without the support of proof of objective actions which clearly corroborate his guilt.

Stanley E. Crawford, Jr., 4 Am. J. Crim. L. 317, 333 (1976) (footnote omitted).

action be objectively guilty combined with the resulting shift in focus to the defendant's beliefs and motives inevitably means that the jury will be invited, and empowered, to convict solely on the basis of factors traditionally thought to be suspect: the defendant's associations, his prior criminal record, his reputation, accomplice testimony and confessions.¹⁵⁹

At the same time, allowing a conviction where the defendant's actions are objectively innocent will permit conviction where one of the most persuasive bases for inferring the requisite mens rea will be missing, that is, the existence of acts strongly corroborative of a guilty intent. Thus, the risk of wrongful convictions will be increased.¹⁶⁰

Finally, the neo-objectivists argue that elimination of a requirement that the defendant's action be objectively guilty, and the consequent emphasis upon the defendant's motives and intent, will subtly pervert the relationship between the state and the individual contrary to the basic postulates of a liberal society. When the Legal Impossibility II defense is in place, the emphasis is upon the defendant's actions. With the elimination of that defense, the emphasis shifts to the defendant's motives, intent and beliefs. This shift inevitably produces a corresponding shift in how the prosecutor views and operates his office. When the emphasis is on acts, the dangerous or harmful act must precede police intervention. When the emphasis is on an individual's beliefs, the emphasis shifts from acts to the person. This, in turn, encourages the police to make a determination of a person's dangerousness first, and then to "build a case" to convict that person.¹⁶¹ Critics assert it is no coincidence that Legal Impossibility II cases frequently involve "sting" operations. Neo-objectivists argue that this shift in emphasis jeopardizes the security of the sphere for private autonomy (e.g., beliefs, intentions, private conversations) that is the hallmark of a liberal society. They would maintain the Legal Impossibility II defense, or some variant of it, to assure that some objective manifestation of criminality must precede official intervention into this realm of private autonomy: "[T]houghts, intentions and feelings occur in the private sphere. The state needs some ground, some

¹⁵⁹ Enker, *supra* note 134, at 690.

¹⁶⁰ *Id.* at 679-80.

¹⁶¹ See, e.g., Spjut, *supra* note 123, at 276-78.

warrant, for probing into this realm of citizens' autonomy."¹⁶²

The neo-objectivists propose several solutions to these problems. Some, like Professor Enker¹⁶³ and the Court of Appeals for the Third Circuit,¹⁶⁴ would retain the Legal Impossibility II defense in its full vigor. Others, like Professors Hughes and Fletcher, and the Court of Appeals for the Fifth Circuit, would modify the Legal Impossibility II defense by permitting conviction only where there is unambiguous evidence showing a commitment to perpetrate an unlawful act. The Court of Appeals for the Fifth Circuit in *United States v. Oviedo*¹⁶⁵ thus adopted the following test:

"[W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law."¹⁶⁶

Professor Hughes proposes a similar test which insists that "an attempt must be understood as including a reference to trying to achieve the actus reus of the complete crime in some way which is apparent on the face of the actus reus of the attempt."¹⁶⁷ Thus, Professor Hughes would convict only where the "conduct by the accused conjures up for us" the completed crime that he is charged

¹⁶² Fletcher, *supra* note 152, at 64-65.

¹⁶³ *Id.* at 710.

¹⁶⁴ *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973). Although the court based its decision to retain the common law defense of legal impossibility on the absence of any statutory provision to the contrary, *id.* at 185-86, the court was clearly influenced by its concern with the underlying policy considerations; as revealed by the following comment:

Indeed, though it is not before us, we do evidence some concern that the proposed changes in federal criminal code seem to fashion a new crime where the critical element to be proved is *mens rea simpliciter*. We detect the total lack of objective guidelines in the presentation of such proof or a defense. While *mens rea* is certainly within one's control it is not subject to direct proof; it is proved by circumstantial evidence only. More important, it is not subject to direct refutation. It is the subject of inference and speculation. We perceive the danger of potential abuse where the circumstances admit to very little objective measurement. More important, we are unwilling as a court to legislate by judicial fiat a crime consistent only with thought processes, as this is reminiscent of the German law of the Nazi period . . .

Id. at 189 n.39.

¹⁶⁵ 525 F.2d 881 (5th Cir. 1976).

¹⁶⁶ *Id.* at 885.

¹⁶⁷ Hughes, *supra* note 125, at 1026 (second emphases added).

with having attempted.¹⁶⁸ Professor Fletcher would require as a precondition for trying a defendant for attempt that his acts manifest on their face the defendant's dangerousness.¹⁶⁹

The subjectivists have rejoinders to these arguments. The Reporters for the Model Penal Code downplay the practical significance of the concerns raised by the objectivists: "[I]t should first be noted how unlikely it is that persons will be prosecuted on the basis of admissions alone; the person who has behaved in a wholly innocuous way is not a probable subject of criminal proceedings. So, the issue posed . . . is more theoretical than practical."¹⁷⁰ Further, they argue that requiring the defendant's behavior in and of itself to manifest a commitment to break the law would free defendants where the probative indications of guilt arising from both their acts and admissions are substantial, but "whose behavior alone arguably would not be strongly corroborative of that purpose."¹⁷¹ Moreover, subjectivists argue that the various "equivocality" tests proposed thus far are totally unworkable because their criteria are so vague and amorphous.¹⁷² For example, Professor Hughes would acquit the defendant unless his behavior in and of itself "conjure[d] up for us" or "evoke[d] the image" of the completed crime which the defendant is charged with attempting.¹⁷³ But how does one determine the salient features that will "conjure up for us" or "evoke the image" of a successfully completed crime? For example, consider the old chestnut of the defendant who fires a gun at a stump believing it to be his lifelong enemy.¹⁷⁴ Does Hughes's "model of success" of a murder require the presence of the victim, or is it sufficient that the defendant used deadly force?¹⁷⁵

¹⁶⁸ Id. at 1030.

¹⁶⁹ Fletcher, *supra* note 152, at 64.

¹⁷⁰ Model Penal Code § 5.01 commentary at 319-20 (Proposed Official Draft 1962).

¹⁷¹ Id. at 320.

¹⁷² Fletcher, *supra* note 152, at 64. He states "contemporary subjectivist writers, such as Glanville Williams, have nothing but contempt for the standard of equivocality. They dismiss it as 'unworkable' . . ." Id.

¹⁷³ Hughes, *supra* note 125, at 1030.

¹⁷⁴ This was a hypothetical case posed by Baron Bramwell in *R. v. McPherson*, 169 Eng. Rep. 975 (1857).

¹⁷⁵ See Spjut, *supra* note 123, at 266.

V. A CRITIQUE OF THE EXISTING NO-TAX-DUE DEFENSE AND A PROPOSAL FOR REFORM

Having reviewed both the background of section 7201, its terms, its relationship to other tax crimes, its legislative history, and the impossibility defense in the law of attempt, this Article will now try to draw these seemingly disparate strands together to formulate a solution to the issues posed by the No-Tax-Due defense.

A. *Inadequacy of Statutory Language and Legislative History In Determining Correctness of the No-Tax-Due Defense*

As discussed earlier in this article,¹⁷⁶ it is clear that neither the language of section 7201 nor its legislative history can conclusively determine the correctness of the No-Tax-Due defense. Section 7201 is written in broad general language susceptible to varying interpretations. The section proscribes any attempt to "evade or defeat any tax imposed by this title," but leaves undefined the phrase "any tax imposed by this title." The phrase may reasonably be construed to have any of three meanings: the actual dollar amount of tax the taxpayer properly owes; any type of tax imposed by Title 26; or, in the case of the income tax, the tax on each of the components making up taxable income. The applicability and scope of the No-Tax-Due defense turns on the definition of this phrase.

Recall the hypothetical discussed in connection with the *O'Brien* case: T had wages of \$10,000, interest of \$2000 and qualified for a moving expense deduction of \$2000. Thus, T's correct taxable income was \$10,000. Assuming a flat tax rate of 50% and disregarding exemptions, T's tax liability was \$5000. T, with intent to defraud, omitted the \$2000 of interest income, but also failed to claim the \$2000 of moving expenses. Thus T, by inadvertence, reported the correct amount of his taxable income and paid the correct amount of his tax liability.¹⁷⁷

If the phrase "any tax imposed by this title" means the actual dollar amount of the tax owed, it is difficult to say in a case like the above hypothetical that the taxpayer has "attempt[ed] . . . to evade or defeat" (i.e., underpay) the tax "imposed by this title,"

¹⁷⁶ See *supra* text accompanying part III.C.

¹⁷⁷ See *supra* text accompanying notes 71-72.

since T has reported and paid the full amount of the tax owed. T has simply done nothing to evade or defeat the amount of tax he actually owes.

On the other hand if the phrase "any tax imposed by this title" is construed more broadly to mean "any" of the *types* of tax imposed by Title 26, then one can say with linguistic correctness that a defendant who omitted an item of taxable income with the intent to underpay his tax liability has tried, or "attempt[ed]" to "defeat" a "tax imposed by this title," namely the income tax. This would still be true if the attempt fails and no tax deficiency occurs because, as in the above hypothetical, an overlooked deduction offsets the amount of the unreported income. Lack of success is no defense to a charge of attempt.

Likewise, if a person's tax liability is conceived of, not as a single, indivisible amount, but as the sum of separate taxes on each of the different components making up his taxable income, one again could argue that a person who intentionally omits an item of income, such as interest, has "attempt[ed]" to "defeat" the "tax" on that item. This would remain true even if it turns out that the taxpayer inadvertently failed to claim a deduction he was entitled to; the omission does not negate the attempted evasion of another component of his taxable income.

While the first interpretation supports the No-Tax-Due defense, these latter two constructions invalidate it. And there is no way that linguistic analysis can decide among the constructions. Likewise, the statute's legislative history is inconclusive: although nothing in this history explicitly proves that Congress intended to impose as a requirement for conviction that there be a tax deficiency, nothing rules it out.¹⁷⁸ As in so many matters of this nature, the answer must ultimately be found in the policies underlying the statute and the criminal justice system.

B. The Case for Abolishing the No-Tax-Due Defense

One problem with the present No-Tax-Due defense is revealed by the following case: Taxpayers A and B, each having the same culpable intent to underpay his or her rightful income tax liability, omit a significant portion of their respective incomes from their

¹⁷⁸ See discussion *supra* part III.B.

tax returns. A has a deduction that more than offsets his unreported income; however, he fails to claim it because he is unaware of its existence. B is entitled to no such deduction. Under the current state of the law, B would be convicted of attempted income tax evasion while A would be freed under the No-Tax-Due defense.

To convict B while acquitting A when both are equally culpable of attempting to underpay their tax liability offends our sense of justice and fair play, and a construction of the statute that produces that result should be avoided.¹⁷⁹ Moreover, insofar as one of the purposes of criminal statutes is to express the moral outrage of the community towards the proscribed behavior,¹⁸⁰ a construction of the statute that acquits taxpayers for reasons unrelated to their moral culpability undermines and trivializes the moral force of the law. Furthermore, it is probable that the No-Tax-Due defense undermines the deterrent force of the law. To the extent the public perceives that morally guilty persons are acquitted for reasons unrelated to their moral guilt, the impression grows that one has a good chance of escaping punishment with creative lawyering.

Moreover, people who seek to cheat on their taxes and take substantial steps toward that end have sufficiently manifested their propensity to violate the law and their "dangerousness" to society so as to justify societal action against them.¹⁸¹ Although the taxpayer's intent to cheat the government in the present year may have been frustrated by the existence of an undiscovered and therefore unclaimed offsetting deduction, it is likely that such a person will try again and perhaps succeed.

The fact that a defendant in a No-Tax-Due case has paid the full amount of the taxes, and thus caused no immediate harm, should have no bearing on his treatment under section 7201. While many statutes do grade the seriousness of a crime on the degree of harm perpetrated, Congress explicitly rejected this approach in the

¹⁷⁹ See Herbert Wechsler, William Kenneth Jones and Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 571, 572-73 (1961) ("[E]xculpating the actor [because of a fortuity] would involve inequality of treatment that would shock the common sense of justice.").

¹⁸⁰ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 405 (Criminal statutes constitute "a formal and solemn pronouncement of the moral condemnation of the community.").

¹⁸¹ See Model Penal Code § 5.01 commentary at 308-09, 315-16 (Proposed Official Draft 1962).

case of income tax evasion. As the Supreme Court has noted, income tax evasion is "complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation."¹⁸²

While these reasons for eliminating the No-Tax-Due defense, which echo the arguments advanced by the subjectivists in the controversy over the impossibility defense, argue forcefully for the complete abolition of the No-Tax-Due defense, the counter arguments of the neo-objectivists raise a cautionary signal. The following section of this article examines each of the hypothetical cases posed in Part II, and attempts to determine the propriety of conviction.

C. *Applying the Lessons of the Impossibility Defense*

In the Unreported Gift hypothetical (case 1), the taxpayer, D, erroneously believing gifts to be a component of taxable income, willfully omits a gift from income in an attempt to defraud the government. Note the similarity between this case and the Legal Impossibility I cases involving "illusory crimes." In those cases, the defendants believed they were committing unlawful acts, but in fact they did not commit any criminal act. While both the Legal Impossibility I defense and the No-Tax-Due defense would produce the same result in the Unreported Gift case, the question of whether this result represents sound public policy remains.

The usual justification proffered for this result is that conviction would offend the principle of legality: it would make something an offense which the legislature has chosen not to make an offense.¹⁸³ At best, this limited conception of "legality" constitutes only a partial justification.

The principle of legality itself seems to rest on two underlying concerns: that citizens should have fair and adequate notice of what actions may result in criminal liability;¹⁸⁴ and that in a democracy, it is the business of the legislature, and not the judiciary to determine criminality.¹⁸⁵

¹⁸² *Spies v. United States*, 317 U.S. 492, 498-99 (1942).

¹⁸³ Williams, *supra* note 128, at 633-634.

¹⁸⁴ Enker, *supra* note 134, at 670 (principle of legality ensures that "the citizen will receive advance guidance as to what conduct is forbidden.")

¹⁸⁵ Fletcher, *supra* note 152, at 55 ("[L]egislative supremacy is all that is required by the

The insufficiency of this limited conception of "legality" as a policy justification for the result in the "imaginary crime" cases is exposed by asking whether the problem could be cured in these instances if the legislature passed a statute making it a criminal offense for a person to do any act which he believed to be unlawful.¹⁸⁶ If one's objection to conviction in these cases is a concern that the legislature's function not be usurped by the judiciary, then that objection should be overcome by the legislature's express direction to convict a defendant who commits acts he believes to be unlawful.¹⁸⁷ Moreover, the lack of adequate notice to the potential lawbreaker should not be a serious concern under such a statute. Since a defendant could be convicted under such a statute only where he believed his acts to be unlawful, he would necessarily have realized before he embarked on his course of conduct that it entailed potential criminal liability.

Returning to the Unreported Gift case, the objection that conviction in this case violates the principle of legality can be cured simply by amending the statute to provide for conviction of anyone who believes he is defrauding the government of tax revenue. Thus, the belief that conviction is inappropriate in these cases, must ultimately be based on broader grounds than the principle of legality, or alternatively, the concept of legality must expanded to reflect broader concerns than those set out above.

The broader concerns at issue in this case are those raised by the neo-objectivists in their opposition to the elimination of the Legal Impossibility II defense: the concern that such an action will unwisely increase the scope of prosecutorial discretion and enhance the danger that the law will be applied in a discriminatory fashion; the danger that such an action would increase reliance upon unreliable and suspect evidence; and finally, the concern that by eliminating the requirement that the defendants' behavior must in some sense be objectively guilty, one has eliminated one of the most persuasive reasons for inferring the existence of the requisite *mens rea*. Whatever the validity of such concerns elsewhere, the danger of discriminatory and unjust prosecutions in the case of

maxim nulla poena sine lege.")

¹⁸⁶ See Fletcher, *supra* note 152, at 59 ("There is no reason why criminal codes should not include a catchall provision covering any intent to violate the law.")

¹⁸⁷ Fletcher, *supra* note 152, at 55.

federal tax crimes is real and substantial.

First, there is a vast potential for abuse simply because everyone is subject, or can be made subject, to the income tax.¹⁸⁸ If a prosecutor desires to move against an unpopular group or a political enemy, the criminal tax laws offer a handy weapon.¹⁸⁹ Secondly, the tax laws typically are not clear and precise but subject to many different, good faith interpretations. This means that a prosecutor may be able to make out a plausible case of income tax evasion even where the defendant acted in complete innocence.¹⁹⁰ More significantly, there is a well-established tradition in this country,

¹⁸⁸ Even a so-called tax exempt organization may be subject to pressure under the tax laws. The Service may attempt to revoke the organization's tax-exempt status, in which case contributions they receive will no longer be deductible to the donors and the organization's income may be subject to tax. I.R.C. §§ 170, 501. See discussion *infra* note 204 and accompanying text on attempt of the Service to tax income of the Communist Party. The Service may assert that part of the organization's income is taxable as "unrelated business taxable income." I.R.C. §§ 511-514. If the organization is a public charity, the Service may attempt to impose a 25 percent penalty for excess lobbying expenditures, I.R.C. § 4911, and if it is a "private foundation," the Service may attempt to impose punitive excise taxes on the foundation and its manager for engaging in certain prohibited transactions. I.R.C. §§ 4941-4963.

¹⁸⁹ Tax and Vietnam War protesters have frequently asserted that they are victims of selective prosecution for tax crimes. The courts have unanimously rejected such claims. See Bennett L. Gershman, *Prosecutorial Misconduct* § 4.3(d)(5)(B) (1991). For example, in *United States v. Amon*, 669 F.2d 1351, 1356 (10th Cir. 1981), cert. den., 459 U.S. 825 (1982), the court rejected defendant's claim of unconstitutional selective prosecution despite the trial court's finding that he was "selected for prosecution because he is an active and outspoken protestor." *Id.* at 1356.

¹⁹⁰ The Supreme Court has construed the word "willfully," as used in the criminal tax laws, to mean that defendant must intentionally violate a known duty to be convicted. The Court adopted this construction—which is contrary to the general rule that ignorance of the law is no defense—because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law" and "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *United States v. Bishop*, 412 U.S. 346, 360-361 (1973), (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943)). In *Cheek v. United States*, 498 U.S. 192, 604 (1991), the Supreme Court held that a good-faith misunderstanding of the law, no matter how unreasonable, negates willfulness. See generally Mark D. Yochum, *Ignorance of the Law is no Excuse Except for Tax Crimes*, 27 Duq. L. Rev. 221 (1989).

This construction of the criminal tax provisions may provide some protection against conviction of those whose good-faith interpretation of the law differs from that of the government, but, of course, it offers little protection against prosecution by an overzealous or politically motivated prosecutor. See *United States v. Regan*, 937 F.2d 823 (2d Cir.), opinion amended 946 F.2d 188 (2d Cir. 1991) (taxpayer prosecuted for tax evasion despite testimony that he took questioned deduction in reliance on a report of the Tax Section of the Association of the Bar of the City of New York, correspondence from his accountants, and his own study of the relevant section).

dating back at least to the Al Capone case,¹⁹¹ of using the criminal tax laws for purposes extraneous to that of protecting revenue. Today, criminal tax laws are routinely used to convict drug dealers, perpetrators of savings and loan bank fraud and Defense Department procurement fraud, and members of organized crime. One recent study concluded that from 1978 to 1988, the percentage of all criminal tax cases directed against persons who derived income from illegal sources or activities increased from 15% to over 40%, almost a three-fold increase.¹⁹² This use of the tax law has been vigorously debated, with critics charging that it perverts the basic purpose of the tax laws and undermines the deterrent impact of convictions on the average citizen.¹⁹³ The most dangerous aspect of this use of the criminal tax laws is that it puts one on a slippery slope. Once we rationalize the use of the tax laws as a legitimate mechanism to "get" bad persons, such as mobsters, it becomes that much easier to rationalize their use against persons because of unpopular beliefs or activities.¹⁹⁴

Finally, there appear to be numerous well-documented cases of the tax laws being used in all administrations against political enemies and as a means of curbing political dissent, ranging from President Roosevelt's instigation of income tax audits against Rep-

¹⁹¹ *United States v. Capone*, 56 F.2d 927 (7th Cir.), cert. den., 286 U.S. 553 (1932). See Elmer L. Irey & William J. Slocum, *The Tax Dodgers* 25-65 (1948).

¹⁹² Jeffrey A. Dubin, Michael A. Graetz and Louis L. Wilde, *The Changing Face of Tax Enforcement, 1978-1988*, 43 *Tax Law.* 893, 910 (1990).

¹⁹³ A 1991 report of a subcommittee of the Tax Section of the American Bar Association, which was endorsed by eight former Internal Revenue Commissioners, contends that the shift toward specific enforcement cases undermines the deterrent effect of the criminal tax law on the average citizen:

These research results indicate that the mass of law-abiding taxpayers can, and do, distinguish themselves from "special" enforcement targets—obviously, most taxpayers are not drug dealers, organized crime figures or other notorious criminals, nor do they identify with such offenders. Accordingly, a realization by the public that "general" criminal tax enforcement—against person like themselves—is diminishing could indeed reduce overall compliance.

SubComm. on Criminal Tax Policy, Comm. on Civil and Criminal Tax Penalties, Section of Taxation, Am. Bar Ass'n, *Redirecting Criminal Tax Enforcement to Improve Voluntary Compliance*, reprinted in *Tax Notes Today*, Aug. 23, 1991.

¹⁹⁴ For an illuminating discussion of this issue in the context of the Kennedy Administration's decision to use the criminal tax laws to prosecute organized crime members, see Victor S. Navasky, *Kennedy Justice* 63-68 (1971). Howard Glickstein, who was then in the Civil Rights Division of the Justice Department, said of this practice: "This time it's the Mafiosi, but the next time it could be the Black Panthers or Goldwater supporters." *Id.* at 59.

representatives Hamilton Fish¹⁹⁵ and Huey Long¹⁹⁶ to the politically-motivated income tax audits of Lawrence O'Brien and others on President Nixon's "enemies list."¹⁹⁷

Other alleged misuse of the tax law to curb political dissent and punish political enemies include:

(1) The unsuccessful effort of the Roosevelt Administration to indict Andrew Mellon, Secretary of the Treasury in Republican administrations from 1921 to 1932, for income tax evasion;¹⁹⁸

(2) An IRS investigation of Paul Robeson during the Roosevelt Administration focusing on his alleged communist activities;¹⁹⁹

(3) A Treasury Department investigation of a transaction involving Frank Gannett, vice chairman of the Republican National Committee and a conservative newspaper publisher critical of the Roosevelt Administration, which was triggered by a note from Eleanor Roosevelt to the Secretary of the Treasury;²⁰⁰

(4) Leaks by the Nixon White House of unfavorable information about George Wallace derived from an IRS investigation to newspaper columnist Jack Anderson to harm Wallace in his gubernatorial primary fight;²⁰¹

¹⁹⁵ Ted Morgan, *FDR: A Biography* 554 (1985) ("FDR wanted to have [Fish] indicted for violating the statute that barred a private citizen from conducting foreign affairs but Cordell Hull advised against it. So FDR asked [Secretary of the Treasury] Morgenthau to study his tax returns and get something on him.").

¹⁹⁶ David Burnham, *A Law Unto Itself: The IRS And the Abuse of Power* 231-35 (Vintage Books 1991) (1989).

¹⁹⁷ *Id.* at 249-51.

¹⁹⁸ *Id.* at 229-30. Burnham describes the attempt to prosecute Mellon as "[p]robably the single most brazen display of the Roosevelt administration's willingness to use the tax agency for political purposes." *Id.* at 229. The investigation proceeded despite the misgivings of Elmer L. Irey, director of the predecessor of the Criminal Investigation Division, and a Justice Department memorandum that found that the charges that the Roosevelt Administration wanted to lodge against Mellon were either invalid or could not be proved. *Id.* The Administration announced on March 11, 1934, that it would seek criminal tax evasion charges against Mellon, but the grand jury refused to indict him. *Id.* at 229-30. In a subsequent civil action, the Government alleged that Mellon owed a tax deficiency \$2,059,507.49 and sought to recover, in addition to taxes and interest, a 50% fraud penalty. The Board of Tax Appeals held against the Government on the fraud issue and most of the other issues. *A.W. Mellon v. Commissioner*, 36 B.T.A. 977, acq. on fraud issue, 1938-1 C.B. 20 (1937). According to Burnham, the Board found Mellon owed \$485,809—about one-sixth of what the Government had sought to recover in the civil proceeding. Burnham, *supra* note 196, at 230.

¹⁹⁹ Burnham, *supra* note 196, at 235-36.

²⁰⁰ *Id.* at 236-38.

²⁰¹ *Id.* at 250.

(5) An unsuccessful effort by the Nixon White House to have the IRS investigate persons making contributions to the campaign of the Democratic presidential candidate George McGovern;²⁰²

(6) Revocation without a hearing of the tax-exempt status of a number of left-wing groups for being "subversive organizations" during the Truman Administration, although the statute did not define "subversive organization" or make it a basis for denial of tax-exempt status;²⁰³

(7) Seizure of all known assets of the Communist Party and attempts to collect income taxes from it beginning in the Eisenhower Administration, on the ground that it was not a tax-exempt organization, even though no similar action was taken against the Democratic or Republican Parties;²⁰⁴

(8) Alleged IRS harassment of the National Council of Churches during the Johnson and Nixon Administrations purportedly because of its liberal civil rights activities and later because of its anti-Vietnam War activities;²⁰⁵

(9) Audits instigated by the Kennedy Administration against right-wing organizations (e.g., H. L. Hunt's Life-Line Foundation and Dr. Fred Schwartz's Christian Anti-Communist Crusade) under a specially-instituted Ideological Organizations Audit Program.²⁰⁶

It is beyond the scope of this Article to assess the degree to which the tax laws have been used for political and other improper purposes. Great potential for abuse exists in the criminal tax laws, and one would not, absent very compelling reasons, expand the scope of prosecutorial discretion or soften the requirements for conviction.

For these reasons, prosecutions should not be permitted where a taxpayer files a correct return on the theory that the taxpayer believed he was defrauding the government. Thus, there should be no prosecution in the Unreported Gift case. To permit prosecution in such a case would greatly expand the number of potential prosecu-

²⁰² Id. at 251-52.

²⁰³ Id. at 261-62.

²⁰⁴ Id. at 262-63. In *Communist Party of the U.S.A. v. Commissioner*, 373 F.2d 682 (D.C. Cir. 1967), the court directed the Tax Court to consider the Party's claim that it had been singled out from other political parties for discriminatory treatment.

²⁰⁵ Burnham, *supra* note 196, at 264-67.

²⁰⁶ Id. at 270-73.

tions and would correspondingly increase the prosecutor's discretion. But it is not only the increased prosecutorial discretion that is objectionable, it is also the type of evidence that would necessarily be used in such a prosecution. Since the actions of the defendant were not "objectively unlawful," the prosecution, in attempting to demonstrate the defendant's belief that his actions were illegal, would have to rely upon types of evidence commonly believed suspect, such as statements made by confederates and past criminal history. It is also objectionable that the most persuasive evidence for inferring the requisite mens rea, objectively guilty behavior, is absent. Thus, the risk of wrongful convictions is increased. It is for these pragmatic reasons, not the absence of a tax deficiency, that this type of prosecution should not be permitted.

These dangers also exist in the Skimmed Funds case (case 4) and the Unrecognized Picasso case (case 5). These cases would most likely be classified as Legal Impossibility II cases, rather than Legal Impossibility I cases,²⁰⁷ but they contain the same salient feature as the Unreported Gift case: the defendant did not engage in any "objectively guilty" behavior.

Although the defendant in the Skimmed Funds case believed he was unlawfully omitting the skimmed funds from his income, objectively the defendant was simply omitting nontaxable returns of capital. Although the defendant in the Unrecognized Picasso case believed he had fraudulently overvalued the painting he gave to charity, objectively he merely claimed an insufficient deduction for his donation. Since these taxpayers did not engage in any objectively guilty behavior, the prosecution would be based on the defendant's beliefs rather than his actions, and this would pose ex-

²⁰⁷ The Unrecognized Picasso case is a Legal Impossibility II case rather than a Legal Impossibility I case, since the taxpayer's mistake was one of *fact* (the true value of the painting) rather than any misapprehension about the *law* on the deductibility of charitable donations. Classification of the Skimmed Funds case is more problematic, since the facts in the hypothetical provide insufficient information as to the nature of D's mistake. His mistake may have been one of *fact* (i.e., he did not know that the corporation lacked "earnings and profits" at the time of his "skimming"), or one of *law* (i.e., he did not know that distributions from a corporation without "earnings and profits" were treated under the law as nontaxable returns of capital). Professor Hughes has suggested that under the orthodox approach, this type of case should be treated as one of legal impossibility (and thus the defendant should be acquitted) "unless the prosecution is able to show that the accused was acting under a mistake of fact which, if the facts had been as he supposed them to be, would constitute mens rea for the completed crime." Hughes, *supra* note 125, at 1022.

actly the same dangers as in the Unreported Gift case. For these reasons, conviction should not be permitted in these two cases.

However, these concerns do not apply to either the Fictitious Dependent case (case 2) or the Hotel Baroness case (case 3). Unlike the Unreported Gift case and the Unrecognized Picasso case, the defendants in these cases engaged in objectively wrongful behavior. The actus reus of the crime in this type of case, claiming a deduction one is not entitled to, or omitting taxable income, is exactly the same as in the ordinary income tax evasion case. Therefore, allowing conviction in this type of case would not significantly enlarge the prosecutor's discretion; he would still be restricted to prosecuting those cases where the actus reus was of the same nature as any other income tax evasion case. And since the prosecution would attempt to prove objectively guilty behavior, as well as the requisite mens rea, there would not be an excessive focus on the defendant's beliefs and motives and the consequent overreliance upon forms of evidence generally believed to be unreliable.

As discussed earlier, the purposes of the criminal tax law argue strongly for permitting conviction in this type of case.²⁰⁸ Section 7201, the income tax evasion statute, constitutes the "capstone" of the criminal tax system and represents the harshest moral condemnation found in the tax law. Acquitting a person who intentionally set out to defraud the government of his tax merely because of an unrelated and unknown offset offends the moral indignation reflected in the statute. In addition, it would result in people who were equally culpable receiving unequal treatment. Moreover, by creating the impression that conviction for income tax evasion can be avoided by "technicalities," it would subtly undermine the deterrent effect of the criminal tax law. For these reasons, the defendants in both the Fictitious Dependant and Hotel Baroness cases should be convicted.

In the Ten-Percenter hypothetical (case 6) the defendant falsely reported another's winnings as his own in order to enable the true winner to evade income tax liability. In *United States v. Petti*, the case on which this hypothetical was based, the "ten percenter" was acquitted of attempted income tax evasion because there was no proof that the true winner had a tax deficiency.²⁰⁹ Under the com-

²⁰⁸ See discussion *supra* part V.B.

²⁰⁹ 448 F.2d 1257 (3d Cir. 1971).

mon law defense of impossibility this case could not be characterized as a form of legal impossibility because the scheme, had it not been interrupted, would have actually resulted in a crime, namely, income tax evasion. No essential element of the definition of the substantive crime is missing; this is simply a case of a frustrated attempt. The only legal issue therefore, is whether the defendant's actions have gone beyond "mere preparation."²¹⁰ In the hypothetical, the defendant's actions had clearly gone beyond mere preparation; indeed, he had completed all the intended acts.²¹¹

Moreover, there is no policy reason why the defendant in the Ten-Percenter hypothetical should not be convicted. Since the ten-percenter engaged in objectively guilty behavior, the dangers of convicting on belief alone do not exist. The ten-percenter should be convicted of attempted income tax evasion.

D. A Proposed Revision of the No-Tax-Due Defense

The following represents an attempt to synthesize and encapsulate the principles developed in the foregoing discussion:

No defendant shall be convicted of attempted income tax evasion under section 7201 where there is no tax deficiency, unless he either:

(a) Claims or attempts to claim (or enables or attempts to enable another to claim) a deduction or a credit²¹² that is not properly

²¹⁰ For a discussion of the distinction in the case law between "preparation" and "attempt," see Model Penal Code § 5.01 commentary at 321-29 (Proposed Official Draft 1962); Lafave & Scott, *supra* note 119, §6.2(d).

²¹¹ See Model Penal Code § 5.01 commentary at 321 (Proposed Official Draft 1962) ("[T]here is general agreement that when the actor has done all that he believes to be necessary to commit the offense in question, he has committed an attempt."). Support for convicting the ten-percenter, based upon analogy to the common law of attempt, may also be found in the doctrine that "involuntary abandonment" of an attempt (e.g., where the defendant abandons the attempt because he believes the police have discovered his plans) is not a defense. See Lafave & Scott, *supra* note 119, § 6.3, at 520. In the Ten-Percenter case, no tax evasion occurred because the true winner "involuntarily abandoned" his plan, that is, he accurately reported his winnings because he realized the authorities knew he was the true winner.

²¹² A "deduction" is subtracted from "gross income" to determine "taxable income." I.R.C. § 63(a). The taxpayer's tax liability is computed on his taxable income. I.R.C. § 1. "Credits" are subtracted directly from the taxpayer's computed tax liability in determining the amount the taxpayer owes the government. Examples of "credits" include the credit for dependent care expenses (I.R.C. § 21), the foreign tax credit (I.R.C. § 27), and the general business credit (I.R.C. § 38).

allowable; or

(b) Omits or attempts to omit (or enables or attempts to enable another to omit) an item of income that is properly reportable.

Under this formulation, the defendants in the Unreported Gift case, the Skimmed Funds case and the Unrecognized Picasso case would be acquitted because in none of these cases had reportable income been omitted or an improper deduction claimed. However, convictions would be permitted in both the Fictitious Dependent case, because an improper deduction had been claimed, and the Hotel Baroness case, because reportable income had been omitted. The fact that the resulting tax deficiency had been eliminated by an unrelated deduction or credit would not be a defense. Finally, conviction would be permitted in the Ten-Percenter case, since the defendant attempted to enable another to omit income that was properly reportable.

VI. ISSUES RAISED BY THE REVISED NO-TAX-DUE DEFENSE

A. *Proper Placement Within the Criminal Tax Law Scheme*

In many, possibly most, of the cases where the revised No-Tax-Due defense would alter existing law to permit conviction for attempted income tax evasion under section 7201, the defendant could also be convicted of the lesser, and more leniently treated, felony of filing a false return or statement under section 7206(1). For example, in the Hotel Baroness case, the defendant would be guilty under section 7206(1) of fraudulently filing a false return, whether or not she was guilty under section 7201, since she willfully filed a false return that omitted a material item of income.²¹³

²¹³ Likewise, the taxpayer in the Fictitious Dependent case would have been guilty of violating § 7206(1), since he filed a false tax return claiming an exemption for a nonexistent dependent.

In the Ten-Percenter case, the ten-percenter had nothing to do with the filing of the true winner's tax return, but he did provide false information to the racetrack, which it needed to prepare Treasury Department Form 1099, an information "return" that the racetrack is required to file with the Service pursuant to I.R.C. § 6041(a). In *United States v. Cohen*, 617 F.2d 56 (4th Cir. 1980), the court found a ten-percenter who had filled in a Form 1099 falsely listing himself as the winner guilty of violating § 7206(2), that is, of assisting in the preparation of a false return (i.e., the Form 1099).

However, consider the following variation of the Hotel Baroness case: E, an employee of D, causes the preparation of an invoice falsely showing work performed at her palatial home (i.e., installation of a swimming pool) as having been performed for one of her hotel corpora-

Since conviction may occur in any case, albeit under a different section, we must consider whether this type of case is more appropriately punishable under section 7201, imposing a maximum sentence of five years, or section 7206(1), imposing a maximum sentence of three years.²¹⁴

Under section 7206(1), the only burden on the government is to prove that the defendant willfully filed a return or statement that he believed to be materially false; neither intent to defraud nor a tax deficiency is a necessary element of this crime.²¹⁵ Relatively innocent behavior can therefore be caught by this offense. For example, in *United States v. Greenberg*,²¹⁶ the taxpayer reported part of his income as having been earned by his wife on their joint return so she could obtain credit.²¹⁷ The Court of Appeals for the Second Circuit affirmed his conviction, even though there was no finding that he intended to defraud the government of any tax and the amount of the tax deficiency was de minimis (\$48).²¹⁸ The justification for this seemingly harsh result was that any willfully false statement, regardless of the taxpayer's motivation for making it, could impede the Service in carrying out its mission of verifying the accuracy of tax returns.²¹⁹

Contrast this with the type of case where the revised No-Tax-Due defense would permit conviction: the hotel owner who, intending to cheat the government of taxes, deliberately fails to report income; the taxpayer who, with intent to defraud the government, deliberately claims an exemption for a nonexistent dependent. The mens rea in these cases is substantially more egregious than that proscribed by section 7206; it is in fact the mens rea called for by section 7201. It therefore deserves to be punished by the tax crime which embodies the harshest moral condemnation

tions. In the hypothetical, D's unclaimed depreciation deductions offset her unreported income so there was no tax deficiency. E could not be convicted under § 7201 since there was no tax deficiency, *United States v. Petti*, 448 F.2d 1257 (3d Cir. 1971), and since E had nothing to do with the filing of any return with the I.R. Service, it is arguable that E cannot be convicted under § 7206(1) or § 7206(2).

²¹⁴ I.R.C. §§ 7201, 7206(1).

²¹⁵ E.g., *United States v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978).

²¹⁶ 735 F.2d. 29 (2d Cir. 1984).

²¹⁷ *Id.* at 30.

²¹⁸ *Id.*

²¹⁹ *Id.* at 31-32.

of the tax law and imposes the maximum sanction, section 7201.²²⁰

B. Effect of the Revised No-Tax-Due Defense on the Use of Collateral Estoppel in Subsequent Civil Tax Cases

Adopting the revised No-Tax-Due defense would create a cleavage in the criminal and civil treatment of certain tax cases. For example, in the Hotel Baroness case, the revised No-Tax-Due defense would permit criminal conviction of the defendant, even though she had no civil tax liability since there was no overall tax deficiency.

After a successful criminal tax prosecution, the government fre-

²²⁰ I.R.C. § 7201. The United States Sentencing Guidelines apparently reduce, but do not eliminate, the significance of whether a defendant is convicted under § 7201 or § 7206 in a No-Tax-Due case. Under the guidelines, the length of a sentence under § 7201 is based on the greater of (a) "the total amount of tax that the taxpayer evaded or attempted to evade;" and (b) the amount of the "tax loss." U.S.S.G. §2T1.1 (Federal Sentencing Guideline Manual). Tax loss is defined, in the case of an individual, as "28 percent of the amount by which the greater of gross income and taxable income was understated." U.S.S.G. §2T1.3. In the case of a conviction under § 7206, length of sentence is based on the amount of "tax loss" (as defined above), and if there is no tax loss, sentence is imposed under the relatively lenient guideline that applies to an offense level of 6. *Id.*

Where there is no tax deficiency because the fraudulently omitted income is offset by an unclaimed deduction (as in the Hotel Baroness case), the sentencing guidelines make it irrelevant whether the defendant is convicted under § 7201 or § 7206. If convicted under § 7206, the guidelines deem there to be a tax loss (that is, 28 percent of the amount by which *gross income* was understated) even though there was no tax deficiency. Sentence would then be based on the amount of this "deemed" tax loss. This also seems to be the basis on which sentence would be imposed where the defendant is convicted under § 7201.

However, where there is no tax deficiency because the scheme to defraud the government was stopped (as in the Ten-Percenter case), it matters whether conviction is under § 7206 or § 7201. If the defendant is convicted under § 7206(2), he would be sentenced under the relatively lenient level 6 offense guideline, since there was no "tax loss." U.S.S.G. §2T1.4. If the defendant is convicted under § 7201 (as would occur under the revised No-Tax-Due Defense), the sentence would be based on the amount of tax the defendant "attempted to evade." Hence the sentence could be long if the amount of tax sought to be evaded were large.

It also makes a difference whether a defendant is convicted under § 7201 or § 7206 in a case where the defendant fraudulently claims an improper deduction, but there is no deficiency because there exists an equally large legitimate but unclaimed deduction (as in the Fictitious Exemption case). If convicted under § 7206, the defendant would be sentenced under the relatively lenient level 6 offense guideline. This is because there is seemingly no "tax loss" within the meaning of the sentencing guidelines, as neither gross income nor taxable income was understated. However, if the defendant is convicted under §7201 (as would occur under the revised No-Tax-Due defense), his sentence would be based on the amount of tax he "attempted to evade," and the sentence could be substantial if the improperly claimed deduction were large.

quently brings civil suit against the defendant for his unpaid taxes and the imposition of a fraud penalty, and asserts that the taxpayer is collaterally estopped by his prior conviction. Concern has been expressed that if the elements for criminal conviction and for civil liability are not identical, the government will be deprived of collateral estoppel as an enforcement tool.²²¹ This concern appears ill-founded.

First, the effect of the collateral estoppel doctrine under current law is not as sweeping and all-encompassing as the above concern suggests. Under the doctrine, there is estoppel only as to those issues which are actually litigated and necessarily determined in the first litigation.²²² Therefore, although a conviction under section 7201 estops the taxpayer under current law from denying that there was an underpayment of tax, it does not estop him from contesting the amount of the underpayment.²²³ This result follows since the government in a tax evasion case need not prove the specific amount of the underpayment, but only that an underpayment exists.²²⁴ Moreover, it is impossible to tell from a general jury verdict of "guilty" what portions of the government's case on the underpayment it accepted and what portions it rejected, and therefore impossible to determine how much of an underpayment the jury found.

Adoption of the revised No-Tax-Due defense would therefore only marginally limit the utility of collateral estoppel to the gov-

²²¹ Ira L. Tilzer, *May IRS Ignore Character of Diverted Funds in Criminal Cases?*, 46 J. Tax'n 308, 310 (1977) ("The distinction drawn by the Ninth Circuit [between criminal and civil tax cases] may also tend to undermine the doctrine of collateral estoppel.").

²²² *Montana v. United States*, 440 U.S. 147, 153 (1979); *Kotmair v. Commissioner*, 86 T.C. 1253, 1262-63 (1986) (stating and applying rule in an income tax context); Restatement (Second) Of Judgements § 27 (1982).

²²³ See Note, *Collateral Estoppel in Civil Tax Fraud Cases Subsequent to Criminal Conviction*, 64 Mich. L. Rev. 317, 332 (1965) ("While *some* deficiency must be proved to establish a willful evasion under section 7201, the exact amount need not. Therefore, . . . the exact deficiency . . . is still subject to litigation."); *Considine v. Commissioner*, 68 T.C. 52 (1977) (taxpayer, who was convicted in prior criminal case under § 7206(1) of filing a materially false tax return in that he omitted 1969 capital gain, was not estopped in subsequent civil case from contesting *amount* of omitted gain, since determination of exact amount of omission was not necessarily determined in criminal case); cf. *Moore v. United States*, 360 F.2d 353 (4th Cir. 1965), cert. den., 385 U.S. 1001 (1967) (government not collaterally estopped from redetermining taxpayer's tax liability in civil proceeding by taxpayer's prior conviction under section 7201, since determination of exact amount of taxpayer's tax underpayment was not essential to prior judgment).

²²⁴ *Id.*

ernment, if at all. It is true that under current law a taxpayer convicted under section 7201 is theoretically precluded in a subsequent civil proceeding from presenting evidence that would reduce his deficiency to zero, since his conviction conclusively established that some tax deficiency existed. If the revised No-Tax-Due defense were adopted, a convicted taxpayer would no longer automatically be precluded from contesting the existence of a deficiency since conviction would be possible in some cases where there was no deficiency. But since a taxpayer convicted under section 7201 is permitted even under current law to contest the size of the deficiency in a subsequent civil proceeding, this difference appears more theoretical than real. Furthermore, the taxpayer would bear the burden of proof on this issue in any subsequent civil case.²²⁵

Some circuits have placed an additional judicial gloss on section 7201, requiring not only that there be an underpayment of tax but also that such deficiency be "substantial."²²⁶ In these jurisdictions, a taxpayer who has been convicted under section 7201 is arguably estopped collaterally from presenting evidence in a subsequent civil proceeding showing that his deficiency was "insubstantial," the theory being that it was actually and necessarily determined in the criminal proceeding that his deficiency was "substantial." However, it appears unlikely that this rule places any significant restriction on the evidence the taxpayer can introduce in the civil proceeding. The test of what constitutes a "substantial" underpayment of tax is not reducible to an absolute amount or even a specific percentage of either the tax owed or the taxpayer's net or gross income. As the Second Circuit has stated, the test "is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration."²²⁷ In practice, it appears that no acquittal has ever been directed or any con-

²²⁵ *Lewis v. Reynolds*, 284 U.S. 281 (1932) (taxpayer bears burden of proof in refund actions). See also Tax Ct. R. 142(a) (same in Tax Court actions with limited exceptions).

²²⁶ E.g., *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986). See also Paul P. Lipton & Richard A. Petrie, *The Substantial Understatement Requirement in Criminal Tax Fraud Cases*, 19 Inst. on Fed. Tax'n 1175 (1961).

²²⁷ *United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), cert. den., 353 U.S. 912 (1957).

viction reversed because of the smallness of the tax deficiency.²²⁸ Instead, convictions involving very small deficiencies have been sustained by courts purporting to require a "substantial" underpayment.²²⁹ Given the amorphous nature of the "substantial" underpayment requirement, it appears unlikely that a court in a subsequent civil proceeding would place any meaningful restriction on the evidence the taxpayer could present on the size of his deficiency. Thus, adoption of the revised No-Tax-Due defense would not significantly reduce the usefulness of the collateral estoppel doctrine to the government, even in jurisdictions requiring a "substantial" underpayment as a prerequisite for conviction under section 7201.

The principal use of the collateral estoppel doctrine in cases where the taxpayer has been convicted under section 7201 relates to the imposition of the civil fraud penalty under section 6663. Under this section, the government may impose a penalty equal to 75 percent of any portion of an underpayment attributable to fraud.²³⁰ Unlike most issues in civil tax cases, the government bears the burden of proving fraud.²³¹ However, if the taxpayer has

²²⁸ Lipton & Petrie, *supra* note 226, at 1178 ("[T]here is no reported case granting an acquittal on the ground that the understatement was not substantial."); Henry G. Balter, *Tax Fraud And Evasion* ¶ 13.03[2] (5th ed. 1983). Balter states,

[s]ince there seems to be no accepted standard of what would be considered *not* a substantial deficiency in tax for the purpose of sustaining a motion for acquittal or to justify a reversal after conviction, it seems then that the substantiality *vel non* of the deficiency must remain a jury question under proper instructions

Id.

²²⁹ In *Janko v. United States*, 281 F.2d 156 (8th Cir. 1960), *rev'd* on other grounds, 366 U.S. 716 (1961), the court sustained the defendant's convictions for 1955 and 1956 even though the amount evaded for each of those years was only \$264, pointing out that "on a percentage basis the amount involved is large." *Id.* at 163. Since Janko had reported a tax of \$450 for 1955 and 1956, the amount evaded for those two years was about 37% of his correct tax liability. The Supreme Court ordered a new trial upon the government's confession of error. *Janko*, 366 U.S. 716 (1961). The error was not stated but it apparently did not relate to the size of the deficiency, since the Court ordered a new trial rather than dismissing the case.

In *United States v. O'Day*, 186 F. Supp. 572 (D. Del. 1960), the court refused to grant a post-trial motion for acquittal where the government only proved a tax liability of \$992.50. Since the taxpayers had reported a tax liability of \$218.00, the deficiency was only \$774.50. *Id.*

²³⁰ I.R.C. § 6663(a).

²³¹ I.R.C. § 6663(b); H.R. Rep. No. 247, 101st Cong., 1st Sess. 1392 ("The committee has not altered the present-law burden of proof imposed on the IRS in establishing the fraud initially; the IRS must continue to meet its burden of proof by clear and convincing

previously been convicted of income tax evasion, under section 7201, the taxpayer is collaterally estopped from contesting his fraud, since proof of a fraudulent intent to underpay taxes is a necessary element for conviction under section 7201.²³² This use of the collateral estoppel doctrine would be completely unaffected by adoption of the revised No-Tax-Due defense, since proof of a fraudulent intent to underpay one's taxes would still be a necessary element for conviction under section 7201.

Finally, whatever incremental burden adoption of the revised No-Tax-Due defense may place upon the government in civil tax cases seems justified. The criminal tax law is concerned with vindicating the moral outrage of the community and deterring the proscribed behavior. With respect to these issues, the intent of the defendant seems paramount. It is for this reason that the revised No-Tax-Due defense permits conviction where the defendant intended to defraud the government and took substantial steps toward that end, even though an unknown, offsetting deduction frustrated that intent. In contrast, the civil tax law is concerned with the government getting its due, no more, no less. Thus, the government should not be permitted to use the collateral estoppel doctrine to collect a tax deficiency where none exists.

C. The Distorting Effect of the Current No-Tax-Due Defense on the Development of Civil Tax Law Doctrine

A shortcoming of the present No-Tax-Due defense is the pressure it exerts on the courts to stretch and distort civil tax law doctrine to sustain a conviction. Consider the posture in which such cases typically come before the courts. Substantial evidence, possibly overwhelming evidence, has been presented to a jury showing that the defendant intended to defraud the government of tax revenue and took substantial steps toward that end. The taxpayer's lawyer asserts, however, that a conviction cannot stand because an unrelated deduction eliminates the tax deficiency. Subconsciously, the court recoils from the thought of the defendant being acquitted on the basis of a technicality and strains to disallow the deduction that purportedly offsets the unreported income. In this way,

evidence.").

²³² *Amos v. Commissioner*, 43 T.C. 50 (1964), *aff'd*, 360 F.2d 358 (4th Cir. 1965).

strained and unjustified constructions of the tax law come about, and rational development of the law is impeded.

One cannot conclusively demonstrate that this phenomenon occurs, but a review of the decisions suggests it does. In *Helmsley*,²³³ Mrs. Helmsley asserted that she owed no additional taxes for the prosecution years in part because personal property owned by her husband's partnerships had erroneously been classified as real property.²³⁴ This resulted in less depreciation being deducted on the personal property than the Helmsleys were entitled to under the applicable ACRS depreciation system.²³⁵ Had proper depreciation deductions been taken, Mrs. Helmsley asserted, there would have been no tax deficiencies, hence her conviction for income tax evasion could not stand.²³⁶ As part of its response to this claim, the Second Circuit asserted that the Helmsleys' improper classification of personal property as real property, even though erroneous, was in "effect . . . the selection of an accounting method for personal property, and it is axiomatic that a taxpayer may not change accounting methods without first obtaining the Commissioner's consent."²³⁷

In his dissent, Chief Judge Oakes replied that "the change of method requirements were specifically [made] inapplicable to ACRS under the Economic Recovery Tax Act of 1981"²³⁸ and, further, that a "correction of a classification of property is not a change in method of accounting" under the governing Treasury Regulations.²³⁹

The majority did not address either of these points.²⁴⁰ Perhaps

²³³ 941 F.2d 71 (2d Cir. 1991), cert. den., 112 S.Ct. 1162 (1992).

²³⁴ Id. at 83-85.

²³⁵ Id.

²³⁶ Id.

²³⁷ Id. at 87.

²³⁸ Id. at 106.

²³⁹ Id. The Treasury Regulation Chief Judge Oakes referred to, Treas. Reg. § 1.446-1(e)(2)(ii)(b), does not specifically state that a correction of a classification of property is not a change of an accounting method. It does state that "an adjustment in the useful life of a depreciable asset" is not a change in a method of accounting. This is the provision Chief Judge Oakes was apparently referring to, since reclassifying the property at issue in *Helmsley* from real to personal property would shorten the useful life of such property and result in larger depreciation deductions.

²⁴⁰ The failure of the majority to address the possible application of Treas. Reg. § 1.446-1(e)(2)(ii)(b) is also surprising because Mrs. Helmsley specifically relied upon that provision in her reply brief. Appellant's Reply Brief at 24, *Helmsley* (88-0219). The government at-

the underlying motivation of the majority is revealed in another part of the opinion where it wrote "if recalculation is denied to tax cheats who have selected valid depreciation periods, it must a fortiori be denied to tax cheats like Mrs. Helmsley who further enhanced tax benefits by selecting impermissible periods."²⁴¹

As a result of the court's decision in *Helmsley*, it now appears that an honest taxpayer who has mistakenly classified personal property as real property to his detriment will not be able to correct that mistake without the prior approval of the Commissioner.

It is obviously impossible to establish to what extent, if any, the majority's holding on the "change of accounting method" issue was influenced by its feeling that Mrs. Helmsley was a "tax cheat," and it is beyond the scope of this article to determine the substantive merits of the "change of accounting method" issue. What appears evident, however, is that a criminal tax case, with all the emotion it generates, is an inappropriate forum for the dispassionate determination of the extremely complex and technical issues raised by the tax law.²⁴² The revised No-Tax-Due defense, by eliminating the re-

tempted to dismiss the relevance of the regulation arguing that it "operates prospectively 'in the current and future years.' . . . Here, *Helmsley* attempts to change the useful life retroactively." Respondent's Brief at 53-54, *Helmsley* (88-0219) (citation and footnote omitted). The government's argument appears weak. Mrs. Helmsley was seeking prospective relief with respect to the years under consideration (i.e., the prosecution years); she did not seek adjustment of the useful lives with respect to the pre-prosecution years.

²⁴¹ *Helmsley*, 941 F.2d at 87.

²⁴² See also *Willingham v. United States*, 289 F.2d 283 (5th Cir.), cert. den., 368 U.S. 828 (1961). In *Willingham*, the sole shareholder of a corporation was convicted of evading the taxes of the corporation by setting up fictitious expenses on the books of the company. On appeal, he claimed the corporation owed no taxes for the prosecution years because the corporation was entitled to carry forward net operating losses it had incurred prior to its reorganization in bankruptcy. The court rejected this claim on the ground that the corporation was no longer the same entity that had incurred the losses since there had been a complete change in ownership and a new corporate structure, the prior shareholders' interests having been wiped out in the bankruptcy proceeding. However, the corporation operated under the same corporate charter as it did before bankruptcy and also carried on the same business. *Id.* at 285-287. Theretofore, the courts had denied net operating loss carryforwards only where the corporation was operating under a different charter or carrying on a different business than the one that incurred the losses. Thus, the decision represented a substantial expansion of the preexisting law.

The decision was described by one commentator as a "surprising victory for the Government," Robert A. Krantz, Jr., *Loss Carryovers in Chapter X Reorganizations*, 16 *Tax L. Rev.* 359, 412 (1961), and criticized by others as "fatally oversimplif[ying] a most complex situation." David R. Tillinghast and Stephen D. Gardner, *Acquisitive Reorganizations and Chapters X and XI of the Bankruptcy Act*, 26 *Tax L. Rev.* 663, 714 (1971). Again, it is impossible to determine whether the court's decision was influenced by the fact that the

quirement of a tax deficiency in most instances, would reduce the number of occasions when Courts will be called upon to resolve such technical issues in the context of a criminal tax case.

D. The Choice Between Judicial and Legislative Reform

May the revised No-Tax-Due defense advocated in this article be implemented by a new judicial construction of section 7201, or is new legislation required?

No sound reason exists why the revised No-Tax-Due defense should not be applied by the courts prospectively. The fact that most statements of the existing formulation, including those made by the Supreme Court, are dicta;²⁴³ the lack of any reasoned analysis in the cases that have applied the defense;²⁴⁴ the lack of support for the existing formulation in either the language of the statute or its legislative history;²⁴⁵ and the powerful reasons for reforming the existing defense²⁴⁶ all require that the principle of stare decisis yield to a prospective application of the revised No-Tax-Due defense.²⁴⁷

Undoubtedly, the preferred course of action would be legislative reform. This would allow a thorough reconsideration of the defense and would facilitate a clean, decisive, and comprehensive revision of the defense. In contrast, any judicial revision of the defense is likely to be halting, drawn out, and piecemeal given the case-by-case nature of the case law process. Nonetheless, one must recognize that it is unlikely that Congress will turn its attention to this relatively arcane aspect of the criminal tax law. More to the point, it was the judiciary that created the present No-Tax-Due defense; it is the judiciary's responsibility to correct its past mistakes.

defendant had attempted to practice tax fraud. But clearly, a criminal tax proceeding is not the appropriate forum to decide these technical and complex questions.

²⁴³ See discussion *supra* part III.C.

²⁴⁴ See discussion *supra* part III.C.

²⁴⁵ See discussion *supra* part III.A-B.

²⁴⁶ See discussion *supra* part V.B.

²⁴⁷ In *James v. United States*, 366 U.S. 213 (1961), the Supreme Court overruled its holding in *Commissioner v. Wilcox*, 327 U.S. 404 (1946), that embezzled funds were not taxable income but did not apply the overruling retroactively in criminal tax fraud cases. Subsequent cases made it clear that *James* would be applied *prospectively* in criminal cases. E.g., *Nordstrom v. United States*, 360 F.2d 734 (8th Cir.), cert. den., 385 U.S. 826 (1966) (taxpayer subject to criminal prosecution where he omitted embezzled funds from return filed after *James* although embezzlement occurred before *James*).

Retroactive application of the No-Tax-Due defense is more problematic. The Supreme Court has held that a new or surprising judicial construction of a criminal statute, that has the effect of classifying past conduct as criminal which was not punishable under the then prevailing interpretation of the statute at the time it occurred, may not be applied retroactively.²⁴⁸ The Court held that such a retroactive application of the statute violates the defendant's due process right to have fair notice of those actions which will subject him to criminal penalties.²⁴⁹

It is unclear whether this principle would preclude retroactive application of the revised No-Tax-Due defense. The Supreme Court's concern with retroactive application of a new construction is the lack of warning to the defendant. In most of the cases where the revised No-Tax-Due defense would alter the existing law by permitting conviction, the defendants would be hard pressed to make a tenable claim of justified reliance upon the existing form of the defense. For example, in the Fictitious Dependent case, the defendant could be convicted under the revised No-Tax-Due case only if the government proved beyond a reasonable doubt that the defendant, with intent to cheat the government out of tax revenue, willfully took a deduction not permitted under the law. The requirements under the revised No-Tax-Due defense that the government prove that the defendant willfully took the deduction in question, that the deduction was not permitted under existing law, and that the defendant took the deduction with intent to underpay his taxes will generally assure that the defendant had fair warning that his conduct would subject him to criminal penalties. Moreover, the defendant is usually unaware of the facts that would exonerate him under the existing form of the No-Tax-Due defense; that is, he is usually unaware of the offsetting deduction that eliminates the tax deficiency resulting from his wrongful deduction or his wrongful omission of income. For example, the taxpayer in the Fictitious Dependent case was unaware that the loss he treated as a capital loss qualified as a deductible ordinary loss, and that the resulting deduction would wipe out the deficiency resulting from his wrongful claiming of an exemption for a fictitious dependent.

²⁴⁸ *Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

²⁴⁹ *Marks*, 430 U.S. at 191-92.

Consequently, the defendant would normally be unable to claim he relied on the existing form of the defense.

This, however, may not always be true. For example, the court of appeals suggested in *Helmsley* that the Helmsleys misclassified personal property as real property not out of ignorance but out of shrewd, calculated self-interest.²⁵⁰ In such cases, the defendant may be able to make a claim, albeit tenuous, of reliance upon the existing formulation of the defense. The defendant could claim that he believed he was immune from a charge of income tax evasion for the year in which he claimed his wrongful deduction, or omitted his income, because he relied on his ability to offset the resulting deficiency by the previously unclaimed depreciation deductions he knew he was entitled to.

This problem of retroactivity could possibly be solved by limiting retroactive application of the revised defense only where the government proves that the defendant was unaware of the offsetting deduction. Drawing this type of distinction, however, seems both unworkable and inequitable. Requiring the government to prove, and the jury to decide, that the defendant was unaware of the offsetting deductions in order to convict will further muddle the already confusing and complex task of trying income tax evasion cases. Moreover, the distinction seems to cut in the wrong direction. A very cunning and deceitful tax cheat who knows of an offsetting deduction and keeps it in reserve as a defense escapes conviction, while the less cunning and sophisticated tax cheat gets convicted. Concern about even-handed treatment, as well as practical concerns about the administration of justice, dictate that the revised No-Tax-Due defense not be applied retroactively.

VII. CONCLUSION

The existing form of the No-Tax-Due defense requires that a defendant be acquitted of attempted income tax evasion even though he intended to cheat the government of tax and took substantial steps toward that end where unrelated and unclaimed deductions eliminate the tax deficiency resulting from his wrongful acts. This defense is subversive of our sense of justice: defendants who are

²⁵⁰ *United States v. Helmsley*, 941 F.2d 71, 86 (2d Cir. 1991), cert. den., 112 S.Ct. 1162 (1992).

equally culpable are treated differently depending on the fortuitous circumstance that one had unknown offsetting deductions while the other did not. The defense also undermines the deterrent effect by creating the impression that the law is riddled with technical defenses that can relieve a guilty person of his just deserts.

Nevertheless, the modern learning on the impossibility defense in the law of attempt teaches that there are significant dangers to allowing persons to be convicted solely on the basis of their beliefs and intent without regard to their acts. These dangers include vastly enhanced prosecutorial discretion and the resulting increased risk of discriminatory prosecutions against unpopular individuals and groups, and the danger of excessive reliance on suspect evidence: a person's associates, his past criminal record, accomplice evidence, his reputation in the community, etc. The history of the income tax law teaches that the danger of discriminatory prosecution against unpopular persons and groups and political enemies is a real and not a fancied concern.

To balance these competing concerns, this Article proposes to revise the No-Tax-Due defense to permit conviction where the defendant either willfully claimed, or attempted to claim, an improper deduction or credit, or willfully omitted, or attempted to omit, income that was properly reportable. By requiring that the defendant commit some objectively guilty act, that is, that he claimed, or attempted to claim, an improper deduction or credit, or that he omitted, or attempted to omit, income that was properly reportable, the dangers that would result from permitting a defendant to be convicted solely on the basis of intent can be avoided. At the same time, curtailing the No-Tax-Due defense in the manner proposed would permit convictions in most, probably all, of the cases where it is currently employed, and thus eliminate the capricious operation of the defense, which is subversive of our sense of justice.

Ideally, the current No-Tax-Due defense should be reformed legislatively. Nevertheless, the courts should not hesitate to correct prospectively the errors of the current No-Tax-Due doctrine that they engrafted onto the law.