

WILLFUL IGNORANCE, CULPABILITY AND THE CRIMINAL LAW

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ABSTRACT: When conviction of a given crime requires knowledge of some fact, courts commonly allow the defendant's willful ignorance to satisfy this knowledge requirement. However, because most agree that willful ignorance is not actually a form of knowledge, the practice of allowing willful ignorance to substitute for knowledge calls out for justification. Why is it that some willfully ignorant defendants may be treated as if they possessed knowledge—even when they in fact did not? The traditional answer relies on the so-called "equal culpability thesis," which provides that willful ignorance is just as culpable as knowing misconduct.

However, the equal culpability thesis itself is rarely given an explicit defense. The few arguments that have been offered in its favor fail. The present article aims to fill this void by offering a new account of what makes it the case that someone who commits the actus reus of a crime in a state of willful ignorance is at least as culpable as someone who does so knowingly. On the account defended here, willful ignorance involves the breach of a duty of reasonable investigation, and willfully ignorant defendants are as culpable as their knowing counterparts when they breach this duty in sufficiently serious ways.

Of course, equal culpability does not automatically entail identical legal consequences, and so this article concludes by investigating the legal significance of the equal culpability thesis (suitably restricted). In particular, the article argues that courts ought not give willful ignorance jury instructions unless a jury could reasonably infer from the trial evidence that the defendant's willful ignorance made him at least as culpable as the analogous knowing criminal. In addition, a defense of the equal culpability thesis is of paramount importance to the legislative question of whether criminal statutes should be amended to explicitly permit willful ignorance to satisfy the knowledge element of various crimes. By providing a deeper understanding of the applicable principles of culpability, this article thus aims to pave the way for a more discerning and just application of the willful ignorance doctrine in the criminal law.

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INTRODUCTION

All the federal courts of appeals have endorsed some version of the willful ignorance doctrine.¹ This is the doctrine that, where conviction of a crime requires knowledge of a given fact, this knowledge requirement can be satisfied by the defendant's willful ignorance about that fact. For example, federal law makes it a crime "for any person knowingly . . . to . . . possess with intent to . . . distribute . . . a controlled substance."² A willful ignorance instruction in a drug possession case thus might permit the jury to find that the knowledge required for conviction under this statute is present

¹ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011) (observing that "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to 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"); 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"; collecting cases).

See also *United States v. Perez-Melendez*, 599 F.3d 31, 41 (1st Cir. 2010) ("Willful blindness serves as an alternate theory on which the government may prove knowledge."); *United States v. Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003) ("conscious avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence" (internal quotation marks omitted)); *United States v. Stadtmauer*, 620 F.3d 238, 252, 257 (3rd Cir. 2010); *United States v. Schnabel*, 939 F.2d 197, 204 (4th Cir. 1991) ("hold[ing] that the trial court did not err by giving the jury a willful blindness instruction"); *United States v. Freeman*, 434 F.3d 369, 378-79 (5th Cir. 2005) (upholding "deliberate indifference" jury instruction); *United States v. Holloway*, 731 F.2d 378, 380-81 (6th Cir. 1984) (per curiam) (noting that "this circuit has repeatedly upheld the district court's knowledge instruction on the basis that it prevents a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct"); *United States v. Draves*, 103 F.3d 1328, 1333 (7th Cir. 1997) (noting that the defendant's "knowledge of the activity did not have to be 'actual' knowledge. Under the 'conscious avoidance' or 'ostrich' doctrine, knowledge may in some circumstances be inferred from strong suspicion of wrongdoing coupled with active indifference to the truth"); *United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004) (the "evidence supports an inference of deliberate ignorance" if the "defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts"); *United States v. Heredia*, 483 F.3d 913, 917, 920 (9th Cir. 2007) (en banc) (reaffirming the Ninth Circuit's decision in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), one of the seminal cases establishing the permissibility of a willful ignorance instruction); *United States v. Glick*, 710 F.2d 639, 642 (10th Cir. 1983) ("conclud[ing] that an instruction on deliberate avoidance was appropriate"); *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) ("knowledge element of a violation of a criminal statute can be proved by demonstrating either actual knowledge or deliberate ignorance"); *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1378 (Fed. Cir. 2010) *aff'd sub nom. Global-Tech*, 131 S. Ct. at 270 (finding the Federal Circuit's test for willful blindness to be improper but that in the case presented, the error was harmless); *United States v. Mellen*, 393 F.3d 175, 181 (D.C. Cir. 2004) (noting that to prove "guilty knowledge," "the government may show that, when faced with reason to suspect he is dealing in stolen property, the defendant consciously avoided learning that fact"); but see *United States v. Alston-Graves*, 435 F.3d 331, 339-41 (D.C. Cir. 2006).

² 21 U.S.C. § 841(a)(1).

if the defendant was willfully ignorant of the fact that the substance he possessed was a narcotic.³ (This article will refer to the proposition of which one must have knowledge in order to be guilty of a given crime as the “inculpatory proposition” for that crime.) If the evidence introduced at trial shows that the defendant could easily have learned whether the substance in his possession was a drug, but decided not to investigate in the hopes of avoiding conviction if apprehended, it might be particularly appropriate to allow the jury to consider convicting this defendant on a willful ignorance theory.⁴

If willful ignorance were just a species of actual knowledge,⁵ there would be nothing puzzling about the practice of allowing the willfully ignorant to be convicted of crimes that require knowledge. However, the view that willful ignorance falls within the definition of knowledge, as traditionally construed, does not withstand scrutiny. Instead, the general consensus among commentators is that the mental state of willful ignorance is neither the same as nor a sub-species of the mental state of knowledge.⁶

This result, however, raises a difficult question: what justifies the practice of taking the mental state of willful ignorance to be the functional equivalent of knowledge? That is, if one can be willfully ignorant without possessing genuine knowledge, why is it that some willfully ignorant defendants may be punished *as if* they possessed knowledge—even in cases where they in fact do not?

As the Supreme Court recently observed in *Global-Tech Appliances, Inc. v. SEB S.A.*, “[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.”⁷ Similarly, in *United States v. Jewell*, one of the leading cases to recognize the permissibility of willful ignorance jury instructions, the Ninth Circuit noted that “[t]he substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable.”⁸ This idea—often referred to as the “equal culpability thesis”—thus figures centrally into courts’ attempts to justify the practice of permitting willfully ignorant defendants to be convicted of crimes requiring

³ See, e.g., *Heredia*, 483 F.3d at 917 (upholding jury instructions stating that “[y]ou may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth”).

⁴ Cf. *id.* at 919-20 (upholding willful ignorance jury instruction in a drug possession case even though the defendant’s reason for remaining ignorant was not merely to preserve a defense).

⁵ The Model Penal Code appears to endorse such a view, for example. See *infra* notes 46-50 and accompanying text.

⁶ See *infra* note 44.

⁷ 131 S. Ct. 2060, 2069 (2011).

⁸ 532 F.2d 697, 700 (9th Cir.1976) (en banc).

knowledge.

However, the equal culpability thesis itself is notoriously difficult to give convincing arguments for. Doug Husak and Craig Callender diagnose the problem by pointing out that because “no adequate theory to measure degrees of culpability has yet been proposed,” “commentators are left with only their unsupported (and frequently conflicting) intuitions about whether one mental state is more or less culpable than another.”⁹ As a result, it should come as no surprise that adequate justifications of the equal culpability thesis are hard to come by. As argued below, the few sustained efforts to establish the equal culpability thesis, or something like it, that have been offered are unsuccessful. One of the primary aims of this article, therefore, is to explain why willful ignorance can sometimes be just as culpable as knowing misconduct, but *without* relying on any comprehensive theory about how to assign degrees of culpability to different actors.

To be clear, this article does not contend that it is *always* the case that performing the actus reus of a crime with the mental state of willful ignorance is as culpable as doing so knowingly. Instead, it maintains only that this *sometimes* is the case. The aim of this article is to give an account of what makes it the case (when it is true) that a given person who performs the actus reus in willful ignorance is at least as culpable as a similarly situated individual who performs the same conduct knowingly.

To see the motivation for the account developed here, consider what willful ignorance is. As explained below, a person is willfully ignorant (roughly) when he is aware that there is a substantial and unjustified chance that the inculpatory proposition for a crime is true, but he consciously decides not to take readily available steps to determine with greater certainty whether it is true, and he then proceeds to perform the actus reus of the crime anyway.¹⁰ Thus, one cannot be willfully ignorant without at a minimum being reckless—*i.e.* being aware of a substantial and unjustified risk of some harmful or culpability-enhancing feature of one’s action.¹¹

However, it is both intuitive and widely accepted in the criminal law that performing the actus reus of a crime recklessly is not as culpable as doing so knowingly.¹² For example, suppose a statute were to define second-degree arson as the act of lighting a building on fire knowing that a person is inside.¹³ The inculpatory proposition for this crime thus would be that there

⁹ Douglas N. Husak and Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 54-55 (1994).

¹⁰ See *infra* notes 33-42 and accompanying text.

¹¹ See, e.g., Model Penal Code § 2.02(2)(c) (defining recklessness).

¹² See *infra* note 31 and accompanying text.

¹³ Cf. N.Y. Penal Law § 150.15 (“A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and when (a) another

is someone in the building. It is intuitively plausible that a person who lights the building on fire while aware of a substantial and unjustified risk that a person is inside (*i.e.* is reckless with respect to the inculpatory proposition) seems to be somewhat less culpable for his action (perhaps just a little) than one who lights the building on fire while practically certain that a person is inside (*i.e.* has knowledge).

Now, if recklessness is generally less culpable than the analogous knowing misconduct, then in order for a willfully ignorant actor to be as culpable as a knowing wrongdoer, there must be some additional source of culpability—beyond that which stems from his recklessness—that could explain why the willfully ignorant individual is as culpable as the similarly situated knowing wrongdoer. That is, some additional bit of culpability must be identified, which could raise the willfully ignorant actor's level of culpability up from the level of a merely reckless wrongdoer to that of a knowing wrongdoer. What could it be?

The answer this article defends is that, in addition to the culpability acquired by virtue of acting recklessly, the willfully ignorant criminal may incur some additional culpability from breaching what will be referred to as the “duty of reasonable investigation.”¹⁴ As explained in detail below, when one is aware that some conduct that one is set on performing would impose substantial and unjustifiable risks on others, one acquires a duty to investigate in reasonably available ways whether the risks imposed by one's conduct really will materialize. When willfully ignorant actors incur this duty and breach it, they may acquire some additional culpability beyond what they possess in virtue of acting recklessly. However, the duty of reasonable investigation can be breached in different ways and for different reasons, and this can affect the amount of additional culpability one incurs from the breach. Sometimes one can breach this duty in ways or for reasons that are so bad that, when taken together with one's culpability for recklessly performing the risky conduct itself, one becomes at least as culpable as the similarly situated individual who acted knowingly. Under these circumstances, the willfully ignorant actor will be at least as culpable as his knowing counterpart.

Spelling out this argument in detail is the burden of the first three Parts of this article. After clarifying the concept of willful ignorance (in Part I) and explaining why existing arguments for the equal culpability thesis fail (in Part II), the article proceeds (in Part III) to specify the circumstances in which a person who performs the *actus reus* in willful ignorance is at least as culpable as a similarly situated person who acts knowingly. Part III

person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the *defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.*” (emphasis added).

¹⁴ See *infra* notes 93-101 and accompanying text.

formulates the duty of reasonable investigation with precision, and explains how the different ways of breaching it allow us to account for the wide range of cases in which willful ignorance is intuitively as culpable as knowing misconduct.

Of course, even in cases where we are confident that a willfully ignorant person is as culpable as her knowing counterpart, there is still an open question about what legal significance this conclusion has. The fact that two actors are equally *morally* culpable, after all, does not automatically entail that they are *legally* to be treated the same. The final section of this article (Part IV) thus aims to investigate what follows from the fact of equal culpability (when it is a fact). Granted, the equal culpability thesis, as a proposition in moral philosophy, does not bear directly on the questions of statutory interpretation that determine whether a particular crime requiring knowledge is in principle a suitable candidate for giving willful ignorance jury instructions. Nonetheless, Part IV maintains that the truth of the equal culpability thesis (appropriately restricted) has important implications for two other types of legal questions.

First, even where a statutorily defined crime is found to be in principle amenable to a willful ignorance instruction, courts have imposed a number of additional prerequisites that must be met before a willful ignorance instruction may actually be given in a particular case. What Part IV.B argues is that in order to faithfully adhere to the traditional rationale for the willful ignorance doctrine, courts should not give a willful ignorance instruction unless a jury could reasonably infer from the trial evidence that the defendant's willful ignorance rendered him at least as culpable as the corresponding knowing criminal. Thus, the defense of the equal culpability thesis provided here should help guide courts' decisions about whether willful ignorance instructions are appropriately given in particular cases.

Second, the equal culpability thesis is of paramount importance to the legislative question of whether criminal statutes should be amended to explicitly permit willful ignorance to satisfy the knowledge element of the crimes they define. Without some reason to think that the willfully ignorant at least under some circumstances are as culpable as their knowing counterparts, such reforms would be on shaky normative footing. A defense of the equal culpability thesis is needed in order to be sure that allowing willful ignorance to substitute for knowledge would not invariably over-punish willfully ignorant defendants who are convicted of knowledge crimes.

This inquiry into the legal significance of the equal culpability thesis thus elucidates the at-times-convoluted relationship between moral culpability and criminal punishment.¹⁵ Accordingly, this article aims to

¹⁵ It would also be worthwhile to investigate how the questions discussed in this article

make good on the promise that a greater understanding of the principles that render individuals culpable for their actions can help pave the way toward a more discerning and just application of the mens rea categories employed in the criminal law.

I. THE WILLFUL IGNORANCE DOCTRINE

In what follows, the term “willful ignorance doctrine” will be used to refer to the practice of instructing juries that they may convict a defendant of a crime requiring knowledge if the defendant merely was willfully ignorant of the relevant fact.¹⁶ The willful ignorance doctrine that this article is concerned with should not be confused with the distinct evidentiary rule that facts tending to show a defendant to be willfully ignorant can also constitute evidence from which a jury might infer actual knowledge.¹⁷ Instead, the willful ignorance doctrine to be discussed here provides that willful ignorance can “substitute” for knowledge, *i.e.* by itself be sufficient to satisfy the knowledge element of a crime.¹⁸

If willful ignorance were just a species of genuine knowledge, there would be no puzzle surrounding the practice of allowing the willfully ignorant to be convicted of crimes that require knowledge. However, as this Part shows, such a view does not withstand scrutiny. To establish this conclusion, section A first introduces the traditional understanding of the mental states of knowledge and recklessness in the criminal law. Then section B discusses the willful ignorance doctrine itself. Finally, section C explains why willful ignorance is neither the same as nor encompassed by the mental state of knowledge. This conclusion sets the stage for the challenge to be confronted in the next Part, namely that of justifying our practice of treating willfully ignorant defendants as if they had knowledge.

would apply to tort liability and other areas of the private law. However, that task is beyond the scope of this article.

¹⁶ By way of example, the jury instruction in *Heredia* stated: “You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.” 483 F.3d at 917.

¹⁷ *See, e.g. Global-Tech*, 131 S. Ct. at 2073 (Kennedy, J., dissenting) (“Facts that support willful blindness are often probative of actual knowledge. Circumstantial facts like these tend to be the only available evidence in any event, for the jury lacks direct access to the defendant’s mind. The jury must often infer knowledge from conduct, and attempts to eliminate evidence of knowledge may justify such inference, as where an accused . . . avoids further confirming what he already believes with good reason to be true.”).

¹⁸ The distinction between this evidentiary rule and the willful ignorance doctrine proper was recognized, for example, in Justice Kennedy’s dissent in *Global-Tech*. There, he attempted to distinguish a prior case on the ground that the question there “was whether the defendant’s admitted violation was willful, and (. . .) the Court simply explained that wrongful intent may be inferred from the circumstances. It did not suggest that blindness can substitute for knowledge.” *Global-Tech*, 131 S. Ct. at 2073.

A. Background: Knowledge, Recklessness and the “Culpability Hierarchy”

To begin with, some terminology is needed. What it means to say that a crime requires the mental state (or *mens rea*) of knowledge is that, to be guilty of that crime, the defendant must have performed some action (the *actus reus*), while knowing some *inculpatory proposition*, *p.* For example, first-degree burglary in New York requires (among other things) that the defendant “knowingly enters or remains unlawfully in a dwelling with the intent to commit a crime therein.”¹⁹ Thus, the *actus reus* would be entering or remaining in a building, and the *inculpatory proposition* for this crime (or one of them) would be that the building in question is a dwelling. For drug possession crimes, the *inculpatory proposition* might be that the substance one possesses is a narcotic, or perhaps that one possesses more than a certain quantity of the narcotic. In general, the *inculpatory proposition* that the defendant must have knowledge of is going to be some factual circumstance in virtue of which the *actus reus* is harmful to some person(s) or legally protected interest(s)—or at least *more so* than the conduct would be without that fact.

Thus, there are two kinds of cases involving *inculpatory propositions*. First, there are cases in which the underlying action would be culpable even if the *inculpatory proposition* is false. It seems independently bad, say, to unlawfully enter a building with the intent to commit a crime therein even if the *inculpatory proposition* “the building in question is a dwelling” is false. In these cases, the truth of the *inculpatory proposition* merely makes the underlying action *worse* (provided one has a suitable *mens rea* towards it). Second, there are cases in which the underlying action would not be bad if the *inculpatory proposition* is false. Possessing or transporting substances is not bad in its own right, but would seem culpable if one, say, does it while knowing the *inculpatory proposition* that the substance in question is an illegal narcotic. Any account of willful ignorance will have to accommodate both types of case.

Now, to see why willful ignorance is not simply a sub-species of some other mental state that is already well-established in the criminal law, we need to understand what these other, more familiar mental states involve. Of particular importance here are the mental states of knowledge and recklessness. To understand more precisely how the law uses these terms, consider the Model Penal Code (“MPC”). Although the MPC has been the subject of much critical discussion,²⁰ it captures the traditional

¹⁹ N.Y. Penal Law § 140.30 (emphasis added).

²⁰ See, e.g., Paul H. Robinson and Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983); Danyne Holley, *The Influence of the Model Penal Code's Culpability Provisions on State*

understanding of acting with a particular mental state (say, recklessly or knowingly) well enough for present purposes. Thus, this article will largely adopt the MPC's understanding of the four mental states it defines—negligence, recklessness, knowledge and purpose.

The MPC defines recklessness as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.²¹

Relatedly, the MPC offers the following definition of acting knowingly:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is *practically certain* that his conduct will cause such a result.²²

MPC § 2.02(7) then proceeds to clarify that the knowledge element of a crime can be satisfied by “knowledge of high probability.” Specifically, it provides that “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a *high probability* of its existence, unless he actually believes that it does not exist.”²³

From these definitions, it is clear that the MPC employs a picture on which belief comes in degrees. On this picture, we can assume that one's confidence in the truth of a proposition may be assigned a number between

Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine, 27 SW. U. L. REV. 229 (1997).

²¹ Model Penal Code (“MPC”) § 2.02(2)(c) (Official Draft and Revised Comments 1985); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 220-22 (1990) (“Recklessness is conscious disregard of a substantial and unjustifiable risk, or ‘conscious risk creation.’ ‘Conscious disregard’ requires that the actor actually have recognized the particular risk. . . . Recklessness therefore describes a willingness to act in the face of a perceived probability of the existence or creation of a particular fact, circumstance, or result.”)

²² MPC § 2.02(2)(b) (emphasis added).

²³ MPC § 2.02(7) (emphasis added). As the comments to the MPC explain, “[p]aragraph (7) deals with the situation British commentators have denominated ‘wilful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist.” Model Penal Code 129-30 (Tent. Draft No. 4, 1955). However, it will be argued below that this attempt to define knowledge so as to encompass cases of willful blindness does not succeed.

0 and 1, where 0 represents absolute confidence that the proposition is false and 1 represents absolute confidence that the proposition is true. If one's degree of confidence (or credence, as it is often called in the formal epistemology literature²⁴) in the proposition is 0.5, for example, this would correspond to a belief that the proposition is equally likely to be true as it is to be false.

As one gains more and more confidence in the truth of an inculpatory proposition, *p* (which, let us suppose, is in fact true), there is some point at which one would count as reckless were one to perform the actus reus of the crime with that degree of credence in *p* (provided the risk is unjustifiable). Call the level of confidence in *p* that is required to be reckless the "recklessness threshold." In the terminology of the MPC, this is the point at which one becomes aware of a "substantial" risk that *p* is true.²⁵

As one's confidence in *p* is increased still further, one will eventually reach a point where one no longer merely is reckless with respect to *p*, but indeed would count as *knowing* it for purposes of the criminal law.²⁶ Robin Charlow, for example, points out that, for purposes of the criminal law, "we can assume that knowledge requires both belief, or subjective certainty, and the actual truth or existence of the thing known."²⁷ Call the level of confidence that is required to have knowledge of the proposition the "knowledge threshold." As will be seen below, we do not need to specify exactly what likelihood one must believe *p* has of being true in order for one to count as knowing it—perhaps it is 90% certainty, 95% certainty, etc. The required level may also vary depending on the context.²⁸

This concept of knowledge that the criminal law employs is not the one found in the philosophical literature (which purports to map onto a "common sense" or "ordinary language" meaning of the term).

²⁴ See, e.g., David Lewis, *A Subjectivist's Guide to Objective Chance*, in Richard C. Jeffrey (ed.), *STUDIES IN INDUCTIVE LOGIC AND PROBABILITY*, VOL. II. 263-93 (1980); Jacob Ross & Mark Schroeder, *Belief, Credence, and Pragmatic Encroachment*, forthcoming, *PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH* (discussing the view that "what it is for an agent to believe a proposition is for her credence in this proposition to be above a certain threshold, a threshold that varies depending on pragmatic factors"); cf. Richard Foley, *Beliefs, Degrees of Belief, and the Lockean Thesis*, in Franz Huber and Christoph Schmidt-Petri (eds.), *DEGREES OF BELIEF*, Springer (2009) (discussing the "Lockean thesis" that "it is rational for someone *S* to believe a proposition *P* just in case it is rational for *S* to have a degree of confidence in *P* that is sufficient for belief").

²⁵ MPC § 2.02(2)(c).

²⁶ See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 474 (1992) ("Criminal 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).").

²⁷ Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1374-75 (1992). See also MPC § 2.02(2)(b).

²⁸ See, e.g., Ross and Schroeder, *supra* note 24.

Philosophers typically take knowledge to require justified true belief, plus some additional condition designed to get around so-called “Gettier counterexamples.”²⁹ By contrast, the notion of knowledge employed in the criminal law allows one to count as knowing a proposition even if one only has a high confidence of its truth and one happens to be correct—even if one’s evidence does not objectively justify that level of confidence.³⁰ Indeed, it makes sense that the criminal law would employ this more anemic concept of knowledge because subjective certainty (perhaps together with truth) appears to be the primary factor that an actor’s culpability depends on in this context. A person who sets fire to a building while subjectively certain that someone else is inside but whose evidence does not objectively justify that belief would seem to be just as culpable as a person who lights the fire with the same subjective certainty but whose evidence does *not* objectively justify the belief. Thus the differences between the criminal law and philosophical concepts of knowledge do not seem to matter much when it comes to culpability assessments. In any case, it is not necessary here to provide an elaborate critique of the legal conception of knowledge. It should simply be emphasized that this article will use the term in its standard legal sense.

One final bit of background is important before proceeding. It is a familiar observation that the MPC establishes a “culpability hierarchy.”³¹ That is, the MPC supposes that performing a criminal act purposefully is worse than performing it knowingly, which in turn is worse than performing it recklessly, which again is worse than performing it negligently. However, it is important to point out that this hierarchy appears to hold only if the object of these mental states is held fixed across the examples one considers.

²⁹ See Edmund Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121–23 (1963); Jonathan J. Ichikawa and Matthias Steup, *The Analysis of Knowledge*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012) (“Most epistemologists have accepted Gettier’s argument, taking it to show that the three conditions of the JTB account—truth, belief, and justification—are not in general sufficient for knowledge. How must the analysis of knowledge be modified to make it immune to cases like the one we just considered? This is what is commonly referred to as the ‘Gettier problem.’”) (available online: <http://plato.stanford.edu/entries/knowledge-analysis/#GetPro>).

³⁰ See Charlow, *supra* note 27 at 1374–75 (“For purposes of defining criminal knowledge, it does not appear to be necessary to resolve this philosophical issue; we do not normally impose criminal liability when the applicable mens rea is knowledge unless the thing that must be known actually is true or exists. (. . .) In short, criminal knowledge is correct belief.”).

³¹ See, e.g., Simons, *supra* note 26 (discussing “the hierarchical ordering of states of mind in contemporary law”; proceeding to critically “examine[] the Model Penal Code hierarchy, which has gained broad acceptance in the United States”); Kimberly Kessler Ferzan, *Don’t Abandon the Model Penal Code Yet! Thinking Through Simons’s Rethinking*, 6 BUFF. CRIM. L. REV. 185, 186 (2002) (responding to Simons’s “objection to the Model Penal Code’s [culpability] hierarchy”); Danyne Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A “Model” Assessment*, 34 AKRON L. REV. 401, 410 (2001) (providing an empirical study of, *inter alia*, how extensively states have adopted the “Model Penal Code culpability definitions and its hierarchical interrelationship”).

For instance, suppose that one is considering the relative culpability of actors who have different mental states with respect to the harm that their actions caused. Suppose A negligently caused some harm, and B did so recklessly, while C caused harm knowingly, and D did so purposefully. The proposition *D is worse than C who is worse than B who was worse than A* will only be true provided that the harm in question is held fixed across the four examples. After all, it seems possible for it to be much more culpable to act, say, recklessly with respect to a *huge* harm (e.g. the death of 1000 people) than to purposefully cause a small harm (e.g. a bruised elbow). Thus, the culpability hierarchy in the MPC appears to hold true only if one keeps the magnitude of the harm in question constant. Something similar can be said if the object of the various mental states in one's examples is not a result element, but rather an attendant circumstance or a conduct element. The arguments given below are constructed with this point in mind.

B. Willful Ignorance

With these preliminaries completed, we can now begin to investigate the phenomenon of willful ignorance and ask how it relates to the more traditional mental states recognized by the criminal law.

To begin with, willful ignorance must be distinguished from ignorance more generally. Ignorance, after all, need not be willful or deliberate. Suppose, for example, there is some question about which one is uncertain, and while one meant to investigate the matter, one simply forgot to or was distracted from doing so. In such a case, it is clear that one would count as ignorant, but one's ignorance would not be *willful*—just inadvertent. For one's ignorance of some fact or question to be willful, it seems one must consciously decline to acquire additional information about the matter.

Thus, the concept of willful ignorance aims to capture scenarios in which a defendant knows there is a substantial likelihood that some relevant factual circumstance obtains (e.g. that this building is a dwelling, that there is a person inside, etc.), but he then consciously decides not to take the obviously available steps to ascertain whether that circumstance in fact obtains. Husak and Callender³² have offered a particularly plausible account of the concept of willful ignorance, which I will adopt here with but one emendation. They define willful ignorance as follows:

a defendant is wilfully ignorant of an incriminating proposition p when he is suspicious that p is true [*i.e.* believes it has a substantial chance of being true], has good reason to think p true, fails to pursue reliable, quick, and ordinary measures that would enable him to learn the truth of p, and, finally, has a conscious desire to remain ignorant of p in order to avoid

³² Husak and Callender, *supra* note 9.

blame or liability in the event that he is detected.³³

While this account of willful ignorance is quite plausible, it is nonetheless questionable—both legally and conceptually—in one important respect. The legal doubts stem from the fact that there is a split between the Ninth Circuit, on the one hand, and the Eighth, Tenth and Eleventh Circuits, on the other, with respect to whether willful ignorance *requires* that one’s specific motive in not obtaining knowledge is that one wants to set up an ignorance defense. Given the last prong in Husak and Callender’s account, it is clear that they take it that this motive is required. So do the Eighth,³⁴ Tenth³⁵ and Eleventh Circuits.³⁶ However, this approach was rejected by a recent *en banc* decision of the Ninth Circuit. In *United States v. Heredia*, the Ninth Circuit held that “deliberate indifference” jury instructions need not state that the defendant’s motive in failing to learn the truth had to have been to preserve an ignorance defense should he be charged with a crime.³⁷ Instead, the *en banc* court determined that “the requirement that [the] defendant have *deliberately* avoided learning the truth” was sufficient.³⁸ In so holding, the Ninth Circuit overruled some of its prior cases and expressly rejected the sort of approach endorsed by the Eighth, Tenth and Eleventh Circuits,³⁹ which Husak and Callender also favor.

At least on conceptual grounds, the Ninth Circuit’s approach is on a firmer footing. Specifically, the reason is that Husak and Callender’s account, like the approach of the Eighth, Tenth and Eleventh Circuits, is overly narrow. While the desire “to avoid blame or liability in the event that [one] is detected”⁴⁰ is obviously one *possible* reason for deciding to remain ignorant of a particular fact, it is clear that one might make this decision for *other* reasons as well. For example, one might decide to remain ignorant about a given matter of fact in order to benefit from some risky action, while avoiding the guilt one would feel upon doing the action with full knowledge

³³ *Id.* at 40.

³⁴ *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002) (“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).

³⁵ *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000) (“district court may tender a deliberate ignorance instruction when the Government presents evidence that the defendant ‘purposely contrived to avoid learning all of the facts’ in order to have a defense in the event of prosecution”).

³⁶ *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003) (“An instruction on deliberate ignorance is appropriate only if it is shown that the defendant was aware of a high probability of the fact in question and that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.” (internal quotation marks omitted)).

³⁷ 483 F.3d at 919-20.

³⁸ *Id.* (emphasis in original).

³⁹ *Id.*

⁴⁰ Husak and Callender, *supra* note 9 at 40.

that one's conduct will be harmful. (David Luban calls this character "the ostrich."⁴¹) Similarly, one's reasons for remaining ignorant might involve a form of wishful thinking (e.g. when ignoring evidence that one's spouse is having an affair or that one's child is stealing). The decision to remain ignorant might be made for any number of other reasons as well, depending on the case, and some of these reasons would likely render the willfully ignorant actor more culpable than others.

Thus, while Husak and Callender, together with the Eighth, Tenth and Eleventh Circuits, have singled out *one particularly egregious* reason for which an actor might consciously decide to remain ignorant, a fully accurate account of the phenomenon should remain neutral with respect to the reasons for which the actor chooses to remain ignorant. After all, it is a substantive evaluative question whether a particular actor who opts to remain ignorant for any given reason is culpable enough to merit a particular punishment or conviction. We should not *define* willful ignorance so that only some especially bad cases of willful ignorance fall within its ambit.⁴² Rather, the concept should be given an independently plausible definition, and it can subsequently be asked which instances of the phenomenon are culpable enough to merit a particular sanction.

With this slight modification to Husak and Callender's account, the definition of willful ignorance that I will be relying on in this article may be stated as follows:

Willful ignorance: An actor, A, performs an action, *a*, in willful ignorance of an inculpatory proposition, *p*, if and only if

- (1) A is suspicious that *p* is true (*i.e.* takes it that *p* has a substantial likelihood of being true) and this is for good reason;
- (2) A could take certain reasonably available steps to learn with substantially greater certainty whether *p* actually is true; but
- (3) A consciously decides not to take these steps (for some reason or other); and
- (4) A proceeds to perform action *a* anyway.

A couple clarifications are in order before proceeding. First, it is plausible that the degree of confidence one must have in *p* in order to count

⁴¹ David Luban, *Contrived Ignorance*, 87 GEO. L. J. 957, 969 (1999) (discussing two versions of the "ostrich" character).

⁴² Deborah Hellman makes a similar observation. See Deborah Hellman, *Willfully Blind for Good Reason*, 3 CRIM. L. & PHILOSOPHY 301, 302 (2009). There, she notes that we could reserve the term "willfully blind" for only those cases in which the willfully ignorant individual is culpable, or we could use the term more broadly to denote any case of willful ignorance, regardless of whether it is culpable or not. She then proposes to use "culpable blindness" to refer to just the culpable cases of the phenomenon, while "contrived ignorance" would refer to any case of the phenomenon—culpable or not. *Id.* I do not adopt her terminology, but I fully agree with her underlying insight.

as being suspicious that p might vary depending on what is at stake. For instance, if there is a question as to whether you put arsenic in your tea rather than sugar, it might not take a very high credence in this proposition on my part in order for me to count as having a suspicion about it. By contrast, with regard to the proposition that I assigned the wrong article to my class as required reading, a higher level of confidence might be required in order for me to count as having a suspicion that this is true.

Second, this account of willful ignorance accommodates the fact that there are a wide variety of reasons for which a person might be willfully ignorant. This is captured in prong (3) of the account. For instance, one might decide not to investigate whether there is a person in the building one intends to set on fire because one wants to set up an ignorance defense. One might decide not to investigate whether one's employees are engaging in deceptive business practices because one wants to continue reaping the financial benefits, or perhaps because one is afraid of confrontation or one because one feels overworked or just is lazy. Thus, prong (3) is important because it gives the account the ability to capture a wide range of cases of willful ignorance.⁴³

C. *Willful Ignorance is Not Knowledge*

Now we are in a position to see why the mental state of willful ignorance, understood as indicated above, is neither identical to, nor a species of, the mental state of knowledge (as understood in the criminal law). In fact, there is widespread agreement on this point among commentators⁴⁴ and courts.⁴⁵ This may come as something of a surprise

⁴³ I also do not want to rule out the possibility that in some cases of willful ignorance, the relevant steps to acquiring greater certainty about p (mentioned in prong (2)) are not “external” investigations involving the acquisition of new information. Rather, it is possible for the relevant steps to be “internal”—*e.g.* reflection on information one already possesses. For instance, it is intuitive that one could be willfully blind by consciously stopping oneself from thinking any further about certain red flags one possesses in order to prevent oneself from putting the pieces together and coming to believe some undesirable conclusion. Intuitively, some cases fitting this pattern might count as willful ignorance. To permit this result, the account should allow that the available steps to acquiring greater certainty (mentioned in prong (2)) could involve processing information one already has, rather than obtaining additional information.

⁴⁴ See Charlow, *supra* note 27 at 1390 (“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) (noting that “limitations imposed on the [willful ignorance] doctrine by the courts also indicate that deliberate ignorance is not knowledge”); Frans J. Von Kaenel, *Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Control Act?*, 71 WASH. U. L.Q. 1189, 1212-13 (1993) (“willful blindness is simply not the equivalent of recklessness or actual knowledge”); Husak and Callender, *supra*, note 9 at 51 (arguing that “many (but not all) wilfully ignorant defendants do not possess knowledge of the incriminating proposition p in either the philosophical or the more colloquial senses”); Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of*

considering that the drafters of the MPC intended their definition of knowledge in MPC § 2.02(b), as clarified by MPC § 2.02(7), to capture cases of willful blindness.⁴⁶ Recall that the latter section 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.”⁴⁷

However, the main reason that many cases of willful ignorance will fall outside the MPC’s conception of knowledge is that being willfully blind with respect to p does not require believing that there is a “high probability” that p is true (however “high” that might be). After all, one can be willfully blind toward p even in cases where one merely *suspects* that p is true (*i.e.* only believes it has some substantial, but certainly not “high,” chance of being true), and then deliberately avoids learning with certainty whether p obtains.⁴⁸ For example,⁴⁹ if a drug dealer asks three tourists to each carry a suitcase into the U.S., but credibly promises to only put drugs in one of the three suitcases, then each tourist will know that there is a 33% chance that his suitcase contains drugs. Nonetheless, if they all refrain from taking the simple and obvious step of looking inside their suitcases to determine whether or not they contain the drugs, the tourists would nonetheless be willfully ignorant (both intuitively and according to the account of willful ignorance adopted above). Thus, some paradigm cases of willful ignorance will fall outside of the MPC’s definition of knowledge, even though it was intended to capture the phenomenon of willful ignorance.⁵⁰

Deliberate Ignorance in Conspiracy Cases, 100 MICH. L. REV. 473, 482-83 (2001) (“It seems relatively clear that deliberate ignorance is not genuine knowledge, otherwise it would be unnecessary to distinguish the concept of deliberate ignorance” in a jury instruction); Hellman, *supra* note 42 (endorsing the “view that contrived ignorance itself is not a form of knowledge”).

⁴⁵ Courts also widely recognize that willful blindness is not the same as the mental state of knowledge. *See, e.g., Svoboda*, 347 F.3d at 477-78 (2d Cir. 2003 (“a conscious avoidance instruction to the jury permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge.” (internal quotation marks omitted)); *Freeman*, 434 F.3d at 378 (“The deliberate indifference charge permits ‘the jury to convict without finding that the defendant was aware of the existence of illegal conduct.’”). Similarly, Justice Kennedy, in a recent dissenting opinion, wrote, that “[w]illful blindness is not knowledge; and judges should not broaden a legislative proscription by analogy.” *Global-Tech*, 131 S. Ct. at 2072 (Kennedy, J., dissenting).

⁴⁶ As the comments to the MPC note, “[p]aragraph [2.02](7) deals with the situation British commentators have denominated ‘wilful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist.” Model Penal Code 129-30 (Tent. Draft No. 4, 1955).

⁴⁷ MPC § 2.02(7).

⁴⁸ *See Heredia*, 483 F.3d at 918 & n.4 (“A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality.”).

⁴⁹ This example, too, is due to Husak and Callender, *supra* note 9 at 37-38.

⁵⁰ Marcus argues that the best response to “the problems the various willful blindness doctrines create is simply to abolish them” and instead he argues that MPC “Section 2.02(7), which provides a less rigid definition of knowledge, offers a more desirable alternative.” Marcus, *supra* note 1 at 2254. However, his proposal does not get around the

In principle, one might propose some other account of knowledge that is designed to give the result that willful ignorance is a form of knowledge. However, not only would such an alternative depart from the criminal law's traditional understanding of knowledge, embodied in the MPC, but there are also independent reasons to think that this strategy will not succeed.

Husak and Callender offer a simple but elegant example to demonstrate that the willfully ignorant actor is not necessarily a knowing actor.⁵¹ Consider two individuals, Smith and Jones, both of whom have exactly the same amount of information with respect to the proposition *this gemstone is a diamond*. Both think there is a reasonable chance that the gem is a diamond, but they are not sure. In principle they could consult a jeweler, but no jeweler is available. Unbeknownst to them, the gem is in fact a diamond. Suppose further, as seems intuitively plausible, that Smith lacks knowledge. Finally, assume that there is nothing more Smith can reasonably do to investigate the matter further. Accordingly, Smith is “non-willfully ignorant.” By contrast, Jones is different from Smith only in that he has an additional method of investigation open to him: he knows that only a diamond can scratch a ruby, and he happens to have a ruby in his possession. Nonetheless, for whatever reason, he consciously decides not to avail himself of this test. Accordingly, he remains willfully ignorant about whether the gem is in fact a diamond. Because both Smith and Jones have the same amount of information and both see it as equally likely that the gem is a diamond, but Smith *lacks* knowledge, we can conclude that Jones also lacks knowledge. Thus, Jones is a willfully ignorant individual who lacks knowledge.

Accordingly, since there can be individuals who are willfully ignorant about some fact without possessing knowledge of it, it is clear that we cannot simply take willful ignorance to be captured by our favorite definition of knowledge if that definition is to be independently plausible.

II. THE EQUAL CULPABILITY THESIS

The previous Part showed that the mental state of knowledge is neither the same as nor a sub-species of knowledge as understood in the criminal law. At best, therefore, the willful ignorance doctrine would permit courts to treat a defendant who acted in willful ignorance *as if* the knowledge element of the crime he is charged with is satisfied—even when he in fact does not possess knowledge in the required sense. The doctrine, in other words, would say that willful ignorance may be treated as a permissible

fundamental problem with the MPC approach—namely, that suspicions not rising to the level of an awareness of a “high probability” that the inculpatory proposition is true can nonetheless suffice for willful blindness.

⁵¹ Husak and Callender, *supra* note 9 at 51.

substitute for actual knowledge.⁵²

This result, however, immediately raises a serious question, which will be the focus of the remainder of this article. The practice of deeming willful ignorance to be the functional equivalent of knowledge cries out for justification. If one can be willfully ignorant without possessing actual knowledge, why is it that some willfully ignorant defendants may be punished *as if* they possessed knowledge even in cases where they in fact do not?

A. *Stating the Equal Culpability Thesis*

The “equal culpability thesis” figures centrally into most attempts to answer this question. Courts⁵³ and commentators⁵⁴ who try to justify the willful ignorance doctrine frequently do so by appeal to the thought that it is equally bad to act in willful ignorance as it is to do so knowingly. As Husak and Callender explain it, this oft-repeated justification for the willful ignorance doctrine rests on the claim “that wilful ignorance is the ‘moral equivalent’ of knowledge; it involves a degree of culpability that is equal to genuine knowledge.”⁵⁵ Indeed, as they point out, “[u]nless these two distinct mental states were equally culpable, it would be outrageous to hold a defendant with the first mental state liable for violating a statute that required the second mental state.”⁵⁶

For ease of exposition, the equal culpability thesis in its most general form may be summarized as follows:

Equal Culpability Thesis (ECT): Consider two individuals, A1 and A2, each of whom performs the actus reus of a crime that requires knowledge of an inculpatory proposition, p. Suppose A1 and A2, and their respective actions, are identical in every respect except for one: while A1’s action is performed with knowledge of p, A2’s action is performed in willful ignorance of p. (That is, A2 knows there is a substantial likelihood that p is true, has access to a reasonable

⁵² Cf. the “substitute for knowledge” account discussed by Husak and Callender, *supra* at note 9 at 42-43.

⁵³ The Supreme Court recently observed that “[t]he traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.” *Global-Tech*, 131 S. Ct. at 2069. See also *Jewell*, 532 F.2d at 700 (“The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable.”); *id.* at 704 (“society’s interest in a system of criminal law that is enforceable and that imposes sanctions upon all who are equally culpable requires” the willful ignorance doctrine).

⁵⁴ See *infra* notes 57-82 and accompanying text.

⁵⁵ Husak and Callender, *supra* note 9 at 53.

⁵⁶ *Id.*

method of determining whether p in fact is true, but consciously decides not to make use of it.) On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

As explained below, one might not endorse the equal culpability thesis in this general form, as a claim about *all* willfully ignorant acts. Instead, one might adopt only a restricted version of the thesis according to which willful ignorance is as culpable as knowing misconduct under a limited set of circumstances.

Though easy enough to state, providing a compelling argument for the equal culpability thesis (either generally or a more restricted version of it) is no easy task. As Husak and Callender explain,

The “equal culpability” thesis may or may not be true, depending on the criteria by which two distinct mental states are held to be equally culpable. Controversy about the equal culpability thesis cannot be resolved in the absence of a theory to identify what makes one mental state more or less culpable than another. Unfortunately, no adequate theory to measure degrees of culpability has yet been proposed. In the absence of such a theory, commentators are left with only their unsupported (and frequently conflicting) intuitions about whether one mental state is more or less culpable than another.⁵⁷

Almost twenty years after their paper was written, this evaluation of the state of play in moral philosophy and the theory of the criminal law remains unchanged.⁵⁸ Still, despite the difficulty in providing arguments for the equal culpability thesis, some commentators have taken this bull by the horns and attempted to offer an explicit defense of the thesis. I will argue that none of these succeeds. Nonetheless, understanding their shortcomings helps point the way to a better account.

B. Charlow’s Defense of the Equal Culpability Thesis

⁵⁷ Husak and Callender, *supra* note 9 at 54-55.

⁵⁸ Larry Alexander and Kim Ferzan, for example, have a new book in the area, which while novel in many respects, does not provide a clear recipe for calculating amounts of blame that various actors deserve. See L. Alexander and K. Ferzan, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009). The literature on reactive attitudes theories of blameworthiness, while rich with insight about the nature of our blaming practices, also does not point the way to a clear method of calculating degrees of culpability. See, e.g., Peter Strawson, *Freedom and Resentment*, 48 *PROCEEDINGS OF THE BRITISH ACADEMY* at 85 (1960); Stephen Darwall, *THE SECOND PERSON STANDPOINT* 17 (2006); Leonard Kahn, *Moral Blameworthiness and the Reactive Attitudes*, 14 *ETHICAL THEORY AND MORAL PRACTICE* 131-42 (2011); Jules Coleman and Alex Sarch, *Blameworthiness and Time*, 18 *LEGAL THEORY* 101-37 (2012). The same is true of the “corrupt reasons theory” of blameworthiness that figures centrally into, for example, Gideon Yaffe’s work. See Gideon Yaffe, *ATTEMPTS* 38 (2010).

Robin Charlow's argument for the equal culpability thesis is premised on the idea that the willfully ignorant actor must have decided to avoid knowledge out of a "corrupt motive."⁵⁹ First, she notes that the first three elements in her account of willful ignorance by themselves do not necessarily render one as culpable as a knowing wrongdoer:

Having good reason to believe that some fact exists that makes what one is doing wrong (the first suggested factor) and being on the verge of believing (the second suggested factor) do not make a person quite as heartless as someone who actually does believe in the truth or existence of the fact that indicates he is acting wrongly. Nor does purposefully avoiding finding out the truth seem as evil, because it may be innocently motivated.⁶⁰

Instead, she suggests that a corrupt motive is what makes all the difference:

It is the last element—a corrupt motive in not knowing—that is most indicative of callousness and of criminality. When all four factors are present, the individual is on the verge of knowing and deliberately avoids knowing for some sinister purpose connected with promoting criminal activity and avoiding criminal liability. Someone who commits a criminal act with all these factors present is probably as insensitive and indifferent to the criminality of his act as someone who actually believes he is acting criminally.⁶¹

Accordingly, she concludes that "[w]ith all four suggested factors in evidence, it seems reasonable to conclude that the wilfully ignorant actor will usually be about as malevolent as the knowing actor."⁶²

The first problem with Charlow's argument is its speculative nature. Because it does not employ any explicit principle about how degrees of culpability are to be assigned to individuals for their actions, the argument rests on intuition and conjecture in assessing the relative culpability of willfully ignorant and knowing actors. This is evidenced by the hedged language in which Charlow couches her conclusions. She asserts that the willfully ignorant actor "is *probably* as insensitive and indifferent"⁶³ as the knowing actor, and that the former "will *usually* be about as malevolent"⁶⁴ as the latter.

Her argument also suffers from a more substantive problem: namely, that it rests on assumptions about the insensitivity and callousness of criminal actors. Charlow claims that someone who decides to remain ignorant of an inculpatory proposition, and does so for a corrupt motive,

⁵⁹ Charlow, *supra* note 27 at 1417.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1418.

⁶³ *Id.* at 1417 (emphasis added).

⁶⁴ *Id.* at 1418 (emphasis added).

likely is “as insensitive and indifferent to the criminality of his act as” the knowing actor.⁶⁵ However, this assumption seems contingent and is unlikely to hold for all actors. There is nothing in principle preventing a criminal (willfully ignorant or otherwise) from being highly sensitive to the criminality of his act, as well as sympathetic to the foreseeable victims of his crime.

For example, we could imagine a very sensitive criminal, whose overly-developed capacity for empathy makes it difficult for him to tune out thoughts of the ways in which his actions might negatively impact others. Such an individual might decide to remain in ignorance precisely in order to spare himself from the powerful guilt he would feel if he acted with certain knowledge that his conduct would harm others. He might calculate that he would experience a more tolerable level of guilt if he merely thought the contemplated action to be risky, thus keeping the hope alive that it would in fact prove harmless.⁶⁶ Such a motive for remaining ignorant does appear “corrupt” in some sense, albeit not as corrupt as other possible motives for remaining ignorant (say, attempting to set up an ignorance defense). Still, the culpability that attaches to the decision to remain ignorant to protect one’s fragile conscience does not stem from a lack of sympathy or indifference to the effects of one’s acts. Rather, this sensitive soul opts to remain in ignorance precisely because he is unusually sensitive and conscious of the nature of his conduct. Thus, since Charlow’s argument fails to account for other ways in which a willfully ignorant person’s motives might be corrupt besides insensitivity or indifference, her argument appears incomplete.⁶⁷ Nonetheless, as argued below, her emphasis on a corrupt motive for remaining ignorant captures an important insight.

C. Luban’s Defense of the Equal Culpability Thesis

David Luban, discussing willful ignorance in the professional responsibility context, has offered a different sort of defense of something like the equal culpability thesis. He suggests that our concept of willful ignorance in fact comprises three distinct prototypical cases, each of which

⁶⁵ *Id.* at 1417.

⁶⁶ Luban describes a similar “ostrich-like” character: “Willful ignorance is a moral strategy for postponing the moment of truth, for sparing ourselves the test of our resolve. St. Augustine famously prayed to God to give him the strength to resist temptation, only not yet. The Ostrich hopes to God that she has the strength to resist temptation—only she doesn’t want to find out yet.” Luban, *supra* note 41 at 968.

⁶⁷ In general, it is not merely what one *feels* while committing a criminal act—whether one is sympathetic to one’s victims or callous, regretful of the harm one causes or indifferent—that determines whether one’s act is criminal. Rather, it seems to be the *way* in which one’s mental states issue in action—*i.e.* whether one’s decision to impose a harm or risk of harm on others lacks adequate justifying reasons—that renders one culpable and potentially subject to criminal sanctions.

corresponds to a different level of blame.⁶⁸ He dubs them the “fox,” the “unrighteous ostrich” and the “half-righteous ostrich.”⁶⁹

The fox represents the willfully ignorant actor who, were he given full knowledge that his action would cause the harm he suspects it will, would have proceeded to perform that action anyway. This character “aims to do wrong and structures his own ignorance merely to prepare a defense.”⁷⁰

Luban then describes two versions of an ostrich character (so-named because he figuratively buries his head in the sand, but not for reasons as malicious as the fox). The first version is the *unrighteous ostrich*, who does not want to know that what she is doing is wrong (*i.e.* wants to postpone the moment of temptation, as Luban puts it⁷¹) but if given advance knowledge of the harm her action would cause, would have gone on to perform it anyway. In other words, the unrighteous ostrich “doesn’t want to know she is doing wrong, but would do it even if she knew.”⁷² By contrast, the *half-righteous ostrich* “shields herself from guilty knowledge, but would actually do the right thing if the shield were to fail.”⁷³ In other words, she too does not want to know that what she is doing is wrong, but if given advance knowledge of the harm the action would cause, she would refrain from performing it.

Luban contends that the fox is as culpable as the purposeful actor, the unrighteous ostrich as culpable as the knowing actor and the half-righteous ostrich as bad as one who is reckless.⁷⁴ Luban argues that, at the moment the fox acts to prevent himself from acquiring full knowledge (*i.e.* the so-called “screening action”⁷⁵), he effectively has the *mens rea* of purpose. Since he would do the act even if given knowledge of its true consequences or nature, and merely is engaged in a clever attempt to set up an ignorance defense, the fox seems to be acting from a desire to perform the action.⁷⁶ By contrast, the unrighteous ostrich does not affirmatively want to do the crime, but would proceed to do it even if he knew it would cause the bad results he suspects it might. Thus, Luban claims the unrighteous ostrich is “precisely fitted for the commonlaw equation of willful ignorance with knowledge,” since “[b]y definition, her guilt is unchanged whether she knows or not,

⁶⁸ Luban, *supra* note 41 at 969.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 968.

⁷² *Id.* at 969.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (using the term “screening actions” to denote “the actions or omissions by which an actor shields herself from unwanted knowledge”).

⁷⁶ *Id.* (“The grand-scheming Fox, who aims to do wrong and structures his own ignorance merely to prepare a defense, has the same level of culpability as any other willful wrongdoer—the highest level, in the Model Penal Code schema.”).

because her behavior would be unchanged.”⁷⁷ Finally, Luban suggests that the half-righteous ostrich, “who won’t do wrong if she knows, but would prefer not to know, is in a state of conscious avoidance of a substantial and unjustifiable risk of wrongdoing—precisely the Model Penal Code’s definition of recklessness.”⁷⁸ Accordingly, he endorses a version of the equal culpability thesis: he thinks the thesis true of any defendant who fits the pattern of the fox or the unrighteous ostrich.

Luban seems correct about the half-righteous ostrich: this character does meet the traditional definition of recklessness. But that is only because *every* willfully ignorant defendant qualifies as at least reckless, since willful ignorance by definition includes the performance of the actus reus of a crime with an awareness of the attendant substantial and unjustified risks.⁷⁹

However, Luban’s evaluation of the fox and the unrighteous ostrich is more problematic. To see why, consider Luban’s justificatory strategy in more detail. It consists in looking at the mental state that the fox and the unrighteous ostrich *would* have had if they were given full knowledge and then continued on to do the act in question (as, *ex hypothesi*, they would have). Luban then assumes that this is the mental state that these characters possess when they perform the “screening actions” designed to preserve their actual ignorance. His approach thus “amounts to broadening the time-frame in which we consider the unwitting misdeed [*i.e.* the actus reus of the crime in question], by regarding it as a unitary action *that begins when the actor commits the screening actions*.”⁸⁰ On his proposal, “the relevant question is ‘What was the actor’s state of mind toward the unwitting misdeed at the moment she opted for ignorance?’”⁸¹ He contends that one’s later “self at the moment of the unwitting misdeed[] in effect ratifies the earlier self’s decision to screen off potentially guilty knowledge,” such that “the earlier self’s attitude toward the unwitting misdeed” can be imputed to the later self who actually performs the actus reus of the crime in question.⁸²

Luban’s argument is flawed, however. He contends that the mental state of the actor when performing the screening action can be imputed to the later self who performs the actus reus of the crime. The trouble is that the fox and the unrighteous ostrich, when they perform their screening actions, *do not actually have* the mental states of purpose or knowledge, respectively, as Luban contends. Instead, he assumes that these characters can be treated *as if* they were purposeful or knowing actors because they

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Husak and Callender, *supra* note 9 at 42 (noting that “all willfully ignorant defendants are reckless”).

⁸⁰ Luban, *supra* note 41 at 973.

⁸¹ *Id.*

⁸² *Id.*

would go on to perform the actus reus even if they were given full knowledge of its nature and effects.

This reveals the mistaken assumption on which Luban's argument relies. In general, to say that an individual *would* have a certain mental state under certain circumstances is not the same as saying that he *actually* acted with that mental state.⁸³ Consider the unrighteous ostrich again. (A similar point holds for the fox). Luban's argument assumes that because the unrighteous ostrich *would* perform the actus reus of the crime knowingly (*i.e.* if given full knowledge), it follows that she is *actually* as culpable as her counterfactual self who performs the crime knowingly. At first glance, this may not seem implausible considering that the ostrich is herself responsible for the fact that she does not possess full knowledge (*i.e.* that the counterfactual circumstances do not obtain). However, on closer inspection, the argument is flawed because the mental state one *would* have under counterfactual circumstances, but actually lacked, cannot be the basis for how culpable one is for one's *actual* action. After all, one's counterfactual mental state did not produce the actual action. Accordingly, that mental state is not relevant to how culpable one is for that action.

Luban's argument thus is an instance of the following false assumption about one's culpability for mental states one would have acted with under counterfactual circumstances:

Culpability for counterfactual mental states (CMS):

Consider A and her counterfactual self, A*, who are as similar as can be except for one difference in their mental states noted below. Both A and A* perform a certain type of action, X. A is in circumstances C1 and does X with mental state, M1. A* is in C2 (not C1) and does X with a more culpable mental state, M2. However, *were* A in C2, she *would* do X with M2 (just like A*). Moreover, suppose that A herself is responsible for the fact that she is in C1, not C2. On these suppositions, A is just as culpable as A*.

But this principle, on which Luban's argument crucially depends, is false. To take a tongue-in-cheek but illustrative example, suppose that Joe gets irrationally angry when he sees Smokey the Bear signs in the park. (He had some traumatic encounters with bears as a child.) One day, he heads to Yosemite Park to have a barbeque with friends. Suppose that if he were to see a Smokey the Bear sign on this trip, it would cause him such anger that he would intentionally refrain from dousing his campfire in the hopes that it

⁸³ It seems deeply problematic—a violation of the ideas of fairness that underlie our due process norms—to blame (let alone convict) someone for acting with a mental state he does not actually possess, merely because she would have acted with that mental state under certain non-actual circumstances.

will lead to a forest fire (which, let us stipulate, it would). In fact, however, Joe *knows* he tends to get in trouble when he sees Smokey the Bear signs, so he now tries to avoid the sight of them. Accordingly, as he is driving through the entrance gate to the park en route to his barbeque party, he stares intently at his GPS in order to avoid seeing any Smokey the Bear signs. As a result, he does not actually see any Smokey the Bear signs and avoids getting angry. Nonetheless, he is so stuffed when he leaves the barbeque party that he simply forgets to douse his campfire and it causes a forest fire.

Joe and his counterfactual self fit the pattern of (CMS). Joe is actually only negligent in forgetting to douse his campfire. But if he were in the counterfactual scenario where he saw a Smokey the Bear sign, he would have performed the same action purposefully. Moreover, Joe himself is responsible for the fact that this counterfactual scenario does not obtain. Thus, (CMS) entails that Joe would be just as culpable as his counterfactual self. However, it should be intuitively obvious that this result is implausible. After all, Joe's actual conduct was not produced by the mental state of purpose. That mental state seems irrelevant to how culpable he is for his actual negligent failure to douse the campfire. Hence, (CMS) is false.

In principle, Luban might try to avoid this objection by revising (CMS). The most obvious proposal is to replace the phrase "A herself is responsible for the fact that she is in C1, not C2" with "A herself is *culpable* for the fact that she is in C1, not C2." After all, in the putative counterexample just offered, Joe might seem praiseworthy for trying to avoid the sight of any Smokey the Bear signs.

Nonetheless, the example can be easily amended to refute also this revised version of (CMS). In particular, we could change the facts of the story in such a way that Joe seems culpable for not seeing the Smokey the Bear signs. For instance, we might suppose that he only failed to see the signs because he was preoccupied by texting while driving, yelling unfairly at his passengers or doing something else that makes him worthy of blame. Even in this revised version of the case—where Joe is culpable for failing to see the sign and later starts a forest fire by accident—he still seems less culpable than his counterpart who sees the sign and starts a forest fire on purpose. Thus, the proposed amendment to (CMS) does not avoid the underlying problem from which Luban's argument suffers.⁸⁴

⁸⁴ One might try to defend Luban's argument by claiming that his point is not about what mental states the unrighteous ostrich or the fox *would* act with were they given knowledge of the inculpatory proposition; rather, his point might be that these characters can be seen as *actually* having decided that they *would perform the action even if they knew the proposition to be true*. Thus, suppose that the unrighteous ostrich or the fox realize that they do not know whether they are carrying drugs, but when they entertain the hypothesis

Accordingly, since Luban's argument relies on (CMS) to establish that the fox and unrighteous ostrich are just as bad, respectively, as purposeful and knowing criminal actors, his argument must be rejected.

III. A NEW (LIMITED) DEFENSE OF THE EQUAL CULPABILITY THESIS

This Part offers a new account of what makes it the case that a person who performs the actus reus of a crime in willful ignorance is at least as culpable as a similarly situated individual who performs the same conduct knowingly. The aim is not to establish that acting with willful ignorance is *always* as culpable as the analogous knowing misconduct. As seen above, one might decide not to investigate a given suspicion for any number of reasons, some of which might not be as culpable as others. For example, deciding not to investigate the suspicion that a friend or mentor is engaged in illegal activity in order (naïvely) to preserve the high esteem in which one holds that person might seem less culpable than deciding not to investigate because one hopes to win favor with the friend or mentor by not causing trouble, or because one is trying to preserve an ignorance defense. Given the variety of reasons that might underlie one's willful ignorance, it is very likely that some instances of willful ignorance will not rise to the level of culpability associated with the analogous knowing misconduct. Thus, the equal culpability thesis as a general claim about all actions performed in willful ignorance likely is false.⁸⁵

Nonetheless, there are some circumstances under which the willfully ignorant are as culpable as their knowing counterparts, and the primary aim of this Part is to specify precisely what these conditions are. Thus, the account offered here amounts to an argument for a suitably restricted version of the equal culpability thesis. One of the main virtues of the account formulated here is that it does not rely on any comprehensive theory about how to assign degrees of culpability to different actors. It thus overcomes what Husak and Callender identify as the main challenge for

that they know they are carrying drugs, they decide that they would go ahead and carry the drugs anyway.

The difficulty with this way of re-characterizing Luban's argument, however, is that there is nothing requiring a willfully ignorant actor to actually entertain the hypothesis that she has knowledge about the inculpatory proposition and then form a plan about what she would do if she had such knowledge. There is nothing in the concept of willful ignorance that requires the actor to consider how he or she would have acted if given knowledge of the inculpatory proposition or to form some conditional intention about how she would act if given such knowledge. Nor is there anything in the way that Luban describes the unrighteous ostrich or the fox that requires them to consider this hypothesis. Accordingly, this re-characterization of Luban's argument cannot save his claim that the unrighteous ostrich generally is as culpable as the knowing actor and the fox generally is as culpable as the purposeful actor.

⁸⁵ Cf. *supra* Part II.A.

justifying the equal culpability thesis.⁸⁶ The argument relies only on a few general principles about culpability, which should be acceptable regardless of which substantive theory of culpability one might favor.

A. Premises

The account offered here relies on two main groups of principles: one concerning the connection between degrees of belief and culpability, and the other concerning the need to investigate in situations where one's suspicions have been raised.

1. A principle about culpability

The first premise in the account is the supposition that the more confidence one has in the truth of an inculpatory proposition, the more culpable one is when one proceeds to act with that mental state. For example, one might define second-degree arson such that the required actus reus is lighting a building on fire and the inculpatory proposition that the defendant must possess knowledge of to be convicted is that there is a person in the building when the fire is lit.⁸⁷ If the arsonist believes only that this proposition has a substantial likelihood of being true (say, a 20% or 30% chance), then he would be reckless with respect to it when he proceeds to set the building alight. By contrast, if he believes the proposition has a "high probability" of being true—however much confidence that requires (say, 95%)—then he counts as acting with knowledge. The claim my argument relies on is that more certainty in the inculpatory proposition entails more culpability for performing the actus reus. Other commentators have argued that the criminal law embodies a principle along these very lines.⁸⁸ Precisely stated, the claim is this:

Comparative Culpability Principle (CCP): For any two people who commit the actus reus of a crime and are identical in all respects except that one is more confident than the other in the truth of the inculpatory proposition, *p*, then (assuming there are no relevant excuses or justifications) the

⁸⁶ Husak and Callender, *supra* note 9 at 54-55.

⁸⁷ *Cf.* N.Y. Penal Law § 150.15.

⁸⁸ Charlow argues that the criminal law endorses a principle about culpability along these lines. Likening one's degree of belief in a proposition to the number of pieces in a puzzle one possesses, she explains that "[t]he more pieces of the puzzle one has, the more certain he is that some significant fact exists that will make his conduct criminal, and the more blameworthy he is if he goes ahead and acts despite his awareness of that fact. To put it another way, the greater one's certitude, the more callous one is assumed to be in disregarding the fact. At some point, the callousness reaches a level where the conduct becomes sufficiently blameworthy to be criminal. In the stolen goods example, the legislature has determined the level to fall somewhere above recklessness (eighty-five pieces) and to include knowledge (ninety-nine pieces). Charlow, *supra* note 27 at 1394-95.

one with the greater degree of confidence in p is more culpable than the one with the lesser degree of confidence.⁸⁹

This principle is meant to capture the intuition that one who, for example, lights a building on fire while merely reckless as to whether a person is inside seems to be somewhat less culpable for his action (even if just a little bit less) than one who lights it on fire while knowing that there is a person inside. The latter action, after all, would appear to manifest a greater degree of disregard or disrespect for others than the former.⁹⁰

Now, if something like CCP is correct,⁹¹ and recklessness is generally less culpable than the analogous knowing misconduct, then in order for a willfully ignorant actor to be as culpable as a knowing wrongdoer, there must be some additional source of culpability—beyond that which stems from his being reckless as to the inculpatory proposition—that could explain why the willfully ignorant individual is as culpable as a similarly situated knowing wrongdoer. That is, some additional bit of culpability must be identified that could raise the culpability of the willfully ignorant person (who always is at least reckless) up from a level associated with recklessness to the level that an analogous knowing wrongdoer would have. What could this additional source of culpability be?

2. The duty of reasonable investigation

The answer to this question lies in the idea that being aware that one's conduct would create a risk of harm or illegality can at times give rise to a

⁸⁹ Just to be clear, this principle is meant to involve one's subjective confidence or credence in the proposition in question.

⁹⁰ It is plausible that one could derive this principle, CCP, from the assumption that all culpability is at bottom a matter of insufficient concern for the interests of others. For example, Larry Alexander has influentially argued that the mental states of purpose, knowledge and recklessness collapse into one concept because "they exhibit the basic moral vice of insufficient concern for the interests of others." Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000). More specifically, his argument proceeds by noting that "[f]rom the basic moral injunction to have due regard for others' interests, we can derive injunctions for how to act in situations of epistemic uncertainty, situations in which we do not know for certain how our acts will affect others." *Id.* at 938. Analogous considerations support the principle CCP formulated in the text.

⁹¹ One might doubt that a criminal who is 65.001% confident that the inculpatory proposition is true is more culpable than the criminal who is exactly 65% confident. However, this objection is more plausibly seen just as a concern about whether degrees of belief in general can be as fine-grained as this. After all, the implications of CCP remain intuitively plausible in a case where we are absolutely sure that these are the exact probabilities that obtain. For example, if two people are told that pressing one button would impose exactly a 65% chance of harm on some unsuspecting victim, while pressing another button would impose exactly a 65.001% chance of the same harm, then it seems plausible (all else equal) that the person who presses the second button is *ever so slightly* more culpable than the person who presses the first one.

moral duty to investigate in reasonable ways. It is intuitive that such a duty would arise when one is aware that some future action one plans to perform would pose a risk to others' well-being (*e.g.* by causing them physical or emotional harm) or more generally would threaten certain interests that are legitimately protected by the law (*e.g.* if the action, while not overtly harmful, is still illegal).⁹² Under such circumstances, one's primary duty would be to not perform the risky action in question. However, this is not one's only duty. After all, the primary duty not to behave in certain ways can give rise to secondary duties. This happens, for example, when breaking a promise or wrongfully injuring someone creates a duty to apologize, offer compensation or make amends.⁹³ In addition to secondary duties that arise *after* the breach of a primary duty, there are also secondary duties that arise *before* such a breach, as would be the case if one is planning to break a promise and there are preemptive steps one should take to mitigate the inconvenience one will cause to the promisee. The duty to reasonably investigate likewise is a secondary duty that arises in anticipation of subsequent wrongdoing.

To get the duty of investigation more clearly in view, suppose that one is aware that some future action one might perform would pose a substantial and unjustified risk of harm to others' well-being or to interests of theirs that are legitimately protected by the law (as would be the case whenever one has suspicions about the inculpatory proposition).⁹⁴ Moreover, suppose that one is planning or intending to perform the act in question.⁹⁵ Under these circumstances, one would have a distinct *secondary* duty, derivative of the primary duty not to perform the underlying action, to at least make reasonable investigations before performing the action. In other words, when one plans or intends to do an action, *a*, that one is aware poses a substantial and unjustifiable risk of harm or illegality, one has a weighty moral reason to make use of any reasonably available methods of

⁹² Holly Smith discusses the related case in which a man "should have checked his mirror earlier, but given that he did not, he should check it now rather than back down the driveway." Holly Smith, *Culpable Ignorance*, 92 *PHILOSOPHICAL REV.* 543, 546 (1983). Thus, she notes, "[t]here are many cases in which enquiry should be made earlier, but it is better to enquire now rather than act without its benefit." *Id.* See also GEORGE SHER, WHO KNEW? RESPONSIBILITY WITHOUT AWARENESS, 111-12 (2009) (discussing the idea that one's moral obligations can give rise to secondary epistemic duties to be or become aware of morally relevant features of one situation).

⁹³ See, *e.g.* Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 *HARV. L. REV.* 1727, 1737-38 (2012) (discussing the idea that "the payment of damages is not identical to the performance of the original duty," but rather that "it is the next-best thing to performance"); John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 33-35 (2011); Erik Encarnacion, *Corrective Justice as Making Amends*, *BUFF. L. REV.* (forthcoming).

⁹⁴ This assumes that the law is *just*. This moral duty to reasonably investigate obviously would not be triggered if the criminal statute in question is substantively immoral or unjust.

⁹⁵ One might think that the duty to reasonably investigate arises not just when one is intending or planning to perform the underlying risky action, but even when one merely is seriously *considering* whether to perform it.

ascertaining whether *a* really would cause the harm or illegality that one suspects it might—at least provided such feasible methods of investigation exist.⁹⁶ (Note that it may well be the case that—as with suspicions generally—what is at stake may make a difference. That is, it is plausible that the more grievous the harm that is risked, the less chance one needs to believe it has of materializing in order for the risk to count as “substantial,” such that the duty of reasonable investigation is triggered.)

This duty may be succinctly stated in a way that also makes reference to inculpatory propositions, which, after all, are particularly important in the context of willful ignorance and knowledge crimes more generally:

Duty of Reasonable Investigation (DRI): If one is intending or planning⁹⁷ to perform the actus reus of a crime and one possesses a substantial confidence (short of knowledge) that the inculpatory proposition, *p*, is true (but has no reason to think the risk of *p*'s being true is somehow justified), then one has a duty to investigate in reasonable and available ways, if any, before performing that actus reus.⁹⁸

This is the formulation of the duty that will be most relevant when considering crimes that require knowledge. By way of illustration, suppose John is thinking about whether to set fire to a particular building and is aware that there is a substantial possibility that a person is in the building at the time (*i.e.* he is confident, say, to degree 0.25 that this is the case). Moreover, suppose he is planning to go ahead with the action in spite of the risks he knows it will pose. When John has settled on this less-than-ideal course of action, he still has some secondary duties the breach of which can make him even more culpable. In particular, by virtue of DRI, so long as he is planning to burn down the building, he has a secondary duty to stop and

⁹⁶ It is conceivable that the investigations one has a duty to perform are not *external* investigations involving the accumulation of additional information. In principle, the required investigations could merely involve further processing or reflection on information one already has. For example, one might possess several red flags, but then consciously decide not to think about the matter any further in order to stop oneself from putting the pieces together and arriving at the certain belief that one's planned conduct would cause harm. Intuitively, this could count as willful blindness. Thus, I want to leave open the possibility that the investigations one has a duty to make merely involve further reflection on evidence one already possesses.

⁹⁷ The term “planning” is included here because, as noted above, *supra* note 95, it is not merely the unconditional intention to do the underlying risky act that can trigger the duty to investigate; in addition, some lesser degree of commitment to doing that act may also trigger it. For example, if one is merely seriously considering doing the risky act, or intends to do it conditional on certain circumstances obtaining (*e.g.* that one does not get bored first), then this may well be enough to trigger the duty.

⁹⁸ I take no stand on whether this obligation (duty) to investigate should be read as having so-called “wide scope” or “narrow scope.” *See, e.g.*, Mark Schroeder, “The Scope of Instrumental Reason,” 18 PHILOSOPHICAL PERSPECTIVES 337–64 (2004).

investigate in reasonably feasible ways before proceeding—for example, by looking inside the building.

DRI and the conditions that trigger it should be further clarified in several respects. For one, because the duty is conditional on the actor's intending or planning to perform an underlying action he knows to be risky, if he abandons this intention or plan, his corresponding duty of investigation evaporates. Thus, were John to change his mind and decide to conform with his primary duty not to set the building on fire, he would be relieved of the need to investigate whether someone is inside. One might worry that this gives John an easy way to sidestep his duty to investigate: perhaps he could simply withdraw his intention to burn down the building until the very last moment, and thereby avoid incurring any secondary duty to investigate before starting the fire. However, on closer inspection, such a strategy would never succeed. After all, were John to adopt such a scheme, he would not *genuinely* be abandoning his plan or intention to burn down the building. Instead, he would merely be executing an elaborate plan to burn it down that involves a generous helping of self-deception. Accordingly, the intention that triggers the duty to investigate would remain in place.

Because the duty of investigation is triggered only when the defendant believes that the act he is planning would pose a substantial and *unjustified* risk of harm or illegality (or an unjustified risk that the inculpatory proposition is true), the account developed here can accommodate exigencies that intuitively prevent the duty to investigate from arising in the first place. For example, if Jack knows the building must be burnt down to halt a fire that is rapidly spreading towards a densely populated area, but he realizes that there is absolutely no time for checking if a person is inside, this might justify the risk he is aware of that there may be a person inside the building. For similar reasons, the account can also accommodate a view like Deborah Hellman's that criminal defense lawyers and doctors may have good duty-of-loyalty reasons to remain willfully ignorant in the face of their respective suspicions that their clients are not telling the truth or that their patients are reselling their prescribed medication.⁹⁹ If Hellman is right that these lawyers and doctors have good reason to preserve their ignorance (a question on which I take no stand here), they would not breach the duty of investigation as formulated here because it would not be triggered.¹⁰⁰

Now, one might wonder what would happen if John in the original example were to *comply* with his duty to reasonably investigate. There are

⁹⁹ See Hellman, *supra* note 25 at 305-12.

¹⁰⁰ If these duty-of-loyalty reasons are sound, they would not only prevent the actors in question from incurring additional culpability via a breach of the duty of investigation, but it would also prevent these actors from counting as reckless. Even though the lawyer's and doctor's conduct runs risks (*i.e.* of perjury or medicinal resale), those risks would count as justified to the extent that the duty-of-loyalty considerations are legitimate.

two main possibilities. If he learns that there is a greater chance than anticipated that there is a person in the building, this would strengthen his primary duty not to set fire to the building. Indeed, if his investigations furnish him with positive knowledge that someone is in the building and he proceeds to light the building on fire, he would be a knowing wrongdoer and his culpability level would be correspondingly high. By contrast, if John learns upon investigating that there is a smaller or no chance that there is a person in the building, this would somewhat weaken his duty not to set the building on fire—although that duty would of course still remain in force thanks to all the reasons not to light a fire even in an unoccupied building. (In addition, the strength of his primary duty not to start the fire likely would remain unchanged in the event that his investigations neither raise nor lower his estimate of the likelihood that there is a person in the building.)

By far the most important point for present purposes, however, is that *breaching* the duty of reasonable investigation is itself an independent source of culpability. More specifically, I submit that someone to whom the duty applies and who violates it (provided he has no relevant excuse or justification) acquires some additional amount of culpability in virtue of breaching the duty—*i.e.* an amount beyond what he would have just in virtue of performing the actus reus of a crime while being, say, reckless with respect to *p*. I cannot say exactly *how much* additional culpability one acquires, since I have no comprehensive theory about how to assign degrees of culpability to individuals. Nonetheless, I can offer three general remarks about what one's culpability for breaching this duty to investigate depends on.

First, it is plausible that the additional amount of culpability one acquires in virtue of breaching this duty is greater the more easily available the methods of investigation open to one are. If it requires virtually no effort to find out whether one is transporting drugs (*e.g.* if one can simply open one's suitcase in private), then failing to investigate would appear more culpable than if there are significant dangers or burdens associated with investigating (*e.g.* if looking inside the suitcase would be likely to get one shot). Indeed, if there are no methods of investigation that one can reasonably recognize and avail oneself of, then not investigating would not entail any additional culpability.

Second, this duty of investigation can be breached in different ways, which might affect how much culpability one acquires. If one merely forgets to investigate or is distracted from investigating when one meant to do so, it seems plausible that one would be less culpable for the breach than if one *consciously* decides not to investigate in reasonable ways. Similarly, if one breaches the duty because one fails to realize that some method of investigation exists or because one does not realize that one should investigate (either one of which would constitute a form of negligence), one

would seem to be less culpable than if one failed to investigate while knowing that it is possible to investigate and that one should do so (as required for true willfulness). Willful ignorance will typically involve a breach of this duty that is on the more grievous end of the spectrum, since one must consciously decide not to investigate in order to count genuinely willfully ignorant.¹⁰¹

Third, when one breaches this duty through a conscious decision not to investigate (as opposed to negligently failing to do so), this decision can be made for different reasons, and some of these reasons might render one more culpable for one's breach than others. For example, it is plausible that deciding not to investigate in reasonably available ways in order to set up an ignorance defense (as in Luban's case of the fox) is more culpable than deciding not to investigate because one hopes to protect one's fragile conscience or to postpone "the moment of temptation" (as in Luban's ostrich cases). Likewise, it may well be more culpable to decide not to investigate whether one is helping one's boss to perpetrate a fraud because one hopes to keep getting paid off or curry favor than if one decides not to investigate out of a sense of admiration and naïve loyalty. In general, it seems plausible that the decision not to investigate will be more culpable the greater the extent to which it is made for reasons that are a manifestation of disregard or disrespect for others.¹⁰²

To stave off confusion, it should also be noted that although one's culpability for breaching this duty of investigation might vary depending on how grievous the harm or illegality is that one's contemplated action would risk, this type of variability does not matter for present purposes. After all, when asking whether one mental state is as culpable as another, the inquiry is greatly simplified by holding the harm at issue fixed across our examples. Otherwise, comparing the relative culpability of the actors in the examples becomes needlessly difficult.¹⁰³ For example, is it worse to commit arson while recklessly disregarding the risk that someone may be inside than, say, to knowingly transport a large shipment of crack cocaine? The incommensurability difficulties surrounding such questions can be largely avoided by holding the harm in question fixed across one's cases. For this reason, this article is concerned only with the question of whether a

¹⁰¹ See Part I.B.

¹⁰² This suggestion is clearly similar in spirit to Larry Alexander's argument that because purpose, knowledge and recklessness all "exhibit the basic moral vice of insufficient concern for the interests of others," they are but specific instances of one basic culpable mental state—*i.e.* something like insufficient regard for others. See Alexander, *supra* note 90 at 931. See also Gary Watson, *Responsibility and the Limits of Evil*, in FERDINAND SCHOEMAN, ed., *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 223-24 (1987) (discussing the idea that culpability is at bottom a matter of "noncompliance with the basic demand" for reasonable regard).

¹⁰³ As seen above, for similar reasons, the MPC culpability hierarchy holds up only when the crimes or harms in question are held fixed. See *supra* Part I.A.

particular willfully ignorant defendant is as culpable as the *similarly situated* knowing defendant would be.

As seen above, there are a number of factors that affect how culpable a given breach of the duty of reasonable investigation would be. This means that the account offered here has substantial explanatory power in that it can accommodate a wide variety of cases and intuitions about the culpability of different actors. (Thus far, I have merely postulated that a duty of investigation exists, and one so might legitimately want to know why it would be more culpable to breach this duty and then act recklessly than to merely do the reckless action alone. This question will be squarely addressed below.¹⁰⁴)

B. Putting the Pieces Together

Now to put the various pieces of the account together to show that there are some circumstances under which acting in willful ignorance is as culpable as performing the same conduct knowingly. Start by noticing that willful ignorance involves a violation of this secondary duty to investigate in reasonable ways before performing an action that one is aware poses risks of harm or illegality. Given the definition of willful ignorance provided above, we know several things about the willfully ignorant actor: (1) he has some degree of confidence that the inculpatory proposition, *p*, is true (at least enough for him to qualify as reckless with respect to it); (2) he is aware that there are reasonably available methods by which he could learn whether *p* is true or not; (3) he consciously decides not to make use of those methods; and (4) he proceeds to perform the action in question (which we are supposing is the actus reus of a crime) anyway. Because of (1), the duty of investigation is triggered (assuming no justifications or excuses are available). Moreover, because of (2) and (3), we know the actor consciously decides not to take certain reasonably available steps to learn with certainty whether *p* is true. Because he proceeds with the action anyway, as noted in (4), we know that he breaches his duty of investigation.

Beyond the general observations offered in the previous section, I know of no way to specify *exactly how much* additional culpability the willfully ignorant actor incurs in any given case as a result of his breach of the duty of investigation. It seems reasonable to suppose (though it is not crucial to the argument) that willful ignorance generally will involve a breach of the duty of investigation that lies at the more serious end of the spectrum. After all, the willfully ignorant person by definition knows of some reasonably available way to learn with certainty whether the inculpatory proposition is true, but consciously decides not to avail himself of those methods. Thus, the willfully ignorant person breaches his duty to investigate not in merely a negligent way (*e.g.* because he does not notice that some reasonable way to

¹⁰⁴ See *infra* Part III.C.

investigate exists), but in a knowing way (*i.e.* because he consciously chooses not to make certain investigations that he is aware are feasible). Still, I am not in a position to say precisely how much extra culpability a willfully ignorant individual would acquire in virtue of breaching his duty of investigation in any particular case. I submit only that it is some positive amount. (This is all the argument requires.) Let “ C_i ” represent this amount—whatever it is.

Now, supposing the willfully ignorant actor does not have genuine knowledge of the inculpatory proposition, p ,¹⁰⁵ he has some degree of confidence in p that falls below the level required for knowledge—the “knowledge threshold.” Let “ C_r ” stand for the amount of culpability that the willfully ignorant actor possesses in virtue of acting with this sub-knowledge level of confidence in p (so-labeled because such an actor would count as reckless). Moreover, let “ C_k ” stand for the amount of culpability that a similarly situated actor *would* have were he to perform the actus reus with enough certainty of p to qualify as knowing that p . C_r is assumed to be less than C_k . Given the principal (CCP) above, we know that if we were to increase the willfully ignorant actor’s credence in p , he would become progressively more culpable until he has the same level of culpability as the person who counts as having knowledge of p . That is, as we increase the willfully ignorant actor’s credence in p upwards to the knowledge threshold, C_r will approach C_k .

The crucial last step in the argument is to notice that in at least some cases of willful ignorance, the additional amount of culpability incurred by breaching the duty to reasonably investigate, C_i , will be equal to or greater than $C_k - C_r$, *i.e.* the extra amount needed to get the actor’s culpability level up to where it would be if the act is done with knowledge that p . In all such cases where C_i is equal to or greater than $C_k - C_r$, we can be sure that the net level of culpability possessed by the one who performs the actus reus with willful ignorance of p is *at least as high as* the person who performs it with knowledge that p . Thus, in this subset of cases, we can be sure that the willfully ignorant actor is *at least as culpable* as the knowing actor. Accordingly, if the equal culpability thesis is restricted to this subset of cases, we can be sure that it holds.

C. Potential Objections

¹⁰⁵ Husak and Callender suggest that even a willfully ignorant actor could in theory have enough confidence in p to count as possessing knowledge. *See supra* note 9 at 53. However, this makes the label “willful ignorance” an awkward fit. As the term is used here, “willful ignorance” applies only to those individuals who fail to investigate and who have *less* confidence in the inculpatory proposition than is required for knowledge. (Perhaps a broader term like “willful blindness” would be capacious enough to cover both those who have less confidence in the proposition than is required for knowledge and those who have more.)

At this point, several objections might be raised. Although I cannot address all possible objections, a few of the most important ones should be considered. To begin with, one might ask what guarantee there is that there will be *any* such cases of the sort I have just identified. How do we know that I have not merely described an empty set?

The answer lies in recognizing that willfully ignorant actors will in fact possess varying degrees of confidence in the relevant inculpatory proposition. Some of them will be quite close to the level of confidence required for knowledge (the knowledge threshold). These actors will require just a small amount of additional culpability in order to reach the level possessed by individuals at the knowledge threshold. That is, for these actors, C_r will lie at a point not far below C_k . Now, I have not claimed to be able to specify exactly how much additional culpability one will incur from violating one's duty of investigation. (Indeed, I suggested that the amount would vary depending on the precise manner in which that duty was violated.) But however much it is in a given case, we will in principle be able to identify some actor, A , whose level of confidence in the inculpatory proposition is near enough to the knowledge threshold that the additional amount of culpability A incurs from *this* breach of the duty of investigation is sufficient to lift A 's total level of culpability up to the amount that the similarly situated knowing actor would have. Speaking algebraically, for any value assigned to C_i we will be able to identify some C_r such that $C_i + C_r = C_k$. In this way, we can be quite sure—given the plenitude of actors in the real world with differing degrees of belief in the inculpatory proposition and differing reasons for violating their duties of investigation—that there are *some* cases where the willfully ignorant person is at least as bad as the similarly situated knowing actor.¹⁰⁶

Second, one might wonder why it is legitimate to add together the culpability one incurs in virtue of performing the actus reus of a crime recklessly and the extra culpability one incurs from breaching one's duty of investigation. After all, if my view permits adding these two quantities of culpability together, why can't we supplement the reckless wrongdoer's culpability by adding the additional culpability he might incur from, say, breaking a promise to his mother, mistreating his dog, or cheating on his income taxes?

The answer lies in recognizing that the notion of culpability that is of primary importance to the criminal law is how culpable one is *for a particular action*—not how defective one's character is in general or how many other, unrelated bad acts one might have performed. One is not

¹⁰⁶ If nothing else, one might think that the large number of cases in which courts have upheld willful ignorance jury instructions is evidence that I have not merely described an empty set.

convicted of a given crime on the ground that one has bad character,¹⁰⁷ but rather because one's conduct satisfies each of the elements required for being guilty of the crime. Accordingly, the notion of moral culpability that is most relevant to the criminal law is culpability *for a particular action or course of conduct*. In cases of willful ignorance, therefore, it is legitimate to add one's culpability for recklessly performing the actus reus with one's culpability for breaching one's duty of investigation because both of these elements are necessary components of willful ignorance. As seen earlier, willful ignorance decomposes into two main parts: a) the performance of an action with the mental state of recklessness (elements (1) and (4) in the definition of willful ignorance in Part I.B), and b) a conscious decision not to take available steps to investigate whether the inculpatory proposition in question is true (elements (2) and (3) in the definition).¹⁰⁸ This means that any act of willful ignorance involves both a reckless action and a breach of the duty of investigation. As a result, for purposes of evaluating the culpability of an act done in willful ignorance, it is legitimate to add together the culpability incurred from both components of one's willfully ignorant conduct. By contrast, the culpability one incurs from other unrelated actions (*e.g.* breaking promises, mistreating one's dog, cheating on one's taxes) may not be added to one's culpability for a particular criminal action. The former is not conceptually connected to the latter as two components of one unified course of conduct. Therefore, they may not be summed together for purposes of evaluating how culpable one is *for a given action* (even if they might be indicators of how bad one's overall character is).

Still, even if one agrees that willful ignorance constitutes a unified course of action, the worry might persist. Specifically, it does not generally seem to follow from (i) the fact that P did something as culpable as crime C that (ii) P may legitimately be convicted of C. But my argument might seem to require that something like this inference is valid. However, while I agree that the inference from (i) to (ii) is not generally valid, there is good reason to think it holds specifically in the context of willful ignorance and knowledge crimes. In general, this inference would appear valid provided there is a sufficient degree of *similarity* between the action mentioned in (i)

¹⁰⁷ For example, Justice Felix Frankfurter famously observed that “[o]ur whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct.” *Michelson v. United States*, 335 U.S. 469, 489 (1948) (Frankfurter, *J.*, concurring). More recently, Ken Simons, for example, noted that our criminal law aims to “avoid punishing individuals simply because they display a ‘bad character.’” 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, 234 (2002). He continues on to describe the widespread view that “the criminal law should not be brought to bear on individuals who have not yet done anything wrong, but who merely have disreputable—or even dangerous—character traits.” *Id.*

¹⁰⁸ See *supra*, notes 41-42 and accompanying text.

and the crime mentioned in (ii). Although it is beyond the scope of this article to give a full account of what this similarity relation consists in, there is nonetheless evidence showing that the required degree of similarity obtains when it comes to acting in willful ignorance and acting knowingly. The difference between doing the actus reus of a crime in willful ignorance and doing it knowingly, after all, is just one of mens rea. Moreover, courts routinely justify the practice of allowing willful ignorance to satisfy the knowledge element of a crime by appealing to the idea that the former mens rea can render the defendant just as culpable as the latter mens rea.¹⁰⁹ Thus, at least in the estimation of most courts, the sort of similarity required for the inference from (i) to (ii) to be valid exists between willful ignorance and knowing misconduct.

A third, more philosophical objection is that the discussion thus far has merely *described* the duty of investigation, but has not explained *why* performing the underlying reckless action after breaching the duty to investigate is worse than simply performing the reckless action on its own. How can the mere fact that there were some available methods of investigation that one decided not to make use of render one more culpable for subsequently performing a reckless action?

To start, note that the account offered above only purports to specify the conditions under which performing the actus reus of a crime is at least as culpable as doing so knowingly. Thus, the account is in principle compatible with many different explanations of why breaching the duty of reasonable investigation can render one more culpable. Nonetheless, the account naturally seems to suggest one sort of explanation in particular. Specifically, one might think that performing a reckless action having breached the duty to investigate involves forgoing *two* chances to do right, while performing the reckless action when investigating is not an option involves only one.

The idea can be illustrated with a simple pair of examples. In the first case, Jerry has two options: throw a big rock into the water while aware of the risk that a person is snorkeling under the surface, or refrain from doing so. Suppose he picks the former. The second case is just like the first except that now there is an easy way for Jerry to investigate at t1 whether a snorkeler is present before throwing the rock in the water at t2. (Perhaps there is a reliable list of the people scheduled to snorkel on the day in question, which Jerry could easily consult in the second case but not the first.) Suppose Jerry decides not to investigate at t1 and then throws the rock in at t2. Why is it more culpable for Jerry to throw the rock in the second case than the first?

¹⁰⁹ See *supra* note 53.

The explanation suggested by the presence of the duty of investigation is that Jerry's conduct in the second case, *at least from Jerry's point of view*, involves deliberately rejecting two chances to assure himself that he does no harm. As things seem to Jerry, the first of these chances is at t1. At that point, he can investigate, and for all he knows, he might learn that there is no snorkeler in the water. This would immediately tell him his conduct will be harmless, regardless of whether he throws the rock in the water at t2 or not. Deciding not to take this opportunity to rule out the possibility that the actual world is one in which he does harm seems to be a manifestation of a lack of due regard for others, and therefore is an action that makes Jerry more culpable. However, Jerry's total culpability level is not yet set in stone at t1, because he has a second chance to rule out the possibility that the actual world is one in which he does harm—*i.e.* at t2. After all, at t2 he can simply decide not to throw the rock in the water, thereby ensuring that the resulting risks do not materialize. Not taking this opportunity is another manifestation of his lack of due regard for others. Thus, Jerry's willfully ignorant conduct, *at least from his own perspective*, involves forgoing two chances to rule out the possibility that his conduct will be harmful. Although the first opportunity involved ruling this out through actions aimed at improving his epistemic condition and the second involved ruling it out directly through action, both amounted to a deliberately rejected (not merely missed) opportunity for Jerry to assure himself that conduct *he* intended would not be overtly harmful to others.

As a result, Jerry's willfully ignorant course of conduct seems to involve two expressions of his lack of due regard for others, while his merely reckless action in the first case involves only one. This may account for why it seems more culpable for Jerry to throw the stone in the second case after deliberately breaching his duty to investigate than it is for him to do so in the first case, where no reasonable investigations (it was stipulated) were possible. Of course, my account of the conditions under which willful ignorance is at least as culpable as the corresponding knowing misconduct does not *require* that this is the correct explanation of why deliberately breaching the duty of investigation augments the culpability of reckless action; if some other explanation proves more successful, it can safely be substituted for this one. Nonetheless, the explanation just proposed does seem to fit naturally with the account of the heightened culpability of willful ignorance defended in this article.

This, then, completes my defense of the equal culpability thesis, suitably restricted. Although I have only attempted to provide an abstract account of the circumstances under which acting in willful ignorance would be at least as culpable as the corresponding knowing misconduct, I will argue below

(in Parts IV.B-C) that the account developed here nonetheless has important practical upshots.¹¹⁰

IV. THE LEGAL SIGNIFICANCE OF EQUAL CULPABILITY

Even if presented with a case where one is quite confident that the willfully ignorant defendant is at least as culpable as his knowing counterpart, there is still an open question about what follows from this fact from the perspective of the law. Just because two actors are equally *morally* culpable, after all, it does not automatically follow that they should *legally* be treated the same—for a number of fairness-related, institutional and pragmatic reasons. This final Part will confront the question of what legal significance the fact of equal culpability has. Specifically, this Part argues that while the truth of the equal culpability thesis (suitably restricted) does not directly bear on the questions of statutory interpretation that confront courts in the first instance when considering willful ignorance instructions, it nonetheless has relevance to two other types of questions—the first of which is routinely confronted by courts, while the other concerns legislators.

To begin with, let us distinguish between two questions. The first is whether a particular crime, C, which the legislature has explicitly defined to require knowledge of some fact, is *in principle* amenable to a willful ignorance instruction. That is, are there *any* cases in which it would be appropriate to permit the jury to convict a willfully ignorant defendant of crime C even though he lacked actual knowledge?

This question may be contrasted with another. Even if a willful ignorance instruction *sometimes* may be given with respect to a particular crime requiring knowledge, it clearly would not always be appropriate. In the most extreme case, if the evidence presented at trial provides *no basis* for believing that the defendant was willfully ignorant, it would only confuse the jury to mention willful ignorance in the jury charge. For example, if the evidence gives no indication that the defendant decided not to investigate in available ways, a willful ignorance instruction clearly would be inappropriate. Similarly, if the evidence at trial provides only a slim factual basis from which willful ignorance may be inferred, or perhaps only that some distant cousin of willful ignorance is present (not willful ignorance properly understood), then a willful ignorance instruction likewise might be inappropriate. Courts are well aware of these points, and therefore require that a number of prerequisites be satisfied in a particular case before a willful ignorance instruction can be given.¹¹¹ Thus, the second sort of

¹¹⁰ A natural suggestion (which will be investigated further below) is that a willful ignorance instruction should be given *only if* a reasonable jury could find by the relevant evidentiary standard that the willfully ignorant defendant in the case at hand is at least as culpable as a similarly situated knowing defendant would be.

¹¹¹ See *infra* notes 120-123 and accompanying text.

question at issue is this: assuming in general that there are *some* circumstances in which a willful ignorance instruction may be given with respect to crime C, is *this* particular case involving C one where such an instruction would be appropriate?

I contend that the question of equal culpability has little or no relevance to the first question just mentioned, but I will argue that understanding when the equal culpability thesis holds and when it does not helps illuminate the second sort of question. Specifically, I argue that a willful ignorance instruction should not be given unless it can be reasonably inferred from the trial evidence that the defendant's willful ignorance rendered him as culpable as the corresponding knowing criminal would be. Understanding when the equal culpability thesis holds is crucial to being able to apply such a constraint. Making the case for these conclusions will be the business of the first two subsections of this Part.

Finally, in the third subsection, I will argue that the equal culpability issue also bears directly on the legislative question of whether a particular statute should be written (or perhaps amended) so as to explicitly permit willful ignorance as a basis for conviction of crimes that otherwise require knowledge. As we will see, without some reason to think that the equal culpability thesis holds under at least some circumstances, such reforms would be on shaky normative footing.

A. *What the Equal Culpability Thesis is Not Relevant to*

Whether and under what circumstances the equal culpability thesis holds is of no moment to the questions of statutory interpretation that courts confront in deciding whether a particular knowledge crime is *in principle* amenable to a willful ignorance instruction. Consider, for example, the influential line of Ninth Circuit decisions that confronted this question with respect to the federal statute making it a crime to knowingly possess drugs with intent to distribute. See 21 U.S.C. § 841(a)(1). In particular, the question presented was whether “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.”¹¹² The Ninth Circuit first answered this question in the affirmative in its widely cited decision in *United States v. Jewell*.¹¹³ The holding in *Jewell* was recently reaffirmed in *United States v. Heredia*, in which the en banc court recognized “that many of our post-*Jewell* cases have created a vexing thicket of precedent,” but concluded that “rather than overturn *Jewell* . . . the better course is to clear away the underbrush that

¹¹² *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (en banc) (internal citation omitted).

¹¹³ 532 F.2d 697, 702-04 (9th Cir. 1976) (en banc).

surrounds it.”¹¹⁴ As a question about the meaning a statute, the issue of whether Congress in criminalizing the knowing possession of controlled substances also intended to punish the willfully ignorant must be resolved with the traditional tools of statutory interpretation.

Perhaps the most straightforward argument *in favor* of thinking that Congress did mean to also punish the willfully ignorant is that Congress was well aware that courts interpret the term “knowingly” to include willful ignorance and yet proceeded to pass the statute nonetheless. *Heredia* offered a forceful version of this argument:

Congress has amended section 841 many times since *Jewell* was handed down, but not in a way that would cast doubt on our ruling [in *Jewell*]. Given the widespread acceptance of *Jewell* across the federal judiciary, of which Congress must surely have been aware, we construe Congress’s inaction as acquiescence.¹¹⁵

Indeed, *Jewell* itself offered an argument of this sort: “Nothing is cited from the legislative history of the Drug Control Act indicating that Congress used the term ‘knowingly’ in a sense at odds with prior authority. Rather, Congress is presumed to have known and adopted the ‘cluster of ideas’ attached to such a familiar term of art.”¹¹⁶

My goal here is not to assess whether such arguments from tacit Congressional intent succeed (though some commentators do endorse them in the willful ignorance context¹¹⁷). Rather, I merely mean to point out that it is arguments *of this sort* that will have to be used to answer the question of whether a particular knowledge crime is generally amenable to a willful ignorance instruction. If Congress did not intend for willful ignorance to be able to substitute for the knowledge required for a given crime, this plausibly would bar courts from giving willful ignorance instructions in cases involving that crime. (However, it is worth noting that if this tacit Congressional intent argument *did* succeed, it would go some way towards answering the objection that willful ignorance instructions violate rule of law principles¹¹⁸ or even due process¹¹⁹ to the extent they allow non-

¹¹⁴ 483 F.3d at 919.

¹¹⁵ 483 F.3d at 918-19.

¹¹⁶ *Jewell*, 532 F.2d at 703 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

¹¹⁷ Von Kaenel offers a similar argument in the context of money laundering crimes. Von Kaenel, *supra* note 44. In particular, he contends that “Congress clearly intended that willful blindness suffice as a culpable mens rea for prosecution under the MLCA, but it failed to do so explicitly.” *Id.* at 1212. Indeed, there is some support for this conclusion in the legislative history. See Senate Report, S.Rep. No. 433, 99th Cong., 2d Sess. 9-10 (1986) (“The ‘knowing’ scienter requirements are intended to be construed, like existing ‘knowing’ scienter requirements, to include instances of ‘willful blindness,’” and citing *Jewell*). However, Von Kaenel is not content with the status quo, but instead advocates that “Congress should codify its tacit approval of the substitution of willful blindness for actual knowledge in money laundering prosecutions.” 71 WASH. U. L.Q. at 1212.

¹¹⁸ Husak and Callender, *supra* note 9 at 58-62.

knowing defendants to be convicted of crimes that on their face require full-blown knowledge. Insofar as Congress *intended* its use of the term “knowingly” to include at least some cases of willful ignorance, there would be a proper legal basis for giving willful ignorance instructions. Thus, these rule of law or due process concerns would be mitigated.)

In general, though, courts will have to use their regular statutory interpretation toolkit—to which the equal culpability thesis does not obviously belong—in order to answer such questions of statutory interpretation.

B. Equal Culpability and the Question of When a Particular Case Warrants a Willful Ignorance Instruction

For each statutorily defined knowledge crime, some inquiry like the one gestured at above will have to be performed in order to determine whether textual meaning or Congressional intent bars courts from giving willful ignorance instructions for that crime. It is then a distinct question whether such an instruction is appropriately given in any particular case. This latter question is usefully illuminated by keeping in mind the conditions under which the equal culpability thesis holds. In particular, I argue that a willful ignorance instruction should not be given unless a jury can reasonably infer from the trial evidence that the defendant’s willful ignorance rendered him at least as culpable as the analogous knowing criminal.

Begin by noting that circuit courts require that a number of different prerequisites be met before a willful ignorance instruction may be given in a particular case (even where the crime charged is generally amenable to it). For example, a number of circuits have held that willful ignorance instructions are not permitted unless (1) the defendant himself asserts his own ignorance,¹²⁰ or (2) the defendant took some affirmative actions to

¹¹⁹ Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 467 (1977) (“It is at least arguable that by permitting a jury to substitute this sort of deliberate ignorance-or “willful blindness”-for the statutorily specified element of knowledge, a court violates the defendant’s fundamental right to due process.”). *Cf.* Robbins, *supra* note 44 at 194-95 (“if the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the legislative prerogative of defining criminal conduct”).

¹²⁰ *See, e.g., United States v. Reyes*, 302 F.3d 48, 55 (2d Cir. 2002) (“Courts in this Circuit commonly give the jury a conscious avoidance instruction when a defendant claims to lack some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance.”); *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)); *United States v. George*, 347 F. App’x 941, 943 (4th Cir. 2009) (same).

avoid obtaining knowledge¹²¹—or perhaps both.¹²² Some Circuits also caution that a willful ignorance instruction should not be given if the evidence supports actual knowledge rather than willful ignorance.¹²³

Moreover, there are overt circuit splits on several points. As noted in Part I.B, there is a split between the Ninth Circuit, on the one hand, and the Eighth, Tenth and Eleventh Circuits, on the other, with respect to whether a willful ignorance instruction must require that one's motive in consciously deciding to avoid knowledge is to set up an ignorance defense. Part I.B argued that the Ninth Circuit was correct in rejecting the approach of the Eighth, Tenth and Eleventh Circuits, and instead holding that willful ignorance jury instructions need not require that the defendant's motive in failing to learn the truth was to give himself a defense should he be charged with a crime.¹²⁴ Another split concerns the appropriate standards of review for willful blindness jury instructions.¹²⁵ Yet another concerns what elements of the crime of conspiracy a willful ignorance instruction may be used for.¹²⁶

Despite these differences among the Circuits, there appears to be broad agreement on one point: namely, that a willful ignorance instruction may only be given if the evidence introduced at trial can reasonably be taken to

¹²¹ See, e.g., *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (permitting willful ignorance instruction only if, *inter alia*, “the defendant purposely contrived to avoid learning of the illegal conduct”).

¹²² See, e.g., *United States v. Anthony*, 545 F.3d 60, 64 (1st Cir. 2008) (“A willful blindness instruction is appropriate if (1) a defendant claims a lack of knowledge [and] (2) the facts suggest a conscious course of deliberate ignorance . . .”); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991) (“deliberate ignorance instruction must not be tendered to the jury unless evidence, circumstantial or direct, has been admitted to show that the defendant *denies knowledge* of the operant fact and the defendant's conduct includes *deliberate acts* to avoid actual knowledge of that operant fact”).

¹²³ *United States v. Perez-Tosta*, 36 F.3d 1552, 1564-65 (11th Cir. 1994) (a “district court should not instruct the jury on ‘deliberate ignorance’ when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance” (emphasis and alterations in original)); *Anthony*, 545 F.3d at 64 (1st Cir. 2008) (willful blindness instruction not appropriate unless “the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge”).

¹²⁴ 483 F.3d at 920. See generally Part I.B.

¹²⁵ Justin C. From, *Avoiding Not-So-Harmless Errors: The Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions*, 97 IOWA L. REV. 275, 287-92 (2011).

¹²⁶ See Kozlov-Davis, *supra* note 44. On the one hand, the Second Circuit permits “the use of deliberate ignorance to establish knowledge of the unlawful goals of the conspiracy,” it cannot be used to “support a finding of intent to further th[ose] goals.” *Id.* at 488. See *Reyes*, 302 F.3d at 55 (“When a defendant has been charged with conspiracy, however, the jury may use the conscious avoidance doctrine to establish the defendant's knowledge of the aims of the conspiracy but, as just noted, may *not* use it to establish the defendant's intent to participate in the conspiracy.”). On the other hand, the Fifth Circuit “allows the ostrich instruction to establish both knowledge of the unlawful goals of the conspiracy and intent to further the goals of that conspiracy.” Kozlov-Davis, *supra* note 44 at 492.

show that the defendant actually acted with willful ignorance, properly construed. More specifically, they all seem to accept that a willful ignorance instruction is appropriate *only if* a reasonable jury could find by the relevant evidentiary standard that the defendant really was willfully ignorant, as that mental state is to be understood.¹²⁷

It is here that an understanding of when the equal culpability thesis holds, and when it does not, can point the way toward a more discerning and just application of willful ignorance instructions. After all, if such instructions can be given only when the evidence supports a finding of willful ignorance, properly construed, we need to know how willful ignorance is *properly construed*.

The account defended above suggests that courts should not simply give willful ignorance jury instructions whenever the defendant meets the *basic* definition of willful ignorance (laid out in Part I.B), but rather should only give such instructions when it may be inferred from the trial evidence that the defendant in the case at hand acted with willful ignorance that was at least as culpable as the analogous knowing misconduct would have been. In other words, the account defended in the last Part suggests that there should be an *equal culpability constraint* on willful ignorance jury instructions. There are two reasons for this conclusion: one doctrinal and the other fairness-related.

The doctrinal argument is that imposing such an equal culpability constraint is required in order to remain true to the courts' own rationale for the willful ignorance doctrine in general. As the Supreme Court has observed, "[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."¹²⁸ Many other courts echo this idea when justifying the decision to give willful ignorance jury instructions.¹²⁹

¹²⁷ See, e.g., *Anthony*, 545 F.3d at 64 ("A willful blindness instruction is appropriate if . . . the facts suggest a conscious course of deliberate ignorance. . ." among other things); *Reyes*, 302 F.3d at 55 ("Courts in this Circuit commonly give the jury a conscious avoidance instruction . . . where the evidence may be construed as deliberate ignorance") (internal quotation marks omitted); *Abbas*, 74 F.3d at 513 (willful blindness instruction is appropriate only if "the evidence supports an inference of deliberate ignorance"); *Freeman*, 434 F.3d at 378 (noting that the court will "uph[o]ld the deliberate indifference instruction, provided it has the required factual basis," where "[t]he proper factual basis is present if the record supports inferences that "(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct"); *de Francisco-Lopez*, 939 F.2d at 1411 ("the deliberate ignorance instruction must not be tendered to the jury unless evidence, circumstantial or direct, has been admitted to show that . . . the defendant's conduct includes deliberate acts to avoid actual knowledge of that operant fact").

¹²⁸ *Global-Tech*, 131 S. Ct. at 2069.

¹²⁹ See, e.g., *Jewell*, 532 F.2d at 700 ("The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable."); *id.* at 704 ("society's

However, the account of willful ignorance defended above demonstrates that it is not always the case that acting in willful ignorance will be just as culpable as performing the same conduct knowingly.¹³⁰ Accordingly, the “traditional rationale” for the willful ignorance doctrine holds only under some circumstances. Only sometimes will it be true, in other words, that willfully ignorant defendants will be at least as culpable as the analogous knowing criminal. Therefore, in order for courts to remain faithful to their own rationale for permitting willful ignorance jury instructions, they ought *not* give such instructions when it is clear from the trial evidence that *this particular defendant* acted with a form of willful ignorance that was significantly less culpable than the analogous knowing wrongdoing would have been. After all, the “traditional rationale” would not support a willful ignorance jury instruction in such a case. Instead, such instructions would be appropriate only when the “traditional rationale” holds—*i.e.* when this particular willfully ignorant defendant is at least as culpable as the analogous knowing criminal.

This conclusion is also supported by considerations of fairness. As seen in Part I.B, the basic definition of willful ignorance allows for many different types of motives and thus many different degrees of culpability, as well. But if a willfully ignorant defendant can be convicted of a knowledge crime *whenever* she satisfies the basic definition of willful ignorance, regardless of how bad her reasons for deciding not to investigate, then this might lead to the unfair result that some willfully ignorant defendants get punished as knowing criminals despite being significantly *less* culpable than the knowing criminal would be.

To see more precisely why this unfairness would arise, consider the desideratum that the criminal law should not permit people to be punished more than they deserve (where the amount of punishment deserved is assumed to depend on how culpable the individual is).¹³¹ Such a desideratum flows naturally from certain moderate forms of retributivism.¹³²

interest in a system of criminal law that is enforceable and that imposes sanctions upon all who are equally culpable requires” the willful ignorance doctrine); *Heredia*, 483 F.3d at 926 (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).

¹³⁰ See generally Part III.

¹³¹ Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 290, 308 (2003) (describing “a just criminal law” as one “that attempts never to punish defendants more than they deserve”; describing the “current law” of excuses based on diminished rationality as “unfair because it blames and punishes some defendants far more than they deserve”).

¹³² Alec Walen, for example, explains that “a moderate and plausible form of retributivism is committed to,” *inter alia*, the claim that “it is intrinsically bad to punish the innocent

Now suppose that the available range of penalties for some knowledge crime, C, are correctly keyed to the amount of culpability that individuals guilty of C generally possess. That is, suppose that those convicted of C generally are not over or under punished, but receive a punishment within the range that they deserve. On these assumptions, it could violate the above desideratum if just any willfully ignorant defendant could be convicted of a knowledge crime even if she is significantly less culpable than her knowing counterpart. After all, if someone who chose to remain willfully ignorant for not especially culpable reasons could be convicted of a knowledge crime, it would allow her to be punished *as a knowing defendant*. It would open her up to a range of sentencing options that might in principle all be appropriate for knowing defendants, but which are unfairly harsh given the low culpability of the willfully ignorant actor we are imagining. As Husak and Callender put this point, unless we are faced with a case in which the “two distinct mental states [of willful ignorance and knowledge] were equally culpable, it would be outrageous to hold a defendant with the first mental state liable for violating a statute that required the second mental state.”¹³³

One might object that the assumptions of the argument I just offered are unrealistic. Most obviously, one might say that the sentencing ranges for knowledge crimes often are *not* correctly keyed to the culpability of knowing defendants. However, the problem I mean to highlight would actually become worse if the penalties for knowledge crimes systematically *over-punished* knowing defendants—as is commonly argued, for example, with respect to drug possession crimes.¹³⁴ If the penalties for knowledge crimes systematically over-punish even defendants with genuine knowledge, it would be even more likely that allowing just *any* willfully ignorant defendant (*i.e.* anyone meeting the basic definition of willful ignorance) to be convicted of knowledge crimes will lead to their being punished more than they deserve. Thus, the problem I am emphasizing would be less pressing only if one supposes that knowing defendants convicted of knowledge crimes generally are *under-punished* (which I take it is not a widely held view).

mistakenly or to punish anyone more than that person deserves on a fair scheme of punishment.” Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status As A Foundation for A Lost Immunity*, 48 SAN DIEGO L. REV. 1229, 1263 (2011).

¹³³ Husak and Callender, *supra* note 9 at 53.

¹³⁴ See, e.g., Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 339 (1995) (arguing that the penalties for drug offenses, including possession, are overly harsh because “imprisonment neither enhances public safety nor decreases the ‘drug crisis’”); Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777, 779 (2000) (questioning the idea underlying many drug statutes that “[t]he greater the quantity of drug possessed or distributed, the greater the harm unleashed, and the greater the punishment”); see generally *id.* 793-95.

Alternatively, one might object that even if willfully ignorant defendants sometimes are less culpable than their knowing counterparts, they may still be convicted of knowledge crimes because their comparatively lower culpability can be accounted for at the sentencing stage. After all, judges can use their discretion under 18 U.S.C. § 3553¹³⁵ to fashion sentences that are appropriate for willfully ignorant defendants who are less culpable than their knowing counterparts.

Although this might be another way to avoid over-punishing the willfully ignorant, it would still be troubling to allow willfully ignorant defendants who are less culpable than their knowing counterparts to be convicted of knowledge crimes because it exposes them to the very same range of penalties as analogous knowing criminals. It would, in effect, allow less culpable willfully ignorant defendants to be sentenced *as a more culpable knowing defendant*. The fact that sentencing judges in principle could use their discretion to rectify the matter after the fact on an ad hoc basis at the sentencing stage does not seem to be an effective safeguard against over-punishing willfully ignorant defendants on the less culpable end of the spectrum. Instead, the *ex ante* solution of preventing these less culpable willfully ignorant defendants from being exposed to the same range of penalties as their more culpable knowing counterparts likely would be more effective.

Therefore, to guard against the sort of unfairness indicated above and to remain true to the courts' "traditional rationale" for the willful ignorance doctrine, I submit that willful ignorance instructions should not be available simply as a matter of course whenever the defendant meets the basic definition of willful ignorance. Instead, willful ignorance instructions would be appropriate only if the trial evidence could reasonably support a finding not only that the defendant met the basic definition of willful ignorance, but also *that he was just as culpable as a similarly situated defendant who acted knowingly*. In other words, my view is that willful ignorance instructions should not be given unless it can reasonably be inferred from the evidence that the defendant acted with *sufficiently egregious* willful ignorance to make him at least as culpable as one who acted with knowledge. This proposal would provide a more effective *ex ante* safeguard against the possibility of over punishing willfully ignorant defendants than the *ex post* approach.

Note that this question of whether a particular willfully ignorant defendant is as culpable as the similarly situated knowing criminal would be

¹³⁵ This statute instructs that sentencing courts "in determining the particular sentence to be imposed, shall consider," inter alia, (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (. . .)." 18 U.S.C. § 3553.

could in principle be posed to the jury. However, to prevent the sort of jury confusion that has worried some writers,¹³⁶ I think the better course likely would be to insist only that this determination be made by the trial judge. That is, the trial court should not exercise its discretion to give a willful ignorance instruction unless it is satisfied that a reasonable jury could find that the defendant in question acted with a form of willful ignorance that rendered him at least as culpable as a similarly situated knowing wrongdoer. (Ultimately, though, more work is needed to decide which of these two options would be most advisable.¹³⁷)

If something like this suggestion is correct, then the defense of the equal culpability thesis given above indicates that courts (or juries) should focus on two questions in determining whether a willful ignorance instruction is appropriate in a particular case.

First, courts should ask how much confidence the defendant had in the inculpatory proposition when performing the actus reus—and, in particular, how much below the knowledge threshold the defendant's degree of confidence in that proposition was. After all, as seen above, the defendant's confidence in the inculpatory proposition is one factor in determining his overall level of culpability. The more confidence he has in the inculpatory proposition, the less of a culpability deficit there would be to fill before he becomes just as culpable as the similarly situated knowing actor.

The second question courts should ask before giving a willful ignorance instruction is how much additional culpability the willfully ignorant defendant acquired in virtue of breaching his duty of reasonable investigation. This, in turn, will depend on *why* the defendant breached that duty. Was it only because he did not notice that certain feasible methods of investigation existed? If so, he would not truly count as willfully ignorant.¹³⁸

¹³⁶ Judge Richard Posner, for instance, has opined that “[t]he most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent.” *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, *J.*). See also Shawn D. Rodriguez, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. PA. J. INT’L L. 691, 730 (2008) (discussing the criticisms related to “virtually incomprehensible jury instructions on willful blindness”); From, *supra* note 125 at 279 (“When trial courts give willful-blindness instructions in the absence of evidence that the defendant deliberately tried to avoid acquiring knowledge, the instructions may confuse the jury into thinking it is appropriate to convict a defendant who has merely acted negligently or recklessly, instead of knowingly or willfully.”).

¹³⁷ For instance, one might worry that such a requirement would encroach on the prerogative of the jury. However, I think this need not be the case if the requirement of equal culpability is merely meant as a guide to judges in exercising their discretion about whether to give a willful ignorance instruction in a particular case.

¹³⁸ See Van Kaenel, *supra* note 44 at 1213 (“it is crucial to distinguish a willfully blind actor, ‘who wants or needs to be ignorant of some fact or risk, from one who does not notice it because he simply does not care’ or is simply the naive-pawn of his clients”).

Alternatively, did he consciously decide not to make certain reasonable investigations he knew were possible in order to avoid acquiring full knowledge? If so, what were his reasons for this, and how bad were they? Was he trying to set up a defense against a possible conviction, perhaps, or attempting to protect his fragile conscience, or something else entirely? Furthermore, how easy would it have been for him to investigate the facts in question further? The easier it would have been, the more culpable he might seem for deciding not to investigate.

Answering these two types of question will provide courts (or juries) with the raw material from which to form an opinion about whether a particular willfully ignorant defendant could reasonably be seen as equally culpable as a similarly situated defendant with knowledge. The defense of the equal culpability thesis offered here thus helps sharpen the inquiry that should be undertaken in considering whether a willful ignorance instruction would be appropriate in a particular case.

C. Equal Culpability and the Legislator's Question

The equal culpability thesis also directly bears on the question legislators might face of whether to write or amend criminal statutes so as to explicitly allow willful ignorance to satisfy the knowledge element of various crimes. Many commentators have called for statutory reforms designed to make it explicit that willful ignorance can substitute for knowledge. For example, Husak and Callender argue that as long as drug possession statutes state only that knowledge is required for conviction of possession crimes, “the principle of legality allows only a knower, and not a defendant whose culpability is identical to that of a knower, to be punished for possession.”¹³⁹ They argue that “statutory reform is needed if willfully ignorant defendants (who possess only a substitute for knowledge) are to be punished under possessory statutes” or else we risk sacrificing essential rule of law values.¹⁴⁰ Others have pushed similar arguments.¹⁴¹

However, without some reason to think that the equal culpability thesis holds at least under some circumstances, such reforms would be on shaky normative footing. After all, without such a reason, the legislature could not be sure that permitting willful ignorance to substitute for knowledge would not systematically over-punish a less culpable group of defendants (the willfully ignorant) by punishing them the same as other more culpable defendants (the knowing wrongdoers). That would seem to be an unfair

¹³⁹ Husak and Callender, *supra* note 9 at 57.

¹⁴⁰ *Id.* at 57-58.

¹⁴¹ See Von Kaenel, *supra* note 44 at 1212 (arguing that “Congress should codify its tacit approval of the substitution of willful blindness for actual knowledge in money laundering prosecutions”); Hellman *supra* note 42 at 303 (“legality concerns would demand a new and separately drafted statute which would make it a crime to do X with a mental state of contrived ignorance”).

result. Recall the desideratum mentioned in the last section, to the effect that the criminal law ought not punish people more than they deserve.¹⁴² Moreover, suppose that the available penalties for knowledge crimes are correctly pegged to the amount of culpability that knowing individuals who are guilty of those crimes generally possess (or at least do not significantly under-punish them). On these assumptions, if the willfully ignorant were always less culpable than their knowing counterparts, allowing willful ignorance to support a conviction for a knowledge crime would lead the above desideratum to be violated. After all, convicting the willfully ignorant of knowledge crimes would expose them to the range of penalties that was designed to be appropriate for knowing wrongdoers, not necessarily for defendants who are less culpable. Without an argument establishing that the willfully ignorant *sometimes* are at least as culpable as their knowing counterparts, we could not rule out the possibility that punishing the willfully ignorant as if they were knowing wrongdoers might constitute over-punishment of the willfully ignorant.

Because the account offered in this article shows that the equal culpability thesis holds at least under some circumstances, it provides just what is needed to place these reform efforts on a more solid normative foundation. In particular, it should give legislators greater confidence that drafting statutes that explicitly permit willful ignorance to substitute for knowledge will not inevitably lead to substantive unfairness by over-punishing a group of defendants who are less culpable than knowing wrongdoers. After all, my account demonstrated that some willfully ignorant defendants will be just as culpable as their knowing counterparts.¹⁴³

Furthermore, there also is reason to think that when these statutory reforms are implemented, the revised statutes should be worded so that willful ignorance can substitute for actual knowledge only when the willfully ignorant are as culpable as their knowing counterparts. Recall that the willfully ignorant can breach their duty of investigation in different ways and for different reasons, some of which would be more culpable than others.¹⁴⁴ However, assuming it is a desideratum that the criminal law not punish people more than they deserve, and supposing that existing knowledge crimes generally are pegged to an appropriate level of punishment, then we should not allow willful ignorance to substitute for knowledge *unless* the willfully ignorant defendant is as culpable as a knowing criminal. Thus, if criminal statutes are to be amended to explicitly

¹⁴² See *supra* notes 131-132 and accompanying text.

¹⁴³ Cf. Hellman, *supra* note 42 at 303: “there is something deeply troubling about changing the mental state requirement for a crime after the fact [by interpreting ‘knowledge’ to also encompass ‘contrived ignorance’]. I will assume that legality concerns would demand a new and separately drafted statute which would make it a crime to do X with a mental state of contrived ignorance. The relevant question then becomes: when should such parallel statutes be drafted and what should they look like?”

¹⁴⁴ See Part I.B and Part III.A(2).

allow willful ignorance to substitute for knowledge, this substitution should be subject to something like the following condition:

Equal Culpability Condition (ECC): A willfully ignorant defendant may be deemed to possess the knowledge required for conviction of a crime defined in the relevant statute *only if* the defendant consciously decided to avoid learning the truth about the relevant facts for reasons (or in ways) that render him or her at least as culpable as a similarly situated person who acted with knowledge of those facts would be.

Imposing something like the equal culpability condition appears warranted to guard against the possibility that willfully ignorant defendants are punished more than they deserve. Moreover, if something like this constraint is included when implementing the statutory reforms discussed above, it will be of paramount importance to understand the conditions under which the equal culpability thesis holds and when it does not. In this article, I hope to have taken some steps toward illuminating that question.

CONCLUSION

This article has been concerned to investigate the conditions under which acting in willful ignorance is as culpable as acting knowingly. It argued that several existing attempts to defend the equal culpability thesis fail, and then proceeded to offer a new account of when the willfully ignorant are at least as culpable as knowing wrongdoers. It then discussed the legal significance of this conclusion. From the outset, I acknowledged that the equal culpability thesis, as a proposition in moral philosophy, has little bearing on the questions of statutory interpretation that determine whether a particular crime is in principle amenable to willful ignorance jury instructions. Nonetheless, this article's defense of a suitably restricted version of the equal culpability thesis was seen to have important implications for two other types of legal questions.

First, it was argued that trial courts should not exercise their discretion to give willful ignorance instructions unless the evidence introduced at trial would permit a reasonable jury to find that the defendant acted with a form of willful ignorance that was at least as culpable as the analogous knowing misconduct. After all, it is only if this precondition is met that we can be reasonably sure that the "traditional rationale" courts have offered for permitting willful ignorance jury instructions in general—*i.e.* that willful ignorance is just as culpable as knowing misconduct—holds true. If this is correct, then the account of willful ignorance defended here shows that courts should focus on two specific issues in deciding whether a willful ignorance instruction is appropriate in a given case: (1) how confident the defendant was in the inculpatory proposition when he performed the actus

reus, and (2) how culpable the defendant was in breaching his duty of reasonable investigation. Both of these questions were seen to bear on the overall culpability of a willfully ignorant defendant. Accordingly, the arguments of this article shed light on how to determine whether willful ignorance instructions are warranted in particular cases.

Second, it was argued that the equal culpability thesis bears directly on the legislator's question of whether criminal statutes should be written to explicitly permit willful ignorance as a basis for conviction of crimes that otherwise require knowledge. Without some reason to think that the equal culpability thesis holds under some circumstances, such reforms would be on shaky normative footing. The argument of this article thus provides what is needed to guard against the possibility that willful ignorance instructions might systematically over-punish willfully ignorant defendants charged with knowledge crimes. Moreover, we saw that in carrying out the statutory reforms that others have effectively advocated for, the amended statutes should permit willful ignorance to substitute for knowledge only subject to something like the equal culpability condition.

In these ways, this investigation of the legal significance of the equal culpability thesis (suitably restricted) helps to elucidate the relationship between moral culpability and the criminal law. We saw that equal moral culpability does not directly translate into identical punishment, since criminal sanctions are mediated by a complex set of statutes containing a range of different categories of culpable acts and associated mental states (not to mention substantial judicial discretion with respect to sentencing). The rule of law requires that the terms of this statutory regime be strictly adhered to. However, once the initial questions of statutory interpretation have been settled, and we are confident that Congressional intent does not bar willful ignorance jury instructions for certain crimes, understanding the conditions under which willful ignorance and knowing misconduct are equally culpable can guide courts' decisions about whether to issue willful ignorance jury instructions in particular cases. Moreover, understanding the basis for the equal culpability thesis helps legislators navigate the difficult normative questions concerning whether and how our criminal laws should be written to permit willful ignorance to substitute for knowledge. Willful ignorance is often a permissible substitute for genuine knowledge of the relevant facts, but only in those cases where the defendant's willful ignorance entails a level of culpability that is on a par with what the similarly situated knowing criminal would possess.