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**Beyond Willful Ignorance**

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# Beyond Willful Ignorance

Alexander F. Sarch

## Abstract

The law allows willful ignorance to substitute for knowledge on the theory that these two mental states are equally culpable. This Article argues that, as a result, the law is also committed to allowing some forms of egregious non-willful ignorance—most importantly, reckless ignorance—to substitute for knowledge when the conditions of equal culpability are met. In addition to developing this theoretical argument, the Article argues that some courts already allow reckless ignorance to substitute for knowledge—namely, in cases governed by the collective knowledge doctrine. Allowing reckless ignorance to substitute for knowledge is thus not unprecedented. What’s more, moving beyond the traditional willful ignorance doctrine is especially important in order to combat the incentives that lawyers, accountants and other white-collar professionals have to remain in ignorance of fraud committed by their clients. While the existing willful ignorance doctrine adequately responds to conscious efforts to remain in ignorance of fraud in one’s midst, the criminal law does not have sufficient doctrinal tools to counteract the incentives to recklessly allow one’s ignorance to be preserved. This is the gap the Iterated Reckless Ignorance Principle defended here aims to fill. A substitution principle of this kind is particularly needed in light of recent legislative “mens rea reform” proposals, aiming to increase the default mens rea for federal crimes to the level of knowledge or willfulness.

# BEYOND WILLFUL IGNORANCE

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## INTRODUCTION

At present, several versions of a bill to reform the mens rea requirements under federal criminal law are working their way through the House and Senate.<sup>1</sup> Recognizing that many federal crimes do not explicitly specify a mens rea element, the proposed legislation would establish a default mens rea for such crimes. Where a crime does not specify a mens rea, the Senate version of the bill would require that the violation be “willful”—which, in turn, is defined as possessing “knowledge that the person’s conduct was unlawful.”<sup>2</sup> The House version of the bill, by contrast, would impose the mental state of knowledge as the default mens rea requirement (at least for crimes involving conduct that a reasonable person would know to be illegal).<sup>3</sup>

Aside from numerous problems with the bills’ drafting,<sup>4</sup> this proposed “mens rea reform” legislation has been criticized for making the prosecution of

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<sup>1</sup> *Criminal Code Improvement Act of 2015*, House Resolution 4002, 114th Congress (2015-2016) (introduced Nov. 16th, 2015) (full text available online at <https://www.congress.gov/bill/114th-congress/house-bill/4002/text>); *Mens Rea Reform Act of 2015*, Senate Resolution 2298, 114th Congress (2015-2016) (introduced Nov. 18th, 2015) (full text available online at <https://www.congress.gov/bill/114th-congress/senate-bill/2298/text>).

<sup>2</sup> *Id.* § 28(b) (stating that “a covered offense shall be construed to require the Government to prove beyond a reasonable doubt that the defendant acted . . . (2) willfully, with respect to any element for which the text of the covered offense does not specify a state of mind,” where the term “willfully” is defined as “mean[ing] that the person acted with knowledge that the person’s conduct was unlawful”).

<sup>3</sup> See H.R. 4002, *supra* note 1 (stating that “[i]f no state of mind is required by law for a Federal criminal offense (1) the state of mind the Government must prove is knowing; and (2) if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful”).

<sup>4</sup> See, e.g., Orin Kerr, *A confusing proposal to reform the ‘mens rea’ of federal criminal law*, N.Y. TIMES (Nov. 25, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/>. Consider just a few examples. The Senate bill, for all covered offenses, imposes the mens rea of “willful”—i.e. “knowledge that the person’s conduct was unlawful”—“with respect to any element for which the text of the covered offense does not specify a state of mind.” S. 2298 §28(a)(4)-(b)(2) (emphasis added). But what in the world could it mean for the willfulness requirement to apply to every element of a crime? Consider firearm possession by felons. Roughly, it is a crime to 1) possess a firearm that 2) has moved in interstate commerce if one also 3) is a felon. See 18. U.S.C. § 922(g). It is clear how the willfulness requirement applies to element 1): The idea is that one must possess the firearm despite knowing that doing so is illegal. But what does could it mean for the willfulness requirement to apply to elements 2) and 3)? How can one be willful, defined as knowing one’s conduct is illegal, with respect to the attendant circumstances that one’s firearm has moved in interstate commerce and that one is a felon? After all, it is not illegal *per se* for a gun to move in interstate commerce, or for a person to have been convicted of a felony. Thus, it is extremely hard to see how the willfulness requirement could apply to attendant circumstance elements of a crime.

The House bill has different problems. It imposes knowledge as the default mens rea where none is specified, and then goes on to say “and” if a reasonable person would know the specified conduct is a crime, then the mens rea of negligence applies (i.e. “the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful”). H.R. 4002 § 11(1)-(2). However, because of this “and,” two mens rea—knowledge and negligence—apply to the second category of crime. The “and” clearly should be replaced by “except that.” More substantively, the statute states that negligence is the mens rea for offenses

white-collar crime—already rare—even more difficult.<sup>5</sup> Given the prospect that some legislation along these lines might soon enter into force, there is reason to ask what strategies might exist for preserving the scope and efficacy of federal criminal prohibitions—especially in the white-collar context.

One of the most obvious doctrinal tools for accomplishing this end is the willful ignorance doctrine. According to this widely accepted doctrine, juries may convict a defendant of a crime requiring knowledge of a fact simply on the ground that the defendant was merely willfully ignorant of that fact—even if the defendant did not *actually* know it.<sup>6</sup> Thus, the willful ignorance doctrine provides a natural avenue of response to the current brand of mens rea reform legislation, which seeks to establish some form of knowledge as the default mens rea for federal crimes. Should some such mens rea reform bill ultimately enter into effect, the willful ignorance doctrine would take on an even more central role in federal criminal prosecutions than it already enjoys.

Given the increasing importance of the willful ignorance doctrine, this Article aims to probe the limits of the principles on which this doctrine rests. There is a simple, but powerful thought underlying the willful ignorance doctrine—namely, that turning a blind eye to criminality shows one to be just

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reasonable people would know to be illegal, while the higher mens rea of knowledge applies for all other offenses, even if reasonable people would not know to them to be illegal. That is exactly the opposite of what one would expect. Typically, for esoteric offenses that regular people would not expect to be crimes, a higher mens rea (offering more protections) might seem natural, while for garden-variety offenses that regular people know to be illegal, a lower mens rea would seem adequate. Somewhat bizarrely, the statute gets this exactly backward.

<sup>5</sup> Zach Carter, *House Bill Would Make It Harder To Prosecute White-Collar Crime*, THE HUFFINGTON POST (Nov. 16, 2015), [http://www.huffingtonpost.com/entry/white-collar-crime-prosecution\\_us\\_564a2336e4b06037734a2f84](http://www.huffingtonpost.com/entry/white-collar-crime-prosecution_us_564a2336e4b06037734a2f84) (arguing that this legislation “would make it more difficult for federal authorities to pursue executive wrongdoing, from financial fraud to environmental pollution”); *id.* (quoting Department of Justice spokesman Peter Carr as arguing that the legislation “‘would . . . significantly weaken, often unintentionally, countless federal statutes,’ including ‘those that play an important role in protecting the public welfare’”); M. Apuzzo and E. Liptonov, *Rare White House Accord With Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), [http://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html?\\_r=1](http://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html?_r=1) (citing Justice Department officials who contend that this legislation “would make it significantly harder to prosecute corporate polluters, producers of tainted food and other white-collar criminals”). *See also* Editorial, *Don’t Change the Legal Rule on Intent*, N.Y. TIMES (Dec. 5, 2015), <http://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html>.

<sup>6</sup> The Supreme Court and all the federal courts of appeals have endorsed some version of this doctrine. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 & n.9 (2011) (collecting cases); *see also* Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2232 & n.5 (1993) (“All the federal circuits have employed willful blindness doctrines”).

The willful ignorance doctrine should not be confused with the distinct evidentiary rule that evidence of willful ignorance can also constitute evidence from which a jury may infer actual knowledge. *See, e.g., Global-Tech*, 131 S. Ct. at 2073 (Kennedy, J., dissenting) (“[f]acts that support willful blindness are often probative of actual knowledge”).

as culpable as acting with knowledge of it does.<sup>7</sup> This Article argues that this rationale, which has been broadly endorsed by courts as the substantive justification for the existing willful ignorance doctrine,<sup>8</sup> in fact supports imposing criminal liability well beyond the boundaries of the willful ignorance doctrine as currently applied. The core of my argument is that since courts allow willful ignorance to substitute for knowledge on the theory that these two mental states are equally culpable, courts are also committed to allowing some forms of egregious *non-willful ignorance*—most importantly, *reckless ignorance*—to substitute for knowledge when the conditions of equal culpability are met. Given the threat the proposed mens rea reform bills would pose to the efficacy of federal criminal law (especially, though not exclusively, in white-collar contexts), this should be a particularly welcome result.

The Article proceeds as follows. Part I argues that courts and commentators have not recognized the full sweep of the rationale underlying the existing willful ignorance doctrine. Specifically, Part I uses the case of criminal liability for lawyers who facilitate client misconduct as the basis for arguing that the existing willful ignorance doctrine *does not extend far enough* in important respects. Part I then sketches my basic argument for thinking that the principles underlying the willful ignorance doctrine actually justify going *beyond* the limitations of this doctrine in its current form. Parts II and III then proceed to place this argument on a more secure theoretical footing. Specifically, Part II takes a closer look at the willful ignorance doctrine and presents the theory of willful ignorance I have defended elsewhere,<sup>9</sup> since it will be crucial for the arguments to follow. Part III then provides the theoretical grounding for my conclusion that courts are committed to allowing repeated reckless ignorance to serve as a substitute for knowledge. Moreover, Part III provides an explicit and precise statement of the reckless ignorance substitution principle I argue courts can and should adopt.

Part IV further bolsters these conclusions by offering a bottom-up argument from caselaw. In particular, Part IV argues that some courts *already* treat reckless ignorance as a substitute for knowledge in cases involving the “collective knowledge doctrine.” This doctrine allows the beliefs of different employees in a corporation to be stitched together to impute knowledge to the corporation. Some scholars argue that the collective knowledge doctrine just is the willful ignorance doctrine by another name.<sup>10</sup> But they are mistaken. As we will see, some of these cases involve only *reckless* ignorance.

Finally, Part V confronts several difficult practical questions for the doctrinal reform I advocate. After addressing concerns about jury confusion, I

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<sup>7</sup> *Global-Tech*, 131 S. Ct. at 2069 (observing that “[t]he traditional rationale for this doctrine is that defendants who behave in [a willfully ignorant] manner are just as culpable as those who have actual knowledge”).

<sup>8</sup> See *infra* notes 32-34.

<sup>9</sup> Sarch, *supra* at note 36 at 1077-93; see also Alex Sarch, *Equal Culpability and the Scope of the Willful Ignorance Doctrine* (manuscript on file with author).

<sup>10</sup> Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210 (1997).

explain why there is a particular need for my proposed doctrinal expansion in light of existing law. Of course, given the pressing worries about overcriminalization that other scholars have raised,<sup>11</sup> do we really need *yet another* tool by which to secure more criminal convictions? I argue that, despite these worries, my proposed expansion is especially important in the white-collar context. Judicial tools are needed to counteract the incentives to structure corporate relationships—*whether consciously or unconsciously*—so that parties can pursue lucrative forms of wrongdoing while avoiding liability by claiming ignorance. The willful ignorance doctrine addresses conscious efforts of this sort, but we lack adequate tools to address reckless or inadvertent versions of the same problem. This is the gap that my proposed doctrinal expansion aims to fill.

#### I. WHY THE EXISTING WILLFUL IGNORANCE DOCTRINE DOESN'T GO FAR ENOUGH AND WHY IT CAN (AND SHOULD) GO FURTHER

Even apart from the curtailing effect that recently proposed mens rea reform bills would have on the prosecution of white-collar crime, there is reason to investigate how far the principles behind the willful ignorance doctrine extend. In particular, there is a serious worry that, *even under current law*, the willful ignorance doctrine in its present form does not extend far enough. The reason, this Part contends, is that the doctrine appears insufficient to fully address the incentives to remain in ignorance that actors in corporate contexts with potential conflicts of interest routinely face.

To see this, consider the ways in which lawyers and accountants, hired to vet a corporation's transactions, can face pressure to remain in ignorance of problems in those transactions. If the corporation has behaved questionably, it has obvious incentives to keep its lawyers and accountants in the dark. Doing so could help the corporation in attempting "to use lawyers [or accountants] to paint a gloss of respectability (sprinkle holy water, as it were) on dubious transactions."<sup>12</sup> For their part, the lawyers and accountants have incentives to please their clients in order to retain their business, and thus may end up being only too happy to labor away in conditions of imperfect information.<sup>13</sup>

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<sup>11</sup> DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 10-28 (2008) (arguing that there is too much criminal law, *inter alia*, because the law has grown so complex, with so many surprising crimes, that ordinary citizens lack fair notice of its requirements).

<sup>12</sup> Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1201 (2003).

<sup>13</sup> Max Bazerman et al., *Why Good Accountants Do Bad Audits*, HARV. BUS. REV., Nov. 2002, at 97 ("Auditors have strong business reasons to remain in clients' good graces and are thus highly motivated to approve their clients' accounts. Under the current system, auditors are hired and fired by the companies they audit, and it is well known that client companies fire accounting firms that deliver unfavorable audits. (...) Moreover, in recent decades, accounting firms have increasingly treated audits as ways to build relationships that allow them to sell their more lucrative consulting services. Thus, from the executive team down to individual accountants, an auditing firm's motivation to provide favorable audits runs deep."). See also Donald C. Langevoort, *Reflections on Scientoer (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 15 (2006) (discussing the

This combination of incentives can be a recipe for disaster. Although many cases prove the point (including, most recently, the conduct of ratings agencies hired to evaluate risky securities in the run up to the 2008 financial meltdown<sup>14</sup>), nowhere is the problem more readily apparent than in the infamous Enron scandal. Prior to Enron's collapse, senior executives warned chairman Kenneth Lay that Enron might be engaged in a serious accounting fraud.<sup>15</sup> In particular, vice president Sherron Watkins informed Lay of her worries that Enron—with the help of accounting firm Arthur Andersen—was executing sham transactions designed to keep debt off Enron's books, thereby inflating company earnings.<sup>16</sup> Watkins recommended having the dubious transactions reviewed by an outside law firm, but Lay retained Enron's traditional law firm, Vinson & Elkins, to review the transactions instead.<sup>17</sup> Moreover, he instructed them not to look too closely at Arthur Andersen's accounting treatment of these transactions.<sup>18</sup> Perhaps unsurprisingly, Vinson & Elkins eventually reported back that the transactions seemed fine, especially since the accountants had signed off on them.<sup>19</sup> Vinson & Elkins proceeded to interview only a handful of senior executives who offered cursory assurances that nothing was amiss, and the law firm declined to interview low-level employees identified as likely sources of information about the problems.<sup>20</sup> Vinson & Elkins cautioned that the transactions might lead to adverse publicity and litigation, but concluded that further investigations were not needed.<sup>21</sup>

Clearly some form of accountability for actors like the Vinson & Elkins lawyers is called for,<sup>22</sup> and the criminal law's willful ignorance doctrine is a prime candidate for getting the job done. If it could be established that lawyers at Vinson & Elkins deliberately acted to preserve their ignorance of the fraudulent nature of the transactions in question, but then approved those transactions nonetheless, it would allow courts to treat the lawyers who turned

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increasingly popular view “that auditor bias is self-serving, a way of coming to agree with the client in order to maintain and foster the audit relationship”).

<sup>14</sup> See, e.g., FINANCIAL CRISIS INQUIRY REPORT 210 (Jan. 2011), available at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_full.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf) (noting that “[i]f an issuer didn't like a Moody's rating on a particular deal, it might get a better rating from another ratings agency. The agencies were compensated only for rated deals—in effect, only for the deals for which their ratings were accepted by the issuer. So the pressure came from two directions: in-house insistence on increasing market share and direct demands from the issuers and investment bankers, who pushed for better ratings with fewer conditions.”)

<sup>15</sup> Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 189 (2011).

<sup>16</sup> *Id.* See also *Text of Letter to Enron's Chairman After Departure of Chief Executive*, N.Y. TIMES, Jan. 16, 2002, at C6 (reprinting letter from Sherron Watkins chairman Kenneth Lay).

<sup>17</sup> Roiphe, *supra* note 15 at 189; Gordon, *supra* note 12 at 1187.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; Roiphe, *supra* note 15 at 189.

<sup>20</sup> *Id.*; Gordon *supra* note 12 at 1187.

<sup>21</sup> *Id.* at 1187-88 (noting that the lawyers “warned that ‘the bad cosmetics’ of the partnerships could result in “a serious risk of adverse publicity and litigation,” but concluded with the advice that no further investigation was necessary”).

<sup>22</sup> See Gordon, *supra* note 12 at 1189 (“It is likely that some of these lawyers engaged in conduct that may expose them to civil liability. Some may even face criminal liability (...).”).

a blind eye to the Enron fraud *as if* they had actually known of it.<sup>23</sup> This, in turn, would permit a conviction, say, for fraud,<sup>24</sup> conspiracy to commit fraud,<sup>25</sup> or aiding and abetting fraud.<sup>26</sup>

The trouble, however, is that on closer inspection it is not obvious that the lawyers at Vinson & Elkins, while culpable, in fact were genuinely *willfully* ignorant. Willful ignorance requires *deliberately* acting to prevent oneself from learning whether the suspected fraud was occurring.<sup>27</sup> Granted, the lawyers likely had some suspicions of fraud—especially given Lay’s instructions not to look too carefully into Arthur Andersen’s treatment of the transactions in question.<sup>28</sup> But it is far from clear that the lawyers then proceeded to act with the *purpose* of preserving their ignorance. True, they interviewed only a handful of executives about the possibility of fraud, and failed to speak with lower-level employees who might have been able to shed light on whether fraud was occurring.<sup>29</sup> But it is not obvious that this was part of a *deliberate scheme* to preserve their ignorance, as opposed to shoddy investigation manifesting a willingness to tolerate the *risk* of remaining in ignorance. I take it for granted that serious professionals generally are averse to behaving in ways that are patently wrong, that can’t be easily rationalized and that threaten their self-perception as decent and moral people.<sup>30</sup> Thus, a more realistic and

<sup>23</sup> See *supra* note 6.

<sup>24</sup> *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964) (Friendly, *J.*) (“We think that in the context of § 24 of the Securities Act as applied to § 17(a), the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see”); *United States v. Epstein*, 426 F.3d 431, 441 (1st Cir. 2005) (upholding willful ignorance jury instructions where defendants were charged with, *inter alia*, mail fraud, but asserted that they lacked knowledge that the underlying timeshare scheme was fraudulent). See also GEOFFREY C. HAZARD, JR., et al., *THE LAW AND ETHICS OF LAWYERING* 2010 (5<sup>th</sup> ed.) at 88-91 (discussing various forms of criminal liability for lawyer misconduct).

<sup>25</sup> *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000) (concluding, where defendants were charged with conspiracy to commit securities fraud and mail fraud, “that the jury was properly instructed that conscious avoidance could...be used to infer knowledge of the conspiracy’s unlawful objectives, [though] not...intent to participate in the conspiracy”); *United States v. Svoboda*, 347 F.3d 471, 479 (2d Cir. 2003) (holding, in prosecution for conspiracy to commit securities fraud, that “the factfinder may...rely on conscious avoidance to satisfy at least the knowledge component of intent to participate in a conspiracy”).

<sup>26</sup> *United States v. Whitehill*, 532 F.3d 746 (8th Cir. 2008) (upholding use of willful ignorance jury instruction, in prosecution for, *inter alia*, aiding and abetting wire and telemarketing fraud, and aiding and abetting money laundering, in connection with a credit card telemarketing scheme); *United States v. Shoreline Motors*, 413 F. App’x 322, 328 (2d Cir. 2011) (holding that the “use of a conscious avoidance charge was appropriate” in prosecution for, *inter alia*, aiding and abetting wire fraud). See also Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 355-56 (1998) (discussing when lawyers can be convicted under federal law as “an ‘aider and abetter’” “by giving legal advice, drafting documents, making court appearances, or providing other law-related assistance to individuals engaged in ongoing criminal conduct”).

<sup>27</sup> See *infra* notes 63-65 and accompanying text, as well as note 90 and accompanying text.

<sup>28</sup> See *supra* note 18 and accompanying text.

<sup>29</sup> See *supra* note 20 and accompanying text.

<sup>30</sup> See Gordon, *supra* note 12 at 1190 (“professionals in high-status jobs at respectable blue-chip institutions do not like to think of themselves as amoral [utility] maximizers. Like human beings everywhere who want to enjoy self-respect and the esteem of others, they tell stories about how what they do is all right, even admirable”); Susan P. Koniak, *When the Hurlyburly’s*

charitable reading of the facts is that the lawyers did not overtly *aim* to remain in ignorance of the fraud (this is blatant wrongdoing of a kind that most professionals would balk at), but instead merely *risks* remaining in ignorance out of an independent desire to curry favor with their clients. In this more charitable version of events, the willful ignorance doctrine would not support convicting the lawyers of crimes like aiding and abetting fraud—even though they intuitively demonstrated a substantial degree of culpability.<sup>31</sup>

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*Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1245 (2003) (explaining that, plausibly, “lawyers believe what they are doing is lawful, that advising their clients in a manner that [may] end[] up undermining state law is their job. I think that they believe at the end of the day that they have done the right thing, acted not just as law permits, but as it commands them to act.”).

<sup>31</sup> See *infra* notes 63-65 and 90 (explaining that willful ignorance requires *deliberately* acting to preserve one’s ignorance). In general, I take it that criminal aiding and abetting liability requires at least *knowledge* on the part of the aider and abettor of the underlying offense. *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (noting with respect to the “intent” required for being an accomplice, that the Court had “previously found that intent requirement satisfied when a person actively participates in a criminal venture with full *knowledge* of the circumstances constituting the charged offense”) (emphasis added). This plausibly holds in the context of aiding and abetting violations of the securities laws as well. See *United States v. Corbin*, 729 F. Supp. 2d 607, 620 (S.D.N.Y. 2010) (observing that “aiding and abetting in the securities context” requires “knowledge of the [underlying] violation by the aider and abettor” (internal quotation marks omitted); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (“those who provide *knowing* aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime”) (emphasis added). Thus, when the prosecution cannot show actual knowledge of the underlying violation, willful ignorance is the primary way to satisfy the knowledge element of an aiding and abetting charge. See *supra* notes 24-26.

However, note one complication. Some courts have assumed that a lesser mental state than knowledge can sometimes suffice for liability for aiding and abetting securities fraud. See e.g. Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 675-76 (1988). Where recklessness suffices for aiding and abetting liability, the prosecution needn’t appeal to a willful ignorance theory. After all, willfully ignorant actors always are at least reckless. See *infra*, note 68 and accompanying text.

Nonetheless, the argument of this paper remains important because in some cases, *reckless does not suffice* for aiding and abetting securities fraud. Specifically, many courts reject the recklessness standard and instead require actual knowledge of the fraud *when the defendant does not owe a fiduciary duty to the victims of the fraud*. See *id.* at 767-77 (noting that “only a few cases” allow recklessness to suffice for aiding and abetting in the absence of a fiduciary duty). In the Second Circuit, for liability to be imposed under section 20(e) for aiding and abetting a securities violation, “the knowledge prong can be satisfied by proof of recklessness *only if* the alleged aider and abettor breached a fiduciary duty[;] [o]therwise, the violation must be knowing.” *S.E.C. v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 491 (S.D.N.Y. 2007) (emphasis added and internal citations omitted). See also *Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 484-85 (2d Cir. 1979) (“We have not used the ‘recklessness’ standard when money damages are claimed in an aiding and abetting context, except on the basis of a breach of fiduciary duty.”); *S.E.C. v. Johnson*, 530 F. Supp. 2d 325, 332-34 (D.D.C. 2008) (distinguishing cases that rely on the “recklessness” standard in the aiding and abetting context, and holding that “the ‘knowing’ standard should be applied to the alleged violations of Section 20(e)”).

Thus, there are some contexts where recklessness of the primary violation does not suffice for aiding and abetting liability, and actual knowledge of the violation is required instead. It is in such cases that prosecutors will indeed have reason to appeal to a willful ignorance theory of guilt. Accordingly, this is where my argument that the willful ignorance doctrine needs to be expanded to cover also reckless ignorance is particularly important. Where recklessness towards the underlying fraud does not suffice for aiding and abetting, lawyers or accountants

Since the willful ignorance doctrine does not cover scenarios of this kind, it falls short of providing a fully adequate response to the powerful incentives to avoid inculpatory knowledge in the white-collar context. Granted, the willful ignorance doctrine is responsive to *conscious efforts* to prevent oneself from learning inculpatory facts. But the doctrine in its current form is inadequate to counteract the incentives to *non-willfully allow* the same result to occur.

Accordingly, the main argument of this Article is that there is reason to move beyond the existing willful ignorance doctrine to allow also some forms of not fully willful ignorance to satisfy the knowledge prong of a crime under certain limited circumstances. Indeed, I argue that courts are *committed* to this doctrinal expansion in virtue of the justification they have given for the existing willful ignorance doctrine.

The argument developed throughout this Article begins with the simple but powerful thought underlying the willful ignorance doctrine. As the Supreme Court recently put it, “[t]he traditional rationale for this doctrine is that defendants who behave in [a willfully ignorant] manner are just as culpable as those who have actual knowledge.”<sup>32</sup> Following other scholars, I dub this the *equal culpability thesis*.<sup>33</sup> Courts routinely endorse this idea as the “substantive justification” for the willful ignorance doctrine.<sup>34</sup>

My contention, then, is that *if we take this traditional rationale seriously*, there is reason to go beyond the existing willful ignorance doctrine. As seen above, sometimes defendants act in ignorance, but not because they *purposefully*, or through a *conscious decision*, preserved their ignorance. Rather, they might have only *recklessly* remained ignorant. Such cases of not

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who are repeatedly recklessly ignorant of a client’s fraud could not be convicted of aiding and abetting that fraud. But that is problematic because sometimes such lawyers or accountants *can*, I argue, be just as culpable as actors who behaved the same way with full-on knowledge.

<sup>32</sup> *Global-Tech Appliances*, 131 S. Ct. at 2069.

<sup>33</sup> Douglas N. Husak and Craig A. Callender, *Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 53 (1994). See also Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 619-20 (1984) (recognizing the doctrine of “deliberate blindness” as a substitution principle that can be justified on the basis of “equivalency” of culpability).

<sup>34</sup> See *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (noting that “the substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable”); *United States v. Heredia*, 483 F.3d 913, 926 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring) (“‘Wilfulness’ requires a ‘purpose of violating a known legal duty,’ or, at the very least, ‘a bad purpose.’ That is why wilful blindness is ‘equally culpable’ to, and may be substituted for, positive knowledge.”); *United States v. Stadtmauer*, 620 F.3d 238, 255 (3d Cir. 2010) (quoting *Jewell*’s observation that the “substantive justification” for the willful ignorance doctrine is the equal culpability of willful ignorance and knowledge); *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266 By & Through Goodman*, 43 F.3d 794, 808 (3d Cir. 1994) (describing “the mainstream conception of wilful blindness as a state of mind of much greater culpability than simple negligence or recklessness, and more akin to knowledge”); *United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (noting that the willful ignorance doctrine “is premised on the belief that acts conducted under the guise of deliberate ignorance and acts committed with positive knowledge are equally culpable”).

fully willful ignorance fall outside the scope of the existing willful ignorance doctrine.<sup>35</sup> Nonetheless, sometimes they intuitively can rise to the same level of culpability as the analogous knowing misconduct. If so, then given the law's endorsement of the traditional rationale, it would be arbitrary not to also allow reckless ignorance to substitute for knowledge—at least when the conditions of equal culpability are satisfied. Accordingly, taking the traditional rationale seriously requires us to allow also some forms of egregious non-willful ignorance—most importantly, reckless ignorance—to substitute for knowledge in conditions of equal culpability.<sup>36</sup>

Of course, this argument has traction only if some non-willfully ignorant misconduct *really is* as culpable as the analogous knowing misconduct. The plausibility of this central claim can be shown most easily by focusing on reckless ignorance. Consider a series of cases based on the allegations against the Vinson & Elkins lawyers discussed above: one involving knowledge, the second involving willful ignorance and the third involving reckless ignorance.<sup>37</sup> All three versions of the hypothetical concern a law firm hired by a large corporation to review a series of esoteric transactions whose legality has been called into question. Several red flags have come to light, and the lawyer heading up the investigation is aware of the risk that the transactions might be fraudulent. He visits the client corporation's headquarters to interview employees about the questionable transactions.

In the first version of the case, the lawyer—call him Attorney A—sits down to interview the employees involved, and they immediately admit they were violating accounting rules to hide the company's debt off of its balance sheet. Attorney A, however, is unfazed. He says he does not care, and he proceeds to write “true sale” opinions for the deals in question despite knowing

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<sup>35</sup> See *infra* notes 63-65, 90 and accompanying text.

<sup>36</sup> Elsewhere, I have argued that the willful ignorance doctrine as applied by most circuits is overbroad. See Alex Sarch, *Willful Ignorance, Culpability and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023, 1061-71 (2014) (critiquing the “unrestricted approach”). If the traditional rationale is taken seriously, we must apply the doctrine only when the willfully ignorant defendant's decision to remain in ignorance actually renders her as culpable as an analogous knowing wrongdoer. The danger for over-application of the doctrine is especially great unless we consider the specific reasons for which the defendant opted to remain in ignorance. After all, sometimes the decision to remain in ignorance can be made for not-especially-culpable reasons—like safety, loyalty to family or ethical obligations to clients (as opposed to merely wanting to please a client in order to preserve business and enhance profits). See Deborah Hellman, *Willfully Blind for Good Reason*, 3 CRIM. L. & PHIL. 301, 302 (2009) (arguing that willful ignorance can be justified on the basis of one's professional obligations). This argument of this Article runs in the opposite direction: taking the traditional rationale seriously requires us to allow also reckless ignorance to substitute for knowledge in conditions of equal culpability.

<sup>37</sup> I do not claim that any individual at Vinson & Elkins should have been convicted of aiding and abetting fraud or the like. Rather, I merely use the Vinson & Elkins allegations as the template for a series of hypotheticals suggesting that criminal sanctions sometimes *would* be appropriate even in the absence of overt willful ignorance.

that they are fraudulent.<sup>38</sup> Attorney A can be straightforwardly convicted of crimes like fraud, conspiracy to commit fraud or aiding and abetting fraud.<sup>39</sup>

In the second version of the case, Attorney B likewise sits down to interview the employees, but before they can say anything, he says, “I don’t know what you have been up to in connection with these transactions, but if there’s been any funny business, I don’t want to hear about it. The less I know, the better.” After chatting about the Yankees for a bit, he heads back to his office and promptly signs off on the transactions. Suppose that Attorney B, just like Attorney A, is fundamentally unconcerned about the legality of the transactions—so much so that Attorney B would have approved the transactions even if he knew they were fraudulent. However, he decides to preserve his ignorance because he hopes this would allow him to avoid liability should the fraud ultimately come to light. Attorney B is a classic willfully ignorant actor, who can without difficulty be convicted of fraud, conspiracy to commit fraud or aiding and abetting fraud on a willful ignorance theory.<sup>40</sup> This result is well supported by the logic of the traditional rationale, since Attorney B intuitively is just as culpable for his behavior as Attorney A was for engaging in the analogous knowing misconduct. (Part I provides a principled argument for equating Attorney B’s culpability with Attorney A’s.)

In the third variation, Attorney C also remains ignorant of the fraudulent nature of the transactions—not due to a *conscious decision* to this effect, but rather because he is *recklessly indifferent to the truth*. When Attorney C sits down with the employees, he is blinded by his outsized desire to curry favor with the executives of the company that hired him. As a result, he is too easily satisfied with the interviewees’ flimsy explanations and vague assurances that they did nothing wrong. Suppose Attorney C actually realizes there is a chance the employees might be hiding something, since their explanations of the irregularities contain many holes. But he is so caught up in a “gold-rush mentality”<sup>41</sup> from the prospect of a long and lucrative business relationship with this client that it seems to him alarmist and excessive to exert too much effort digging into the weak explanations and assurances from the employees.<sup>42</sup> Accordingly, Attorney C conducts only cursory interviews, despite realizing the risk that this might lead him not to uncover any fraud that might be going on.<sup>43</sup> Attorney C thus ends up preserving his ignorance of the fraud—not because of a *desire* or *conscious decision* to insulate himself from knowledge

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<sup>38</sup> Cf. Gordon, *supra* note 12 at 1187 (mentioning that Vinson & Elkins allegedly had “had signed off (given “true sale” opinions) on some of the deals and had a conflict of interest”).

<sup>39</sup> See Hazard, *supra* note 24 at 88-91 (discussing lawyers’ criminal liability for fraud, aiding and abetting fraud and conspiracy to commit fraud).

<sup>40</sup> See *supra* notes 24-26.

<sup>41</sup> Cf. FINANCIAL CRISIS INQUIRY REPORT, *supra* note 14 at 5 (quoting Countrywide CEO Angelo Mozilo’s testimony that “a ‘gold rush’ mentality overtook the country during these years, and that he was swept up in it as well”).

<sup>42</sup> Cf. Epstein, 426 F.3d at 440-41 (discussing one defendant’s claim not to have been willfully ignorant as to whether timeshare scheme was fraudulent because he asked his boss about the truthfulness of certain representations to customers, and received flimsy assurances that the representations were true).

<sup>43</sup> Cf. *supra* note 9.

of the fraud, but rather because of his reckless disregard of the need to dig deeper into the employees' claims. Instead of pressing for details or cross-examining the employees' answers, he breezes through the scheduled interviews and can't be bothered to schedule follow-up interviews with other employees who might possess relevant information. None of this is done as part of a scheme *aimed* at preserving his ignorance, but rather is done just to avoid needlessly irritating the executives at the company that hired him. Thus, he preserves his ignorance of the fraud *recklessly*—*i.e.* despite realizing his actions run the risk of preventing him from learning of the fraud.

Is Attorney C as culpable as the willfully ignorant Attorney B, and thus by extension as culpable as the knowing Attorney A? If this were an isolated incident, in which Attorney C's preoccupation with profits and indifference to the possibility of fraud got the better of him just this once, one might fairly doubt that there is a sufficient basis for deeming him to be as culpable as Attorneys A and B. But suppose this is not just a one-off lapse.<sup>44</sup> Assume that Attorney C, like the other two lawyers, is so indifferent to the fraud that he would have approved the transactions even if he knew some fraud was occurring. Indeed, suppose his desire for profits and indifference to the possibility of fraud is so pronounced that it manifests itself on *multiple occasions*. For example, when the corporation splinters the legal team hired to vet the questionable transactions into geographically dispersed offices, Attorney C (as head of the legal team) offers no meaningful resistance even though he realizes the risk that this might make it more difficult for the legal team to uncover any fraud in connection with the disputed transactions.<sup>45</sup> Although he realizes this risks preserving his team's ignorance of any ongoing fraud, he deems it to be more important not to make the client unhappy. In this way, the legal team's work gets stifled. Again, this is not part of a *conscious effort* on Attorney C's part to preserve his team's ignorance of the fraud. Rather, it is due to the fact that he cares too little about the risk of fraud and thinks pleasing the client in order to secure future profits for his firm is *far more pressing* than investigating this risk of fraud any further. By thus obstructing the legal team's efforts, Attorney C recklessly creates further barriers to his learning of the fraud.

Indeed, suppose the same thing happens yet again when Attorney C delegates additional interviews about the transactions to a junior member of his team with a reputation for sloppiness. It is not Attorney C's *purpose* in doing

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<sup>44</sup> Part II.A discusses the importance of requiring a *pattern* of indifference to the truth.

<sup>45</sup> A task-force established by the New York Bar Association found that something along these lines occurred—perhaps deliberately, perhaps merely recklessly—in the case of the lawyers doing oversight and compliance work for WorldCom: “WorldCom’s in-house legal department was splintered into geographically dispersed groups, several of which had General Counsels who did not report to WorldCom’s General Counsel for much of the relevant period. This purposeful decentralization, combined with a corporate culture that discouraged anyone—including counsel—from closely scrutinizing transactions favored by [CEO Bernard] Ebbers, effectively disabled counsel from exercising any meaningful oversight of the business and financial functions of the company.” *Report of the New York Bar Association Task Force on the Lawyer’s Role in Corporate Governance* 26 (2006), available online: [http://www.nycbar.org/pdf/report/CORPORATE\\_GOVERNANCE06.pdf](http://www.nycbar.org/pdf/report/CORPORATE_GOVERNANCE06.pdf).

so to remain ignorant of any ongoing fraud—though he does recognize that it risks preventing the team from uncovering the fraud. Rather, he delegates the interviews because he wants to be available to ensure the client’s happiness, and because it has the added benefit of shedding some dead weight from his team. Thus, this is yet another recklessly erected barrier to learning of the fraud. What’s more, suppose Attorney C further reduces his chances of learning of the fraud by allowing a culture to take root within his legal team that discourages sharing bad news. Again, he tolerates this culture not because he *wants* to remain in ignorance of any fraud that might exist, but because he thinks shielding the client from bad news is what will keep them happy.

After all these investigative failures, Attorney C proceeds to sign off on the transactions in question. Given all these manifestations of his indifference to the suspected fraud, there is little room to doubt that Attorney C is just as unconcerned with the potential victims of the fraud as Attorneys A and B were. Intuitively, Attorney C’s string of acts that recklessly prevented him from learning of the fraud, followed by his approval of the transactions, demonstrates as much culpability—*i.e.* as little concern for the protected interests of others—as Attorney B’s willfully ignorant conduct, and thus as Attorney A’s knowing conduct as well. (Part II further defends this claim.)

While the willful ignorance doctrine allows Attorney B to be convicted of the same knowledge crimes as Attorney A, this is not true of Attorney C. Attorney C did not *aim* or *consciously decide* to remain in ignorance of the suspected fraud, and so he does not count as willfully ignorant.<sup>46</sup> Because he only *recklessly allowed* himself to remain blinded to the truth, rather than engaging in a conscious effort to avoid knowledge, he currently would be able to escape liability for the crimes that Attorneys A and B can properly be convicted of.<sup>47</sup> However, this result is puzzling. After all, the three attorneys all manifested substantially the same degree of indifference to the victims of the fraud, such that all are equally culpable for their respective courses of conduct. Thus if we take seriously the traditional rationale’s premise that willfully ignorance can substitute for knowledge when and because the two mental states are equally culpable, then Attorney C should be treated in just the same manner as Attorneys A and B—*i.e.* as a knowing wrongdoer.

Of course, some might be skeptical of the willful ignorance doctrine on the ground that it allows us to convict defendants of knowledge crimes even though all the elements of the crime are not literally satisfied.<sup>48</sup> Still, such *mens rea substitution principles*<sup>49</sup> are common in the criminal law.<sup>50</sup> Moreover, the

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<sup>46</sup> See *infra* notes 63-65, 90.

<sup>47</sup> See *supra* notes 24-26.

<sup>48</sup> Some legal scholars have argued that it conflicts with rule of law values—specifically, the principle of legality. See Husak and Callender, *supra* note 34 at 58.

<sup>49</sup> Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 551 (2012) (observing that the willful ignorance doctrine is a “mens rea substitution principle”).

<sup>50</sup> The doctrines of voluntary intoxication and transferred intent are examples. *Id.* at 549-550. See also Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 65

criminal law actually *is* committed to the substitution principle embodied in the willful ignorance doctrine. Courts' use of willful ignorance instructions is pervasive.<sup>51</sup> Accordingly, my conclusion is conditional: *If* the logic behind the willful ignorance doctrine is taken seriously, then we have reason to adopt other substitution principles whereby some cases of not fully willful ignorance—most importantly, reckless ignorance—can substitute for knowledge as well. Since the law *does* resoundingly endorse the willful ignorance doctrine, consistency dictates that it also has reason to adopt other substitution principles involving equally culpable reckless ignorance.

Showing that reckless ignorance sometimes can and should substitute for knowledge in cases like that of Attorney C is the burden of this Article. My strategy is two-pronged. First, I elaborate the top-down, theoretical argument that this rule is required by the logic of the traditional rationale for the willful ignorance doctrine. Second, I offer a complementary, bottom-up argument grounded in caselaw. Some court decisions are best read as permitting precisely the kind of reckless ignorance substitution principle that I claim is also justified on theoretical grounds. Taken together, these two arguments help show that the law already is committed, both in theory and in practice, to the view that some recklessly ignorant actors are as culpable as the analogous knowing actors and can be convicted of knowledge crimes.

Granted, going beyond the willful ignorance doctrine to also cover some forms of egregious reckless ignorance is not the *only* available way to respond to the problems illustrated by the role of Vinson & Elkins in the Enron scandal. For example, one might also look to the rules of professional ethics or to private litigation for a response, or perhaps revisit the idea of criminal responsibility for negligent conduct. However, there are concerns about these responses.<sup>52</sup> Moreover, I do not offer my proposal of moving beyond the

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(1996); Robinson, *supra* note 33 at 616-20 (discussing a range of substitution principles and the possible rationales for them).

<sup>51</sup> See *supra* notes 6-7, 32-34.

<sup>52</sup> The trouble with relying on professional ethics as a response is that lawyers' ethical obligations are generally even *less* restrictive than the criminal law. The Model Rules of Professional Conduct only prohibit *knowingly* aiding client misconduct, and do not include a willful ignorance doctrine. Roiphe, *supra* note 15 at 190 (noting that the Model Rules employ an actual knowledge standard, not a willful ignorance standard). Moreover, it's doubtful that Bar Associations will be willing to substantially expand the scope of these rules, thereby making life more difficult for their members. *Id.* at 199 (noting that "the bar has made nods toward a more explicit willful ignorance standard," but "[r]ather than demonstrating a genuine response to concerns about lawyer abuse, these efforts depict a professional organ that remains captive of its powerful clients and makes changes only when necessary to satisfy regulators").

When it comes to criminal penalties for *negligently* performing one's professional duties, there is substantial skepticism about imposing criminal liability for negligence. See, e.g., LARRY ALEXANDER AND KIMBERLY FERZAN, CRIME AND CULPABILITY 71 (2009) ("we are not morally culpable for taking risks of which we are unaware"); see generally *id.* at 24, 69-71. In my view, much of this skepticism can be answered in principle. See Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 337-38 (2006) (arguing that inadvertent risk creation can be warranted because it is culpable to fail "to exercise doxastic self-control, i.e., control over desires that influence the formation and awareness of one's

willful ignorance doctrine as the *sole* response to these problems. The expansion of the willful ignorance doctrine advocated here is just meant to be one of several desirable responses that would help counteract the incentives to remain in ignorance that actors in white-collar contexts routinely face. Nonetheless, moving beyond the willful ignorance doctrine as advocated here is a particularly promising response because courts are *already committed* to this doctrinal expansion in virtue of the justification they have given for the willful ignorance doctrine.

## II. A THEORY OF WILLFUL IGNORANCE

This Part aims to develop a theory of willful ignorance. The “traditional rationale” for the willful ignorance doctrine is that “defendants who behave in [a willfully ignorant] manner are just as culpable as those who have actual knowledge.”<sup>53</sup> This is the so-called *equal culpability thesis*. This Part begins from the premise that if we are to remain faithful to the traditional rationale, willful ignorance should satisfy the knowledge element of the crime charged *in all but only* those cases where the equal culpability thesis holds. However, this thesis is not true across the board, I argue, but only sometimes. In this Part, relying on a view I have defended elsewhere, I explain *why* the equal culpability thesis holds when it does. The resulting theory of willful ignorance provides the basis for the argument of the rest of the Article.

### A. *The Puzzle With Willful Ignorance*

The willful ignorance doctrine raises a puzzle, and solving it lets us determine the set of cases the doctrine should be limited to. Willful ignorance (as we’ll see) is a form of recklessness, and since recklessness is assumed to be less culpable than knowing misconduct, one might wonder how willfully ignorant behavior could *ever* be as culpable as knowing misconduct—as the equal culpability thesis asserts. To see better why this puzzle arises, the concepts of *culpability* and willful ignorance must be clarified.

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beliefs”). Nonetheless, the proposal of imposing criminal liability for negligence involves an uphill battle one might reasonably be hesitant to wage.

Lastly, tort liability remains possible as a response to the present problem. However, tort liability is limited by the fact that it requires a plaintiff who not only is willing and able to sue, but also who also can demonstrate that her injuries were *proximately caused* by the lawyer or accountant misconduct in question. Moreover, there already is civil liability for lawyer and accountant misconduct, and yet it seems not to have been adequate to fully eliminate the problem. *See* Gordon, *supra* note 12 at 1188 (observing that “it is difficult and exceedingly rare to hold corporate lawyers and law firms liable for frauds committed by their clients’ managers,” and noting that “the Supreme Court and Congress have eviscerated private actions against lawyers for aiding and abetting under the securities laws”). *See also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191, 114 S. Ct. 1439, 1455, 128 L. Ed. 2d 119 (1994) (“a private plaintiff may not maintain an aiding and abetting suit under § 10(b)”); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing A Firm Foundation*, 50 SMU L. REV. 225, 229-31 (1996) (discussing civil liability for lawyers failure to detect and disclose securities fraud).

<sup>53</sup> *Global-Tech Appliances*, 131 S. Ct. at 2069. *See supra* notes 32-34.

For purposes of this Article, I assume that something like the familiar *insufficient regard theory* of culpability is roughly correct.<sup>54</sup> Its basic thought is that one is culpable for an action to the extent that it manifests insufficient regard for the protected interests of others. For our purposes, it is not crucial to decide exactly how to spell out the details of the view.<sup>55</sup>

What, then, is willful ignorance? Although the Model Penal Code sought to define knowledge to cover cases of willful ignorance,<sup>56</sup> it is widely agreed that willful ignorance is not just a sub-species of knowledge. Knowledge in the criminal law requires high subjective certainty plus truth.<sup>57</sup> But the consensus is that willful ignorance is not knowledge thus defined.<sup>58</sup>

<sup>54</sup> Many philosophers and legal theorists adopt this type of theory. *See, e.g.*, Larry Alexander, *Culpability*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW (Deigh, and Dolinko, eds.) (2011) (“acts are culpable when they manifest insufficient concern for the interests of others”); LARRY ALEXANDER AND KIMBERLY FERZAN, *CRIME AND CULPABILITY* 67-68 (2009) (arguing that “insufficient concern [is] the essence of culpability”); NOMY ARPALY AND TIM SCHROEDER, IN PRAISE OF DESIRE 170 (2014) (“a person is blameworthy for a wrong action A to the extent that A manifests ill will (or moral indifference) through being rationalized by it”); Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHILOSOPHY 289, 373-74 (“a person is normatively blameworthy for engaging in conduct that a statute prohibits if he was motivated by an attitude of disrespect for the interests that the statute seeks to protect, whether the attitude consists of malice, contempt, indifference, callousness, or inadvertence toward those interests”).

<sup>55</sup> For example, the insufficient regard theory is similar in spirit to the theory that an action is culpable to the degree that “it is a product of a faulty mode of recognition or response to reasons for action.” GIDEON YAFFE, *ATTEMPTS* 38 (2011). *See also* Julia Markowitz, *Acting for the Right Reasons*, 119 PHIL. REV. 201 (2010) (discussing the theory that “my action is morally worthy if and only if my motivating reasons for acting coincide with the reasons morally justifying the action”); Peter Graham, *A Sketch of a Theory of Blameworthiness*, 88 PHIL. & PHENOMENOLOGICAL AFF. 388, 407 (2014) (arguing that X is blameworthy for  $\phi$ -ing iff the reactive emotions are appropriate, and this, in turn, is true iff “in  $\phi$ -ing, X has violated a moral requirement of respect”).

<sup>56</sup> Model Penal Code (“MPC”) § 2.02(7) states that “knowledge is established if a person is aware of a high probability of [the relevant fact’s] existence, unless he actually believes that it does not exist.” The MPC commentary states that this definition of knowledge “deals with the situation British commentators have denominated ‘wilful blindness’ or ‘connivance.’” MPC 129-30 (Tent. Draft No. 4, 1955). *See also* Marcus *supra* note 6 at 2231-32.

<sup>57</sup> *See* Charlow, *supra* note 58 at 1374-75 (noting that criminal law “knowledge requires both belief, or subjective certainty, and the actual truth or existence of the thing known”).

<sup>58</sup> The clear consensus among courts and commentators is that willful ignorance is not actually a form of knowledge. *See United States v. Svoboda*, 347 F.3d 471, 477-78 (2d Cir. 2003) (willful ignorance instruction “permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge” (internal quotation marks omitted)); *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (“deliberate indifference charge permits ‘the jury to convict without finding that the defendant was aware of the existence of illegal conduct’”); *Global-Tech*, 131 S. Ct. at 2072 (Kennedy, J., dissenting) (“[w]illful blindness is not knowledge”). *See also* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1390 (1992) (“most definitions of wilful ignorance delineate a mens rea that is the equivalent neither of knowledge nor recklessness”); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 226 (1990) (discussing “indicat[ing] that deliberate ignorance is not knowledge”); Hellman, *supra* 36 at 302 (“contrived ignorance itself is not a form of knowledge”); Husak and Callender, *supra*, note 33 at 37-38, 51 (arguing that many “wilfully ignorant defendants do not possess knowledge of the incriminating proposition p”).

Rather, willful ignorance is a distinct phenomenon that, on the most basic understanding, has two components. As Glanville Williams put it, a party is willful ignorant if he “has his suspicions aroused but then deliberately omits to make further enquiries.”<sup>59</sup> Likewise, the Supreme Court observed that courts agree on “two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”<sup>60</sup> Given the broad agreement on these two prongs, I adopt this *basic account* of willful ignorance:

**Basic Willful Ignorance:** To be willfully ignorant of an inculpatory proposition *p* (which let’s suppose is true<sup>61</sup>), one must

- (1) have sufficiently serious suspicions that *p* is true (*i.e.* believe that there is a sufficiently high likelihood that *p* is true, short of practical certainty<sup>62</sup>), and
- (2) deliberately (as opposed to negligently or recklessly) fail to take reasonably available steps to learn with greater certainty whether *p* actually is true.

One clarification is in order about the meaning of “deliberately” (a term taken from *Global-Tech*).<sup>63</sup> Paradigmatically, to deliberately fail to investigate involves acting with the *purpose*—or the aim or desire—to preserve one’s ignorance. Most courts seem to adopt this meaning of “deliberately preserving one’s ignorance.”<sup>64</sup> On the other hand, comments by some courts suggest that even when the defendant did not have the purpose to remain in ignorance, a *merely knowing* failure to investigate can also suffice for willful ignorance. This is suggested especially by statements to the effect that willful ignorance requires “conscious avoidance” of inculpatory knowledge.<sup>65</sup> On this view, one could also count as willfully ignorant if one acted in ways that one merely is *practically certain* will preserve one’s ignorance, even if this is not one’s purpose or aim. (Some courts are not consistent on this point and appear slide back and forth between these two views of willful ignorance.<sup>66</sup>) However, I

<sup>59</sup> GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART*, 2d ed., 157 (1961).

<sup>60</sup> *Global-Tech*, 131 S. Ct. at 2070.

<sup>61</sup> It is not clear if a person can be willfully ignorant of a proposition that is false. However, this need not concern us, since (barring abuses) one is not likely to be charged with a knowledge crime unless the inculpatory proposition is plausibly true.

<sup>62</sup> I leave it open that what counts as a “sufficiently high probability” here might vary depending on features of the context, *e.g.* the magnitude of harm that is at stake.

<sup>63</sup> 131 S.Ct. at 2070.

<sup>64</sup> *See, e.g., Jewell* 532 F.2d at 700 (requiring “conscious *purpose* to disregard the nature of that which was in the vehicle, with a conscious *purpose* to avoid learning the truth”) (emphasis added); *Heredia*, 483 F.3d at 918 (observing that “when Congress made it a crime to ‘knowingly...possess with intent to manufacture, distribute, or dispense, a controlled substance,’ (...) it meant to punish not only those who know they possess a controlled substance, but also those who *don’t know because they don’t want to know*”) (emphasis added). *See also* Williams, *supra* note 59 at 157 (noting that a party is willful ignorant if he “has his suspicions aroused but then *deliberately* omits to make further enquiries *because he wishes to remain in ignorance*”) (emphasis added).

<sup>65</sup> *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000) (concluding “that the jury was properly instructed that conscious avoidance could...be used to infer knowledge of the conspiracy’s unlawful objectives, [though] not...intent to participate in the conspiracy”).

<sup>66</sup> On the one hand, the Second Circuit noted that for a willful ignorance instruction to be warranted the evidence must “establish[] the defendant’s *purposeful* contrivance to avoid

mention this complication only to set it aside. For purposes of clarity, I focus just on the first, more familiar type of willful ignorance. (The arguments of this Article go through regardless of which view of willful ignorance is adopted.)

Using this account of willful ignorance, the simplest version of the equal culpability thesis that is plausibly defensible asserts that defendants who are willfully ignorant in the basic sense are as culpable as their *similarly situated knowing counterparts*. Call this version of the thesis *Basic ECT*. There are other ways the thesis might be construed, but they are far less plausible.<sup>67</sup>

Now, the puzzle raised by the equal culpability thesis is this. Given the first prong of the basic definition of willful ignorance, every willfully ignorant actor is at least reckless.<sup>68</sup> But knowing wrongdoers are assumed, all else equal, to

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guilty knowledge.” *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (internal quotation marks and citations omitted; emphasis added). But in that same decision, the Second Circuit also held that “the factfinder may...rely on *conscious avoidance* to satisfy at least the knowledge component of intent to participate in a conspiracy.” *Id.* at 479 (emphasis added).

<sup>67</sup> The underlying claim that willfully ignorant misconduct is just as culpable as knowing misconduct might be also understood as the claim that whenever a defendant D does the actus reus of knowledge crime C in willful ignorance, *there is some possible person guilty of C who D is just as culpable as*. More precisely, consider the *least culpable knowing actor*—call him “A”—who could legitimately be found guilty of C. Suppose D does the actus reus of C only in willful ignorance of the inculpatory proposition. On these suppositions, one might claim, D is at least as culpable for her action as A.

However, this version of the equal culpability thesis—call it the “Indeterminate Counterpart” interpretation—is problematic. Even if true, it would not be a defensible basis for allowing willful ignorance to substitute for knowledge. The logic of this version of the thesis suggests that anyone who does the actus reus of crime C can be convicted of C solely because the person attains the *minimum level of culpability* required for C. However, it is unclear how we might even begin to go about determining what this minimum culpability level is for any particular crime. Thus, it is doubtful that there is any such level for each crime. More importantly, since many (perhaps most) crimes can be committed under circumstances that do not render one very culpable, this means that even *very slightly negligent* actors could in principle be convicted of serious knowledge crimes. Consider a secretary bullied into performing an act she knew would help her domineering boss commit fraud. While the extreme abuse and pressure she faced greatly reduces her culpability for assisting the fraud, it stops just short of constituting the defense of duress to the crime of aiding and abetting fraud (a crime that requires knowledge of the underlying offense). But accountants, lawyers or bankers in everyday life who are only slightly negligent, lazy or incompetent can very easily attain the same level of culpability as the secretary when dealing with clients perpetrating a fraud. By the logic of the Indeterminate Counterpart interpretation of the equal culpability thesis, this would allow the slight negligence of these accountants, lawyers or bankers to straightforwardly substitute for full-on knowledge of their clients’ fraud. But this seems implausible.

Basic ECT, by contrast, avoids this problem, since it makes a claim only about the culpability of the willfully ignorant defendant and her *similarly situated* knowing counterpart. For one thing, it does not require figuring out what the minimum culpability level for each crime is. Moreover, it is unlikely that there are circumstances under which only slightly negligent actors would be as culpable as their *exactly analogous* knowing counterparts. Accordingly, Basic ECT provides a more plausible basis for the willful ignorance doctrine.

<sup>68</sup> Larry Alexander and Kimberly Ferzan emphasize that willful ignorance is a type of recklessness: “The prototypical willfully ignorant actor is, of course, reckless. The risk he is taking—of, say, smuggling drugs—is an unjustifiable one.” Alexander & Ferzan, *supra* note 54 at 34. Nonetheless, the puzzle I confront in this Part arises for their account, too. They are correct that the willfully ignorant actor generally is at least reckless. But some cases of willful ignorance seem especially culpable—indeed, as culpable as the analogous conduct done with

be more culpable than reckless wrongdoers. This follows from the general assumption in the criminal law that, all else equal, the more subjective confidence one has in the truth of the inculpatory proposition, the more culpable one is (*i.e.* the more insufficient regard one manifests) when one goes on to do the actus reus.<sup>69</sup> But if this principle is correct, then the willfully ignorant actor—who is assumed to have a degree of confidence in p less than knowledge<sup>70</sup>—can be as culpable as the analogous knowing wrongdoer *only if* there is some *additional* source of culpability (beyond his recklessness) that raises his culpability up to the level of the similarly situated knowing actor. What could this additional source of culpability be? What provides the extra culpability in cases of willful ignorance needed to get the defendant up to the level of the knowing wrongdoer? Answering this question allows us to home in on the proper scope of the willful ignorance doctrine.

### B. Restricting the Equal Culpability Thesis

Whatever the missing x-factor is that explains why willfully ignorant conduct can be as culpable as the analogous knowing misconduct, it is not present in *all* cases of basic willful ignorance. As I've argued elsewhere, Basic ECT is too broad.<sup>71</sup> Thus, the equal culpability thesis must be restricted to be defensible. This matters because most federal circuits endorse giving willful ignorance jury instructions whenever the basic, two-pronged definition of willful ignorance is satisfied—on the theory that Basic ECT is true.<sup>72</sup>

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knowledge (practical certainty) of the inculpatory proposition. And one might want to know what it is, precisely, about opting to remain in ignorance about the risks of one's conduct that could increase the actor's culpability from the level of a low-grade reckless wrongdoer up to the level of a knowing wrongdoer. It is this question that my account seeks to answer. Thus, my account can be seen as fleshing out Alexander and Ferzan's view.

<sup>69</sup> See Sarch, *supra* note 36 at 1062-63 (discussing the "Comparative Culpability Principle"). See also Charlow, *supra* note 58 at 1394-95 (noting that "the more certain he is that some significant fact exists that will make his conduct criminal, ... the more blameworthy he is if he goes ahead and acts despite his awareness of that fact").

<sup>70</sup> Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 474 (1992) (observing that the law "distinguishes recklessness from knowledge according to a single factor: whether the actor believed that the risk was merely 'substantial' (recklessness) or instead 'highly probable' (knowledge)"). Although some theorists claim one can be willfully ignorant despite knowing p, see Husak and Callender, *supra* note 33 at 48, my account only seeks to explain what makes willfully ignorant defendants with a *sub-knowledge* level of confidence in p at least as culpable as a knowing wrongdoer. After all, it is only when a defendant possesses a sub-knowledge level of certainty in p that any puzzle arises about how his conduct can be as culpable as the analogous knowing misconduct.

<sup>71</sup> See Sarch, *supra* notes 36 & 9.

<sup>72</sup> Most notably, this unrestricted approach was adopted by the Ninth Circuit in *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (en banc). There, the court adopted a "two-pronged instruction," *id.* at 920-21, that required only that the defendant had suspicions "and deliberately avoided learning the truth." *Id.* at 917. Many other circuits also adopt this unrestricted approach. *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000); *United States v. Stadtmauer*, 620 F.3d 238, 257 (3d Cir. 2010); *United States v. Flores*, 454 F.3d 149, 155 (3d Cir. 2006); *United States v. Mendoza-Medina*, 346 F.3d 121, 132-33 (5th Cir. 2003); *United States v. Geisen*, 612 F.3d 471, 485-86 (6th Cir. 2010); *United States v. Tanner*, 628 F.3d 890, 904 (7th Cir. 2010).

Nonetheless, Basic ECT is over-broad. There are cases where defendants are willfully ignorant in the basic sense and yet are not as culpable as the analogous knowing actors. The explanation is simple: There are many different reasons for which one might decide not to investigate one's suspicions about the inculpatory proposition, and some of these reasons are not very culpable. For example, Deborah Hellman argues that both criminal defense lawyers and doctors treating patients claiming to suffer from chronic pain sometimes have a justification, in virtue of their professional roles, for remaining in ignorance—even if they suspect their clients might be lying or their patients might want to illegally resell the prescribed painkillers.<sup>73</sup> Suppose that, *out of a concern for their professional obligations*, such a lawyer or doctor decides not to investigate their suspicions about the veracity of their clients' or patients' claims (not in the hopes of preserving a defense against liability). In that case, the doctor or lawyer intuitively is not as culpable as a counterpart who *knowingly* makes misleading arguments to the court or prescribes painkillers *knowing* it will be illegally resold. Thus, Basic ECT is over-broad since not all cases of willful ignorance in the basic sense are as culpable as the analogous knowing misconduct.<sup>74</sup>

To avoid this problem, the willful ignorance doctrine must be restricted so it only applies to cases where the willfully ignorant defendant really is as culpable as the analogous knowing wrongdoer—*i.e.* to the conditions in which the equal culpability thesis actually holds. A few circuits restrict the doctrine so that the willfully ignorant defendant's *reason* for not investigating his suspicions must be that he wanted to preserve a defense against liability in the event of prosecution.<sup>75</sup>

But this restricted motive approach is underinclusive in that it sometimes *precludes* willful ignorance from satisfying the knowledge element even when the defendant *is* as culpable as the analogous knowing wrongdoer. The desire to preserve a defense is not the *only* highly culpable reason for which one might choose not to investigate. For example, one might also remain in ignorance in order to *perpetuate or protect suspected criminal conduct* (e.g. a

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<sup>73</sup> See Hellman, *supra* note 58 at 305-12.

<sup>74</sup> I've offered other cases to make a similar point, though in a different way than Hellman. Sarch, *Equal Culpability and the Scope of the Willful Ignorance Doctrine*, *supra* note 9.

<sup>75</sup> *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002) (noting that “[a] willful blindness or deliberate indifference instruction is appropriate when there is evidence to ‘support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts *in order to have a defense’ against subsequent prosecution”* (emphasis added)); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000) (same); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003) (same). See also *Heredia*, 483 F.3d at 920 (explicitly rejecting the Eighth, Tenth and Eleventh Circuit's insistence on this “motive prong” in the definition of willful ignorance). The Eighth, Tenth and Eleventh circuits have all recently reaffirmed their commitment to the motive prong. *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008); *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011); *United States v. Fernandez*, 12-16049, 2014 WL 349744 (11th Cir. Feb. 3, 2014).

conspiracy).<sup>76</sup> Deciding not to investigate for this reason intuitively can also make one as culpable as the analogous knowing wrongdoer. Thus, it is overly narrow to restrict the willful ignorance doctrine to cases of remaining ignorant to preserve a defense. Thus, this approach also fails to fully respect the logic of the traditional rationale.<sup>77</sup>

### C. *When and Why Willful Ignorance Is As Culpable as Knowledge*

If the unrestricted approach to willful ignorance is overinclusive and the most common restriction adopted by courts is underinclusive, an intermediary position must be found. How are we to go about determining when the equal culpability thesis actually holds? One strategy is to try out various restrictions and see whether they stand up to scrutiny. In other work, I have done just this, arguing that a number of attempts to restrict the equal culpability thesis are unsatisfactory.<sup>78</sup> Here, I pursue the more systematic strategy of explaining the general factors the truth of the equal culpability thesis depends on. This yields a recipe for homing in on the proper scope of the willful ignorance doctrine.

Recall the puzzle to be solved: Whence the extra culpability needed to make a willfully ignorant defendant as culpable as the analogous knowing wrongdoer? My account proposes that the missing bit of culpability can be traced to the willful ignorant actor's breach of her *investigative duties*. Thus, willfully ignorant misconduct is as culpable the analogous knowing misconduct when these investigative duties are breached in sufficiently serious ways. Accordingly, the conditions under which the equal culpability thesis holds can be picked out using the following general schema:

**ECT\*:** Suppose A1 and A2 each perform the actus reus of a crime

<sup>76</sup> For example, the Sixth Circuit found willful ignorance to be present where an “employer [wa]s virtually certain that harm [wa]s about to occur but cho[se] to ‘look the other way’ in the interest of continuing the job.” *Jandro v. Ohio Edison Co.*, 167 F.3d 309, 316 (6th Cir. 1999). The defendant in *Jandro* thus decided to remain in ignorance *not* to avoid liability, but to continue getting the benefit of suspected illegal conduct.

<sup>77</sup> One might object that the underinclusivity of the restricted motive approach is not a serious problem. Wouldn't it merely amount to an unobjectionable form of leniency? However, the reason it is unfair is that it gives defendants who were convicted on a willful ignorance theory, having possessed the particular motive of wanting to avoid liability, a *complaint of arbitrariness* against the state. These defendants can legitimately ask why *they* were singled out for conviction, while other willfully ignorant defendants who were just as culpable, but happened to have other motives for remaining in ignorance, were exempted from conviction. The restricted motive approach thus stops arbitrarily short of the full extent of liability that the internal logic of the traditional rationale supports.

<sup>78</sup> See generally Sarch, *supra* notes 36 & 9. Perhaps most importantly, I argue against the counterfactual test (roughly: “would he still have done the act even if he knew?”), which has been suggested by both David Luban's and Alan Michaels's work on acceptance. See David Luban, *Contrived Ignorance*, 87 GEO. L. J. 957 (1999); Alan Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998). I argue that the counterfactual test has problematic implications because it allows some actors to be punished merely for their bad character, even when it is not actually expressed in action. Rather, I argue, what is important is the amount of insufficient regard for others that is *manifested in* (*i.e.* needed to properly explain) one's *actual* conduct.

requiring knowledge of an inculpatory proposition, *p*. A1 and A2, and their respective actions, are identical in every way except one: while A1's action is performed with knowledge of *p*, A2's action is performed *with a form of willful ignorance toward p that involves a sufficiently culpable breach of the duty of investigation*. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

More clearly needs to be said about when an investigative breach really is "sufficiently serious," but ECT\* at least provides a recipe for how to home in on a properly restricted version of the willful ignorance doctrine. Still, in order for the recipe suggested by ECT\* to be defensible, two further claims must be established: 1) that there is a duty of investigation, and 2) that breaching it can make one's conduct more culpable than if no investigations had been feasible. I argue for each in turn.

### 1. There is a duty of reasonable investigation

Some might worry that there can't be a general duty to investigate all morally important matters, since complying with such a duty would be unreasonably difficult.<sup>79</sup> However, my account claims only that the duty to investigate arises in very specific circumstances: namely, when one is aware that one's conduct would pose substantial risks to the protected interests of others (*e.g.* by causing harm or otherwise being illegal).<sup>80</sup> In that case, one's primary duty is to refrain from performing the risky conduct in question. But sometimes primary duties give rise to secondary duties, *e.g.* to apologize or compensate.<sup>81</sup> Some secondary duties arise *in anticipation of* the breach of a primary duty, as when one plans to break a promise and preemptive steps could mitigate the resulting harm to the promisee. The duty of investigation I postulate is a secondary duty of this kind. It can be summarized as follows:

**Duty of Reasonable Investigation (DRI):** *If i* one is intending or planning<sup>82</sup> to perform the actus reus of a crime, *ii* one possesses substantial confidence (short of knowledge) that the associated inculpatory

<sup>79</sup> See, *e.g.*, NOMY ARPALY & TIM SCHROEDER, IN PRAISE OF DESIRE 237 (2014) (arguing that because "we cannot in general know which of our beliefs need checking," we are not "under a moral obligation to scrutinize all of [our] beliefs regarding" important matters). See also Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 194 (2011) (critically evaluating the argument that "it defies common sense to assume that everyone has a duty to know everything at all times such that the deliberate evasion of facts is culpable").

<sup>80</sup> Others have discussed similar duties to investigate. See Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543, 546 (1983); GEORGE SHER, WHO KNEW? RESPONSIBILITY WITHOUT AWARENESS 111-12 (2009) (discussing whether moral duties can give rise to epistemic duties to become aware of morally relevant features of one's situation).

<sup>81</sup> See, *e.g.* Gregory Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293, 309 (2012) (observing that "[r]emedial responsibilities arise out of the breach of antecedent primary duties"); John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 L. & PHIL. 1, 33-35 (2011).

<sup>82</sup> The term "planning" is included here because it may well be possible that some lesser degree of commitment, short of an irrevocable intention to do the underlying act, also triggers the duty to investigate.

proposition, *p*, is true (but lacks reason to think the risk of *p*'s truth is somehow justified), and **iii**) one believes or reasonably should believe that there are available ways to learn whether *p* that are not unduly burdensome, **then** one has a *pro tanto* obligation, conditional on continuing to hold the relevant intention, to (at least try to) avail oneself of these reasonable methods of learning whether *p* before performing the actus reus.

Thus, suppose Brad plans to set fire to a building while aware of a substantial chance that someone is inside. When Brad has settled on this less-than-ideal course of action, DRI says that he should stop and investigate in reasonably feasible ways before proceeding—for example, by looking inside the building. This duty is *conditional* in the sense that if Brad were to abandon his plan, his duty of investigation would evaporate. Moreover, the duty is *pro tanto* in the sense that it can be outweighed by other considerations, *e.g.* that investigating would make it too hard to comply with the primary duty not to do the actus reus, or that investigating otherwise would be overly costly. The required investigation can involve either *external* steps aimed at acquiring further information, or *internal* steps like further processing or reflecting on information one already has.<sup>83</sup>

It should also be emphasized the duty to investigate requires not only actively acquiring new information (if appropriate), but also not *blocking* information one otherwise will receive.<sup>84</sup> After all, the duty to investigate whether *p* entails that one should not act in ways that prevent one from learning whether *p*. Obviously, one minimal form of investigation is *refraining* from taking steps to prevent oneself from learning the truth.

## 2. Breaching DRI confers added culpability

To explain why acting in willful ignorance is more culpable than purely reckless action—and indeed sometimes as culpable as acting knowingly—I need to show that breaching DRI can itself be an independent source of culpability. The key claim to be shown is that breaching DRI and then performing the underlying risky actus reus is *more culpable* (provided there is no excuse or justification) than it would be to perform the same risky actus reus when investigating is not an option (in which case, DRI would not be breached and the actus reus would be done merely recklessly). More precisely:

**Added Culpability Thesis:** For any person, *A*, to whom DRI applies, if *A* breaches DRI and proceeds to perform the underlying actus reus that DRI required *A* to investigate the risks of, then in virtue of this breach, *A* is at least *a little bit more culpable* for his conduct (provided he has no justification or excuse) than a similarly situated person, *B*,

<sup>83</sup> For example, one might see several red flags, but then consciously decide not to think about the matter further to prevent oneself from putting the pieces together and becoming certain that one's planned conduct would cause harm. I take it that this could count as willful ignorance.

<sup>84</sup> This nuance will be especially important in the context of the collective knowledge doctrine discussed below. *See infra* Part III.

who likewise does the same actus reus but had no reasonable way to investigate the risks of that action, would be for her conduct.<sup>85</sup>

The argument for the Added Culpability Thesis is that—from the perspective of the actor—doing the underlying risky action having breached one’s duty to investigate involves *two* missed chances to assure oneself that conduct one intends will not be wrongful, while doing the risky action when investigating is not an option involves only *one*. Suppose I intend to do an action at *t1* that I am aware will be risky. Moreover, I realize I can feasibly investigate at *t0* whether this risk really will materialize after I act. My first chance to assure myself that my intended conduct will not be wrongful comes at *t0*. As things seem to me then, if I investigate, I might learn that the risk in question will not materialize. But if I fail to investigate, while retaining my intention to perform the risky action (and I have no justification or excuse), I manifest a lack of due regard for others that makes me culpable. However, my culpability level is not yet fixed at *t0* because I have a second chance to assure myself that my intended conduct will not be wrongful—*i.e.* during the period up to *t1*. After all, up until *t1*, I can simply abandon my intention to perform the underlying risky action at *t1*. Going ahead with that action is another manifestation of my lack of due regard for others. Thus, breaching DRI and carrying out the risky action involves two missed chances (one epistemic and the other practical) to rule out the possibility that conduct that I intend is wrongful. By contrast, when I have no feasible way to investigate, doing the underlying risky action only involves one such missed opportunity, and thus only one manifestation of my insufficient regard for others. Accordingly, breaching DRI and doing the risky action seems more culpable than doing it when investigating is not an option—just as the Added Culpability Thesis says.

Let me stave off a potential confusion. One might think there is something odd about my claim that breaching DRI is independently culpable.<sup>86</sup> After all, even if one investigates as DRI requires, one might still go on to act very culpably. If one learns that the inculpatory proposition is *true* and performs the actus reus anyway, then one would be a knowing wrongdoer and display a correspondingly high level of culpability. Thus, even if one complies with DRI, one might display more on-balance culpability than certain actors who breach it—like a person who doesn’t investigate but then decides not to do the actus reus. There is no *guarantee* that someone who breaches DRI will be on-balance more culpable than someone who complies with it, so how can failing to investigate be independently culpable?

To see the answer, note that my claim is only that, in virtue of breaching DRI, there is *one respect* in which one is more culpable than someone who complies with DRI. This leaves open the possibility that someone who investigates might still be *on-balance* more culpable than someone who does not. Thus, my basic claim about the relative culpability of breaching versus

<sup>85</sup> Cf. Sarch, *supra* note 36 at 1084 (discussing the claim labeled “CDRI”).

<sup>86</sup> Arpaly and Schroeder raise a related worry. They object to the idea of a duty like DRI on the ground that complying with it would “not absolve one of moral blame.” *Supra*, note 79 at 238.

complying with DRI is fairly limited. Specifically, I claim only that *for any two similarly situated individuals, A and B, if A breaches DRI while B does not, then there is at least one respect in which A is more culpable than B—even if B (in virtue of other features of her behavior) is on-balance more culpable than A.*<sup>87</sup> This claim allows that people who breach DRI can still be on-balance less culpable than people who comply with it. Moreover, this limited claim about the culpability of breaching versus complying with DRI naturally supports my main claim, the Added Culpability Thesis.<sup>88</sup>

How *much* additional culpability does breaching DRI confer? Here are three relevant factors (perhaps there are others). First, the amount of culpability it entails seems to be affected by the costs of acquiring more information about one's suspicions compared with not doing so. The additional culpability acquired from breaching DRI seems greater the easier or less costly it would be to seek out additional information about one's suspicions. If it requires little effort or cost to find out whether one, say, is transporting drugs, then failing to investigate appears more culpable than if there are significant burdens associated with investigating (*e.g.* if it may get one shot). Relatedly, one's culpability for breaching DRI would also seem to be greater the harder or more costly it would be to *avoid* additional information that one otherwise naturally would have received. Thus, taking active steps to *block* oneself from learning facts one otherwise would have learned (*e.g.* if one takes a detour on one's way to work to avoid seeing the bad thing one suspects one might) can be an especially egregious failure of investigation.<sup>89</sup>

Second, DRI can be breached with different mens rea towards the breach. I follow existing caselaw in assuming that to be willfully ignorant, one must *deliberately or purposefully* fail to learn about the inculpatory proposition (*i.e.* consciously choose not to investigate).<sup>90</sup> One could also inadvertently fail to

<sup>87</sup> Cf. Sarch, *Equal Culpability and the Scope of the Willful Ignorance Doctrine*, *supra* note 9 (discussing the claim labeled “CBC”).

<sup>88</sup> Here is why. The Added Culpability Thesis compares the culpability of two people, A and B, who do the actus reus with suspicions about the inculpatory proposition, but where A breaches DRI and B has no opportunity to investigate such that DRI does not apply. On the view I have just endorsed, there is *one respect* in which A is more culpable than B. Since all else is assumed to be equal in this case, A is also *on-balance* a bit more culpable than B—just as the Added Culpability Thesis claims.

<sup>89</sup> This explains why some courts require that the defendant take *affirmative steps* to avoid knowledge in order for a willful ignorance jury instruction to be appropriate. *See, e.g., United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). *See also Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 2071, 179 L. Ed. 2d 1167 (2011) (noting that the Federal Circuit's willful ignorance instructions were flawed because its “test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities,” though ultimately approving these jury instructions).

<sup>90</sup> For example, *Jewell* states that what was required for a willful ignorance instruction was that the defendant had the “conscious *purpose* to disregard the nature of that which was in the vehicle, with a conscious *purpose* to avoid learning the truth.” 532 F.2d at 700 (emphasis added). Moreover, *Heredia* also says in some places that what is required is that the “defendant *purposefully* contrived to avoid positive knowledge.” 483 F.3d at 927 (emphasis added).

Of course, one might argue that the law is wrong to suppose that deliberately or consciously choosing to remain in ignorance is required for willful ignorance. (Thanks to

investigate if one, say, forgets or is distracted. But then one would not count as truly willfully ignorant; this would be a form of non-willful ignorance. Indeed, inadvertently breaching DRI in this way seems less culpable than consciously deciding not to investigate in reasonable ways. Similarly, if one breaches DRI because one does not realize that some method of investigation exists or that one should investigate, one seems less culpable than if one failed to investigate while *knowing* that it's reasonably possible to investigate—as is required for true willfulness. Thus, willful ignorance involves a more culpable breach of DRI, all else equal, than merely negligent breaches thereof.

Third, when one breaches DRI through a conscious decision not to investigate (as required for truly *willful* ignorance), the decision can be made for different reasons. Some of these might render one more culpable than others. In general, the decision not to investigate is more culpable the more it manifests one's disregard for the interests of others.<sup>91</sup>

### 3. Putting the pieces together

If the Added Culpability Thesis is correct, it is easy to see how acting in willful ignorance can be at least as culpable as doing the same conduct knowingly. As seen above, willful ignorance involves a deliberate breach of DRI. Given the Added Culpability Thesis, the willfully ignorant actor acquires some additional culpability from this breach beyond what he would have had if he merely did the actus reus without being able to investigate. Sometimes this added culpability, however much it is, can be enough to get the willfully ignorant actor's culpability level up from the level of a merely reckless actor to the level of the similarly situated *knowing* actor. More precisely, sometimes the extra culpability of consciously breaching DRI before doing the actus reus recklessly can fill the culpability gap that otherwise would exist between a purely reckless actor and an analogous knowing actor. In such cases, the willfully ignorant misconduct will be at least as culpable as the analogous knowing misconduct.<sup>92</sup> If the equal culpability thesis is restricted to these cases—as is ECT\*—we can be confident that it holds.<sup>93</sup>

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Gideon Yaffe for raising this point.) One might construe willful ignorance more broadly than the law does, so that the phenomenon includes all cases where the failure to investigate is traceable to an overly strong concern with what one gets out of remaining ignorant, *viz.* the putative benefits of doing the crime while ignorant. This would require expanding the legal concept of willful ignorance, and I am open to this possibility. But in that case, the argument of this Article would have to be recast as the claim that the law should recognize some cases of willful ignorance beyond those involving a deliberate breach of DRI. *See infra* Part II.

<sup>91</sup> Also note that although one's culpability for breaching DRI might vary depending on how grievous the harm or illegality is that one's contemplated action would risk, this factor is not important for present purposes. After all, the truth of the equal culpability thesis depends on whether willfully ignorant defendants are as culpable as *similarly situated* knowing wrongdoers. For more on this issue, *see supra* note 67.

<sup>92</sup> In a related vein, Paul Robinson observes that under some criminal law doctrines, the "imputation of the elements of a serious offense can be justified on a finding of equivalent culpability reached by aggregating the actor's culpability for two or more less serious offenses." Robinson, *supra* note 33 at 650.

<sup>93</sup> Of course, ECT\* is true only if there are some cases of the sort just identified. But given the wide range of actors in the real world, we can be confident that there are some.

Under the logic of the traditional rationale, willful ignorance jury instructions are justified only when the trial evidence plausibly suggests that ECT\* is satisfied—*i.e.* when the willfully ignorant defendant breached his duty of investigation in serious enough a way to make his otherwise reckless conduct as culpable as the analogous knowing misconduct. Applying this rule *directly* would of course be quite difficult. But I have argued elsewhere that simplifying assumptions can be used to reach workable jury instructions that closely track the conditions of equal culpability laid out in ECT\*.<sup>94</sup>

*D. The Legality Problem: What Justifies Mens Rea Substitution?*

Merely showing that one is as culpable as someone guilty of a knowledge crime does not yet establish that one is *appropriately* convicted of that crime. Doesn't substituting willful ignorance for knowledge violate the principle that courts must apply the law as written? I dub this concern the *legality problem*.<sup>95</sup>

Gideon Yaffe provides a helpful explanation—which I endorse—of why equal culpability can support substituting one mental state for another.<sup>96</sup> The explanation starts from a theory about the underlying point of requiring mental states for crimes *in general*. Yaffe claims that “a particular mental state is required for a crime because it makes a contribution to the objectionable nature of the agent’s conduct in virtue of which the agent is properly punished; it contributes to making the conduct punishable.”<sup>97</sup> Next, Yaffe observes that “another mental state [besides the one required by statute] that is just as bad or worse can make *the same, or a greater contribution of this sort*.”<sup>98</sup> When this is the case, it would make sense to allow this other mental state to substitute for the mental state expressly required for the crime. More precisely, if mental state M is required for crime C because the presence of M makes a particular kind of contribution to explaining why the conduct designated by C is criminalized in the first place, then if another mental state, M\*, makes *exactly that same contribution* (or a greater contribution of the same kind) to explaining why that conduct is criminalized, then M\* should be allowed to substitute for M. It would make sense because punishing [the conduct in C accompanied by M\*] would *serve the very same underlying purpose* as

<sup>94</sup> See Sarch, *supra* note 36 at 1097-1101. See also *infra* Part IV.A.

<sup>95</sup> See Husak and Callendar, *supra* note 33. One possible response to the legality worry is to seek statutory reforms that say that crimes previously requiring knowledge now require either knowledge *or willful ignorance*. But this is not a sufficient response to the underlying issue. After all, why *should* willful ignorance be sufficient? Is this a *desirable* legal reform to enact? The law itself should ideally be sensible and justified. So we still need an answer as to why the *legislature* should deem it a good idea to change various criminal statutes from requiring just knowledge to requiring either knowledge *or willful ignorance*. Would this be justified by retributivist lights? If willful ignorance is so different from knowledge that we worry about whether the former can substitute for the latter, why should the legislature change the law to explicitly *encode* this substitution in the language of the statutes? Thus, we still need an answer as to why willful ignorance can legitimately substitute for knowledge—if indeed it can.

<sup>96</sup> Yaffe, *supra* note 49 at 550.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

punishing [the conduct in C accompanied by M]. As Yaffe puts it, “[t]he conduct in question, when accompanied by the substituting mental state, is just as worthy of punishment (or even more worthy) than it would be were it accompanied by the mental state the law requires.”<sup>99</sup>

However, this is just the *template* for explaining why willful ignorance can substitute for knowledge under conditions of equal culpability. It still remains to be shown that willful ignorance really would make the same kind of contribution to explaining why various act types are criminalized as knowledge alone does. That is, it remains to be shown that punishing willfully ignorant conduct serves the same *underlying purpose* as punishing knowing conduct.

I contend that willful ignorance *is* similar enough to the mental state of knowledge for the two to make the same kind of contribution to explaining criminalization. First, consider why knowledge makes such a contribution. The reason a risky act done with knowledge of the harms it will cause makes one deserve punishment is this: For a normal person with sufficient regard for others, such knowledge can fairly be expected to give one *overriding motivation* not to do the harmful action in question. When one proceeds to do it anyway, this shows that one lacked the motivation against this risky action one should have had, and thus that one lacks sufficient regard for others.<sup>100</sup>

Acting in willful ignorance shows the same kind of lack of due regard. On my account, willfully ignorant action involves two things: i) breaching DRI and ii) doing the actus reus with suspicions of the inculpatory proposition, *i.e.* recklessly. Both of these show the willfully ignorant actor to have insufficient regard in the same way that knowledge does. Regarding ii), being aware that one’s contemplated action is risky can legitimately be expected to produce an overriding motivation *against* doing that action if one has sufficient regard for others. If one does it anyway, this shows one lacked the motivation against the action one *should* have had. This is one manifestation of insufficient regard. Regarding i), I argued that the decision not to investigate as required by DRI can also manifest insufficient regard. If one decides not to investigate because one does not care enough about others to be bothered to incur the costs of inquiring, this, too, shows that one lacks the motivations one should have had. Thus, one is culpable and worthy of punishment in the same way one would be if one acted with knowledge.<sup>101</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> For more on this account of the culpability of knowing misconduct see Alex Sarch, Knowledge, Recklessness and the Connection Requirement Between Mens Rea and Actus Reus, PENN ST. L. REV. (forthcoming). See also Kenneth W. Simons, Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”? Examining the Requisite Connection Between Mens Rea and Actus Reus, 6 BUFF. CRIM. L. REV. 219, 247-57 (2002).

<sup>101</sup> Related considerations show that willful ignorance cannot substitute for *purpose*. The mental state of purpose goes beyond mere knowledge and willful ignorance because purpose involves more than just the failure to be motivated to avoid the bad effects of one’s actions; it also involves an overt *commitment* to bringing about those bad effects. See Allison Hills, *Defending Double Effect*, 116 PHIL. STUDIES 133, 134 (2003) (“an agent *intends* some state of affairs [as opposed to merely foreseeing it] if she is *committed* to bringing it about” (emphasis added)); MICHAEL BRATMAN, INTENTION, PLANS AND PRACTICAL REASON at 141-42 (1999)

This may be the start of an answer, but more is required. One might still worry that it is not legitimate to add the culpability of breaching DRI to the culpability of recklessly doing the actus reus, as my account allows. If *these two* quantities of culpability can be added together, why can't the reckless wrongdoer's culpability be supplemented by the culpability of other bits of misconduct (say, cheating on one's taxes)?<sup>102</sup>

To answer this objection, and thus dispose of the legality worry, notice that there are natural limits on what we can consider when deciding if someone is guilty of a given knowledge crime—*e.g.* knowingly possessing drugs. We are only allowed to consider facts tending to show that one engaged in the prohibited conduct (possession of drugs) and facts tending to show that one knew the inculpatory proposition (that the substance possessed was drugs). One's culpability for *other* mental states or *other* bits of misconduct (*e.g.* tax evasion) are irrelevant to assessing one's guilt of *this* crime. A knowledge crime picks out a natural "unit" of misconduct, and we cannot look beyond the bounds of this behavioral unit to decide if one is guilty of the crime.

If willful ignorance really does make the same kind of contribution to explaining criminalization as knowledge does, then the same limits should also apply for willfully ignorant misconduct. It would be a *problem* if knowledge crimes prohibit a unified course of conduct, but willfully ignorant misconduct is not a natural behavioral unit. However, closer inspection reveals that the two components of willfully ignorant conduct actually *are* tightly bound together as two parts of the same course of conduct. The two components of willfully ignorant conduct—*i.e.* i) breaching DRI and ii) doing the actus reus with suspicions of the inculpatory proposition (*i.e.* recklessly)—are closely connected because i) is an integral part of the *deliberative process that gives rise* to ii). Part of the cognitive process that causes the willfully ignorant defendant's actus reus is the information he possessed while deliberating about how to act. What information he deliberates from, in turn, is a function of his failure to investigate the risks of the actus reus (*i.e.* the inculpatory proposition). Thus, the failure to investigate is part of the genesis of his performance of the actus reus and is legitimately considered together with it. Of course, there are line-drawing problems about where the process that generates some bit of conduct starts. But, in general, the deliberative process that issues in a course of conduct is a proper basis for deciding how culpable

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(arguing that intending an effect entails being committed to it in three specific ways). Willful ignorance, like knowledge, involves only failing to be sufficiently motivated against the foreseen bad effects of one's conduct, but does not demonstrate any commitment to causing those effects, as purpose necessarily entails. (I argue for this point as applied to knowledge elsewhere. See Alex Sarch, *Double Effect and the Criminal Law*, CRIM. L. & PHIL. (forthcoming). Thus, willful ignorance does *not* inherently make the same kind of contribution to explaining the criminalization of act types that purpose does. Hence, willful ignorance cannot substitute for purpose. See *Ferrarini*, 219 F.3d at 155 (concluding that "conscious avoidance could only be used to infer knowledge of the conspiracy's unlawful objectives, and not...intent to participate in the conspiracy," that is, the purpose to facilitate its objectives).

<sup>102</sup> Thanks to Jake Ross, Steven Schaus and Gideon Yaffe for pressing me on this point.

that conduct is—as is clear from the fact that we decide, say, whether a homicide constitutes first-degree murder by asking if it was premeditated. Thus, one’s culpability for failing to investigate can fairly be added to one’s culpability for doing the *actus reus* recklessly, since they form two parts of *the same course of conduct*.

Thus, in just the same way that a knowledge crime picks out a unified piece of misconduct, so, too, an action done in willful ignorance naturally comprises one unified course of conduct. Accordingly, the mental state of willful ignorance makes the same contribution to explaining criminalization as the mental state of knowledge does. Thus, using Yaffe’s idea about why equal culpability permits *mens rea* substitution, it is clear that willful ignorance can legitimately satisfy the knowledge element of a crime.

### III. SUBSTITUTING RECKLESS IGNORANCE FOR KNOWLEDGE

In this Part, I offer a top-down argument from the theoretical commitments behind the willful ignorance doctrine to the conclusion that some forms of *non-willful* ignorance—specifically, egregious instances of reckless ignorance—should also be allowed to substitute for knowledge. The traditional rationale takes it that willful ignorance can substitute for knowledge when, and because, the former is as culpable as the latter. Accordingly, if also certain types of non-willful ignorance can be as culpable as the analogous knowing misconduct, then the logic of the traditional rationale commits us to allowing these forms of non-willful ignorance to substitute for knowledge as well.

Given the structure of the account given in the previous Part of how willful ignorance can be as culpable as knowing misconduct, it is easy to see how not fully willful ignorance in principle could also reach that same level of culpability. The key is that the duty of investigation can be breached not only through a conscious decision—*i.e.* willfully—but also in less than fully deliberate ways, for example, recklessly or negligently. If some of these non-willful breaches of the duty of investigation can be sufficient to raise one’s culpability up to the level of genuinely knowing misconduct, then the traditional rationale requires us to allow these forms of non-willful ignorance to substitute for knowledge as well.

The main task of this Part, therefore, is to make the case for the claim that some forms of especially blameworthy non-willful ignorance can indeed make one as culpable as one would have been had one acted with knowledge. To make my task more manageable, I focus only on the most culpable case of non-willful ignorance: namely, recklessly preserving one’s ignorance. In theory, it might be possible that negligently preserving one’s ignorance could also rise to the level of culpability of knowing misconduct. But such cases (if any) will be exceedingly rare. Thus, I focus just on reckless ignorance, since it provides the strongest basis for expanding the logic of the traditional rationale beyond the existing willful ignorance doctrine. I begin by making the case in the abstract, and then address lingering concerns about substituting reckless ignorance for knowledge. Specifically, I respond to the legality worry as it

applies in this context, and then I explain why my proposed rule does not permit mere negligence to substitute for knowledge.

*A. The Iterated Reckless Ignorance Principle*

To start, consider the general structure of mens rea substitution principles involving ignorance. I employ Holly Smith's influential analysis of culpable ignorance, itself is an umbrella term that comprises both willful ignorance and its non-willful cousins.<sup>103</sup> On Smith's analysis, culpable ignorance decomposes into two parts.<sup>104</sup> First, it involves a *benighting act*, which creates or preserves one's ignorance of some inculpatory fact. Second, this is followed by an *unwitting act*, which is some bit of risky or wrongful conduct that one proceeds to perform in the resulting state of ignorance. As Smith notes, "[i]n many cases the benighting act is a mental occurrence (such as making an incorrect inference), and the temporal gap between it and the unwitting act [can be] infinitesimal."<sup>105</sup> What's more, she notes, "[f]requently the benighting 'act' will be an omission."<sup>106</sup> I also take it that a *series* of benighting acts can in principle be responsible for creating or preserving one's ignorance. (Indeed, this point is crucial to the argument to follow.) Thus, substitution principles involving ignorance *in general* state that where defendant D does some benighting act(s) followed by unwitting act A, if these acts together are as culpable as doing A with knowledge, then D may be treated as if she did A knowingly.

The willful ignorance doctrine has this structure. On my account, the benighting act corresponds to one's breach of the duty of investigation, *i.e.* DRI, and the unwitting act is the subsequent reckless performance of the actus reus. The substitution principle I argue for in this Part has the same structure, except that it replaces the willful breach of DRI with the *reckless* breach of DRI. To explain my proposed substitution principle, I need to clarify what reckless ignorance means and explain why I focus on this type of culpable ignorance in particular.

There are many ways in which one's ignorance might count as non-willful. For example, if one has entirely failed to notice the risks of one's contemplated conduct, one would be ignorant of these risks but not willfully so. This would be a form of non-willful ignorance where DRI is not triggered. After all, DRI applies only if one is *aware* of a particular risk that one's conduct might impose, provided there are reasonable ways in which one can investigate or learn about the matter. However, I will only be concerned with cases of non-willful ignorance in which DRI *does* apply and was breached. The reason is that I am unsure whether ignorance is truly culpable when it does not stem from the breach of a particularized duty to learn about recognized risks of

<sup>103</sup> Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543, 547-48 (1983); Holly Smith, *Non-Tracing Cases of Culpable Ignorance*, 5 CRIM. L. & PHIL. 115-46 (2011); Sher, *supra* note 80; Matt King, *The Problem with Negligence*, 35 SOC. THEORY & PRAC. 577-95 (2009).

<sup>104</sup> Smith, *Culpable Ignorance*, *supra* note 103 at 547-48.

<sup>105</sup> *Id.* at 547.

<sup>106</sup> *Id.*

one's intended conduct. By contrast, cases where DRI applies and is breached are the ones where one's ignorance is most clearly culpable.

Because my task is to identify a form of not fully willful ignorance that is culpable enough to make the subsequent actus reus as culpable as a knowing wrong, I will focus on the *most culpable* form of ignorance that nonetheless is not willful. DRI can be breached with a range of mental states: not just intentionally or knowingly (which amounts to a willful breach), but also recklessly or negligently. I take it that intentional or knowing breaches are, all else equal, more culpable than reckless breaches, and that reckless breaches are more culpable than merely negligent breaches, all else equal. Accordingly, there are grounds for thinking that *reckless ignorance* is the most culpable form of *non-willful* ignorance. I do not want to rule out the theoretical possibility that grossly negligent ignorance could also rise to the level of culpability of knowing misconduct. But such cases will be harder to come by. Thus, to make my task simpler, I focus on reckless ignorance.

What, then, *is* reckless ignorance, exactly? On my account, ignorance is reckless when DRI applies to one, but one runs a substantial and unjustifiable risk that one is not conforming to DRI, thus helping to preserve one's ignorance. More specifically, DRI is *triggered* when one recognizes a particular risk—call it R—that one's contemplated act A would impose and there are in fact reasonable steps one could take to learn whether R will be actualized if one does A. The *breach* of DRI is reckless when one behaves in ways that one is aware imposes a substantial risk of preserving one's ignorance about R, thereby falling short of the reasonable forms of investigation DRI requires. Suppose DRI requires digging up more information about R, and being careful not to wall oneself off from the information about R one normally would receive. If one then only gathers information about R in what one realizes may not be sufficiently effective ways, thereby running the risk that one will remain in ignorance, one will have breached DRI recklessly. Likewise, if one notices one is behaving in ways that make it less likely that one will receive such information, again creating a substantial risk of preserving one's ignorance, then this would also be a reckless breach of DRI.<sup>107</sup>

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<sup>107</sup> Strictly speaking, recklessly violating DRI requires running the risk that one is investigating in ways that fall short of what DRI requires. For ease of exposition, in what follows I will assume that what DRI generally requires is taking the steps that would *actually lead one to learn conclusively whether the inculpatory proposition, p, is true* provided this is not unduly burdensome. Of course, investigating as reasonably required may not always lead one to learn conclusively whether p is true. But on the assumption that DRI generally requires decisively learning whether p where reasonable, it follows that one breaches DRI *recklessly* when one is aware one is creating a substantial and unjustified risk that one will not learn p (where learning p is not unduly burdensome). By contrast, one breaches DRI *knowingly* (the lowest threshold for willful ignorance that has been suggested, *cf. supra* note 65 and accompanying text) if one is aware one is making it practically certain—*i.e. ensuring*—that one will not learn p (where learning whether p is not unduly burdensome). *Purposefully* breaching DRI, then, requires aiming or wanting to remain in ignorance.

For example, consider a doctor who is scheduled the next day to perform a complex surgery involving some still experimental machinery. As with many of the cutting-edge techniques she uses, the doctor suspects the new machinery for use tomorrow might involve as-yet undiscovered dangers. To stay abreast of the latest research on such dangers, she subscribes to *The Journal of Advanced Surgical Techniques*. Sometimes the doctor reads the journal herself, and other times her assistant reads it and alerts her to relevant articles. The new issue has just arrived. Unbeknownst to the doctor, it contains an article discussing the dangers of exactly the machinery she plans to use tomorrow. However, this time she does not read the journal herself because she is late for her weekly tennis match. She hopes instead that her assistant will read through the journal (as he sometimes does) and let her know if it contains any pertinent articles. Unfortunately, the assistant is nowhere to be found at the moment, so the doctor cannot give him instructions to this effect. Thus, on her way out, she leaves the journal in the common room hoping the assistant will see it. In this way, the doctor creates a *substantial risk* that she will remain in a state of ignorance about the dangers of the experimental technology to be used in the morning. She does not affirmatively desire or decide to remain in ignorance. Nor is she *ensuring* she will remain in ignorance, since her assistant might still see the journal and inform her of the relevant article. But suppose he does not. Accordingly, the doctor proceeds with the surgery not having learned of the dangers of the new technology and her patient is harmed as a result. This is a paradigmatic example of acting in a state of recklessly preserved ignorance.

Take a second example from the corporate context. Suppose Big Business Corp. plans to file a report with the SEC, and an executive recognizes the risk that the report might contain falsehoods concerning the company's 2015 earnings—and in fact, unbeknownst to her, it does. It is the executive's responsibility to find out whether there are falsehoods in the report. But suppose she irresponsibly allows informational *barriers* to arise that reduce her chances of discovering any falsehoods in the report. Perhaps for some unrelated reason—*e.g.* to reward star employees with bigger offices—she moves the accounting division into a different building from the contract managers, thus making it harder for them to share information and discover problems in such reports as these.<sup>108</sup> Suppose the executive does this despite realizing the risk that this might prevent her from learning of any falsehoods that the report might contain. Thus, the executive recklessly breaches DRI. She is aware of, but disregards, a substantial risk that she is preserving her ignorance of the falsehoods by doing less in the way of investigating that she ought to. Her resulting ignorance of the misstatements in the report does not count as truly willful, since she does not affirmatively *desire* to remain ignorant about whether the report contained falsehoods or *consciously decide* to preserve her ignorance thereof. Instead, she merely *recklessly* preserves her ignorance, thereby falling short of the reasonable steps she could have taken to uncover the truth about her suspicions.

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<sup>108</sup> Compare this to the WorldCom example discussed in *supra* note 45.

Despite being due to only a reckless breach of DRI, the executive's ignorance of the falsehoods in the report can still be culpable if her failure to learn of them stems from her insufficient regard for the interests of those whom the falsehoods might harm. Granted, recklessly breaching DRI (*e.g.* by erecting informational barriers despite recognizing the risk that this might prevent one from learning all one should) will be *less culpable* than breaching DRI deliberately or through a conscious decision, as required for truly willful ignorance. Nonetheless, recklessly breaching DRI still entails *some* additional culpability beyond what one would incur if DRI did not apply. This is entailed by the Additional Culpability Thesis, argued for above.<sup>109</sup>

Thus, the big challenge to be confronted is this: How can recklessly breaching DRI can *ever* be culpable enough to raise one's culpability level up from i) the level of purely reckless misconduct when investigation is not reasonably possible (where DRI doesn't apply) to ii) the culpability level of knowing misconduct? Why think there are any such cases? It is only when acting in reckless ignorance is as culpable as knowing misconduct that reckless ignorance could substitute for knowledge.

The clearest answer to this challenge is to employ a particular theoretical device: namely, the idea that one can *repeatedly* recklessly breach one's duty to investigate, such that one incurs more and more culpability for each additional investigative breach.<sup>110</sup> Granted, a single reckless breach of DRI, considered in isolation, usually will not be sufficient to raise one's culpability for the unwitting actus reus up to the level of knowing misconduct (although in theory I think this could occur).<sup>111</sup> But even when a single reckless breach of

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<sup>109</sup> See *supra* Part I.C.2.

<sup>110</sup> Cf. Robinson *supra* note 33 at 650 (discussing the theory that the "imputation of the elements of a serious offense can be justified on a finding of equivalent culpability reached by aggregating the actor's culpability for two or more less serious offenses").

<sup>111</sup> As a theoretical matter, I am open to the possibility that a single reckless breach of DRI could sometimes be enough by itself to raise one's culpability up from the level of a purely reckless actor to the level of the analogous knowing wrongdoer. After all, I endorse the idea that the more likely one believes the inculpatory proposition to be, the more culpable one is when one proceeds to do the actus reus in spite of that belief. See Sarch, *supra* note 36 at 1062-63. Thus, if one has a level of belief in the inculpatory proposition that is just barely below the threshold for what is required for knowing it, one would be just a tiny bit less culpable than a knowing wrongdoer. Accordingly, there would be only a very small culpability deficit that one's breach of DRI would have to fill in order to get one up to the level of culpability associated with knowing misconduct. In such a case, even a single reckless breach of DRI might be enough to get one to be as culpable as the analogous knowing wrongdoer.

However, I suspect that it will be extremely difficult to identify such cases in real life. After all, it is very difficult to know exactly *how likely* one must believe the inculpatory proposition to be in order to count as being "practically certain" of it, and thus knowing it. In addition to this conceptual problem, there is also the difficulty that in practice it is extremely hard to determine precisely what a defendant's credence in the inculpatory proposition *is*, which we have to be able to figure out to decide how far below the knowledge threshold he is. Given these practical problems, I think it will be only in rare cases that we can be confident that one reckless breach of DRI by itself is enough to render the defendant as culpable as the analogous knowing wrongdoer. For this reason, I focus in the main text on the easier case of *repeatedly* breaching DRI recklessly. It will be much easier to find cases where a *string* of reckless breaches of DRI can raise one's culpability up to the level of knowing wrongdoing.

DRI does not suffice, it is clear that a *string* of such breaches of one's duty to investigate a given risk *can* together add up to the culpability of the analogous knowing misconduct. Even when one reckless breach is not sufficient, perhaps two such breaches are enough to make one's conduct as culpable as a knowing wrong. Or if two are not sufficient under the circumstances, then perhaps three would do the trick. However culpable the analogous knowing misconduct is, there will be some number of reckless breaches of the duty to investigate that, when taken together and added to the culpability of the actus reus, amounts to the degree of culpability associated with the analogous knowing misconduct.<sup>112</sup>

What is the mechanism at work here? *How*, exactly, is repeatedly breaching DRI supposed to enhance one's culpability? The thought is that sometimes the *only* plausible explanation for why one repeatedly breaches DRI recklessly is that one possesses a level of regard for others that is *as low as* the level manifested in the analogous knowing misconduct.<sup>113</sup> This idea is related to the view that enhanced punishments can be appropriate for repeat offenders.<sup>114</sup> Sometimes the only way to account for the fact that an offender repeatedly commits a given crime is that he has *even less* regard for his victims than it would take to get him to do the same crime just *once*.<sup>115</sup> Likewise, sometimes defendant D's repeatedly breaching a given investigative duty is *only explainable* by appeal to the fact that D has *less* regard for others than would be needed to cause him to breach that duty only once. In this way, D's string of reckless breaches of DRI can manifest more culpability than just one such breach, considered in isolation, would manifest. Thus, repeatedly breaching DRI recklessly can eventually raise one's culpability for doing the underlying actus reus in the resulting state of ignorance up to the level of culpability of doing the actus reus with full-on knowledge.

One caveat is extremely important here. It is key that the series of reckless breaches of DRI that are added together all pertain to the *same underlying risk*, which the actor suspects his chosen course of conduct will impose. Otherwise,

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<sup>112</sup> This kind of culpability aggregation was arguably recognized by Judge Learned Hand as well. In one case involving a prosecution for mail fraud, he wrote: "It is true that all these instances, taken singly, do not prove beyond question that White knew that the statements which he prepared were padded with false entries; but logically the sum is often greater than the aggregate of the parts, and the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." *United States v. White*, 124 F.2d 181, 185 (2d Cir. 1941) (Hand, J.).

<sup>113</sup> Cf. *supra*, note 54 and accompanying text (discussing the insufficient regard theory).

<sup>114</sup> Ken Simons discusses the idea of a "recidivist premium," *i.e.* a culpability magnifier to be applied in cases of repeatedly doing the same bad act. Kenneth L. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 34 (2012). The idea would be that "[a]n actor who persists in wrongdoing is legitimately viewed as committing a wrong more serious than the composite wrong that is constituted by the sum of the individual unjustifiable acts." *Id.* at 34. If such a recidivist premium is defensible, it makes my argument even easier. But my argument goes through even without applying such a culpability *magnifier* to repeated misconduct. All my argument requires is that the culpability of multiple breaches of one and the same duty of investigation can be *added together*, thereby gradually raising one's culpability level over time, even if no magnifier is applied.

<sup>115</sup> See *id.* at 34 (discussing the idea of a recidivist premium); Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571 (2009).

it would not be legitimate to add together the culpability incurred from each of these reckless breaches of DRI.<sup>116</sup> For example, if one first recklessly breaches the duty to investigate, say, the possibility that one's tax return contains misstatements, and then recklessly breaches the duty to investigate whether one's employees are engaged in insider trading, it would not be appropriate to add together the culpability from these two investigative failures. By contrast, if one suspects that one's employees are engaged in insider trading, but through callous indifference fails to investigate *this very risk* on a number of subsequent occasions, and thereby prevents oneself from recognizing and responding to their violations, then the culpability from these *related* breaches *can* fairly be added together. They would all be traceable to the same underlying attitude of indifference to the risk of insider trading—that is, one's insufficient regard for the protected interests of others.

We are now in a position to appreciate the substitution principle I advocate. For clarity, I state it in schematic form before applying it to an example:

**Iterated Reckless Ignorance Principle:** If defendant D lacks knowledge of an inculpatory proposition, p, which is required for crime C, D can be treated *as if* D knew that p if the following conditions hold:

- 1) D suspected that p was true, thus triggering D's duty to investigate in reasonable ways whether p (*i.e.* D's duty to gather more information about p as appropriate and not erect barriers to learning whether p);
- 2) D performed a series of related reckless benighting acts/omissions in violation of D's duty to investigate whether p, and these breaches explain why D remained in ignorance of p;
- 3) D proceeded to perform the actus reus of C while suspecting but not knowing whether p; and
- 4) the sum of the culpability incurred from the benighting act/omissions in 2), and the subsequent actus reus in 3), is at least as great as the amount of culpability D would have had if D had performed the actus reus of C under similar circumstances *while knowing that p*.

In short, sometimes doing an action while suspecting that it carries the risk that p is true, *after* repeated reckless failures to do what one reasonably should have done to learn whether p, can make one as culpable as if one had done that action while knowing p. When this is the case, we can treat one as if one had known that p when acting. This, in an idealized form, is the substitution principle I defend. The practical question of how this can be turned into a workable set of jury instructions will be discussed in Part IV.

#### *B. An Application of the Iterated Reckless Ignorance Principle*

<sup>116</sup> Robinson also recognizes the importance of this relatedness requirement, which must be met for the aggregation of culpability to be appropriate. He writes that “[t]he relation of the two offenses legitimates the aggregation of the two instances of culpability. The requirement of this relationship also avoids an unacceptable precedent: permitting such aggregation in all cases of multiple [unrelated] offenses.” Robinson, *supra* note 33 at 650.

Under this principle, the defendant in the third variation of the Enron hypothetical discussed in the Introduction—Attorney C—can be treated as if he knew of the fraudulent nature of the transactions his firm was hired to vet and sign off on. The reason is that he repeatedly recklessly breached his duty to investigate his suspicions that the transactions at issue were fraudulent.

It was stipulated that, given the nature of the work Attorney C was hired to do, he was aware of the risk that transactions in question involved fraud. This triggered his duty to investigate, which he proceeded to recklessly breach several times. The first group of such reckless breaches occurred when he only cursorily interviewed company employees. Although he at least did *some* minimal investigation, Attorney C's obsession with pleasing his client led him to recklessly refrain from pursuing his suspicions to the full extent needed. He was too easily satisfied by flimsy answers and weak assurances from the employees. While recognizing that their answers did not fully hold water, he displayed reckless indifference to the truth due to his overpowering desire for keeping the client content, ultimately in order to preserve the profitability of his firm. Cognitively, he remained aware that the employees' answers did not stand up to scrutiny, but his desires interfered with his judgment, thus removing the apparent urgency of his lingering concerns. In this way, he took an unjustifiable risk that his ignorance of the fraud would be preserved.

A second such group of reckless investigative breaches occurred when the attorney failed to make any resistance to the client's decision to split up the legal team into geographically dispersed offices. The attorney recognized that this would hamper the legal team's investigations into the nature of the transactions, but his desire for pleasing his client led him to conclude that objecting to the move would make him seem alarmist and contrarian in the client's eyes. The attorney's fear of annoying the client got the better of him, and as a result he paved the way to creating further barriers to his team's obtaining knowledge of the fraud. Again, this was not due to a *conscious decision* to remain in ignorance, but rather was the product of not caring enough about his duty to learn whether the suspected fraud was occurring. Because his overwhelming concern was only to remain in the client's good graces, he unjustifiably risked not doing enough to learn of the fraud—another reckless investigative breach.

A third such reckless investigative breach occurred when Attorney C delegated subsequent interviews to an irresponsible member of his team, despite realizing it risked preventing the team from learning of the suspected fraud. Again, his motivation was not the overt desire to remain in ignorance of any fraud that might be occurring. Rather, his goal was merely to shed some dead weight from his team. This, too, was a reckless investigative breach because it risked preventing him from obtaining information about the fraud in the required ways. The same, of course, is true for Attorney C's cultivation of a climate within his team that discouraged sharing bad news that would risk the client's displeasure. This is yet another way in which the attorney recklessly preserved his ignorance of the fraudulent nature of the transactions.

When, after all these reckless investigative breaches, Attorney C then proceeded to sign off on the transactions he was hired to vet, he took the final step necessary to warrant treatment as a knowing wrongdoer. This approval of the transactions corresponds to the risky actus reus required under prong 3) of the Iterated Reckless Ignorance Principle.

Since the attorney never *deliberately* decided to remain in ignorance in the face of his suspicions of fraud, he does not count as truly willfully ignorant. Nonetheless, his behavior repeatedly displayed reckless indifference to the truth of his suspicions. The attorney did not *deliberately blind himself to the truth*, but he nonetheless *remained blinded* to it thanks to the distorting influence of his outsized desire for pleasing the client and thereby securing future profits. The attorney's conduct thus amounted to a pattern of recklessly failing to learn the truth about the risks of his chosen conduct.

This series of reckless breaches of Attorney C's investigative duties is sufficient to attribute a high level of culpability to him. All the breaches are traceable to his underlying indifference to the truth of his suspicions that fraud was occurring. Moreover, his pattern of benighting actions can only be explained by a significant amount of insufficient regard for the protected interests of others. Indeed, we assumed (though it's not crucial to the argument) that he cared so little about the possibility of fraud that he likely would have approved the transactions even if he had known they involved fraud. As a result, I submit that Attorney C intuitively is no less culpable for his acting from this pattern of reckless ignorance than he would have been had he knowingly approved the transactions in question.

The traditional rationale for the willful ignorance doctrine is premised on the idea that when an ignorant actor is as culpable as an analogous knowing actor, he may be treated as if he acted with knowledge.<sup>117</sup> Thus, the traditional rationale gives us reason to treat Attorney C as a knowing participant in the fraudulent transactions. As a result, the Iterated Reckless Ignorance Principle entails that Attorney C can be convicted of knowledge crimes like conspiracy to commit fraud or aiding and abetting fraud,<sup>118</sup> just like Attorneys A and B.

### *C. Objection 1: Is the Required Addition Legitimate?*

A natural objection to the argument of this Part is that when we are faced with such a pattern of reckless indifference to the truth of one's suspicions about the inculpatory proposition, it is not legitimate to add together the different quanta of culpability incurred from the various reckless breaches of one's duty to investigate. If these quanta of culpability are not fairly considered together, then it would be illegitimate to take such a pattern of investigative breaches to be a permissible substitute for the mental state of knowledge.

My response to this worry is to emphasize the requirement that the

<sup>117</sup> See *supra* note 32-34 and accompanying text.

<sup>118</sup> See *supra* notes 24-26.

different investigative breaches must all be *related*. That is, they must be a breach of one's duty to investigate *one and the same risk* that one suspects to be true. While it would be illegitimate to add up the culpability involved in breaching several *different* investigative duties concerning unrelated risks, repeatedly breaching the *same* investigative duty concerning the *same* suspected risk steadily increases one's culpability in a way that it makes sense to consider in the aggregate.<sup>119</sup>

More specifically, the thought is that this pattern of related investigative breaches must be traceable to the same underlying attitude of indifference to the truth of a *particular inculpatory proposition* that one suspects to be true. The willingness to repeatedly breach one and the same duty shows that one in fact has a greater degree of culpability (*i.e.* even less regard for others) than we would be able to discern from just one such breach in isolation. Accordingly, a pattern of related breaches of one's duty to investigate can be aggregated in order to attribute a heightened level of culpability to the actor (*i.e.* a greater level than would be manifested simply by one such breach).

For this reason, the distinct amounts of culpability associated with each reckless breach of the duty to investigate, which together comprise the required pattern of indifference to inculpatory information, can be fairly added together. In this way, repeated acts of recklessly preserving one's ignorance can be the basis for attributing to the actor an amount of culpability equal to the culpability inherent in doing the actus reus with knowledge.

#### D. *Objection 2: Is This Merely Substituting Negligence for Knowledge?*

One might also worry that the Iterated Reckless Ignorance Principle defended here would allow *mere negligence* to substitute for knowledge. If one displays enough negligence on enough occasions, couldn't this raise one's culpability up to the level associated with knowing misconduct? If so, one might think, a string of *negligent* incidents could substitute for knowledge, according to the principle I have defended.<sup>120</sup>

However, this objection is mistaken. After all, the Iterated Reckless Ignorance Principle only permits a string of *reckless breaches of the duty of investigation*, followed by a *reckless* performance of the actus reus, to satisfy the knowledge element of the crime charged. The duty of investigation, moreover, is only triggered when one *suspects* that the relevant inculpatory

<sup>119</sup> Robinson also recognizes the importance of requiring that the culpability of different breaches cannot be aggregated unless they are sufficiently related. See Robinson *supra* note 33 at 650 ("The relation of the two offenses legitimates the aggregation of the two instances of culpability. The requirement of this relationship also avoids an unacceptable precedent: permitting such aggregation in all cases of multiple [unrelated] offenses."). It is for this reason that courts, when seeking to impute an element of the offense charged, "often argue that two such related acts are a single course of conduct." *Id.*

<sup>120</sup> Earlier I objected to an "indeterminate counterpart" version of the equal culpability thesis for *willful* ignorance on the grounds that it would sometimes supports taking a defendant's negligence to satisfy the knowledge element of the crime charged. See *supra* note 67.

proposition is true, *i.e.* one is aware of a substantial risk of its truth. While it is possible for one to fail to investigate in the required ways for reasons that only amount to negligence (*e.g.* one completely *fails to realize* that one should have investigated in this or that way), this will only amount to a breach of the duty of investigation when one is at least *aware of the risk* one ought to be investigating. For only then will DRI apply. Thus, the Iterated Reckless Ignorance Principle will never permit a *purely negligent* actor—*i.e.* an actor who is completely unaware of the unjustified risks of the actus reus she plans to perform—to be treated as a knowing wrongdoer. Instead, it will only allow actors who are *at least reckless* with respect to the unjustified risks of their conduct to be treated as knowing actors.

What is more, the principle will only permit this substitution when the actor displays *more culpability* than a similarly situated purely reckless actor who was not able to reasonably investigate his suspicions. Repeatedly breaching the duty of investigation, I argued, will raise one's culpability level *above* the level of purely reckless misconduct, and sometimes even raise it up to the level of knowing misconduct. Accordingly, the present worry is misplaced. The Supreme Court, in upholding willful ignorance jury instructions, stressed the importance of willful ignorance having "an appropriately limited scope that *surpasses recklessness and negligence.*"<sup>121</sup> The form of iterated reckless ignorance identified in the substitution principle I defend respects this requirement. It, too, demands something that "surpasses recklessness and negligence."<sup>122</sup>

#### IV. RECKLESS IGNORANCE IN PRACTICE: THE COLLECTIVE KNOWLEDGE DOCTRINE

Some might resist the argument from the previous Part as too abstract to be convincing. Can the principle I have proposed ever work in practice, one might wonder? To help lessen such worries, this Part argues that some courts already employ the sort of Iterated Reckless Ignorance Principle I am defending. I argue that some cases applying the so-called *collective knowledge doctrine* are best read as applications of the Iterated Reckless Ignorance Principle. Thus, in the kind of factual scenario governed by the collective knowledge doctrine, the knowledge element of a crime can be legitimately satisfied by a pattern of reckless breaches of the duty to investigate a suspected risk, coupled with a resulting reckless actus reus. In this way, the present Part amounts to a bottom-up argument from existing caselaw for the conclusion that the Iterated Reckless Ignorance Principle is sometimes legitimately employed in practice.

I begin by explaining the collective knowledge doctrine generally. Then I consider Hagemann and Grinstein's contention that the collective knowledge doctrine is only permissibly used in response to willful ignorance by a corporation. But I argue that Hagemann and Grinstein are mistaken: In some cases, the collective knowledge doctrine is deployed in response to *reckless*

<sup>121</sup> *Global-Tech*, 131 S. Ct. 2060 at 2070 (emphasis added).

<sup>122</sup> *Id.*

*ignorance*. Thus, I argue, in the context of the collective knowledge doctrine, some courts *actually do* employ a reckless-ignorance-for-knowledge substitution principle.

### A. *The Collective Knowledge Doctrine and Willful Ignorance*

#### 1. The Collective Knowledge Doctrine Generally

The collective knowledge doctrine operates as a narrow exception to the general rule that a mental state will be imputed to a corporation only if at least one individual within the corporation actually possessed that mental state. Under *respondeat superior*, “[a]n agent’s knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.”<sup>123</sup> This suggests that some individual agent of the corporation must possess a given piece of knowledge in order for it to be imputed to the corporation. Call this the *individualist constraint* on knowledge imputation.<sup>124</sup>

When the collective knowledge doctrine applies, it permits a departure from the individualist constraint. The doctrine allows courts to “aggregate the knowledge possessed separately by different employees within a corporation so as to create the requisite guilty corporate state of mind—even if no company employee or official ever actually intended for the corporation to commit a crime or ever knew that a crime had been committed.”<sup>125</sup> Consider:

**Knowledge Compartmentalization:** Big Oil Corp. is charged with knowingly making false statements to the US government in violation of 18 U.S.C. § 1001. Two employees of Big Oil Corp., Alice and Betty, submit a report to a government agency, which asserts that P. It turns out that P is false, but neither Alice nor Betty knows this. Alice knows that P entails Q, but has no knowledge one way or the other about Q. Betty knows that Q is false, but doesn’t know P entails Q. Betty and Alice never talk or combine their knowledge, so neither actually infers that P is false.

Can Big Oil Corp. be convicted of violating the statute? The collective knowledge doctrine says “yes.” This doctrine would allow Alice’s belief that P entails Q to be aggregated with Betty’s belief that Q is false in order to impute the obvious implications of their separate belief states to Big Oil Corp. Accordingly, Big Oil Corp. could be deemed to *know* that P is false, and convicted accordingly. (Note that the collective knowledge doctrine is not to

<sup>123</sup> *In re Hellenic Inc.*, 252 F.3d 391, 395 (5th Cir. 2001).

<sup>124</sup> As one court explained, “[w]hile it is not disputed that a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind *only when that state of mind is possessed by a single individual.*” *First Equity Corp. of Florida v. Standard & Poor’s Corp.*, 690 F. Supp. 256 (S.D.N.Y. 1988) (emphasis added).

<sup>125</sup> Hagemann & Grinstein, *supra* note 10 at 210.

be confused with the distinct evidentiary rule according to which the separate beliefs of different employees can be used as *circumstantial evidence* that there really was an individual employee who actually possessed the requisite knowledge for conviction.<sup>126</sup>)

A number of criminal cases have employed something like the collective knowledge doctrine. Most famous is the First Circuit's decision in *U.S. v. Bank of New England, N.A.*, a case in which a bank was prosecuted for failing to report a series of cash transactions in excess of \$10,000.<sup>127</sup> The court held that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability."<sup>128</sup> It reasoned as follows:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. *It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation* (...) '[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the *collective knowledge* of its employees and is held responsible for their failure to act accordingly.'<sup>129</sup>

Thus, the court concluded that "the [district] court's collective knowledge instruction was not only proper but necessary."<sup>130</sup> A number of other criminal cases have also employed the collective knowledge doctrine.<sup>131</sup> But the

<sup>126</sup> The holding of *Bank of America* has been read this way. See *Sci. Applications, Int'l Corp.*, 626 F.3d at 1275; see also *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). Moreover, although *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958) is often cited as an example of the collective knowledge doctrine, it appears to assume only that a company's knowledge of a violation may be *inferred* from the variously deficient mental states of its employees—*i.e.* that the latter is circumstantial evidence of the former. See *id.* at 250.

<sup>127</sup> 821 F.2d 844 (1st Cir. 1987).

<sup>128</sup> *Id.* at 856.

<sup>129</sup> *Id.* (emphasis added).

<sup>130</sup> *Id.*

<sup>131</sup> See, e.g., *United States v. T. I. M. E.-D. C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) ("the corporation is considered to have acquired the collective knowledge of its employees"); *Inland Freight Lines v. United States*, 191 F.2d 313, 315-16 (10th Cir. 1951), ("No single agent or representative in the offices of the company had actual knowledge of [the logs' and reports'] conflicts and falsities. But one agent...had knowledge of...the logs and another had knowledge of...the reports. And the knowledge of both agents...was attributed to the company."); *United States v. Sawyer Transp., Inc.*, 337 F. Supp. 29, 30-31 (D. Minn. 1971) ("inadvertence or negligence cannot be excused merely by asserting that one employee knew of the logs and another of other facts but that neither knew what the other did. Both were corporate employees and the knowledge of each is imputed to the corporation which thus had knowledge"); see also *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472 (S.D.N.Y. 2005) (holding that in securities fraud cases, "[p]roof of a corporation's collective knowledge and intent is sufficient").

doctrine is notoriously controversial, and has been expressly rejected by some courts (sometimes in civil contexts).<sup>132</sup>

## 2. Critiquing Hagemann and Grinstein's view on collective knowledge

Hagemann and Grinstein argue that “Bank of New England and all of the other cases that have ever applied knowledge aggregation did so only in the face of culpable criminal conduct by a corporation—namely, willful blindness.”<sup>133</sup> Thus, they take it that the collective knowledge doctrine is “a corollary to willful blindness, [and] this characterization of the doctrine is not only sensible, but is, in fact, the only...permissible justification for aggregate corporate knowledge.”<sup>134</sup>

They seek to establish these claims by surveying the most important cases employing the collective knowledge doctrine and then arguing that each one actually involves willful ignorance by the defendant.<sup>135</sup> Thus, they conclude that “the collective knowledge rule has simply acted as a corollary to...the doctrine of willful blindness. Before courts will collectivize knowledge, they will first demand a showing that corporations deliberately attempted...to compartmentalize or avoid inculpatory information.”<sup>136</sup>

Hagemann and Grinstein's view can be recast in terms of my framework from above. Specifically, we may take it that belief aggregation of the sort that the collective knowledge doctrine permits is the *mechanism* through which i) a deliberate breach of the corporation's investigative duties (*i.e.* of DRI), together with ii) subsequent reckless conduct, can suffice for convicting a corporate defendant of a knowledge crime. Thus, the collective knowledge doctrine would be an instance of the willful ignorance doctrine—a principle permitting willful ignorance to substitute for knowledge.

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<sup>132</sup> For example, the DC Circuit stated it doubted “the legal soundness of the ‘collective intent’ theory, under which, as we explained, a corporation’s specific intent to defraud can be inferred if the company’s public statements contradict the accumulated ‘collective knowledge’ of the corporation’s employees.” *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (internal quotation marks omitted). *See also Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995) (finding “no evidence...to support ‘collective scienter’ without a concurrent finding that a defendant director or officer also had the requisite intent”) (internal citations and quotation marks omitted); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (holding in the securities context that “we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement...rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment”) (emphasis added); *McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236 (11th Cir. 2013) (declining to adopt collective knowledge doctrine though other “circuits...encountered litigants who have attempted to weave the fragmented actions of various agents into corporate *mens rea*”).

<sup>133</sup> Hagemann & Grinstein, *supra* note 10 at 211.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 225-37.

<sup>136</sup> *Id.* at 237-38.

Hageman and Grinstein appear to be correct about *some* of the cases they survey.<sup>137</sup> Nonetheless, several other cases they analyze do *not* involve willful ignorance, but rather some form of *non-willful* ignorance and/or gross negligence. Other commentators have recognized this problem with Hageman and Grinstein's analysis too.<sup>138</sup> The trouble is that they sometimes misapply the concept of willful ignorance.<sup>139</sup> We saw above that ignorance is *willful* only if one has made a *conscious* decision to remain ignorant in the face of recognizing red flags that one should investigate. But, as shown below, some of the cases Hagemann and Grinstein discuss are just ones in which employees disregard or overlook various risks because the corporation's operations function in a way that ends up preventing these risks from being examined and detected. But that is not genuinely *willful* ignorance.<sup>140</sup>

Thus, a more accurate reading of these cases shows that sometimes courts applying the collective knowledge doctrine treat some form of *non-willful* ignorance as a substitute for knowledge. More specifically, they treat belief aggregation as the doctrinal *mechanism* through which non-willful ignorance of some form, coupled with a subsequent reckless act, can substitute for knowledge. To demonstrate this point, I discuss in depth a case where what at worst amounts to reckless ignorance was treated as a substitute for knowledge.

<sup>137</sup> See, for example, their discussion of *Inland Freight Lines v. United States*, 191 F.2d 313, 316 (10th Cir. 1951). Hagemann and Grinstein, *supra* note 10 at 231. I think they are correct that *Inland Freight* really does premise liability on conduct that is willfully ignorant.

Moreover, they helpfully point out that most of the statements in *Bank of New England* that seem to support the collective knowledge doctrine are mere *dicta*, since the court held that the defendants straightforwardly possessed actual knowledge. Hagemann & Grinstein, *supra* note 10 at 219-20. See *Bank of New England, N.A.*, 821 F.2d at 857 (noting that the bank employees "who knew of the nature of McDonough's transactions, also knew of the CTR filing obligations imposed by the Bank," and that one employee stated "she knew [the] transactions were reportable"; concluding that the "evidence...proved that the Bank had ample knowledge that transactions like McDonough's came within the purview of the Act").

<sup>138</sup> See Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 670-71 (2000). He notes that many of the cases Hagemann and Grinstein survey do not involve an actor who "highly suspected the presence of the element" "but refrained from inquiring because 'he did not wish to know.'" *Id.* Rather, "in some of [these cases], elements in the organization were negligent and failed to examine or match information." *Id.* at 671. Moreover, it is also "questionable whether, in these cases, the corporation *knowingly* erected a control or monitoring system characterized by compartmentalization and designed to prevent the flow of information between the organization's agents, thereby *consciously* contributing to the creation of suitable conditions for unintended delinquency." *Id.* (emphasis added).

<sup>139</sup> *Id.* at 670 (noting that Hageman and Grinstein "use the concept of willful blindness inaccurately").

<sup>140</sup> A flagrant example (which I don't want to use for my central argument) is *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958). There, the court allowed the defendant trucking company to be convicted of a knowledge crime on the basis of its purely *negligent* unawareness of the risk that its drivers were falsifying their driving logs. The court stated that "no one in defendant's entire organization admitted that he acquired actual knowledge of the violations... But the means were present by which the defendant could and would have detected the infractions and its failure to do so under the existing circumstances cannot, as contended, absolve it of liability as a matter of law." *Id.* at 250. This is clear negligence. Thus, the court did not aggregate beliefs in response to willful ignorance. (*Cf.* Hagemann & Grinstein, *supra* note 10 at 235-36.) Still, it is not clear the outcome in *Riss* is justifiable.

*B. A Case Study in Substituting Non-Willful Ignorance for Knowledge*

I will argue that one of the main cases in the collective knowledge canon, *United States v. T.I.M.E.-D.C., Inc.*,<sup>141</sup> even on the most aggressive available reading of its facts, at most employs only the Iterated Reckless Ignorance Principle defended above, not the classic willful ignorance doctrine. Implicit in the court's reasoning is a compelling equal culpability rationale for substituting reckless ignorance for knowledge.

1. The Facts

T.I.M.E.-D.C. (the "Company") was an interstate trucking company charged with knowingly and willfully violating a provision of the Federal Highway Administration Regulations that prohibited letting drivers operate a motor vehicle in a dangerously impaired condition due, *inter alia*, to illness.<sup>142</sup> The Company had been experiencing "an increase in absenteeism," which caused "severe economic problems."<sup>143</sup> To combat this absenteeism, the "Company instituted a new policy regarding driver mark-offs for illness," under which absences would be unexcused without a doctor's note.<sup>144</sup> The Government contended that "the company refrained from fully explaining various aspects of its new policy," in particular, the fact that an unexcused absence could later be expunged from the driver's record with a doctor's note, and "thereby creat[ed] an aura of confusion and concern which would coerce drivers into refraining from marking off due to illness."<sup>145</sup> Although the company contested this,<sup>146</sup> there is little doubt that the company did not manage to effectively communicate to its drivers that a later doctor's note could expunge an unexcused absence.<sup>147</sup>

Several incidents occurred where company drivers were found on the road while impaired due to illness, but only one led to conviction and matters here.<sup>148</sup> On October 2, 1972, the wife of driver Carlton Brown called a company dispatcher, George Giles, and said her husband would not be able to work that evening due to an ear infection.<sup>149</sup> Dispatcher Giles told Mrs. Brown that under the new policy the absence would be unexcused (though it was disputed whether he also mentioned that providing a doctor's note later would expunge the unexcused absence).<sup>150</sup> A few hours later, driver Brown called up and asked to be put back in the lineup. He showed up for work, but after driving 110 miles became too sick to proceed and had to go to the emergency

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<sup>141</sup> 381 F. Supp. 730 (W.D. Va. 1974).

<sup>142</sup> *Id.* at 732-33.

<sup>143</sup> *Id.* at 733.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 746

<sup>146</sup> *Id.* at 734-35.

<sup>147</sup> *Id.* at 738 (summarizing the evidence of the "confusion regarding the policy").

<sup>148</sup> *Id.* at 741.

<sup>149</sup> *Id.* at 735.

<sup>150</sup> *Id.*

room.<sup>151</sup> The Company was charged with knowingly and willfully permitting Brown to operate his vehicle despite being dangerously impaired due to illness.<sup>152</sup>

As the court (acting as fact-finder) teed up the issue, the only question was “whether the Government ha[d] established beyond a reasonable doubt that the Company acted knowingly and willfully.”<sup>153</sup> Since the “Company d[id] not contend that it was unaware of the regulation, (...) the sole issue regarding knowledge [wa]s whether [it] knew that the drivers were ill.”<sup>154</sup>

The court reasoned that since “knowledge acquired by employees within the scope of their employment is imputed to the corporation,” it follows that “a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual [who] would have comprehended its full import.”<sup>155</sup> Rather, the court explained, “the corporation is considered to have acquired the *collective knowledge* of its employees and is held responsible for their failure to act accordingly.”<sup>156</sup> Thus, the court concluded that “the Company had sufficient information available to it, through its various employees, to know that driver Brown’s ability to drive was impaired, or likely to become impaired, as to make it unsafe for him to begin his trip.”<sup>157</sup>

In normal circumstances, the court noted, the Company could have taken its drivers’ claims to be fit for duty at face value—meaning that since Brown asked to be put back in the driving lineup, knowledge of his illness normally would not have been imputed to the Company.<sup>158</sup> But, here, circumstances were anything but normal, since the Company had “implemented its new program in a manner which was likely to have a significant effect upon a driver’s decision to mark off due to illness.”<sup>159</sup> “Cognizant of this situation...the Company could not simply rely on driver Brown’s subsequent request to be placed back on duty as absolving it from its responsibility to ensure that the requirements [of the Regulation] were not ignored.”<sup>160</sup> Accordingly, the Company was convicted.<sup>161</sup>

## 2. *T.I.M.E.-D.C.* does not involve not genuinely willful ignorance

Hagemann and Grinstein contend that “the facts of *T.I.M.E.-D.C.* represent a classic example of willful blindness.”<sup>162</sup> But they are mistaken. The reason is

<sup>151</sup> *Id.* at 736.

<sup>152</sup> *Id.* at 741.

<sup>153</sup> *Id.* at 738.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 738

<sup>156</sup> *Id.* (emphasis added).

<sup>157</sup> *Id.* at 739

<sup>158</sup> *Id.* at 739-740.

<sup>159</sup> *Id.* at 739-40.

<sup>160</sup> *Id.* at 740.

<sup>161</sup> *Id.* at 741.

<sup>162</sup> Hagemann & Grinstein, *supra* note at 229-30.



that this case involves no evidence that anyone within the Company *consciously decided* to avoid knowledge of a particular risk he was aware of and knew he should investigate. Recall that willful ignorance requires a conscious decision to remain in ignorance—that is, “not knowing because you don’t want to know.”<sup>163</sup> On my account, willful ignorance requires a *conscious decision* to violate the duty of investigation (DRI), not merely a negligent or reckless violation thereof. Consciously deciding to violate DRI, in turn, requires not only i) that one is aware of the risk that the inculpatory proposition might be true (here, that employees are driving while impaired), but also ii) that one is aware that one *can and should* do more to learn whether it is true—either by gathering more information about it or at least by not preventing oneself from learning whether it is true. Thus, one is willfully ignorant *only if*, despite knowing all this, one still chooses not to do all one reasonably can and should to learn whether the inculpatory proposition is true.

To see that *T.I.M.E.-D.C.* does not involve truly *willful* ignorance, consider the players—dispatcher Giles and the Company’s management—in turn. First, dispatcher Giles very likely was aware of the risk that driver Brown was ill, especially given Brown’s quick change of heart after hearing his absence would be unexcused. Nonetheless, there is no evidence that dispatcher Giles was aware that it would be *unlawful* for Brown to drive while sick, or that Brown was so sick that it would be *dangerous* for him drive. Accordingly, there is no reason to think dispatcher Giles *knew* he should investigate his suspicions that Brown might be sick. Giles could only reasonably be expected to investigate his suspicions of Brown’s illness if Giles knew what was at stake. Not realizing that driving while sick might be unlawful, there is no reason it would occur to Giles that he *should* dig deeper into whether Brown was too sick to drive. This is what it would take in order for Giles’s failure to investigate his suspicions to be a *genuinely conscious decision to breach of the duty to investigate*—*i.e.* to remain in ignorance willfully. But that seems not to be what occurred.

What, then, about the Company’s management? It is plausible that they were aware of the general risk that the new attendance policy might lead some employees to drive while impaired. Let us assume that management adopted the policy despite being aware of this risk because they hoped it would lead to less absenteeism overall and thus save money. By itself, however, this would merely amount to *recklessly* increasing the risk that drivers would violate the highway regulations by driving while impaired. It does not yet amount to a *conscious decision* to wall off the Company from inculpatory information about driver misconduct.

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<sup>163</sup> See Williams, *supra* note 59 at 157 (noting that a party is willful ignorant if he “has his suspicions aroused but then *deliberately* omits to make further enquiries *because he wishes to remain in ignorance*”) (emphasis added); *Heredia*, 483 F.3d at 918 (observing that “when Congress made it a crime to ‘knowingly...possess with intent to manufacture, distribute, or dispense, a controlled substance,’ (...) it meant to punish not only those who know they possess a controlled substance, but also those who *don’t know because they don’t want to know*”) (emphasis added).

Nonetheless, the Government offered a more aggressive theory of the case. On this theory, management *intentionally* mislead drivers about the workings of the new policy, specifically withholding the information that unexcused absences could later be expunged with a doctor's note. Management supposedly created an "aura of confusion" *on purpose* in order to induce or coerce drivers into driving while impaired, and thereby reduce absenteeism.<sup>164</sup> If this were really what happened, management might indeed count as willfully ignorant. For this would be to create confusion about the new policy specifically as a way to reduce absenteeism *without* ever having to find out for certain when drivers were operating their vehicles in an impaired state.

However, it appears that the court did not actually adopt this more aggressive theory of the case. All indications are that the court did not take management to have *intended* to induce drivers to drive while impaired, without learning for sure that this was happening. After all, if management in this sense had been purposeful actors—*i.e.* if their conscious objective was to make driving while impaired more prevalent (ultimately to reduce absenteeism)—there would be no need for the court to rely on anything like the collective knowledge doctrine. The Company could straightforwardly be convicted for purposefully causing violations of the highway regulations.

Therefore, I assume that the truth lies somewhere in between the Government's overly aggressive theory and the defense's more benign theory. Specifically, let us suppose that management was merely aware that its implementation of the new policy *might* not be optimal, and that not exerting more effort to fully explain the policy *might* make it more likely that drivers would operate their vehicles in an impaired state.<sup>165</sup>

This more moderate reading of the facts does not amount to *trying* to keep the Company in the dark about specific cases of driving while impaired—that is, willful ignorance. Even if management realized they were creating a risk that drivers would violate the highway regulations, this does not mean management *consciously decided* to create confusion as a way to avoid learning for certain if and when drivers were violating the regulations, while still fighting absenteeism. There is no evidence that management under-explained the new policy as part of a *scheme* to wall the Company off from inculpatory information.

For management to have engaged in a *conscious effort* to remain in ignorance, they would have had to consider and reject at least some alternative ways to implement the policy which they *knew* both i) would keep the Company better informed of downstream wrongdoing, and ii) ought to be adopted instead. But there is no evidence that management was this deliberate in under-informing employees about the new policy. Rather, it seems that management at most recognized that they *might* not be implementing the new

<sup>164</sup> *T.I.M.E.-D.C.*, 381 F. Supp. at 746.

<sup>165</sup> The court stated only that management appeared to be "[c]ognizant" of the risks it was running. *Id.* at 740.

policy in the optimal way, and this was a risk they were willing to live with. Thus, rather than *willfully* remaining in ignorance—*i.e.* rather than consciously rejecting alternatives that it believed to be preferable—management merely *recklessly* set up barriers to learning of specific instances of driving while impaired.

Thus, it seems management at most recognized that there *might* be better ways to learn of and respond to downstream misconduct than the confusing way the policy was actually implemented. They did not consciously choose to avoid inculpatory knowledge, but at most *risked* walling themselves off from such information.<sup>166</sup> Thus, management's confusing implementation of the policy does not amount to a deliberate or conscious decision to breach its investigative duties (*i.e.* DRI), but merely a *careless or reckless* breach thereof. By implementing the new policy in the ineffective way it did, management ended up walling itself off from obtaining inculpatory information—but *it did not do so consciously or intentionally*.

Accordingly, on the best reading of this case, there was no willful ignorance—only several instances of *non-willful* ignorance by various actors within the company. First, dispatcher Giles's failure to investigate his suspicions that driver Brown might be sick was not a conscious decision to breach DRI, since (we have assumed) he was not aware that this was a risk he *ought* to investigate. Plausibly, he realized that it *might* be a risk he should investigate, in which case he would have recklessly breached DRI. (Alternatively, if he was entirely unaware he should investigate whether driver Brown was sick, it would amount to a negligent breach of DRI.) Moreover, Giles's investigative failure was still arguably a bit culpable, insofar he can be expected to realize that allowing sick drivers out on the highway is dangerous.

Likewise, management was only recklessly ignorant. We're assuming management recognized the risk that failing to properly explain the new policy might lead to more cases of driving while impaired. Hence management was reckless. But, as argued, management did not *consciously decide* to remain in ignorance of actual cases of driving while impaired.<sup>167</sup> After all, such a choice requires that management was aware of its duty not to set up barriers to obtaining such inculpatory information, but then proceeded to take steps that it *knew* would prevent it from receiving such information. Rather, they seem to have at most recklessly breached their duty to learn of downstream violations

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<sup>166</sup> One might worry that my account lets defendants too easily claim they were not willfully ignorant. All they have to do is prove they were not consciously aware that they *should* take steps to learn whether the inculpatory proposition is true. For that is what's required to consciously breach DRI. Still, this isn't a problem for my position since I argue that also *non-willful* ignorance can suffice for being deemed a knowing wrongdoer (provided the conditions of equal culpability are met). Thus, even if defendants have an easy way to escape the frying pan of willful ignorance, they'll still just end up in the fire of non-willful ignorance.

<sup>167</sup> Rather, management at most prevented information about the attendance policy from flowing in the *opposite* direction. *Drivers* were obstructed from learning that unexcused absences could later be expunged with a doctor's note. But management did not prevent *itself* from learning about violations of the highway regulations that occurred.

of the highway regulations by proceeding with the new absentee policy despite some awareness that this *might* end up walling them off from inculpatory knowledge.<sup>168</sup>

### 3. Belief aggregation as the mechanism for substituting reckless ignorance for knowledge

Even though *T.I.M.E.-D.C.* did not involve genuinely *willful* ignorance, the court aggregated several beliefs held by Company personnel. Specifically, the court can be read as combining i) dispatcher Giles's suspicions that driver Brown was actually sick with ii) management's knowledge that driving while sick amounted to a violation of the highway regulations. After all, this is what it would take for dispatcher Giles to be expected to realize he should investigate whether driver Brown was fit to drive. In reality, neither dispatcher Giles nor management fully appreciated the need to avoid preventing themselves from learning when various drivers were about to operate their vehicles while impaired. Nonetheless, because management acted culpably by recklessly failing to properly explain the new attendance policy, the court's approach amounts to treating the Company *as if* it possessed both Giles's awareness of the risk that Brown was ill and management's awareness of what was at stake (*i.e.* a possible violation of the highway regulations). This, after all, is what it would take for someone in dispatcher Giles's position to be willfully ignorant: awareness that Brown might be sick, together with awareness of what was at stake, such that Giles would know he should investigate the matter further. Thus, the court aggregated beliefs in order to treat dispatcher Giles *as if* he'd been willfully ignorant, and then used this as the basis for treating the Company as though it actually knew driver Brown violated the highway regulations.

Thus, on my proposed reading of the case, *the court is treating several culpable acts of non-willfully preserving the Company's ignorance as amounting to one instance of willful ignorance, which, in turn, is taken to be equivalent to possessing actual knowledge.* The rationale implicit in the court's finding the Company to have knowingly permitted Brown to drive while impaired is premised on equal culpability. The culpability incurred from several culpable instances of non-willful ignorance and recklessness can, taken together, equal the amount of culpability involved in acting knowingly.

Specifically, the culpable acts in question are these. *First*, management was aware of the risk that its new attendance policy would incentivize driving while impaired, especially if it did not fully explain to drivers that a doctor's note would suffice to expunge an unexcused absence. In this, management was reckless and highly culpable. (But it was not willfully ignorant, since it did not

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<sup>168</sup> To be clear, the relevant barrier here is implementing the new policy without clearly explaining it or adopting preventive measures. Management should have realized it had a duty to guard against erecting such barriers to obtaining inculpatory knowledge, but either it didn't or it remained unmoved to do so. Thus, it only failed in its duty to guard against unintentionally setting up barriers to obtaining inculpatory knowledge (*i.e.* DRI).

consciously decide to shirk its duty to guard against erecting barriers to learning of downstream misconduct.) *Second*, dispatcher Giles at most recklessly failed to investigate his suspicions that driver Brown might be too sick to drive. *Third*, we have the subsequent risky action of *allowing* driver Brown to drive his truck that night while impaired.

Giles's arguably reckless ignorance in stage two, together with the risky action in stage three, normally would not be culpable enough to justify treating the Company as knowing of driver Brown's violation of the highway regulations. What justifies it here is the addition of the prior recklessness by management at stage one. Because of management's reckless failure to fully explain the new attendance policy, which amounted to a *reckless failure to guard against erecting barriers to obtaining inculpatory information*, the court aggregated beliefs and treated the Company *as though* its agents actually recognized the need to investigate whether driver Brown was too sick to drive safely that night. Thus, a series of culpable acts rendered the Company at least as culpable as it would have been had it been willfully ignorant of driver Brown's violation of the highway regulations, since this, in turn, is as culpable as *knowingly* allowing Brown to drive while impaired.

Thus, on the most plausible reading of the case (*i.e.* the one most favorable to the Government that still is charitable to the defense), the court applied what amounts to the Iterated Reckless Ignorance Principle articulated in the previous Part. Company personnel recklessly breached their investigative duties on several occasions, thus displaying a pattern of reckless indifference to inculpatory information within the Company. This prevented the Company from knowing of driver Brown's violation of the highway regulations. When driver Brown was nonetheless allowed to drive in his impaired condition, the offense was complete. Because the culpability attributable to the Company is no less than the culpability of one isolated instance of knowingly allowing an impaired driver out on the road, the Company was treated as if it actually knew of the violation.

### C. *Substituting Iterated Reckless Ignorance for Knowledge is Legitimate*

I have argued that on the best reading of *T.I.M.E.-D.C.*, the court actually relied, albeit tacitly, on the Iterated Reckless Ignorance Principle. Now I want to argue that this substitution principle is *legitimately* employed in factual scenarios like *T.I.M.E.-D.C.* The simplest argument is that insofar as *T.I.M.E.-D.C.* was rightly decided (which seems plausible), and assuming I am correct that the court employed this substitution principle, we would have reason to conclude the principle is legitimate.

The more theoretically interesting argument is that this substitution principle is supported by the courts' "traditional rationale" for the willful ignorance doctrine: *i.e.* the equal culpability thesis.<sup>169</sup> After all, the Iterated Reckless Ignorance Principle is permissibly employed *only when* conditions of

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<sup>169</sup> See *supra* notes 32-34 and accompanying text.

equal culpability are met. This is guaranteed by condition 4). Accordingly, if the traditional rationale for the willful ignorance doctrine is sound, then there is a good reason to think this novel substitution principle would *also* be legitimate. If equal culpability legitimizes substitution in general, and if the conditions of equal culpability are guaranteed to be satisfied whenever the Iterated Reckless Ignorance Principle applies, then this principle is also legitimate.

The primary objection to the Iterated Reckless Ignorance Principle as applied by *T.I.M.E.-D.C.*, however, is the legality worry discussed earlier.<sup>170</sup> The worry is that the mental states and conduct that this principle takes to be a substitute for knowledge are simply too unconnected, and too different from knowledge, to be a permissible substitute for it.

I offer two replies to this objection. First, it seems less problematic to cobble together different bits of misconduct by the agents of a corporation than to cobble together different bits of misconduct done at different times by an individual. After all, we are *already* required to artificially construct the mental states of corporations when deciding which mens rea they acted with. Corporations are not natural entities, but artificial ones (which is, of course, not to say they aren't real). Accordingly, there plausibly is more latitude for amalgamating different bits of culpable conduct in cases involving a corporate defendant than in cases against a natural person. Cobbling misconduct together in the corporate context is simply another way to construct the corporate mens rea, and this is a task we are already committed to undertaking in many cases. Thus, the present worry seems less troublesome in the corporate context than for individuals (where we seem not to be *constructing* the individual's mental state as much as *discovering* it).

Second, even if the Iterated Reckless Ignorance Principle faces a greater challenge on this score than the traditional willful ignorance doctrine does, I doubt it is a *much larger* challenge. If the conscious decision to erect barriers to obtaining inculpatory knowledge can, on equal culpability grounds, suffice for being treated as a knowing wrongdoer, then I don't see why the culpable failure to guard against recklessly allowing such barriers to arise—as in *T.I.M.E.-D.C.*—couldn't also suffice on equal culpability grounds. Accordingly, I doubt that the legality worry is *more* of a problem for the Iterated Reckless Ignorance Principle as applied to corporate defendants than it is for the willful ignorance doctrine. Thus, my conclusion is a conditional one: *If* the willful ignorance doctrine is legitimate, then the Iterated Reckless Ignorance Principle in this context is too.

## V. PRACTICAL CONSIDERATIONS

In this Article, I have argued that in light of the principles underlying the willful ignorance doctrine, the law is committed to allowing certain forms of especially culpable non-willful ignorance to substitute for knowledge. In

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<sup>170</sup> See *supra* Part I.C.

particular, I argued that this is most clearly the case when a series of reckless breaches of one's duty to learn about a particular suspected risk makes one's conduct as culpable as the analogous knowing misconduct. After all, sometimes the only explanation for a pattern of reckless investigative failures is that one possessed a level of regard for others that is *as deficient* as the level manifested in the analogous knowing wrongdoing. In such cases, because we allow willful ignorance to substitute for knowledge in conditions of equal culpability, we are also committed to allowing ignorance resulting from a pattern of reckless investigative breaches to substitute for knowledge—*provided the culpability of the former is as great as the culpability of the latter*. This idea was dubbed the Iterated Reckless Ignorance Principle.

Moreover, I argued that some cases involving the collective knowledge doctrine are best understood as applying a mens rea substitution principle of precisely this kind. Thus, it would not be unprecedented to follow the equal culpability rationale behind the willful ignorance doctrine to its logical conclusion and also allow the form of iterated reckless ignorance identified here to serve as the basis for imposing liability for knowledge crimes.

Nonetheless, even those who accept my arguments thus far might remain skeptical of my proposal for practical reasons. In this final Part, I address the two main practical worries for my proposed reform: that it risks jury confusion and that we don't need *even more* tools for expanding criminal liability.

#### A. Jury Confusion

One natural objection to my argument in this Article is that my proposed rule will lead to jury confusion and therefore be unworkable. Some argue that the willful ignorance doctrine is confusing to juries.<sup>171</sup> This concern might seem equally forceful—perhaps even more so—when it comes to the Iterated Reckless Ignorance Principle I've argued for.

Nonetheless, this objection is misplaced for two reasons. First, my rule actually makes the jury's job significantly *easier* in an important respect than it is under the existing willful ignorance doctrine. As matters currently stand, a defendant who lacks knowledge can be treated as a knowing wrongdoer only if the jury can find beyond a reasonable doubt that he was willfully ignorant—*i.e.* that he made a deliberate decision to act in ways that he knew would preserve his ignorance of the relevant inculpatory facts. Thus, to correctly apply the existing willful ignorance doctrine, juries must distinguish between i) cases where the defendant consciously decided not to investigate because he wanted to remain in ignorance, and ii) cases in which the defendant did not have the purpose to remain in ignorance, but merely was aware he was creating a *risk* of preserving his ignorance by not investigating adequately. Under the existing willful ignorance doctrine, liability for knowledge crimes is appropriate in the

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<sup>171</sup> See, e.g., Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 486-87 (2001) (discussing the concern that willful ignorance jury instructions might be overly confusing to juries).

former type of case but not in the latter.<sup>172</sup> However, this is quite a difficult conceptual distinction to draw in practice. Indeed, empirical evidence suggests that laypeople are not especially good at distinguishing recklessness from higher mental states.<sup>173</sup>

My proposal, however, obviates the need to draw this fine distinction. If we expand the logic of the traditional rationale beyond willful ignorance to also allow some forms of reckless ignorance to substitute for knowledge under conditions of equal culpability, then juries would not have to distinguish between classic willful ignorance and nearby forms of non-willful ignorance—e.g. actions that only recklessly prevent one from learning inculpatory facts. Thus, if my proposal is adopted, the question of whether liability for knowledge crimes is appropriate will no longer depend on being able to stick to the correct side of the fine line between willful ignorance and its non-willful cousins. Instead, on my proposal, to deem the knowledge element of the crime to be satisfied, all the jury needs to find is that the defendant repeatedly acted in ways that she was *aware risked preserving her ignorance*. This is a much easier rule to apply, as it does not require juries to distinguish between those who really *wanted* to remain in ignorance and those who, despite not overtly desiring to remain ignorant, merely were willing to *risk* keeping themselves in the dark for other reasons. As a result, my proposal would in fact make the jury's task *easier* in important respects.<sup>174</sup>

The second reason I am optimistic about the workability of my proposed expansion of the willful ignorance doctrine is that there is in fact little difficulty in formulating simple jury instructions embodying the Iterated Reckless Ignorance Principle. In particular, the idea is to combine traditional willful ignorance jury instructions with a description of the sort of iterated reckless ignorance I have focused on in this Article. Here is one proposal for what such jury instructions might look like:<sup>175</sup>

**Proposed jury instructions:** You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he suspected that [the inculpatory proposition was true], but consciously decided not to confirm his suspicions because he *wanted* to remain in ignorance for highly unjustified reasons [*i.e.* he was willfully ignorant]. Alternatively, even if the defendant did not affirmatively *want* to remain in ignorance, you may also find that he acted knowingly if the defendant, despite

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<sup>172</sup> See *supra* note 64.

<sup>173</sup> Francis X. Shen, et. al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1337-44 (2011) (discussing the difficulties test subjects had in separating cases of recklessness from higher mental states); Matthew R. Ginther et. al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1337 (2014) (noting that test subjects tended to deem it appropriate to punish the mental states of knowledge and recklessness equivalently).

<sup>174</sup> Indeed, it would become even easier if we were to allow also grossly negligent ignorance to substitute for knowledge. I have not argued that this substitution would be legitimate, but I am open to the possibility in theory.

<sup>175</sup> This proposal is loosely modeled on the willful ignorance instructions in *Heredia*, 483 F.3d at 917. What's more, I also incorporate several improvements on the traditional willful ignorance instructions that I have argued for elsewhere. See Sarch, *supra* note 36 at 1100-01.

suspecting that [the inculpatory proposition was true], *repeatedly* created what he knew to be *substantial risks* that he would not learn whether [the inculpatory proposition was true] *because* he was indifferent to the truth. However, you may *not* find that he acted knowingly if you find that he completely failed to recognize the risks that he ought to have investigated. Nor may you find such knowledge if the *only* available ways to learn of [the truth of the inculpatory proposition] were unreasonably difficult, dangerous or costly.

This is merely a first stab at crafting workable jury instructions embodying both the classic willful ignorance doctrine and the reckless ignorance substitution principle I have defended here. Admittedly, these instructions involve a number of simplifications compared to the fully stated, idealized principle I formulated in Part II (*i.e.* the Iterated Reckless Ignorance Principle). Nonetheless, it is likely that any workable jury instructions in this area will have to involve at least some simplifications and normative compromises (a point I have argued for elsewhere).<sup>176</sup> Additional refinements to these proposed jury instructions may be needed. Still, these instructions at least show that there is no great difficulty *in principle* in crafting workable jury instructions that reflect the reckless ignorance substitution principle I have been defending.

One might still worry about my proposed rule on the ground that, given its complexity, juries might end up misapplying the rule to find knowledge to be present even when the evidence does not really support such a finding under my proposed rule.<sup>177</sup> I take this worry seriously, and to help mitigate it, let me offer one additional suggestion.

In particular, a further proposal for increasing the workability of my proposed rule would be to employ what might be termed a *burden-shifting framework* similar to an approach some circuits already employ for willful ignorance instructions.<sup>178</sup> Specifically, the idea is to insist that repeated reckless ignorance can substitute for knowledge only in one narrow litigation scenario: namely, when the defendant has decided to *contest* the prosecution's willful ignorance theory by denying that he, the defendant, *purposefully* remained in ignorance. Suppose in a prosecution for a knowledge crime, the Government offers a willful ignorance theory of guilt. Suppose the defendant then counters by arguing that although he was ignorant of the requisite inculpatory facts, his ignorance was not truly *willful*. That is, suppose he contends he did not have the aim or conscious object of remaining in ignorance. The current idea, then, is to allow the prosecution under such circumstances—but *only* under such circumstances—to use the defendant's

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<sup>176</sup> Sarch, *supra* note 36 at 1097-1101.

<sup>177</sup> Thanks to Don Stuart for pressing me on this point.

<sup>178</sup> See, e.g., *United States v. Reyes*, 302 F.3d 48, 55 (2d Cir. 2002) (noting that willful ignorance jury instructions are given “when a defendant *claims to lack some specific aspect of knowledge* necessary to conviction but where the evidence may be construed as deliberate ignorance” (emphasis added)); *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996) (“A willful blindness instruction is appropriate when the defendant *asserts a lack of guilty knowledge* but the evidence supports an inference of deliberate ignorance.” (emphasis added)).

repeated reckless ignorance to satisfy the knowledge element of the crime charged. Thus, it would only be under these limited circumstances (*i.e.* when the defendant contests a willful ignorance theory by denying that he *purposefully* preserved his ignorance) that reckless ignorance jury instructions could be requested by the prosecution and properly issued by the court. Limiting reckless ignorance jury instructions to these circumstances would help to further reduce the chances of the jury misapplying the Iterated Reckless Ignorance Principle to find the knowledge prong of a crime to be satisfied when the evidence does not support it.

*B. A Reform We Should Bother With?*

A final pressing worry for my proposal is whether it really is all that important to expand the equal culpability rationale behind the willful ignorance doctrine in order to reach something like the Iterated Reckless Ignorance Principle. Should my proposal figure very high on our agenda for reforming the content of the criminal law? Given the worries about over-criminalization that other legal theorists have forcefully pressed,<sup>179</sup> is it really crucial to develop this doctrinal mechanism for expanding criminal liability even further? Do we really need *yet another* sweeping doctrinal tool by which to secure more convictions?

Although this question of course cannot be fully answered here, let me offer a few observations in closing. For many garden-variety criminal offenses involving knowledge, such as drug possession offenses, there is a growing body of literature suggesting that these crimes are prosecuted too aggressively and sentenced too harshly.<sup>180</sup> Accordingly, I doubt that there would be grave unfairness in showing leniency and declining, for crimes like these, to extend the equal culpability rationale as far as it can go.

Instead, it might be more prudent to deploy the Iterated Reckless Ignorance substitution principle not across the board, but rather only as a means to

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<sup>179</sup> Husak, *supra* note 11.

<sup>180</sup> See, e.g., Robert G. Lawson, *Drug Law Reform-Retreating from an Incarceration Addiction*, 98 KY. L.J. 201 (2010) (suggesting that the war on drugs “has involved very aggressive law enforcement, very harsh punishments, and an absolute horde of prisoners”); Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 233 (2015) (observing that “case law and many statutes create or allow harsh punishments for drug crimes, assuming violence will result” but arguing that the assumed linkage between drugs and violence is flawed); Paul H. Robinson et. al., *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 1946 & n.12 (2010) (discussing legal scholars who would reject desert-based principles because of “with what they see as the over-punitiveness of current criminal law”; collecting sources); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005) (arguing that under the U.S. Sentencing Guidelines “sentences are raised easily and often and lowered only rarely and with difficulty,” and that “the guidelines have severely constrained judicial sentencing discretion while conferring on prosecutors a vastly increased ability to influence a defendant’s sentence”) The Honorable Robert W. Sweet, *Will Money Talk?: The Case for A Comprehensive Cost-Benefit Analysis of the War on Drugs*, 20 STAN. L. & POL’Y REV. 229 (2009) (questioning the validity of the war on drugs because of the “toll [it] has taken on our society,” and because the “evidence regarding the social and economic benefits of the present system remains scant”).

combating problems that independently need solving. Most importantly, the doctrinal expansion I have been arguing for seems especially warranted as a way to combat the incentives to remain in ignorance that actors face in white-collar contexts when potential conflicts of interest loom. This group of actors is likely to include in-house counsel, accountants or lawyers hired to vet dubious transactions, corporate officers in charge of compliance or fraud prevention, and ratings agencies hired to evaluate the risks of complex securities. What these cases have in common are the following features:

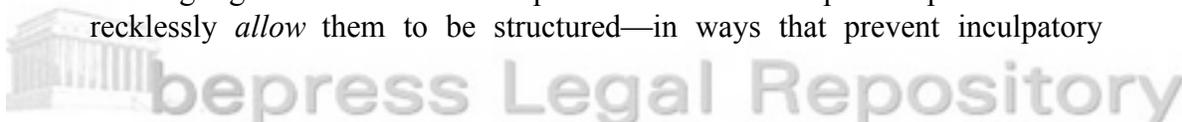
- 1) The actor occupies a role that carries with it a duty to detect or prevent fraud;
- 2) The actor knows or ought to know that the party she serves (*e.g.* her client or employer) has incentives to hamper her efforts to investigate whether fraud is occurring;
- 3) The actor knows or ought to know that she has her *own* incentives to remain in ignorance because this would please her client or employer.

When these three factors are present, some form of heightened accountability is especially called for. Thus, my proposal is that the Iterated Reckless Ignorance Principle should be applied only in factual scenarios possessing these three characteristics as a means to counteract the incentives to remain (whether intentionally or merely recklessly) in ignorance. Ultimately, I think courts are in the best position to determine when heightened accountability of this kind is warranted, which would justify going beyond the existing willful ignorance doctrine in the way I've been arguing for. But I suggest that heightened accountability of this sort would be particularly appropriate in factual scenarios where the three features just mentioned are present.

Why focus on the corporate context in particular? The corporate form brings unparalleled advantages in terms of directing and coordinating the efforts of numerous individuals, but it also creates the risk that these powerful organizational tools will be abused. Especially important in this context is the risk that corporations might be structured—whether intentionally or unintentionally—so as to prevent inculpatory information from being shared, recognized and acted on. As Phillip Pettit and Christian List argue, it is

possible for individuals to incorporate, *consciously or unconsciously*, so as to benefit from this deficit of responsibility [that corporate organization allows]. They might seek to achieve a certain effect, say a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done; they are protected by excusing or exonerating considerations [like ignorance].<sup>181</sup>

This highlights the undeniable temptation to structure corporate operations—or recklessly *allow* them to be structured—in ways that prevent inculpatory



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<sup>181</sup> C. LIST AND P. PETIT, GROUP AGENCY 165-67 (2011) (emphasis added).

information from rising to the surface and being acted on.<sup>182</sup> As Vikram Khanna argues, because traditional mens rea standards “allow[] corporations to avoid liability by partitioning information, it encourages them to do so, resulting in suboptimal information sharing and a suboptimal level of care.”<sup>183</sup>

This danger is even more serious when it comes to the relationship between a corporation and outside professionals like accountants, lawyers or ratings agencies that the corporation relies on to accomplish its business objectives. Where corporations are engaged in legally dubious practices, it will be especially tempting “to use lawyers [or accountants] to paint a gloss of respectability . . . on dubious transactions.”<sup>184</sup> The corporations, of course, will have incentives to keep damaging information from their lawyers and accountants in order to facilitate the approval of the practices in question. For their part, lawyers and accountants have incentives to please the parties they serve, and thus may end up being overly tolerant of receiving less than perfect access to all the relevant information.<sup>185</sup>

Accordingly, it is especially important to craft judicial tools that counteract the incentives for corporations to enter into working relationships with lawyers or accountants that end up perpetuating all the parties’ ignorance of any wrongdoing that might be occurring. This ignorance, after all, helps to enable lucrative wrongdoing, while making it easier for both the corporate actors and their lawyers or accountants to avoid being held accountable for any illegality that may be occurring. The existing willful ignorance doctrine is one tool that serves this purpose. But it is not a fully adequate response to the problem because it is only responsive to *deliberate* attempts to remain in ignorance. But the problem is hardly limited to purposeful efforts to enter into relationships with lawyers or accountants in order to avoid inculpatory knowledge. The problem clearly also extends to cases of merely *recklessly allowing* all the parties’ ignorance to be preserved. To combat this not fully deliberate version of the problem, we need tools that go beyond the willful ignorance doctrine. This is the gap that the Iterated Reckless Ignorance Principle is meant to fill.<sup>186</sup>

As a result, it seems especially important that the Iterated Reckless Ignorance Principle be made available for criminal prosecutions of corporations and the individuals within them who are responsible for detecting and preventing fraudulent activities, together with the lawyers, accountants or ratings agencies retained by corporations to serve such a function. Because

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<sup>182</sup> V.S. Khanna, *Is the Notion of Corporate Fault A Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 380 (1999) (observing that “a corporation could structure its internal processes and agent employment duties so that it would be difficult for one agent to end up having the necessary information to both possess the required mens rea and commit the undesirable act triggering liability”).

<sup>183</sup> *Id.* at 381.

<sup>184</sup> Gordon, *supra* note 12 at 1201.

<sup>185</sup> *See supra* note 13.

<sup>186</sup> *Cf.* Khanna, *supra* note 182 at 371-72 (1999) (discussing how a collective liability standard like we see in *T.I.M.E.-D.C.* “provides the firm and its managers with an incentive to share information among themselves, thereby enhancing deterrence and compliance with the law”).

corporations receive the benefits enabled by having supposedly independent firms vet and approve questionable transactions or activities, it is only fair to subject corporations and the outside firms they hire to heightened forms of accountability.

Moving beyond the existing willful ignorance doctrine and adopting the Iterated Reckless Ignorance Principle in the limited circumstances I have proposed is one way to impose heightened accountability of just this sort. It is not offered as a silver bullet that by itself can eradicate all harm resulting from the incentives to remain in ignorance that corporations, and the firms they hire to vet their transactions, possess. Nonetheless, it is an important step toward filling the troubling gap that exists in the criminal law's response to the incentives to remain in ignorance of fraud going on in one's midst.

## VI. CONCLUSION

Recklessly preserving one's ignorance again and again can end up making one just as culpable as acting in willful ignorance—and thus just as culpable as acting with full-fledged knowledge. Taking seriously the “traditional rationale” for the willful ignorance doctrine entails that, in these cases, courts should allow repeated reckless ignorance to satisfy the knowledge element of white-collar crimes like aiding and abetting fraud. If courts fail to do so, lawyers and accountants who are tasked with uncovering fraud, but who seek to curry favor with clients by recklessly preserving their ignorance, will continue to flourish. In the Iterated Reckless Ignorance Principle, courts have a tool with which to change that. I have argued that they should seize it. Moreover, given the threat that the current “mens rea reform” bills would pose to the prosecution of white-collar crime, it is clear that, should some version of this legislation enter into force, courts would face even greater pressure to adopt the doctrinal tools advocated here in order to preserve the efficacy of the criminal law.