CRIMINAL CULPABILITY'S WILD MENS REA: USE AND MISUSE OF "WILLFUL" IN THE LAWS OF NEW YORK

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INTRODUCTION: A BRIEF HISTORY OF WILLFUL

Liability under criminal statutes prefers a culpable mental state.[1] The Latin phrase *actus non facit reum nisi mens sit rea*, translated as "[t]he act does not make the person guilty unless that person's mind is guilty," illustrates the classic principle that some degree of guilty knowledge—or *mens rea*—is required to impose criminal penalties.[2] Willful, one such *mens rea*,[3] is perhaps the most conflated, confusing, and confounding of all criminal mental states. Willful is also often spelled as *wilful*, *willfull* or even *willfull* in various statutory texts.[4] As Justice Jackson wrote in *Spies v. United States*, willful "is a word of many meanings, its construction often being influenced by its context."[5] In American criminal law generally, *willful* is the legal lizard of *mens rea*, a chameleon-like term that defies a single, constant definition in New York or any other jurisdiction, and is thus a "wild" term.[6]

When a statutory term has two different meanings, judicial interpretation turns on the intention of lawmakers, which is paramount.[7] Absent legislative guidance, courts consider context, purpose, and spirit of the enactment and even dictionary definitions, giving force to particular words of a statute.[8] In criminal statutes, *willful* is a moving target that defies a basic, long-established constitutional principle of explicitness.[9]

The history of *willful* is traced back to the English common law.[10] In 1649, King Charles I of England was executed for launching wars and taxing without authorization from

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[1] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 5.1(a)(1) (4th ed. 2003).

[2] *See* HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS CIVIL AND CRIMINAL § 17.01 (4th ed. 1992). In addition to *mens rea*, criminal acts also require an *actus reus*. *See also* LAFAVE, *supra* note 1, § 5.1(a).

[3] Terms used as *mens rea*, e.g., *willful or willfully*, are italicized for clarity throughout this note, unless part of a quotation.

[4] *See* Michael Louis Minns, *A Brief History of Willfulness as it Applies to the Body of American Criminal Tax Law*, 49 S. TEX. L. REV. 395, 403 n.65 (2007) (citing United States v. Aitken, 755 F.2d 188, 189–93 (1st Cir. 1985); United States v. Murdock, 290 U.S. 389, 393–95 (1933)).

[5] Spies v. United States, 317 U.S. 492, 497 (1943).

[6] *See* United States v. Ladish Malting Co., 135 F.3d 484, 487–88 (7th Cir. 1998) (stating that *willfully* is a notoriously slippery term).

[7] N.Y. STAT. LAW §§ 92, 230, 235 (McKinney 1971).

[8] *Id.* §§ 234, 235.

[9] *See* United States v. Brewer, 139 U.S. 278, 288 (1891).

[10] Minns, *supra* note 4, at 396, 400.

Parliament.[11] When Charles II, the son of Charles I, was restored to the throne in 1658, John Cooke, the lawyer who tried Charles I, was charged, perhaps out of vengeance, with the "*willful* and *knowing*" crime of regicide.[12] Three hundred and fifty years later, *willful* persists in federal and state statutes:

- *Willful* may or may not require an evil intent by an actor.[13]
- *Willful* may mean that an actor simply intended to commit an act and voluntarily did so, a hybrid element composed of both simple, intentional *mens rea* and *actus reus*, i.e., a guilty act.[14]
- *Willful* may be an *intended* act and *knowledge* that conduct was harmful and in violation of law generally or a specific statute, and therefore done with a specific intent to violate of a law.[15]
- *Willful* may mean *intentionally* or *purposely* and offenses defined with the term may also require an evil intent.[16]

Herein lies the problem with the element of *willful* in statues—what the term means depends largely on its context.

From the early to late 1800s, willful, and its many iterations, was a common *mens rea* in New York criminal law[17]—this remained so until the Temporary Commission on Revision of the Penal Law in the early 1960s.[18] The commission removed *willful* as a state of criminal culpability from the Penal Law and relocated other statutes with criminal penalties not fundamental to the Penal Law to more appropriate chapters[19] Currently the

[11] *Id.* at 396.

[12] *Id.* at 400. (emphasis added)(quoting GEOFFREY ROBERTSON, THE TYRANNICDE BRIEF 296 (2005)).

[13] 21 AM. JUR. 2D *Criminal Law* § 130 (2008).

[14] *Id.*

[15] *Id.*

[16] BLACK'S LAW DICTIONARY 1630 (8th ed. 2004) (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 875–76 (3d ed. 1982)).

[17] *See generally* N.Y. REV. STAT., ch. 1 (1829); 1881 N.Y. LAWS § 718(1).

[18] *See* N.Y. STATE TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT 35–38 (1963) [hereinafter INTERIM REPORT]. *See also* Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1469 n.4 (1964) [hereinafter *Proposed Penal Law of New York*] ("The commentary accompanying the bill was prepared by the Commission staff, but not submitted to the Commissioners for their approval. Consequently, the Commission staff notes do not necessarily represent the official position of the Commission.").

[19] *See Proposed Penal Law of New York*, *supra* note 18, at 1469 n.4; *see also* INTERIM REPORT, *supra* note 18, at 35–38.

term is found more than 170 times in New York chapter laws where a felony or misdemeanor penalty applies, including a half dozen statutes in the Penal Law added since the reorganization of the state's criminal laws. New definitions, some wise, others unadvisable, crop up annually in state law. Decisions by the New York Court of Appeals dating back to the late nineteenth century, and those of other appellate courts, fail to fix a constant meaning for the term; *au contraire*, the state's highest court seems to treat each decision concerning the meaning of *willful* as a matter of first impression.

This comment examines the irrationality of the varying standards of the meaning of *willfully* in federal law and New York. Part I summarizes the basics of *mens rea*. Part II illustrates the use of the term in the federal law, and establishes a framework for categorizing its meaning. Part III examines the history of development of the Penal Law, the primary criminal code of New York, and the contemporary uses of *willfully* where criminal liability applies throughout the state's laws. Finally, Part IV proposes an unceremonious end for most uses of *willfully*, a constant definition that is common throughout the sixty-seven chapters of the New York's consolidated laws.

I. GENERAL MENTAL STATES OF CRIMINAL CULPABILITY

Criminal law prefers to punish acts of culpable behavior.[20] After all, how can one commit a criminal act if the person's mind is innocent?[21] Therefore, generally speaking, *mens rea* is an essential element of a crime.[22] The exception to the rule of punishing a culpable mental state, known as strict liability, usually requires a positive expression by a legislature.[23]

The two basic categories of culpable mental states are *intentional* and *unintentional*.[24] *Willful* falls into the first category. Jurisdictions vary on expression of intentional culpability, however, the highest category within intent is

[20] *See* LAFAVE, *supra* note 1, § 5.1(a); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.1 (2d ed. 1986).

[21] *See* LAFAVE, *supra* note 1, § 5.1(a); *see also* LAFAVE & SCOTT, *supra* note 20, § 3.1.

[22] 21 AM. JUR. 2D *Criminal Law* § 117 (2008).

[23] *See* LAFAVE & SCOTT, *supra* note 20, § 3.8(a) n.10*; see, e.g.,* N.Y. PENAL LAW § 15.15(2) (McKinney 2009).

[24] *See* LAFAVE & SCOTT, *supra* note 20, § 5.1(c).

generally known as *intentional* or *purposeful*.[25] Such intent requires an act to be one's conscious object.[26] One must have a near certain belief of that conduct will cause an unlawful result.[27] In New York, this mental state is called *intentional*.[28] The second intentional state is *knowing*, which only requires an awareness that an act may cause an unlawful result.[29] This mental state, in New York, like most other jurisdictions, is conveniently called *knowing*.[30] Neither *purposeful* (or intentional in New York), nor *knowing*,[31] is imputed to mean an act was committed through ignorance, mistake or accident.[32]

In a prosecution, the burden lies with the government to prove each element of a crime beyond a reasonable doubt.[33] Certain defenses are available to criminal statutes that have intentional elements. As stated above, if one commits an act by *bona fide* or good faith mistake or accident, it can hardly be said that an act is *intentional* or *knowing*.[34] Crimes that are *mala in se*, or evil in itself, rarely require one to be aware that one knows that their conduct is unlawful.[35] Examples of such crimes include murder, rape, robbery, assault, etc.[36]

It is often said that ignorance of the law is no excuse, or as the Romans preferred the saying: *ignorantia juris non excusat*.[37] That maxim is often applies to *mala in se* crimes.[38] One of the many meanings of *willful*, especially, in the tax law context, allows for such a defense.[39]

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[25] *See id.* § 5.2(a)–(b).

[26] *Id.* § 5.2(a).

[27] 35 N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* § 28 (2008).

[28] N.Y. PENAL LAW §15.05(1) (McKinney 2009).

[29] *See* 21 AM. JUR. 2D *Criminal Law* § 131 (2008).

[30] N.Y. PENAL LAW § 15.05(3).

[31] *Id.* § 15.05(2)–(3) (McKinney 2009 & Supp. 2011).

[32] The unintentional mental states, which includes reckless and negligence, are not relevant to this discussion. Reckless acts involve a conscious disregard of known risks. Although one acts aware of the consequences and causes an unlawful result, it falls short of intentional. *Id.* § 15.05(3) (McKinney 2009 & Supp. 2011). Negligence, also called criminal negligence, is an unjustifiable risk that one was not aware of but ought to have been. *Id.* § 15.05(4).

[33] LAFAVE, *supra* note 1, § 1.8(a).

[34] *See id.* § 5.6(a)–(b).

[35] *See id.* § 1.6(b).

[36] *See id.*

[37] BLACK'S LAW DICTIONARY 749 (7th ed. 1999).

[38] *Id.* at 749–50 (quoting GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 405 (1978)).

[39] *See* United States v. Bishop, 412 U.S. 346 (1973).

Words in statutes are construed to have a particular purpose in spite of the Shakespearean declaration "that which we call a rose by any other name would smell as sweet."[40] The first command in construing words in a statute is to look to the intention of the legislature. [41] But what if the legislative intent is ambiguous or non-existent? The next command of interpretation is to apply the plain meaning of the words of a statute.[42] But what if a word has more than one meaning?[43] Which meaning will have force in a statute? This is precisely the problem with *willful* in New York law: there is neither legislative intent to guide courts nor a consistent meaning. Within criminal statutes, whether a crime is *mala in se* or not may offer some indication.[44] Humpty Dumpty may best describe the theory of statutory construction as applied to *willful*: "when *I* use a word it means just what I choose it to mean—neither more nor less."[45] As discussed *infra*, the meaning of *willfully* can be organized into three zones.

II. WILLFUL IN FEDERAL LAW

While the purpose of this note is to examine New York and not federal law, the decision of federal courts provide a useful framework for discussion. Still, *willful* eludes a consistent meaning or construction even with federal jurisdictions. The most common use of *willful* in federal statutes is the tax context; the line of Supreme Court decisions interpreting tax statutes and intent stretches nearly eighty years.[46] As part of an effort to reform criminal statutes in the 1980s, one commentator found more than seventy-five different terms used for mental states in federal law.[47] Citing *willfulness* as a "poster child" for reform, seven meanings of the term were identified:

(1) knowledge of illegality, or an intent to further a known illegal objective
(2) recklessness

[40] WILLIAM SHAKESPEARE, ROMEO AND JULIET act, 2, sc. 2.
[41] LAFAVE, *supra* note 1, § 2.2(a); N.Y. STAT. LAW § 235 (McKinney 1971).
[42] LAFAVE, *supra* note 1, §2.2(b).
[43] *See* 417 East Realty Ass'n. v. Ryan, 442 N.Y.S.2d 880, 883 (N.Y. City Civ. Ct. 1981); *see also* N.Y. STAT. LAW § 235 (McKinney 1974).
[44] 21 AM. JUR. 2D *Criminal Law* § 130 (2008).
[45] *See 417 East Realty Ass'n.*, 442 N.Y.S.2d at 883 (citing LEWIS CARROLL, THROUGH THE LOOKING-GLASS 99 (Florence Milner ed., 1917)).
[46] *See* United States v. Murdock, 290 U.S. 389, 392, 394 (1933).
[47] Ken Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123, 125 (1980).

(3) negligence
(4) knowledge of an immoral objective or evil intent
(5) intent to defraud
(6) intent or knowledge with regard to the elements of an offense
(7) recklessness with regard to the elements of an offense[48]

Today, thankfully, the meaning of *willful,* as interpreted by the circuit courts, generally falls within only three zones: (1) the historical definition, acts requiring proof of an *intentional* violation of a *known* legal duty, most often relating to violations of the Internal Revenue Code, i.e., tax crimes;[49] (2) a middle ground that was once commonly known as *malice*, acts that are *intentional* and with a general *knowledge* that conduct is unlawful, which is commonly expressed as an *mens rea* element in statutes as "*knowingly* and *willfully*;"[50] or (3) mere *intent*, which, quite crucially, lacks a specific intent or requirement of *knowledge* that an *intentional* act is a violation of a specific statute or *per se* unlawful.[51] The first zone, unlike the latter two, opens the door for good faith defenses in contrast to the standard of *ignorantia juris non excusat*.

The Fifth Circuit, for example, approves of uses of the term that are both close to the historical definition or mere intent.[52] In money laundering prosecutions, the Fifth Circuit defines the term used in both statutes as an *intentional* violation of a *known* legal duty. [53] In the criminal Medicare kickback context, the circuit approved of substituting *knowingly* for *willfully* in a jury instruction.[54] Similarly, the Eleventh Circuit hews to the historical meaning.[55] Other circuits, however, most notably the Sixth, Seventh and Ninth Circuits, do not recommend any jury instruction at all when *willful* is an element of a crime.[56] Instead,

[48] *Id*. at 127.
[49] *See* Cheek v. United States, 498 U.S.192, 199–201 (1991).
[50] *See* Bryan v. United States, 524 U.S. 184, 192–93 n.13 (1998) (quoting Felton v. United States, 96 U.S. 699, 702 (1887)).
[51] *See*, *e.g.*, *Bryan*, 524 U.S. at 184.
[52] *See* COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIR., FED. PATTERN JURY INSTRUCTIONS FIFTH CIR. (CRIMINAL CASES) § 1.38 (2001).
[53] United States v. Giraldi, 86 F.3d 1368, 1376 (5th Cir. 1996).
[54] United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998).
[55] *See* COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N ELEVENTH CIR., FED. PATTERN JURY INSTRUCTIONS ELEVENTH CIR. (CRIMINAL CASES) § 9.1(A)–(B) (2010).
[56] *See* COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N SIXTH

these circuits recommend that the "district court[s] define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense."[57] This approach is consistent with the Federal Judicial Center Instructions, which recommends substituting terms of clarity in place of willful when it appears as an element of statue.[58]

A. Historical Definition: Intentional Violation of Known Legal Duty

Fundamental precepts of criminal law require that a law be known or understood by a reasonably prudent law-abiding citizen to provide fair warning,[59] although some crimes are self-evidently wrong.[60] Some laws are so obscure or technical that they risk punishing otherwise innocent behavior, where there is either no criminal intent or notice that certain acts are crimes.[61] In these cases, the *mens rea* requirement is at a high tide, a requirement of an *intentional* act combined with a specific *intent* to violate a *known* statute. The most common use of *willful* in this manner—an *intentional* violation of a *known* legal duty—is in a tax context.[62] This is also the approach taken in statutes related to firearm licensing [63] and evasion of bank reporting requirements that is commonly known as "structuring."[64] The consequence of the application of this definition is that it establishes ignorance of the law as a defense. If one legitimately is unaware of a particular statute, one cannot be said to violate a *known* legal duty. Thus ignorance of the law may render one innocent if one is exercising reasonable care or in good faith.[65]

The foundational tax law case where *willfulness* was the requisite *mens rea* was *United States v. Murdock*[66] decided in 1933. Defendant Murdock refused to give the Internal Revenue

CIR., FED. PATTERN CRIMINAL JURY INSTRUCTIONS SIXTH CIR. § 2.05 (2009).

[57] *Id.*

[58] *Id.*

[59] *See* LAFAVE, *supra* note 1, § 2.3(b).

[60] *Id.* § 1.6(b).

[61] *See* United States v. George, 386 F. 3d 383, 394 (2d. Cir. 2004).

[62] *See*, *e.g.*, Cheek v. United States, 498 U.S. 192, 200 (1991).

[63] *See* Bryan v. United States, 524 U.S. 184, 196 (1998).

[64] *See* Ratzlaf v. United States, 510 U.S. 135, 136–37 (1994).

[65] *Cheek*, 498 U.S. at 204–5 (citing United States v. Bishop, 412 U.S. 346, 360–61 (1973)).

[66] United States v. Murdock, 290 U.S. 389 (1933).

Service records of certain deductions based on a Fifth Amendment claim barring self-incrimination.[67]—the equivalent of a modern-day "tax protester." An indictment of defendant charged a *willful* failure to pay tax, submit a return, keep relevant records or supply information.[68] The Court held that *willful* means "an act which is *intentional*, or *knowing*, or *voluntary*, as distinguished from accidental," "a thing done without ground for believing it is lawful" *and*, in the criminal context, "done with a bad purpose."[69] In other words, this interpretation requires an *intentional* violation (arguably) of a known legal duty *and* an evil motive. The most recent Supreme Court case on point, *United States v. Cheek*, settled a split among the circuits decreeing the meaning of *willful* in the tax context, holding:

> The general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. . . . [t]hus the Court almost 60 years ago interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.[70]

Today's Federal Internal Revenue Code expressly requires *willful* in both felony and misdemeanor violations, including attempt to evade tax, failure to collect or to pay tax, failure to file a return and fraudulent statements or returns.[71] This interpretation is reserved for complex, highly technical statues.[72]

B. Middle Zone: Evil Purpose Generally

Outside of the tax context, seemingly contradicting the *Murdock* line of cases, the Supreme Court has found a lesser, middle zone of culpable criminal conduct.[73] Instead of an *intentional* violation of a *known* legal duty, all that is required is

[67] *Id*. at 391.
[68] *Id.* at 392.
[69] *Id.* at 394 (emphasis added).
[70] *Cheek*, 498 U.S. at 199–200 (1991); *see generally*, Minns, *supra* note 4, at 419–22 (discussing the *Cheek* decision in great depth).
[71] *See* 26 U.S.C. §§ 7201–7204 (2006).
[72] *See* United States v. Kay, 513 F.3d 432, 448 (5th Cir. 2007).
[73] *See* Bryan v. United States, 524 U.S. 184, 198–99 (1998); *see also* COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 4.09 (1999).

an *intentional* act accompanied by general unlawful behavior.[74] Here, one acts *willfully* if the act is *intentional*:

> [A]nd with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. . . . [T]he person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.[75]

This is the equivalent of an act that is done with a bad purpose of an evil intent. To satisfy *willful* in this context, all that is required is the knowledge that conduct is generally unlawful.[76]

For example, in *Bryan v. United States*,[77] the statute at issue was the Firearms Owners' Protection Act,[78] which created penalties for *knowing* acts, *and* a blanket penalty for *willful* violations of any portion of the chapter of law dealing with firearms, i.e., whoever "willfully violates any other provision of this chapter [18 U.S.C. §§ 921 *et seq*]."[79] The government presented evidence that defendant was dealing in firearms without a license, and based on his acts—the use of middlemen, filing off the serial numbers of the guns, reselling the guns on street corners reputed for drug activity—he must have known that his *intentional* acts violated the law, though he lacked *knowledge* of the particular statute in question.[80] The jury was instructed that defendant acted *willfully* if he did an act *intentionally* and with a "bad purpose to disobey or disregard the law."[81] Defendant was convicted of dealing firearms without a federal license, which carried a penalty of a five-year prison sentence, $5000 fine, or both.[82] *Knowledge* of the specific statute was not necessary for conviction; rather, only an intent to do something that one knows is generally illegal.[83] The Court affirmed the conviction, refusing to find that Congress had included the term *willful* in the statute with the intent that *knowledge* of the exact statute was an essential element of the crime to be proved beyond a reasonable doubt.[84]

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[74] *Bryan*, 524 U.S. at 198–99.
[75] *Id.* at 190.
[76] *Id.* at 196.
[77] *Id.* at 187.
[78] 18 U.S.C. §§ 924(a)(1)(A)–(D) (2006).
[79] *Id.* § 924(a)(1)(D).
[80] *Bryan*, 524 U.S. at 189 n.8.
[81] *Id.* at 190.
[82] *Id.* at 186, 187 n.3.
[83] *Id.* at 196, 198–99.
[84] *Id.* at 198–200.

C. Mere Intentional Conduct

Willful is at a low tide when interpreted as acts that are merely *intentional* or even *knowing*, which is the approach recommended by the Model Penal Code.[85] In this context, *willful* is often expressed as "willfully and knowingly" (or vice-versa).[86] When it appears in a statute combined with another, well-defined state of criminal culpability, *willful* becomes a vestigial *mens rea*; it performs no function nor serves any purpose. *Willful* may also appear by itself and stand for mere *intent*.[87]

The Ninth Circuit has found simply that *willful* requires only that "an act be done *knowingly* and *intentionally*, not through ignorance, mistake or accident."[88] There is no requirement for a specific intent to violate a known law or possess an evil design thereby violating a law generally. For example, it is a federal crime to "willfully and knowingly" make a false statement on a passport application or to "willfully and knowingly" use a passport that was obtained with a false statement.[89] The Second Circuit upheld a conviction under the statute in *United States v. George* where there was no showing of intent under the two higher zones that are defined and noted above.[90] The rationale for the departure from specific intent to violate a law or unlawfulness, generally, is due to the absence of risk of punishing innocent conduct.[91] When one applies for a passport by *knowingly* supplying false information, the act is *a priori* illegal.[92] The Second Circuit held that "no conceivable meritorious reason exists for knowingly submitting false information on a passport application, [the statute] does not require a finding that the defendant acted with an awareness of the generally unlawful nature of his or her conduct, an improper purpose, or an 'evil-meaning mind.'"[93]

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[85] MODEL PENAL CODE § 2.02(8) (2001).
[86] *See*, *e.g.*, 18 U.S.C. 1542 (2006); 47 U.S.C. § 501 (2006).
[87] *See* 29 U.S.C. § 439(c) (2006).
[88] United States v. Morales, 108 F.3d 1031, 1037 (9th Cir. 1997) (emphasis added).
[89] 18 U.S.C. § 1542.
[90] *See* United States v. George, 386 F.3d 383, 401 (2d. Cir. 2004).
[91] *Id.* at 394.
[92] *Id.*
[93] *Id.* at 395.

III. WILLFUL IN NEW YORK: PAST AND PRESENT

A. Brief History of the Penal Law & the Commission on Revision

In 1881, New York's criminal laws were codified in a chapter entitled "Penal Code"—renamed "Penal Law" in 1909.[94] Prior to 1881, the state's criminal laws existed as the revised statutes.[95] In its early nineteenth century form, New York's criminal statutes were rife with requirements for *willful* acts, but there were no definitions of the culpable mental states.[96] For example, the arson statutes generally began "[e]very person who shall wilfully set fire to, or burn . . . ."[97] Manslaughter in the first degree included "the wilful killing of an unborn quick child."[98] However, no other manslaughter statute, or even murder statute, included any *mens rea*, including willful because such crimes are *malum in se*.[99] The element *willful* was also included in crimes for perjury,[100] poisoning livestock,[101] cruelty to animals[102] and opening or publishing sealed letters.[103] In addition, the criminal intent of "wilfully *or* maliciously" appears in the statutes for destroying bridges and gates,[104] for removing or altering monuments[105] and for removing or destroying mile-stones.[106] The element "wilfully *and* maliciously" appeared in statutes punishing maliciously destroying mills[107] or defacing or altering designation marks on trees that relate to property boundaries.[108] The only other common usage of a culpable mental state in the revised statutes of 1829 is "intent to defraud" in the forgery

[94] N.Y. TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT 8 (1962) [hereinafter INTERIM REPORT, 1962].

[95] *See* 2 N.Y. REV. STAT. pt. 4, ch. 1 (1829).

[96] *See id.*; *see also id.* tit. 4, art. 1, §§ 30–35.

[97] *Id.* tit. 3, art. 1, §§ 1–8 (note the absence of definitions of the culpable mental states).

[98] *Id.* tit. 2, art. 1, § 8.

[99] *See id.* tit. 1, §§ 1–5, *id.* tit. 2, art. 1, §§ 1–21 (note the absence of a *mens rea* requirement in the sections cited).

[100] *Id.* tit. 4, art. 1, § 1.

[101] *Id.* tit. 5, art. 3, § 16.

[102] *Id.* tit. 6, art. 1, § 26.

[103] *Id.* § 27–28.

[104] *Id.* § 30 (emphasis added).

[105] *Id.* § 32(1).

[106] *Id.* § 33.

[107] *Id.* § 31 (emphasis added).

[108] *Id.* § 32(2)–(3).

article.[109]

By 1881, when New York codified its criminal statutes in the Penal Code, the first definitions and rules of statutory construction appeared.[110] The definitions for *willful* and *willfully*[111] "import[ed] a purpose or willingness to commit the act or omission to which it refers, and does not require any specific intent to violate the law, or to injure another . . . ."[112] The law also included forebears to modern-day states of intent, definitions of *knowingly* ("a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act of omission")[113] and *maliciously* ("an evil intent").[114]

The late nineteenth century definition of *willful* squares with *intentional*. Courts interpreted the term to lie within the third, low tide zone, "intentionally or by design,"[115] or intentionally under today's New York law.[116] *Willful* was interpreted to contain an element of malice or evil design, i.e., a criminal mind.[117] The courts, however, refused to find the reciprocal interpretation: "[w]illfulness is implied in maliciousness, but maliciousness is not implied in willfulness."[118]

Eighty years after the adoption of the Penal Code, the legislature created the New York Commission on Revision of the Penal Law and Criminal Code.[119] The purpose of the commission was to study existing law and "accurately define substantive provision of law relating to crimes and offenses by adding or amending language where necessary so as to improve substantive context and remove ambiguity and duplication."[120] The commission drafted five interim reports from 1962 to 1965, followed by a new and redrafted Penal Law passed by the

[109] *See id.* tit. 3, art. 1, §§ 22(3), 25, 34, 35.

[110] *See* N.Y. PENAL CODE ACT, 1881 N.Y. LAWS 187–89, § 718 (codified as amended at N.Y. PENAL LAW § 1.00–500.10 (McKinney 2009)).

[111] The first and least notable change, involved spelling: *wilful* in 1829 became *wilfull* in 1881.

[112] N.Y. PENAL CODE ACT, 1881 N.Y. LAWS 187, § 718(1).

[113] *Id.* at 188, § 718(5).

[114] *Id.* § 718(4).

[115] Anderson v. How, 22 N.E. 695, 697 (N.Y. 1989) (quoting Commonwealth v. Williams, 110 Mass. 401, 403 (1872)).

[116] *See* N.Y. PENAL LAW §15.05(1) (McKinney 2009).

[117] *Anderson*, 22 N.E. at 697.

[118] *Id.*

[119] INTERIM REPORT, 1962, *supra* note 94, at 7.

[120] *See* 1961 N.Y. LAWS 1275 *as amended by* 1962 N.Y. Laws 2513.

legislature, effective in1967.[121]

In redrafting the states of mental culpability, the commission was influenced by the Model Penal Code adopted in 1962.[122] The Model Code recommended limiting the culpable criminal states of mind to four terms: *intentional*, *knowing*, *reckless* and *negligent*.[123] The drafters of the recommended changes were and are "both 'necessary and sufficient' for the general purposes of penal legislation."[124] The commission, organized only a few years after these innovations, was obviously persuaded as to its wisdom.

The revised Penal Law contained the four states of mental culpability that exist in today's section 15.05 and in the Model Penal Code. On the recommendation of the commission, *willful* was removed from the revised Penal Law. In the practice commentary to the Penal Law, the commission's Executive Director and counsel, explained:

> One of the main defects of the former New York statutes defining offenses involving culpability was their use of a host of largely undefined and frequently hazy adverbial terms, such as 'intentionally," 'wilfully," "designedly," "maliciously," "knowingly," . . . and many more. The proposed article designated only four culpable mental states, defines each, and stipulates that unless an offense is one of strict liability, at least one of these particular mental states is essential for the commission of the offense.[125]

Most of the commission's recommendations were viewed as positive reforms.[126]

In addition, the commission was tasked with reorganizing laws that carry criminal penalties.[127] The commission concluded that the Penal Law should only include fundamental and familiar offenses.[128] As the commission noted: "Sections in the Penal Law that are essentially regulatory or administrative in scope should

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[121] *See* 1965 N.Y. LAWS 2343.

[122] *See* PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 1, 5 (1999), http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf.

[123] Feinberg, *supra* note 47, at 129 (quoting MODEL PENAL CODE § 2.02, Comments at 124 (Tent. Draft No. 4, 1955)).

[124] *Id.*

[125] N.Y. TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, COMM'N STAFF COMMENTS ON THE PROPOSED PENAL LAW 312 (1964) [hereinafter COMMENTS ON PROPOSED PENAL LAW].

[126] *An Updated Penal Code,* N.Y. TIMES, Mar. 18, 1965, at 32.

[127] INTERIM REPORT, *supra* note 18, at 36–37.

[128] *Id.* at 37.

be relocated in other bodies of law dealing more fully with the activity regulated or with cognate subject matter."[129] Thus, the commission's remedy relocated statutes that were "integral parts of the criminal law."[130]

There was one glaring oversight in the excellent work of the commission. By relocating statutes outside of the Penal Law, the commission failed to conform to the four culpable mental states contained within the Penal Law. There are thousands of offenses punishable by criminal penalty in other chapters of New York's consolidated laws.[131] Indeed the commission's task was to rewrite the Penal Law and the Criminal Procedure Law, but left untouched were the "largely undefined and frequently hazy adverbial terms" throughout other parts of the law where there are criminal penalties.[132]

As a consequence, *willful* is used throughout other parts of the law where civil and criminal penalties apply. Today, while there are only six mentions of *willful* in the Penal Law (including two noted as "wilfully"), there remain more than 800, including its many iterations, throughout the other sixty-six chapters of consolidated New York Laws.[133] There are about 170 mentions of *willfully*, again including variations, where a felony or misdemeanor penalty applies.[134] However, the actual of number of affected statutes, rules and regulations is far greater due to "dragnet" clauses that apply to violations of an entire article or chapter of law.[135] Despite the frequency of use there is no jury

[129] *Id.* (The commission cited a similar approach to organization of criminal law in Illinois and Wisconsin).

[130] *Id.* at 36.

[131] *Id.* at 35.

[132] COMMENTS ON PROPOSED PENAL LAW, *supra* note 126, at 312.

[133] A search via *LexisNexis* "TEXT (willful! or wilful!)" reveals 784 results, a search via *Westlaw* "te(willful! wilful!)" reveals 806 results.

[134] A search via *LexisNexis* "TEXT (willful! or wilful!) and (felony or misdemeanor))" reveals 219 results, a search via *Westlaw* "te(willful! or wilful!) & felony or misdemeanor))" reveals 228 results. Upon inspection of the results, the total number of statutes with willfully where a felony or misdemeanor penalty applies is about 170. Some statutes that include willfully as a *mens rea*, however, have criminal penalties that apply to the sections that do not include or involve the term. Therefore, willfully likely applies to universe of additional laws and regulations.

[135] *See* INTERIM REPORT, *supra* note 18, at 36. For example, willfully in section 12-b of the Public Health Law, discussed *supra*, applies to *any* violation of the chapter of law *or* a violation of either "any lawful order or regulation prescribed by any local board of health or local health officer" or any public officer. N.Y. PUB. HEALTH LAW § 12-b (McKinney 2002 & Supp. 2011). Therefore, willfully likely applies to universe of additional laws and regulations.

instruction that defines the term.[136] The appendix attached to this article includes the relevant notations of *willful* throughout New York's laws.

B. Ancient Appellate Decisions

The jurisprudence of *willful* dates back more than 120 years.[137] Then, as now, the debate centered on whether a specific intent to violate the law or unlawfulness generally is included within the meaning of *willfully*.[138] In 1889, in *Anderson v. How*, the New York Court of Appeals decided a claim of malicious prosecution that arose from the violation of a Penal Law statute that read: "A person who willfully severs from the freehold of another, or of the people of the state, any produce thereof, or anything attached thereto, is punishable by imprisonment not exceeding six months or a fine not exceeding two hundred and fifty dollars, or both."[139] Plaintiff was hired by defendant to complete plumbing in the stable and completed the job but the sixty-five dollar balance due remained unpaid.[140] Defendant refused final payment claiming a crack in the plumbing.[141] Plaintiff was arrested for removing the water closet from defendant's property and was ultimately acquitted.[142] Complicating the court's interpretation were three factors, the charge upon which plaintiff was arrested read "willfully and maliciously".[143] The court held that the term "was surplusage and unessential."[144] Second, the prior version of the statute read *willfully* commit trespass *and maliciously* sever property.[145] Finally, the definition of "willfully" in the prior act had been eliminated in 1882.[146]

In a 4–3 decision, the court held that *willfully* meant nothing

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[136] *See* N.Y. PATTERN JURY INSTRUCTIONS: CRIMINAL 2D (2008) (note the absence of a definition of *willful*). The state does offer a definition of the term in the context of negligence actions against common carriers. *See* N.Y. PATTERN JURY INSTRUCTIONS–CIVIL § 2:171 (2008).

[137] *See* Anderson v. How, 22 N.E. 695 (N.Y. 1889); *see also* Wass v. Stephens, 28 N.E. 21 (N.Y. 1891).

[138] *See Anderson*, 22 N.E. at 697.

[139] *Id.* at 699 (Haight, J. dissenting) (citations omitted).

[140] *Id.* at 696 (majority opinion).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 697.

[144] *Id.*

[145] *Id.* at 700 (Bradley, J., dissenting).

[146] *Id.*

more than *intentionally*.[147] Relying in part on two Massachusetts court decisions from 1838 and 1872, the court distinguished between *willful* and *malice*:

> The injury must not only be willful,—that is, *intentional and by design*, as distinguished from that which is thoughtless or accidental,—but it must, in *addition,* be *malicious* in the sense above given;' that is, an act or injury done, either out of a spirit of wanton cruelty, or black or diabolical revenge. Willfulness is implied in maliciousness, but maliciousness is not implied in willfulness. 'To make 'willful' imply both a wrong and *malice* is to give to it a force and effect beyond what it will bear, or what can be maintained, either in common acceptance or its legal import.'[148]

Apropos of the contemporary debate, a dissenting justice argued that *willfully*, despite the amendment to the statute, still included an element of *malice*.[149]

Two years later, the Court of Appeals came to a different conclusion.[150] In *Wass v. Stevens*, an employee of the park commissioners of Brooklyn was arrested for violating a Penal Law statute by disconnecting water pipes, which by today's standards, was punishable by felony.[151] The statute read: "A person who willfully or maliciously displaces, removes, injures or destroys . . . a pipe or main for conducting water or gas . . . is punishable by imprisonment for not more than two years."[152] The court concluded that disconnecting the water pipes did not constitute a criminal offense because the employee acted at the direction of his superiors and without a requisite criminal mental state.[153] The opinion imputed *willfully* to mean an *intentional* act, including "an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness."[154] In other words, *willful* also included *malice*, especially in the context of "willfully or maliciously."[155] This time the decision was unanimous.[156] The

[147] *Id.* at 697. A somewhat confusing matters was the charge upon which plaintiff was arrested read "willfully and maliciously." The court held that the term "was surplusage and unessential."

[148] *Id.* (quoting Commonwealth v. Williams, 110 Mass. 401, 403 (1872); Comm. v. Kneeland, 20 Mass. (1 Pick.) 206, 245 (1838)).

[149] *Id.* at 700.

[150] *See* Wass v. Stephens, 28 N.E. 21, 23 (N.Y. 1891).

[151] *Id.* at 21–22.

[152] N.Y. PENAL CODE ACT, 1881 N.Y. LAWS 164, § 639(8).

[153] *Wass*, 28 N.E. at 22.

[154] *Id.* at 23.

[155] *Id.*

[156] *Id.* at 23.

court refused to apply the mere *intent* analysis of *Anderson*[157] with apparently faulty reasoning.[158]

In the span of four months in 1920, the First Department decided two appeals that turned on the meaning of *wilfully*, affirming the approach of *Wass* in a Penal Law statute that made it a crime to violate any provision of the Election Law.[159] In *People v. Luft*, a poll clerk worker was convicted of one count of *wilful* recording of a false vote total in a primary election in 1917, but acquitted of a similar charge of *intentionally* making a false statement of the vote total.[160] The trial court, in charging the jury, used the commonly understood meaning of *intentionally*.[161] The judge did not offer a definition of *wilfully* that differed: "The distinction between . . . 'wilfully' and . . . 'intentionally' is shadowy. In a fine grammatical sense there may be a very narrow distinction, but substantially . . . . so far as the act of this defendant is concerned, it substantially means the same thing."[162]

The court held that the charge as to defendant's liability under *willfully* was not proper.[163] Citing *Wass*, the court reasoned that the term meant more than *intentionally* and included an act done with a wrongful purpose out of *lawlessness*, i.e., *knowledge* that the act was illegal.[164]

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[157] *Id.* The court explained that there was evidence in *Anderson* that the act in question "was wanton and malicious." As explained *infra*, malice did not figure into the majority opinion's analysis of the plaintiff's charged criminal act of removing a water closet. Anderson v. How, 22 N.E. 695, 697 (N.Y. 1889). In fact both dissents in *Anderson* argued that there was evidence that plaintiff was acting in good faith in removing the water closet, and not acting maliciously. *See id.* at 698–99.

[158] The reasons behind the court's abrupt about face is perhaps a topic for a future note.

[159] *See* People v. Luft, 183 N.Y.S. 514, 516 (App. Div. 1920); People v. Brinkman, 184 N.Y.S. 356, 357 (App. Div 1920). The charged violation in *Luft* was Section 751(12) of the Penal Law, punishable by misdemeanor. *Luft*, 183 N.Y.S. at 514. The modern, analogous violation is called misconduct by election officers and punishable by felony. N.Y. ELEC. LAW § 17-106 (McKinney 2009). The facts of *People v. Brinkman*, which are not recounted here, are strikingly similar to *Luft*. *See Brinkman*, 184 N.Y.S. at 356–57.

[160] *Luft*, 183 N.Y.S. at 514–15.

[161] *Id.* at 515 ("The law presumes him to do, or to intend that which he actually does. And the law further presumes him to intend the natural consequences which follow that act . . . ."); *see* LAFAVE, supra note 1, § 5.2(a)–(b).

[162] *Luft*, 183 N.Y.S. at 516.

[163] *See id.* at 517. The court cited a similar case from two years prior that apparently did not offer a charge for willfully, but it a likely inference by its rationale in upholding a conviction that the court equated the term with intentionally. *See* People v. Ullman, 170 N.Y.S. 105, 106–07 (App. Div. 1918).

[164] *Luft*, 183 N.Y.S. at 516 (quoting Wass v. Stephens, 28 N.E. 21, 23 (N.Y.

In the years prior to the Commission to Revise the Penal Law, the Court of Appeals decided two more cases, interpreting *willful* with the same results.[165] The first case was an appeal from a criminal penalty, and the second involved a civil penalty, yet the court reached the same conclusion on both occasions.[166] In *People v. Broady*, at issue was *willfully* in the context of a wiretapping statute punishable by felony.[167] The court affirmed the decision of the lower court holding that the statute, which read "unlawfully and willfully," meant *intentionally*.[168] The court refused defendant's argument that, along the lines of the holding in *Wass*, *malice* was required.[169] The court relied, in part, on the legislative intent of distinguishing between "unlawfully and willfully" and the culpable criminal state of "unlawfully and willfully," which was in the same section of law but a different subdivision.[170]

Three years later, the court decided *Old Republic Life Insurance Co. v. Thacher*, an appeal from a $13,000 civil penalty for *willful* violations of issuing life insurance without approval from the state.[171] Once again, the defense to the violation was that it required *malice*.[172] However, at issue was a *civil*, not a *criminal* penalty.[173] It was obvious that *malice*, a criminal intent, would not be required where civil penalties applied, for good reason.[174] The court cited *Broady*, which involved a criminal statute, to support its conclusion, holding "since the present case is a civil proceeding, criminal intent is not a necessary element."[175] This brings to light an apparent contradiction in the

1891)).

[165] *See* People v. Broady, 158 N.E.2d 817, 819 (N.Y. 1959); Old Republic Life Ins. Co. v. Thacher, 186 N.E.2d 554, 556 (N.Y. 1962).

[166] *See Broady*, 158 N.E.2d at 819; *Old Republic Life Ins. Co.*, 186 N.E.2d at 556.

[167] *Broady*, 158 N.E.2d at 819.

[168] *Id.* at 819.

[169] *Id.* at 820 (The court distinguished between the *mens rea* of "wilfully or maliciously" and "unlawfully and wilfully"). Today, the crime of eavesdropping remains in the Penal Law where the *mens rea* of the act is defined by intentionally and is punished by an unlawful act. N.Y. PENAL LAW §§ 250.00, 250.05 (McKinney 2008).

[170] *Id.* at 820.

[171] *Old Republic Life Ins. Co.*, 186 N.E.2d at 555–56.

[172] *Id.* at 557.

[173] *Id.*

[174] *Id.*

[175] *Id.*

court's reasoning in *Broady*, which refused to require *malice*.[176] Should the court, therefore, have required *malice* in its earlier decision involving a criminal statute?

C. Contemporary Statues and Court Decisions

1. The Penal Law[177]

Today there are only five mentions[178] of willfully punishable by felony or misdemeanor in the Penal Law.[179] Perhaps ironically, the statutes were added *after* the Commission to Revise the Penal Law had completed their work. With two exceptions, all the offenses are punishable by class A misdemeanor; unlawful prevention of access to records (section 240.65) is a violation and manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances (section(s) 265.35(2), (3)) is punishable by either a class D or E felony:

(1) Health Care Fraud in the Fifth Degree (section 177.05)
(2) Making False Statements of Credit Terms (section 190.55)
(3) Misrepresentation by a Child Day Care Provider (section 260.31)
(4) Manufacture, Transport, Disposition and Defacement of Weapons (section 265.10)
(5) Prohibited Use of Weapons (section 265.35)

Health care fraud in the fifth degree was added in the Laws of New York in 2006 as part of the new Office of the Medicaid Inspector General.[180] The culpable mental state for the crime of health care fraud is "knowingly and willfully," which applies to

[176] *Broady*, 158 N.E.2d at 820.

[177] N.Y. PENAL LAW § 190.55 (McKinney 2010).

[178] *See id.* § 177.05 (McKinney 2008) (Health care fraud in the fifth degree); *Id.* § 190.55 (Making a false statement of credit terms); *Id.* § 240.65 (Unlawful prevention of public access to records); *Id.* § 260.31 (McKinney 2008 & Supp. 2011) (Misrepresentation by a child day care provider); *Id.* § 265.10(6) (Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances); *Id.* § 265.35(2), (3).

[179] A sixth mention of willfully in the Penal Law, unlawful prevention of public access to records, is punished as a violation. *Id.* § 240.65 (McKinney 2010).

[180] *See* 2006 N.Y. Laws 3298.

all five degrees of health care fraud.[181] There is nothing in the legislative intent that would offer a clue as to the meaning of the phrase.[182] The model for the statute was quite likely the similar, pre-existing federal law.[183] In Title 18 of the United States Code, health care fraud requires a "knowingly and willfully" scheme to defraud.[184]

Recent decisions from both the Ninth and Tenth Circuits rely on the same line of cases to conclude that "knowingly and willfully" in the health care fraud context requires the government to prove that the defendant acted with a bad purpose, i.e., with *knowledge* that their conduct is generally unlawful.[185] Although New York is not bound by the interpretation of federal decisions, if the law is challenged, it would be fair to assume that courts would find these decisions persuasive authority and hold that the phrase falls into the middle zone of willful conduct.

Like health care fraud, the state crime of making a false statement of credit terms[186] is based on federal law penalties, in this case the Truth in Lending Act.[187] The mental culpability of both statutes is "knowingly and willfully."[188] However, unlike health care fraud, there is no reliable case law to offer lessons. In this context, the term is likely to mean either bad intent or mere intention. The term is exactly as used in health care fraud. However, Truth in Lending Act criminal violations do not involve a scheme, but rather false information. Violations involving false statements, the lynchpin to criminal culpability in both state and federal law, may be analogized to "knowingly and willfully" making a false statement on a passport application.[189] As noted above, federal courts have held that no showing of specific intent

[181] N.Y. PENAL LAW § 177.05 (McKinney 2006).

[182] *See* N.Y. PUB. HEALTH LAW § 30 (McKinney 2006 & Supp. 2011).

[183] *See* 18 U.S.C. § 1347 (2006).

[184] *Id.* The differences between the state and federal statute are technical. The federal crime requires a scheme to defraud, whereas the state statute is divided into degrees by economic harm, which although unsaid, is essentially a scheme.

[185] *See* United States v. Franklin-El, 555 F.3d 1115, 1122 (10th Cir. 2009); United States v. Dearing, 504 F.3d 897, 901 (9th Cir. 2007). Both cases quote Bryan v. United States, 524 U.S. 184, 191–92 (1998) (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

[186] N.Y. PENAL LAW § 190.55 (McKinney 2010).

[187] 15 U.S.C. 1611 (2006).

[188] *Compare id.* § 1611, *with* N.Y. PENAL LAW § 190.55.

[189] 18 U.S.C. § 1542 (2006).

to violate the law is necessary, only that knowledge that the information provided is indeed false.[190]

In 1998, in reaction to the appalling deaths of children at the hands of inattentive day care providers, the state legislature enacted the Jeremy Fiedelholtz and Julia Hass Safe Day Care Act.[191] The state law criminalized certain "willful and intentional" misrepresentations by child care providers to parents or guardians of children.[192] It is wholly unclear what, if anything beyond *intentional*, which is defined in the Penal Law, the statute requires. The practice commentary to the section of law, referring to the staff of the Commission on Revision of the Penal Law, notes "[w]hat the term "willful" adds to an "intentional" mens rea is unclear . . . ."[193] A federal bill that shared similar aims simply required false representations that were made "knowingly."[194] It is wholly unclear what the legislature intended by the phrase "knowingly and willfully." It may or may not be akin to the false statement passport application of health care fraud context. One problem interpreting the phrase will be the rule of construction that, absent legislative intent, prefers to give effect to every word of a statute.[195] Use of *willfully* would likely beg the question from courts: for what purpose is the word included? Like the aforementioned statutes, the answer is a mystery, in total contravention of clear expectations and appropriate notice of the standards of conduct required.

The final two statutes in the Penal Law are firearm offenses that include *wilful*.[196] Here, although the spellings are consistent, the meaning of each term may be different. The first statute punishes *wilfully* defacing a firearm, machine gun, or large-capacity ammunition feeding device as a class D felony.[197] In an earlier subdivision within the same section of law, *knowingly* is used as the *mens rea* to outlaw, also by class D felony buying, receiving, disposing of or concealing a firearm, machine gun,

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[190] *See* United States v. George, 386 F. 3d 383 (2d. Cir. 2004).

[191] 1998 N.Y. Laws 3549, § 2. Although it will probably not come as a surprise, there are two distinct statutes found at section 260.31 of the Penal Law. *See* John Caher, *Governor Signs Day Care Protection Bill*, TIMES UNION (Albany), Sept. 25, 1998, at B2.

[192] N.Y. PENAL LAW § 260.31 (Supp. 2011).

[193] William C. Donnino, *Practice Commentary*, in N.Y. PENAL LAW § 260.30, at 190 (McKinney 2008).

[194] H.R. 469, 106th Cong. § 1822 (1999).

[195] 97 N.Y. JUR. 2D *Statutes* §185 (2007).

[196] N.Y. PENAL LAW §§ 265.10(6), 265.35 (McKinney 2008).

[197] *Id.* § 265.10(6).

large-capacity ammunition feeding device that had been defaced with the specific intent to "concea[l] or preven[t] [ ] the detection of a crime" or misrepresentation.[198] It probably does not square with common sense that the elements of the concealment of a criminalized act would be stricter than the *actual* criminal act. Thus, in this situation, *wilful* likely means nothing more than a *knowing* act.

Finally, subdivision two of section 265.35 of the Penal Law makes *wilfully* firing a firearm at an airplane, train, bus or car a class D or E felony, depending on the circumstances.[199] It would strain credulity to argue that the term means anything more than *knowingly*. Like the false statement context, there is little risk in punishing innocent conduct when one fires a gun at any of the foregoing conveyances.

2. Criminal Penalties in Other Chapters of State Law

a. Recent Innovations

Despite inaction on defining *willful* where criminal penalties apply, there are two interesting developments in recent years. Chapters of the New York Tax Law and the Labor Law were amended to include definitions.

i. The Tax Law: Tax Fraud Acts[200]

The Tax Law, like Title 26 of the United States Code, contains crimes with *willful* intent.[201] Despite the lack of definition in any other part of state law, 2010 introduced a novel approach, at least for New York law. The New York Department of Tax and Finance, in rewriting tax fraud acts, introduced the first known definition: "The term 'willfully' shall be defined to mean acting with either intent to defraud, intent to evade the payment of taxes or intent to avoid a requirement of this chapter, a lawful requirement of the commissioner or a known legal duty."[202] The

198 *Id.* § 265.10(3).

199 *Id.* § 265.35(2).

200 N.Y. TAX LAW §1801(a)(8)(c) (McKinney 2008 & Supp. 2011).

201 See the appendix attached to this article for a summary of the relevant subdivisions of the nine sections of the Tax Law. *Id.* §§ 1812, 1812-f, 1813, 1814, 1817, 1818, 1820, 1821, 1833.

202 2009 N.Y. Laws 57 (codified at N.Y. TAX LAW § 1801(c) (McKinney 2008 & Supp. 2011)).

inclusion of the historical definition—an *intentional* violation of a *known* legal duty—is a wise addition to the Tax Law. The definition fixes the term unlike nearly every other mention, save one even more recent definition.[203]

In 1977, the Court of Appeals ruled on the meaning of *willful* within a statute for failure to collect or pay over tax where only civil penalties applied in *Levin v. Gallman*.[204] An administrative hearing found that the withholding of taxes from employees that were not paid over by a corporation to the state constituted a *willful* violation of failure to pay tax.[205] The defense to the violation was that the corporation could not afford to pay the withholding tax to the state because of its poor financial condition.[206]

The court began its analysis with a qualified admission: "No prior New York authorities have defined 'willful' as used in this statute."[207] The decision was undoubtedly the first to interpret the statute, but as discussed above, not the first to interpret the term in context where criminal penalties applied. The court, however, was restrained by a rule of construction contained in the Tax Law, which holds that terms in a statute "shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes . . . ."[208] Therefore, the court adopted the approach of several federal circuit courts in interpreting a comparable federal statute, which held that a *willful* act "is consciously and voluntarily [and] done with *knowledge* that" funds will not be paid to the government "but used for other purposes."[209] The court further set the limits of the term to include "something more than accidental" but not to include a specific intent to defraud the government.[210] The crucial difference between the holding in *Levin* and the new Tax Law definition is that criminal penalties directly apply in the latter.[211] The purpose of criminal law is to punish wrongdoing,

[203] N.Y. LAB. LAW § 861-e(2) (McKinney 2008 & Supp. 2011).

[204] *See* Levin v. Gallman, 364 N.E.2d 1316, 1317 (N.Y. 1977); *see also* N.Y. TAX LAW § 685(g).

[205] *Levin*, 364 N.E.2d at 1317.

[206] *Id.*

[207] *Id.*

[208] N.Y. TAX LAW §607(a) (McKinney 2006).

[209] *Levin*, 364 N.E.2d at 1317; *see* 26 U.S.C. § 6672 (2006).

[210] *Levin*, 364 N.E.2d at 1317.

[211] The Tax Law allows an exception to similar federal law construction when prescribed by state statute. N.Y. TAX LAW § 607(a).

while the function of imposing civil liability is to protect the public.[212]

ii. The Labor Law: Fair Play Act of 2010

In 2010, the legislature enacted the New York State Construction Industry Fair Play Act.[213] The purpose of the act was to "strengthen the enforcement of labor violations against employers who cheat the government and deny construction workers the prevailing wages benefits and other protections they are entitled to receive under state and federal law."[214] The statute declares that a contractor, which is defined broadly, "willfully violates" the provisions of the act when he or she "*knew or should have known* that his or her conduct was prohibited by [the section of law]."[215]

The meaning of *knowing* as a culpable state of mind is well defined.[216] However, *should have known* implies a negligent act that may either be a criminal or civil standard.[217] Civil negligence is merely a failure to exercise reasonable care of an ordinary prudent person.[218] The criminal standard is applied to failure to perceive "substantial and unjustifiable" risks that are a gross deviation from a reasonable person's standard of care.[219] While the statute does not explain which standard to apply, it would be highly unusual to apply a civil standard of care where criminal acts apply; a *willful* violation of the act is punishable by misdemeanor.[220]

The definition used in the Construction Industry Fair Play Act is grafted from appellate court decisions that involved cases stemming from violations of a related labor law statute, which punished *wilfully* failing to pay prevailing wage laws on public works projects by imposing criminal and civil penalties.[221] The

[212] *See* Arthur Leavuns, *Beyond Blame-Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 2 (2007).

[213] *See* 2010 N.Y. Sess. Laws 1232–37 (McKinney) (codified at N.Y. LABOR LAW § 861-e(2) (McKinney 2002 & Supp. 2011).

[214] Sponsor's Memorandum from George Onorato, N.Y. State Sen., in Support of S. 5847F, 2010 Leg., 223d Reg. Sess. (N.Y. 2010).

[215] N.Y. LAB. LAW §861-e(2) (McKinney 2002) (emphasis added).

[216] *See* N.Y. PENAL LAW § 15.05(2) (McKinney 2009).

[217] *See id.* § 15.05(4); *see also* 79 N.Y. JUR. 2D *Negligence* § 1 (2003).

[218] 79 N.Y. JUR. 2D *Negligence*, *supra* note 217, § 1.

[219] N.Y. PENAL LAW § 15.05(4).

[220] N.Y. LAB. LAW §861-e(4).

[221] *See* Baywood Elec. Corp. v. N.Y. State Dep't of Labor, 649 N.Y.S.2d 28, 29

Second Department ruled in 1996 that *willfulness*, as applied to a civil penalty in the Labor Law, meant "knowingly, intentionally or deliberately," and included *knew or should have known* within the meaning of *knowingly*.[222] Adding yet another definition to "*willfulness*" was not advisable, especially in light of the conflicting holding in *Broady* and *Old Life Insurance Co.* While there is authority for applying *reckless* to the term *willful*, there is no evidence that *negligence* is imported into its scope with any frequency.[223] It would be preferable to have omitted *willful* for the plain words "known or should have known," rather than introducing an entirely new and foreign definition.

b. Public Health Law: Violation of Health Law

The most recent decision of the Court of Appeals is frustrating; yet another missed opportunity to define the thus-far indefinable.[224] Section 12-b of the Public Health Law punishes *willful* violations of any provision of the chapter, as well as failures to comply with orders or regulations by local health officials, by misdemeanor.[225] In 1988, the Court of Appeals decided *People v. Coe*, a challenge to a conviction under the statute.[226] The case involved a registered nurse charged with *willfully* violating the Public Health Law and related regulations by forcibly searching an eighty-six-year-old resident of a geriatric center to find ten missing dollars.[227] The resident died soon after and the nurse was convicted for violating a statute in the Public

(App. Div. 1996); *see* N.Y. LAB. LAW § 220.

[222] *Baywood*, 649 N.Y.S.2d at 30 (citations omitted).

[223] *See* United States v. Keegan, 331 F.2d 257, 262 (7th Cir. 1964) (holding willfully violating a restriction on financial transactions in a labor setting required a minimum proof of reckless disregard for the section of law). *See also* United States v. Inciso, 292 F.2d 374, 380 (6th Cir. 1961). Although Feinberg includes "negligence as to legality" as one of the seven meanings of willful, he cites cases that stand for recklessness as to legality. *See* Feinberg, *supra* note 47, at 127 (citing Martin v. United States, 317 F.2d 753 (9th Cir. 1973); *Inciso*, 292 F.2d at 374; United States v. Gibas, 300 F.2d 836 (7th Cir. 1962)).

[224] People v. Coe, 522 N.E.2d 1039 (N.Y. 1988). Moreover, the *Coe* opinion is unsigned. *Id.* at 1039–1041. *See generally* Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1991, 14 PACE L. REV. 353, 354 (1994) (criticizing the Court of Appeals during the same period for issuing unsigned opinions in cases involving important constitutional questions); Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1990, 12 PACE L. REV. 1, 48, 57 (1992).

[225] N.Y. PUB. HEALTH LAW §12-b (McKinney 2002 & Supp. 2011).

[226] *Coe*, 522 N.E.2d at 1939.

[227] *Id.*

Health Law that barred abuse of residents in health care facilities.[228] The trial court held that defendant "had been instructed in appropriate behavior; that she knew her actions in searching . . . [was] improper."[229]

The appellate court upheld and defendant appealed on the ground that the government "did not make the required showing that she *willfully violated*" the statute.[230] The government argued that all that was necessary to convict under the statute was a voluntary act that violates a provision of the public health laws, i.e., merely *intentional*, the lowest-tide construction.[231] The court likened the government's argument to strict liability, which does not require mental culpability.[232] In contrast to the overall topic discussed herein, New York law is clear on this point.[233] The Penal Law crimes require a clear legislative intent to remove a culpable mental state, i.e., the imposition of strict liability.[234] The Court of Appeals cited examples of a clear expression of strict liability in the Public Health Law.[235] It also rejected defendant's argument that the statute, even where criminal penalties apply, required showing of an "evil motive, bad purpose or corrupt design."[236]

The Court of Appeals introduced a yet another manner of construing *willful* in criminal law; the court distinguished between crimes punishable as felonies, where an evil intent to injure is required, and those classified as misdemeanors, where as in section 12-b of the Public Health Law, all that is needed is *knowledge* that conduct is illegal.[237] The court cited the Model Penal Code as authority to equate *willful* with *knowing*.[238] Thus, *willful* in a criminal context where a misdemeanor applies only requires a *knowing* act without *intent* to violate the law.[239]

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[228] *Id.*; *see* N.Y. PUB. HEALTH LAW § 2803-d(7). The defendant was also convicted of one count of falsifying a record related to the incident under section 175.05 of the Penal Law. N.Y. PENAL LAW § 175.05 (McKinney 2009).

[229] *Coe*, 522 N.E.2d at 1040.

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *See* N.Y. PENAL LAW §15.15(2).

[234] *Id.*

[235] *Coe*, 522 N.E.2d at 1039 (citing N.Y. PUB. HEALTH LAW § 2805-b(2) (McKinney 2007)).

[236] *Id.* at 1040.

[237] *Id.*

[238] *Id.* at 1040 (citing MODEL PENAL CODE §2.02(8) (1985)).

[239] *Id.* at 1041.

The *Coe* court explanation only served to confuse matters, i.e., in order to prove a *willful* violation the government is required to prove that defendant was aware not that she was violating a specific statute, rather she held an awareness of that conduct as generally illegal (the *Coe* defendant admitted that her conduct was illegal).[240] The court's explanation is contradictory, on one hand requiring *knowledge* that an act of generally illegal, and on the other, refusing to include a bad purpose. As discussed *supra* the two concepts are similar. The *Coe* court cited *United States v. Bishop*, discussed *supra*, among others, the leading case of in the tax context requires an *intentional* violation of a *known* legal duty, the high tide of *willfully*.[241]

c. Ethics Laws: Public Servant Financial Disclosure[242]

Certain public servants, statewide elected officials, members of the legislature, state officers and employees and legislative employees, are required to file an annual statement of financial disclosure.[243] The punishments for failure to file a statement or a false filing are detailed in both the Executive and the Legislative Law.[244] Both sections of law require penalize an individual who "knowingly and wilfully fails to file an annual statement of financial disclosure or who knowingly and wilfully with intent to deceive makes a false statement . . . ."[245] The primary penalty for violations is a civil penalty of up to $40,000.[246] Both the Commission on Public Integrity, which oversees executive branch public servants, and the Legislative Ethics Commission, which oversees the legislative branch, may, in lieu of a fine, refer violations for false filing to a prosecutor to be punished by a class A misdemeanor.[247]

In the history of the two statutes, which date back to 1987,[248] there have been only a handful of civil penalties assessed against

[240] *Id.*

[241] Bryan v. United States, 524 U.S. 184, 191–92 (1998) (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

[242] N.Y. LEGIS. LAW § 80(11) (McKinney 2008).

[243] *See* N.Y. PUB. OFF. LAW § 73-a (McKinney 2008).

[244] N.Y. EXEC. LAW § 94(13) (McKinney Supp. 2008); N.Y. LEG. LAW § 80(11) (McKinney Supp. 2008).

[245] N.Y. EXEC. LAW § 94(13); N.Y. LEG. LAW § 80(11).

[246] N.Y. EXEC. LAW § 94(13); N.Y. LEG. LAW § 80(11).

[247] N.Y. EXEC. LAW § 94(13); N.Y. LEG. LAW § 80(11).

[248] 1987 N.Y. LAWS 3022 (amended by the Public Employees Ethics Reform Act of 2007, 2007 N.Y. Laws 159–85).

state public servants connected to the filing of annual statement of financial disclosure.[249] However, like the federal statutes noted above, *knowingly* precedes *willfully* in the *mens rea* in both statutes. There is authority for the proposition that willfully here, at least where criminal penalties apply, means either the strictest interpretation or *knowledge* that an act is generally illegal.[250] In *Gormley v. New York State Ethics Commission*, a former employee of the State Department of Health appealed a $3,500 fine for "knowingly and intentionally" violating post-public employment restrictions.[251] The unanimous court refused to read into the statute a stricter standard for knowledge or intent than as defined in the Penal Law.[252] The court explained that statute's *mens rea* did not require "knowledge of the illegality of [defendant's] conduct or to have the conscious objective to violate the statute; the requirement that [defendant] be aware that his conduct was illegal is normally embodied in the term 'willfully.'"[253]

In the event that a court does rule in a criminal law context, it will be aided by statute that makes the distinction between the two, as well as possible defense, moot. Section 78 of the Public Officers Law requires all public servants subject to the regime of ethics laws and financial disclosure to acknowledge receiving and reading a handbook containing the relevant laws.[254] The section requires a certificate to be filed with the appropriate authority.[255] Whether *willful* in the context of false filing of a financial disclosure statement means an *intentional* violation of a *known* legal duty or an *intentional* violation of a law generally, it would be difficult to defend a violation on the grounds that one did not know the specific law or even that one was generally unaware.

[249] The statute allows several attempts to cure a failure to file. *See* N.Y. PUB. OFF. LAW § 73-a(2)(a) (McKinney 2008). The necessary remedial measures concerning the culture of corruption pervasive in Albany is the subject for a different note.

[250] *See* Gormley v. N.Y. State Ethics Comm'n, 900 N.E.2d 943, 945–46 (N.Y. 2008).

[251] *Id.* at 945 (quoting N.Y. PUB. OFF. LAW § 73(18) (McKinney 2008)).

[252] *Id.*; *see* N.Y. PENAL LAW §15.05(1), (2) (McKinney 2009).

[253] *Gormley*, 900 N.E.2d at 946 (internal citations omitted).

[254] N.Y. PUB. OFF. LAW § 78.

[255] *Id.*

3. Non-Criminal Context: General Obligations Law: Tort Immunity for Recreational Use of Land

The recreational use statute of the General Obligations Law was enacted to promote a trade-off between a person who wishes to engage in recreational activities on the property of others and the owners of such property.[256] In return for allowing access, owners are shielded from tort liability for injuries suffered by those using the land.[257] The immunity, however, does not extend to "willful or malicious failure to guard . . . ."[258]

In *Sega v. New York*, a hiker was injured in the Catskill Forest Preserve, a state park, in 1976.[259] The hiker rested on a bridge that gave way, causing her to fall about twenty feet below into a creek resulting in serious injuries.[260] Ten months prior, a vehicle struck part of the bridge, but park employees determined the damage to be minor.[261] The hiker attempted to recover under a simple theory of negligence, which the Court of Claims rejected.[262] Although it was not raised at trial, the appellate court invoked the immunity provision of the law, section 9-103 of the General Obligations Law, and held that the "claimant had failed to establish any willful or intentional act . . . to justify imposing liability."[263]

Notwithstanding the absence of the issue at trial, the Court of Appeals applied the recreational immunity section and found that the state did act *willfully* or *maliciously* in failing to repair the bridge, therefore shielding the state.[264] Without defining willful, the court held that the statute required "a graver act than mere negligence before liability may be imposed."[265] Still, the court's statement offers *some* clues as to what the term meant, at least in this chapter of law.

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[256] N.Y. GEN. OBLIG. LAW § 9-103(2)(a) (McKinney 2010). *See* Bragg v. Genesee Cnty. Agr. Soc., 644 N.E.2d 1013, 1016 (N.Y. 1994); Sega v. New York 456 N.E.2d 1174 (N.Y. 1983).

[257] *Id.*

[258] N.Y. GEN. OBLIG. LAW § 9-103(2)(a).

[259] *Sega*, 456 N.E.2d at 1176.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* at 1179. One issue the court considered was whether the statute was meant to apply to state-owned land. The court held that the statute indeed applied to state land.

[265] *Id.*

Tort law, which is grouped by general categories of unintentional (i.e., negligence) and *intentional,* is thus analogous to criminal law states of mental culpability. Because the statue includes *maliciously*, it is likely that term is equivalent to criminal law's *intentionally*, i.e., a conscious object of an evil purpose. At the other end of the spectrum, if mere negligence does not suffice for a *willful* act, it also requires some culpability that is more than strict liability. That leaves the criminal law equivalents of *knowing* and *reckless*. The state workers visited the bridge following the accident and made a determination that the damage was minor and that it did not warrant repair.[266] Although the state employees were clearly wrong, it could hardly be said that those who concluded the bridge was safe consciously disregarded risks;[267] they did not believe there was risk.[268] Therefore, in the context of immunity from suits involving recreational use of another's property, it is likely that willful means knowing.

IV. THE WILLFUL CRIMINAL LAW REMEDIATION ACT OF 2011

Nearly fifty years after the Commission on Revision of the Penal Law completed its work the questions surrounding the meaning of "willful" persists in New York laws. The term is used throughout chapters of state law, with new uses regularly added. The lack of a clear definition flies in the face of the conventions of basic criminal law, i.e., notice of what exactly constitutes a crime, and common sense. It would be wise to retain the definition of *willfully* in the Tax Law context, which has long been held as the default definition, and to *remove it from every other chapter of law where a criminal penalty applies. Willful* should be replaced with one of the four culpable mental states of the Penal Law to avoid continued confusion. And, in the future, no law should be enacted that uses the term—unless it conforms to the tax crime context.

The appendix of the uses *willfully* in the criminal law context is a guide to drafters of the Willful Criminal Law Remediation Act of 2011. The term should be used only in cases of complex

[266] *Id.* at 1176.

[267] *Id.*; *see* N.Y. PENAL LAW §15.15 (McKinney 2009).

[268] *Sega*, 456 N.E.2d at 1176. Of course this assumes that the state workers conducted a reasonable inspection of the bridge. Despite the bridge's collapse, there is no evidence to the contrary.

statutory schemes. In replacing the middle zone, statutes should make clear that the standard is an *intentional* act combined with a general *knowledge* that the act in question was illegal, although not requiring *knowledge* of the specific statute. This is inferred from an actor's behavior, e.g., violating gun registration statutes by filing off the serial numbers of firearms and the use of middlemen in a gun-selling operation. Finally, where mere *knowledge* or *intent* is implied by *willfull* the language should read exactly so.

Drafters should allow for the difference in meanings between the tax context and the middle zone. Henceforth, "statutory willfulness" should be considered an *intentional* violation of a *known* legal duty whereas, "constructive willfulness" should be applied to statutes where a *bad purpose* of general illegal conduct is a specific element.

CONCLUSION

The Commission to Revise the Penal Law did a noble job in its effort to bring clarity to the chapter. However, it did not go far enough. The four culpable mental states in section 15.05 of the Penal Law should be the standard for all chapters. As the foregoing shows, the term *willful* (and its many spelling variations) is confusing because it depends on its context. Law should be a statement of clarity for citizens and triers of fact.