

A CONFUSION OF CRIME AND SEMANTICS

United States v. Fahey, ___ F.2d ___ (9th Cir. 1969)

Defendant failed to file income tax returns for three years and was charged with the wilful failure to file those returns in violation of 26 U.S.C. § 7203.¹ He alleged the omissions were not wilful, but a product of his emotional and psychological disturbances. The trial court convicted defendant, finding as a matter of fact that his omissions were "voluntary, deliberate, intentional, and purposeful, and done with a bad purpose."² On appeal, defendant argued that a wilful state of mind cannot be established without proof of an intent to defraud the government.³ HELD: Affirmed. A wilful failure to file income tax returns⁴ is established by voluntary, deliberate, intentional, and purposeful conduct, done with a bad purpose; an intent to defraud the government is not necessary.⁵

The court of appeals states that there is a difference between the meaning of "wilfully" in the felony statute, which requires an intent to defraud the government, and "wilfully" in the misdemeanor statute.⁶ For the purpose of Section 7203, the misdemeanor statute, "wilfully" means only "with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act."⁷ It is necessary that the omission—failure to file a return—be accompanied by a conscious desire to escape the payment of taxes as the felony statute requires.⁸ The trial court found, as a

1. INT. REV. CODE of 1954, § 7203 provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . who *wilfully* fails to pay such estimated tax or tax, make such return, . . . at the time or times required by law or regulations, shall, . . . be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(Emphasis added.)

2. *United States v. Fahey*, ___ F. Supp. ___, ___ (N.D. Cal. 19___).

3. *United States v. Fahey*, ___ F.2d ___ (9th Cir. 1969).

4. INT. REV. CODE of 1954, § 7203.

5. *United States v. Fahey*, ___ F.2d ___ (9th Cir. 1969).

6. *Id.* at ___, *cf. Spies v. United States*, 317 U.S. 492, 497-99 (1943).

7. *United States v. Fahey*, ___ F.2d ___ (9th Cir. 1969); *Martin v. United States*, 317 F.2d 753, 754 (9th Cir. 1963); *Abdul v. United States*, 254 F.2d 292, 294 (9th Cir. 1958); *cf. Eustis v. United States*, 409 F.2d 228 (9th Cir. 1969); *Edwards v. United States*, 375 F.2d 862 (9th Cir. 1967).

8. *Sansone v. United States*, 380 U.S. 343 (1965); *Spies v. United States*, 317 U.S. 492 (1943).

matter of fact, that defendant's failure to file the returns was "voluntary, deliberate, intentional and purposeful . . . , with bad purpose in that by his particular knowledge, . . . (of the statutory requirement to file, he) . . . was aware that there were no reasonable or justifiable grounds for failure to timely file such tax returns."⁹ Therefore, the defendant's state of mind was sufficient to support a conviction for violation of Section 7203.

The court's reaffirmation of its instructions defining "wilfully" perpetuates a conflict existing between the circuits over the language used to define the state of mind required for a violation of Section 7203.¹⁰ The precise conflict centers on the use of *capriciously or with careless disregard whether one has the right so to act* in the definition of "wilfully." This language was rejected by the Fifth and Third Circuits as an inadequate description of the mens rea required for the violation of Section 7203.¹¹ Despite these rejections, the Ninth Circuit continues to use this language in its instruction on "wilfully" for this section.¹²

No court has held that negligent or inadvertent¹³ violation of Section 7203 suffices for a conviction.¹⁴ Neither the failure to file a

9. *United States v. Fahey*, ____ F.2d ____, ____ (9th Cir. 1969), *affirming* ____ F. Supp. ____, ____ (N.D. Cal. 19____).

10. Compare *Martin v. United States*, 317 F.2d 753, 754 (9th Cir. 1963); *Abdul v. United States*, 254 F.2d 292, 294 (9th Cir. 1958), with *United States v. Vitiello*, 363 F.2d 240, 247 (3d Cir. 1966), and *Haner v. United States*, 315 F.2d 792, 794 (5th Cir. 1963). Cf. *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956).

11. See *United States v. Vitiello*, 363 F.2d 240, 247 (3d Cir. 1966); *Haner v. United States*, 315 F.2d 792, 794 (5th Cir. 1963).

12. *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963); see *United States v. Fahey*, ____ F.2d ____ (9th Cir. 1969).

13. "Negligent" and "inadvertent" are used here to connote a lack of awareness or knowledge by a defendant of his duty to file a return or to pay a tax. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 114-17 (2d ed. 1960); G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* § 36 (2d ed. 1961).

14. See *United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Fahey*, ____ F.2d ____ (9th Cir. 1969); *United States v. Johnson*, 386 F.2d 630, 632 (3d Cir. 1967); *Edwards v. United States*, 375 F.2d 862, 864 (9th Cir. 1967); *United States v. Ostendorff*, 371 F.2d 729, 731 (4th Cir. 1967), *cert. denied*, 386 U.S. 982 (1968); *United States v. Vitiello*, 363 F.2d 240 (3d Cir. 1966); *United States v. Schipani*, 362 F.2d 825, 831 (2d Cir.) (*dicta*), *cert. denied*, 385 U.S. 934 (1966); *United States v. Marquez*, 332 F.2d 162 (2d Cir. 1964), *cert. denied*, 379 U.S. 890 (1965); *Edwards v. United States*, 321 F.2d 324, 325 (5th Cir. 1963), *rev'd on rehearing*, 334 F.2d 360, 364 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); *Haner v. United States*, 315 F.2d 792, 794 (5th Cir. 1963); *United States v. Palermo*, 259 F.2d 872 (3d Cir. 1958); *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956); *United States v. Thompson*, 230 F. Supp. 530, 532 (D. Conn.), *aff'd per curiam*, 338 F.2d 997 (2d Cir. 1964); *United States v. Di Silvestro*, 147 F. Supp. 300, 303-04

return nor the nonpayment of taxes proscribed by that section are criminal unless the taxpayer has knowledge of both his legal obligation and that his acts might result in noncompliance.¹⁵ The disagreement between the circuits, then, is narrowed to whether, if "wilfully" is defined to a jury of laymen in terms of "capriciously or with a careless disregard whether one has the right so to act" in addition to "with bad purpose or without grounds for believing that one's act is lawful or without reasonable cause for believing . . . whether one has the right so to act,"¹⁶ the jury might convict a defendant for inadvertent or negligent violation of the statute.

The Fifth Circuit's rejection of the language is based on this possibility.¹⁷ It treats "careless" and "inadvertent" as synonyms and holds that neither term adequately defines the meaning of "wilfully" as used in the statute. The Fifth Circuit does not consider the use of "capriciously" because the word was not before it as part of the contested instructions.¹⁸

The Third Circuit rejects all but the "bad purpose" language in the Ninth Circuit's instructions. The Third Circuit defines "wilfully" in terms of "evil motive." While the court does not further define "evil motive," it rejects knowing or intentional failure to file a return or pay a tax as sufficient, when standing alone, to establish the mens rea required by Section 7203.¹⁹ The words "evil motive" or "bad purpose" provide little help in understanding the meaning of "wilfully," but the court's rejection of "knowing or intentional" conduct as insufficient indicates that "wilfully" requires at least conscious or advertent noncompliance with a statutory duty.

The Third Circuit's suggested instructions for defining "wilfully" juxtaposes its requirement of "evil motive" to the concept of gross negligence to demonstrate the point of differentiation between that mental element which is sufficient for conviction under Section 7203, and that which is not.²⁰ Gross negligence is an inadvertent state of

(E.D. Pa. 1957), *cf.* *Spies v. United States*, 317 U.S. 492, 497-99 (1943). *But see* *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963) (the holding in this case is unclear from the opinion, in that the judge hypothesizes the facts to arrive at his result).

15 See note 12, *supra*, and authorities cited therein.

16 *Martin v. United States*, 317 F.2d 753, 754 (9th Cir. 1963).

17 *Haner v. United States*, 315 F.2d 792, 794 (5th Cir. 1963).

18 *United States v. Vitiello*, 363 F.2d 240 (3d Cir. 1966); *United States v. Palermo*, 259 F.2d 872 (3d Cir. 1958).

19 *United States v. Palermo*, 259 F.2d 872, 881 (3d Cir. 1958).

20 *United States v. Vitiello*, 363 F.2d 240, 242 (3d Cir. 1966); *United States v. Palermo*, 259 F.2d 872, 882 (3d Cir. 1958).

mind.²¹ Because of this juxtaposition, it can be assumed that the Third Circuit, as well as the Fifth Circuit, is concerned with the danger of conviction for inadvertent—negligent—violation. For this reason, the Third Circuit rejects the Ninth Circuit's instruction.

The Ninth Circuit's language is dealt with by dissenting opinions in the Third and Fifth Circuits.²² The Fifth Circuit dissent deals only with the language "careless disregard whether one has the right so to act."²³ The dissent's argument is that taking the instruction as a whole, the addition of the challenged language does not create a danger of conviction for negligent or inadvertent violation. The unmodified word "disregard" means "the conscious, deliberate flouting of the law."²⁴ This requires knowledge of the law's requirements. Modifying "disregard" with "careless" does not remove the element of consciousness in "disregard" but simply introduces an element of indifference or brash irresponsibility.²⁵

The dissent in the Third Circuit argues that the language "careless disregard whether one has the right so to act"²⁶ is lifted from the Supreme Court's list of definitions for "wilfully" in *Murdock v. United States*.²⁷ The Supreme Court does not use it as a synonym for negligence and for that reason its use by the district court is correct. The judge rejected "capriciously" for its complete lack of meaning.²⁸

Together, the majority and dissenting opinions for the Third and Fifth Circuits indicate that there is ground for dispute over the use of "careless disregard whether one has the right so to act" apart from the instructions defining "wilfully" in Section 7203. The word "capriciously," as observed by the dissent in the Third Circuit, lacks concrete meaning and should be rejected.²⁹

How to articulate the state of mind necessary for conviction under Section 7203 is purely a semantic question. Courts are often as perplexed over which language to use in an instruction defining "wilfully" as they are over the meaning of the word in its statutory

21. G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART §§ 36-38 (2d ed. 1961).

22. *United States v. Vitiello*, 363 F.2d 240, 245 (3d Cir. 1966); *Haner v. United States*, 315 F.2d 792, 795 (5th Cir. 1963).

23. *Haner v. United States*, 315 F.2d 792, 795 (5th Cir. 1963).

24. *Id.*

25. *Id.*

26. *United States v. Vitiello*, 363 F.2d 240, 245 (3d Cir. 1966).

27. 290 U.S. 389, 396 (1933).

28. *United States v. Vitiello*, 363 F.2d 240, 249 (3d Cir. 1966).

29. *Id.*

context.³⁰ When the words used to define that mental element are so ambiguous as to precipitate disagreement between circuits, what guarantee is there that a jury will grasp the correct meaning and apply the proper standard to determine whether a defendant's state of mind justifies conviction? The answer is not to be found in precise definitions of words by appellate courts as attempted by the Third and Fifth Circuits.³¹ Neither is it to be found in the assumption that once the Supreme Court uses such language it must be correct, as the dissenter in the Third Circuit contends.³² In both situations, the jury must necessarily struggle with the same definitional problems illustrated by the division among the circuits. The resolution is properly the function of the legislature and the courts but not the jury.

The legislature can use specific terms describing the requisite mens rea as the Model Penal Code suggests.³³ Failing this, the courts are forced to develop a standard definition of an originally ambiguous term. Since all circuits will not resolve the ambiguity identically, conflict and confusion is inevitable. It is submitted, however, that when the resolution for the ambiguity might produce criminal liability where a crime is not in fact committed, it should not be considered as an alternative. Therefore, the weakness inherent in the language "with careless disregard whether one has the right so to act" should preclude its use for purposes of defining "wilfully" in Section 7203.

30. See, e.g., *State v. Foran*, 255 Mo. 213, 164 S.W. 215 (1914); Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 Wis. L. REV. 644, 665-66.

31. See *United States v. Vitiello*, 363 F.2d 240 (3d Cir. 1966); *Haner v. United States*, 315 F.2d 792 (5th Cir. 1963); *United States v. Palermo*, 259 F.2d 872 (3d Cir. 1958).

32. *United States v. Vitiello*, 363 F.2d 240, 246 (3d Cir. 1966).

33. MODEL PENAL CODE §§ 2.01-.02 (1962).

